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Toward A Uniform State Product Liability Law-Virginia And The Uniform Product Liability Act

TOWARD A UNIFORM STATE PRODUCT LIABILITY LAW—VIRGINIA AND THE UNIFORM PRODUCT LIABILITY ACT

The Department of Commerce drafted the Uniform Product Liability Act (UPLA)[1] in response to an apparent product liability insurance crisis.[2] Regarding most proposed product liability legislation as anti-consumer,[3] the Commerce Department attempted to draft a statutory scheme which would balance the interests of consumers and product sellers and promote uniformity among the states.[4] Beyond these broad purposes, the drafters identified the related UPLA goals of reducing insurance costs,[5] providing reasonable compensation for injured claimants,[6] creating incentives for those persons in the best position to prevent harm,[7] expediting the reparations process,[8] and minimizing the litigation costs[9] through a comparatively specific law.[10] To achieve these goals, the UPLA codifies substantive product liability law[11] and provides specific procedures to decrease the

[1] All references to the Uniform Product Liability Act are to the draft version published at 44 Fed. Reg. 2296 (1979).

[2] *See* 43 Fed. Reg. 14,612 (1978). The unavailability of affordable product liability insurance for manufacturers led to the formation of the Federal Interagency Task Force on Product Liability in June 1976. The Task Force reported that the cost of insurance premiums had increased sharply in recent years. As a result of this increase, the Task Force believed that, unless a product were to be discontinued, businesses must choose between increasing consumer prices and foregoing adequate insurance coverage. The Task Force estimated that in some situations as much as fifteen percent of a product's price was attributable to insurance costs. Alternatively businesses which forego insurance severely limit the ability of an injured user to collect damages. *Id.* at 14,612-13. The UPLA drafters concluded from the Task Force's report that a uniform state law would increase the predictability of product liability litigation and thereby enable insurers to set premiums which reflect more accurately a product's risk. UPLA, Preamble, § 101, 44 Fed. Reg. 2997.

[3] 43 Fed. Reg. 14,613; *see* UPLA § 101(a)(4), 44 Fed. Reg. 2997. The Department of Commerce referred to proposed legislation which would deny recovery whenever the user assumed the product's risk, was contributorily negligent, or misused the product. 43 Fed. Reg. 14,613.

[4] 44 Fed. Reg. 2996.

[5] *Id.* The drafters intended to create a situation where product sellers engaging in safe design and manufacturing practices would benefit by the increased availability of affordable insurance. *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* The drafters noted that long delays between the injury and a damage award do not serve consumer interests, and attempted to fashion procedures which would shorten such delays. *Id.; see, e.g.,* text accompanying notes 151-156 *infra.*

[9] 44 Fed. Reg. 2996. Although recognizing that the elimination of the jury trial would minimize litigation costs, the drafters reasoned that the jury serves an important role in product liability cases by providing individualized judgments and the experience of ordinary persons and concluded that the value of the jury outweighs its expense. *Id.*

[10] *Id.* at 2996-97.

[11] *See* text accompanying notes 18-141 *infra.*

time and costs of litigation.[12]

Virginia lacks a comprehensive product liability statute. Although some statutes are applicable to product liability claims,[13] most governing principles have developed through case law.[14] In addition, general adjudication procedures apply to the product liability area.[15] The enactment of the UPLA by Virginia, therefore, would substitute a comprehensive statute for the uncertainty of the present common law development. While some provisions of the UPLA reflect Virginia law,[16] other provisions would change both the substantive and procedural aspects of the current law.[17] In deciding whether Virginia should adopt the UPLA, such changes should be evaluated carefully in light of the policies which they promote.

The UPLA's substantive provisions set forth definitions of defects for which liability may be imposed,[18] methods of proving or disproving the existence of such defects,[19] and specific events which may terminate the product seller's responsibility for harm caused by his product.[20] Although the UPLA substitutes a single claim[21] for causes of action previously based on negligence, breach of warranty and strict liability,[22] the UPLA's stan-

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[12] *See* text accompanying notes 142-306 *infra.*

[13] *See, e.g.,* VA. CODE § 8.2-314 (1965) (implied warranty of merchantibility applicable to sale of goods).

[14] *See, e.g.,* McClanaham v. California Spray-Chem. Corp., 194 Va. 842, 75 S.E.2d 712 (1953) (seller required to warn user of product's incidential dangers and dangers arising from failure to follow directions for use).

[15] *See, e.g.,* text accompanying notes 160-165 *infra.*

[16] *See, e.g.,* UPLA § 104(B), 44 Fed. Reg. 2998; text accompanying notes 43-52 *infra.*

[17] *See, e.g.,* UPLA § 109(B)(1), 44 Fed. Reg. 2999-3000; text accompanying notes 109-125 *infra.*

[18] *See* UPLA §§ 104, 105, 44 Fed. Reg. 2998; text accompanying notes 24-72 *infra.*

[19] *See* UPLA §§ 106, 107, 44 Fed. Reg. 2998-99; text accompanying notes 74-102 *infra.*

[20] *See* UPLA §§ 109, 110, 44 Fed. Reg. 2999-3000; text accompanying notes 103-141 *infra.* The UPLA defines "product seller" as "any person or entity, . . . who is engaged in the business of selling . . . products, whether the sale is resale, or for use or consumption." UPLA § 102(1), 44 Fed. Reg. 2997-98. The definition specifically includes manufacturers, wholesalers, distributers, retailers, lessors and bailors of products and excludes the occasional private seller. *Id; see* UPLA § 102(1) (Analysis), 44 Fed. Reg. 3003. In addition, the drafters suggest that a seller who performs services is a "product seller" only if those services are incidential to the sale of the product while sellers of real estate should be included in the definition only if engaged in the mass production and sale of homes. Finally, the drafters allow individual states to decide the UPLA's applicability to commercial sellers of used goods. UPLA § 102(1) (Analysis), 44 Fed. Reg. 3003. The UPLA separately defines "manufacturer" to include product sellers who "prepare a product or component of a product prior to its sale to a user or consumer," as well as a non-manufacturer who represents itself as a manufacturer. UPLA § 102(5), 44 Fed. Reg. 2998.

[21] A product liability claim under the UPLA includes claims for personal injury, death, and property damage caused by "the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, or labeling of any product." UPLA § 102(2), 44 Fed. Reg. 2998.

[22] UPLA § 103(a), 44 Fed. Reg. 2998. Under traditional theories, a plaintiff injured by a product must base his claim on negligence, breach of warranty or strict liability in tort. In a negligence action, a seller is liable only if he fails to exercise reasonable care in the manufac-

dards of responsibility, defining the types of defects for which liability may be imposed[23] exemplify the drafters' intent to clarify current product liability law. Under the UPLA, liability may be imposed when a claimant[24] proves that a product's faulty construction,[25] defective design,[26] or inadequate warnings[27] caused his harm.[28] In Virginia, whether a claimant bases his claim on negligence or breach of warranty, his recovery depends upon proof that the product was unreasonably dangerous for its foreseeable purposes when it left the product sellers' control.[29] Construction and design defects as well as inadequate warnings may render a product unreasonably dangerous under Virginia law.[30] Recognizing the inherent difficulty of defining "unreasonably" and "unforeseeability", the UPLA drafters attempted to identify the elements which triers of fact in various jurisdictions consider in determining whether products are unreasonably dangerous and whether uses are unforeseeable.[31] Therefore, although the conceptual framework of the UPLA differs from the traditional negligence and warranty theories, if the UPLA retains those elements currently considered by triers of fact in Virginia, Virginia's adoption of the UPLA's standards of responsibility would codify current product liability case law.

Under the UPLA, a product's construction is defective when the prod-

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ture or sale of a product. *See* W. PROSSER, THE LAW OF TORTS § 96 (4th ed. 1971). A plaintiff proceeding under a warranty theory must prove that the product's defect was a breach of an express or implied warranty. *Id.* § 97. Finally, under a strict liability theory, a commercial seller may be held liable for selling an unreasonably defective product. The strict liability theory omits the necessity of proving the product seller's negligence and bars contract defenses such as lack of privity. *See id.* § 98; RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[23] UPLA § 104, 44 Fed. Reg. 2998.

[24] The UPLA defines "claimant" as a person harmed by a product including a user, consumer, or bystander, who asserts a legal cause of action. UPLA § 102(3), 44 Fed. Reg. 2998. "Harm" includes damage to property and personal physical injuries including emotional harm. Although harm to the product is included, damage caused by loss of the product's use is excluded from coverage unless the product seller expressly warrants against such loss. UPLA § 102(4), 44 Fed. Reg. 2998.

[25] UPLA § 104(A), 44 Fed. Reg. 2998; *see* text accompanying notes 32-41 *infra.*

[26] UPLA § 104(B), 44 Fed. Reg. 2998; *see* text accompanying notes 42-52 *infra.*

[27] UPLA § 104(C), 44 Fed. Reg. 2998; *see* text accompanying notes 53-68 *infra.*

[28] UPLA § 104, 44 Fed. Reg. 2998.

[29] *See, e.g.,* Chestnut v. Ford Motor Co., 445 F.2d 967, 968 (4th Cir. 1971) (applying Virginia law); Logan v. Montgomery Ward & Co., 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975). Claims based on negligence are distinguishable from those based on warranty by the defenses available. Contributory negligence is an available defense to a tort claim, *see* Brockett v. Harrell Bros., Inc., 206 Va. 457, 462-63, 143 S.E.2d 897, 902 (1965), while product misuse is an available defense to a breach of warranty claim, *see* Layne-Atl. Co. v. Koppers Co., 214 Va. 467, 473-74, 201 S.E.2d 609, 614 (1974). Virginia does not recognize actions based upon strict liability. *See* Briggs v. Zotos Int'l, Inc., 357 F. Supp. 89, 92 (E.D. Va. 1973).

[30] *See, e.g.,* Matthews v. Ford Motor Co., 479 F.2d 399 (4th Cir. 1973) (applying Virginia law; construction defect); Turner v. Manning, Maxwell & Moore, Inc., 216 Va. 245, 217 S.E.2d 863 (1975) (design defect); McClanahan v. California Spray-Chem. Corp., 194 Va. 842, 75 S.E.2d 713 (1953) (inadequate warnings).

[31] *See* UPLA § 104 (Analysis); 44 Fed. Reg. 3004.

uct does not comply with the manufacturer's own specifications or design.[32] The UPLA imposes strict liability on the product seller for harm caused by such defects.[33] The Virginia legislature and judiciary have not adopted strict liability, but continue to rely instead on negligence and breach of warranty theories of recovery.[34] The warranty of merchantibility under the Virginia Commercial Code requires that a product be fit for its ordinary purposes, and a seller is responsible when his product causes harm while being used for its intended purpose.[35] Since neither the exercise of reasonable care nor the lack of privity of contract constitute defenses to a breach of warranty action,[36] a form of strict liability can be imposed under Virginia law similar to that imposed by the UPLA.[37] Unlike the UPLA, however,

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[32] UPLA § 104(A), 44 Fed. Reg. 2998; *see* § 104(A) (Analysis), 44 Fed. Reg. 3004. To determine whether a particular product's construction is defective, the trier of fact may consider that product's specifications and its deviation from similar products. *Id.* Since the particular product's defectiveness depends upon deviation from its manufacturer's standard, a manufacturer could escape liability for construction defects by designing poor quality products. In such situations, however, liability could be imposed on the basis of design defects. *See* UPLA § 104(B), 44 Fed. Reg. 2998; text accompanying notes 43-52 *infra.*

[33] UPLA § 104(A) (Analysis), 44 Fed. Reg. 3004. The UPLA's drafters modeled § 104(A) on the Restatement of Torts, which imposes strict liability on anyone "who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property . . . if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold." RESTATEMENT (SECOND) OF TORTS § 402A (1965). In contrast to a cause of action based on negligence, under a strict liability claim the seller's failure to exercise due care in the product's manufacture or sale is irrelevant. *See id.* § 402A(2)(a). Accordingly, the UPLA provides that evidence tending to prove the exercise or failure to exercise due care is inadmissible in defective construction cases. *Cf.* UPLA § 106, 44 Fed. Reg. 2998-99 (such evidence admissible in defective design and failure to warn cases). Under the Restatement, privity of contract between the claimant and the product seller is not a defense to a strict liability claim. *See* RESTATEMENT (SECOND) OF TORTS § 402A(2)(b) (1965). The UPLA similarly abolishes lack of privity as a defense in all products liability claims. *See* UPLA § 103(b), 44 Fed. Reg. 2998. The UPLA imposes strict liability for construction defects. *See* UPLA § 104 (Analysis), 44 Fed. Reg. 3004-05. Since the Restatement imposes strict liability whenever a product's defect is "unreasonably dangerous", a claimant may proceed on a strict liability theory for unreasonably dangerous design defects or inadequate warnings. RESTATEMENT (SECOND) OF TORTS § 402A, comment j; *see, e.g.,* Tomer v. American Home Prod. Corp., 170 Conn. 681, 368 A.2d 35 (1976) (failure to warn); Allen v. Kewance Mach. & Conveyor Co., 23 Ill. App. 3d 158, 318 N.E.2d 696 (1974) (design defect).

[34] *See, e.g.,* Briggs v. Zotos Int'l, Inc., 357 F. Supp. 89 (E.D. Va. 1973). The court in *Briggs* refused to approve a jury instruction concerning strict liability because Virginia had not adopted that theory of recovery. *Id.* at 92.

[35] VA. CODE § 8.2-314(2)(c) (1965); *see* Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under The Uniform Commercial Code,* 51 VA. L. REV. 804, 825 (1965) [hereinafter cited as Speidel].

[36] *See* note 34 *supra.* Virginia has abolished the privity defense in all actions based on warranty and negligence. *See* VA. CODE § 8.2-318 (1965). The Virgina anti-privity statute is broader in scope than any of the three alternatives proposed by the Uniform Commercial Code and is not based on a third party beneficiary theory. *Compare* VA. CODE § 8.2-318 *with* U.C.C. § 2-318.

[37] *See* Speidel, *supra* note 35, at 828-39 & n.61.

the Virginia Commercial Code enables the product seller to exclude or modify warranties, and shifts to the buyer the duty to discover apparent defects.[38] Adoption of this provision of the UPLA would significantly modify Virginia law. The buyer and seller cannot delegate the risk of a construction defect under the UPLA regardless of their relative bargaining positions.[39] While this modification would be insignificant in many consumer situations, the UPLA is not limited to the average consumer transaction.[40] When two commercially sophisticated parties negotiate a contract, or when a buyer purchases a product at a discount with knowledge of possible defects, a policy intended to protect the consumer without adequate bargaining power should not alter the terms of the sale.[41]

In contrast to construction defects where a claimant must establish only the existence of a defect in the product itself,[42] establishing design defects requires the claimant to prove that the product seller should have utilized a safer design.[43] In reaching a verdict, the trier of fact must consider the likelihood and gravity of the claimant's injury,[44] the feasibility of an alternative design, and the possibility that the alternative design would cause additional harm.[45] Under current Virginia law, a product's design is defective when unreasonably dangerous for its ordinary and foreseeable purpose.[46] A product is unreasonably dangerous when the likelihood and severity of injury outweigh the availability and cost of alternative designs which would avoid such injuries.[47] Where Virginia law demands that a

[38] VA. CODE §§ 8.2-314, 8.2-316 (1965). Language excluding or modifying the implied warranty of merchantibility must be conspicuous and specify the merchantibility warranty. *Id* § 8.2-316(2). In addition, warranties can be excluded by language which indicates plainly the exclusion or by the buyer's opportunity to inspect the product. *Id.* § 8.2-316(3). A seller can modify or limit consequential damages under Virginia law only if such modification is not unconscionable. *Id.* § 8.2-316(2) & (3); *see* Matthews v. Ford Motor Co., 479 F.2d 399, 402 (4th Cir. 1973) (limitation of damages for personal injuries ineffective; manufacturer and dealer liable for automobile mechanical defect).

[39] *See* UPLA § 104(A) (Analysis), 44 Fed. Reg. 3004 (no provision for delegation of the risk).

[40] *See* UPLA § 103(a), 44 Fed. Reg. 2998.

[41] *See generally* Speidel, *supra* note 35, at 848-51.

[42] UPLA § 104(A), 44 Fed. Reg. 2998; *see* text accompanying notes 32-33 *supra.*

[43] UPLA § 104(B), 44 Fed. Reg. 2998.

[44] The UPLA requires the likelihood of the product causing the claimant's harm to be considered according to the knowledge existing at the time of the product's manufacture. However, a product seller may be liable for inadequate warnings if he discovers a risk in the product after its manufacture and sale and does not issue proper warnings. *See* UPLA § 105(b), 44 Fed. Reg. 2998.

[45] UPLA § 104(B), 44 Fed. Reg. 2998.

[46] *See, e.g.,* Chestnut v. Ford Motor Co., 445 F.2d 967, 968 (4th Cir. 1971) (applying Virginia law); Logan v. Montgomery Ward & Co., 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975).

[47] *See, e.g.,* Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974). In *Dreisonstok,* the plaintiff argued that the automobile manufacturer owed the consumer the duty of designing a vehicle that would withstand collisions under any circumstances. Applying Virginia law, the court held that, while automobile accidents are foreseeable, a manufacturer need not adopt a safer design which would substantially increase the vehicle's cost. 489

suggested design modification be consistent with the product's utility and purpose,[48] the UPLA drafters intentionally omitted reference to the product's utility.[49] Focusing instead on the technical feasibility of a design alternative,[50] the drafters sought to avoid the necessity of value judgments regarding a product's social function.[51] Since Virginia limits consideration of utility to technical feasibility,[52] however, the UPLA's change would not modify Virginia law. The elements considered by a Virginia trier of fact in determining the reasonability of a product's risks, therefore, essentially parallel the factors that a trier of fact under the UPLA considers in determining the existence of a design defect. Thus, adoption of this provision would clarify Virginia law by substituting more objective criteria for the subjective standard based on reasonableness.

The UPLA further imposes liability on product sellers who fail to provide consumers or users with adequate product warnings or instructions.[53] The trier of fact must balance the likelihood and severity of the claimant's injury against the product seller's ability to anticipate the user's knowledge of the product's risks and the feasibility and cost of warnings in determining whether the UPLA requires warnings.[54] In Virginia, a product seller must anticipate reasonably foreseeable dangers arising from a product's normal use and warn potential users of those risks.[55] The product seller's actual or constructive knowledge of the product's risk will support a finding of foreseeability under Virginia law.[56] The product seller, how-

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F.2d at 1070-73. *See also* Spangler v. Kranco, Inc., 481 F.2d 373 (4th Cir. 1973). *Spangler* concerned the need for a warning bell on a crane. Again applying Virginia law, the 4th Circuit stated that the reasonable need for such devices depended upon the product's use. Moreover, a manufacturer can expect that the employer or his employees will recognize an open and obvious hazard and take necessary precautions to avoid injury. *Id.* at 375. Finally, since the plaintiff's employer supplied the specifications for the crane, the manufacturer ordinarily could not be liable for defects in those plans. *Id.*

[48] *See* Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974). The *Dreisonstok* court held that the utility and purposes of a product governs the necessity of a design change. Thus, while the placement of a Volkswagen van's engine in the rear of the vehicle may decrease the passengers' protection, the same feature makes the vehicle fit for its intended purpose of hauling passengers and cargo. Therefore, the court held that the plaintiff's inability to show the existence of a design modification consistent with the vehicle's purpose barred recovery. *Id.* at 1072-73.

[49] *See* UPLA § 104 (Analysis), 44 Fed. Reg. 3005.

[50] *See* UPLA § 104(B), 44 Fed. Reg. 2998.

[51] *See* UPLA § 104 (Analysis), 44 Fed. Reg. 3005.

[52] *See* Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974). Discussing the utility and purpose of the vehicle, the *Dreisonstok* court considered the availability of a design modification rather than the overall social value of the van. *See id.* at 1072-74.

[53] UPLA § 104(C), 44 Fed. Reg. 2998. The product seller's duty to warn depends upon a product's inherent risk rather than the existence of a defect. *See* UPLA § 104(c) (Analysis), 44 Fed. Reg. 3005.

[54] UPLA § 104(C)(1), 44 Fed. Reg. 2998.

[55] *See* Olgers v. Sika Chem. Corp., 437 F.2d 90, 91 (4th Cir. 1971); McClanahan v. California Spray-Chem. Corp., 194 Va. 842, 852-53; 75 S.E.2d 712, 721-22 (1953).

[56] *See* Olgers v. Sika Chem. Corp., 437 F.2d 90 (4th Cir. 1971). In *Olgers,* the plaintiff's

ever, must foresee only the normal uses of his product.[57] The UPLA again substitutes clear and objective considerations of likelihood and severity of injury for the subjective determination of unreasonably foreseeable dangers.

Enactment of the UPLA would replace Virginia's open and obvious danger defense with a balancing test to ascertain the need for warnings. Since Virginia does not require warnings of risks apparent to the foreseeable user,[58] the existence of an open and obvious danger is an affirmative defense to liability. In contrast, under the UPLA the product seller's ability to anticipate the user's knowledge of the product's risk is balanced against the feasibility and cost of warnings.[59] Therefore, a trier of fact under the UPLA could impose liability for failure to warn despite the seller's justified anticipation that the user would recognize the risks involved. The UPLA's drafters rejected the position that the existence of an open and obvious danger should constitute an affirmative defense, reasoning that the product seller should provide warnings where inexpensive warnings could prevent potentially serious harm.[60] Since the causation

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decedent contracted aplastic anemia from exposure to the vapor, fumes and dust of the defendant's product. Although the defendant had no actual knowledge that his product would cause such harm, the court held that the defendant should have reasonably foreseen that his failure to provide warnings would result in a serious injury. *Id.* at 91. *See also* Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962). In *Spruill,* the defendant's knowledge of children's deaths caused by drinking its furniture polish established foreseeability. *Id.* at 88.

[57] Defining a product's foreseeable uses has proven difficult. *See, e.g.,* Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962); Turner v. Manning, Maxwell & Moore, Inc., 216 Va. 245, 217 S.E.2d 863 (1973); McClanahan v. California Spray-Chem. Corp., 194 Va. 842, 75 S.E.2d 718 (1953). In *Spruill,* the court held that the product seller must consider the place where his product normally is used. Since the product, furniture polish, normally is used in the home, the seller could have foreseen the possibility that a child would consume the product. 308 F.2d at 83-84. The *McClanahan* court imposed the additional duty of foreseeing that the user might follow the normal method of using similar products. Therefore, the manufacturer must warn of any dangers of using such a method. 194 Va. at 852-53, 75 S.E.2d at 721-25. The *Turner* court, however, held that a product seller has no duty to foresee the deliberate misuse of a product, especially where the product is used in an industrial environment. Thus, a product seller was not liable when the improper use of a hoist caused an injury to an employee. 216 Va. at 250-52, 217 S.E.2d at 868-69.

[58] Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962); Reed v. Carlyle & Martin, Inc., 214 Va. 592, 202 S.E.2d 874, *cert denied,* 419 U.S. 859 (1974). In *Reed,* a farmer was injured when he fell into the beaters of an insilage wagon while attempting to unclog them. Although the farmer's conduct complied with the customary conduct of farmers, the open and obvious danger of the beaters undercut the manufacturer's duty to warn of the danger. 214 Va. at 594-95, 202 S.E.2d at 876-77. In *Spruill,* since the product's appearance did not reveal its danger to the average housewife, the failure to warn of its danger resulted in the manufacturer's liability. 308 F.2d at 83-84.

[59] UPLA § 104(C), 44 Fed. Reg. 2998.

[60] *See* UPLA § 104(C) (Analysis), 44 Fed. Reg. 3005-06 (citing Marschall, *An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products,* 48 N.Y.U.L. REV. 1065 (1973)). Persuaded by such reasoning, other jurisdictions have abrogated the defense based upon the existence of an open and obvious danger. *See, e.g.,* Byrns

requirement continues to limit the product seller's liability,[61] the UPLA's requirement that the trier of fact consider and weigh the claimant's likely knowledge of the product's risk would not affect most verdicts. In those few situations affected by the change, the seller should be held liable for his failure to take the precaution since a simple warning from the product seller could have prevented the harm.

Under both Virginia law and the UPLA, the product seller must give complete warnings of a product's dangers and instructions regarding its proper use.[62] The UPLA requires at a minimum that product sellers direct all necessary warnings to the persons best able to take precautions against the risks.[63] Since Virginia law requires product sellers to direct warnings and instructions to potential users,[64] adoption of the UPLA would lessen the product seller's minimum responsibility to the consumer. In most situations, however, the user is the person best able to prevent product-caused harm.[65] Moreover, a product seller may be held to a higher standard under the UPLA when the likelihood and severity of a potential injury outweigh the cost of directly informing the user.[66] While perhaps lowering the product seller's minimum responsibility, adoption of this UPLA provision would not actually change his liability since the trier of fact must find that a nonuser could have been expected to prevent the harm[67] and that the possibility of injury justified the cost of directly informing the product's user.[68]

By establishing liability for inadequate warnings in addition to the liability for design defects, the UPLA drafters recognized that some prod-

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v. Riddel, Inc., 113 Ariz. 264, 550 P.2d 1065 (1976); Casey v. Gifford Wood Co., 61 Mich. App. 208, 232 N.W.2d 360 (1975).

[61] Under the UPLA, the claimant must prove both that the failure to provide adequate warnings would have prevented injury to the reasonably prudent person. UPLA § 104(C), 44 Fed. Reg. 2998. Virginia law requires the claimant to prove that the failure to give proper warnings was the proximate cause of his harm. *See* Briggs v. Zotos Int'l, Inc., 357 F. Supp. 89, 91 (E.D. Va. 1973).

[62] *See* Sadler v. Lynch, 192 Va. 344, 64 S.E.2d 664 (1951); UPLA § 104(C), 44 Fed. Reg. 2998.

[63] UPLA § 104(C)(3), 44 Fed. Reg. 2998.

[64] In Virginia, warnings regarding a product's danger must indicate the nature and extent of the product's risk in such a manner that a reasonably prudent person using the product will notice the warnings. *See* Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 85 (4th Cir. 1962).

[65] Under Virginia law, the product user is not necessarily the person affected by the product's adverse effects. Thus, a manufacturer breached his duty of care by failing to warn an average user that drinking furniture polish could cause a child's death. Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 85-86 (4th Cir. 1962). Although by drinking the polish the child could have been considered the product's user, the manufacturer was required to warn only the child's mother, the normal user. *See id.* at 85. Thus, in the *Spruill* context, the user was the person best able to take precautions against the product's dangers.

[66] *See* UPLA § 104(C)(1), 44 Fed. Reg. 2998.

[67] *See* UPLA § 104(C)(3), 44 Fed. Reg. 2998.

[68] *See* UPLA § 104(C)(1)(d), 44 Fed. Reg. 2998; § 104(C) (Analysis), 44 Fed. Reg. 3005-06.

ucts contain "unavoidably unsafe aspects" which design modifications cannot rectify.[69] If a product contains such an unsafe feature, a product seller fulfills his responsibility to consumers by explicitly warning of the product's risks.[70] Virginia law has developed the concept of "inherently dangerous products" to cover such unsafe aspects. An inherently dangerous product is one whose potential danger arises from the nature of the product itself rather than the existence of a defect.[71] Adequate warnings must accompany products considered inherently dangerous.[72] Since liability under either current Virginia law or the UPLA depends upon the sufficiency of the warnings, adoption of this provision of the UPLA would not alter existing Virginia law.

After setting forth the product seller's responsibilities to the consumer,[73] the UPLA establishes rules of evidence for the admission of evidence concerning the state of the art,[74] industry customs[75] and safety standards[76] to prove or disprove liability based upon a defective design or inadequate warnings.[77] Under these provisions, evidence of changes in product design, the state of the art or industry custom is inadmissible if offered to establish design defects or inadequate warnings.[78] However, since a product seller's compliance or noncompliance with industry customs may show the availability of safe alternative designs or the necessity of warnings,[79] evidence of industry custom at the time of the product's manufacture is admissible to prove the product's defect.[80] Reasoning that compliance with the state of the art at the time of the product's manufacture

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[69] UPLA § 105, 44 Fed. Reg. 2998.

[70] *Id.* The adequacy of warnings is determined according to the terms of UPLA § 104(C). *See* text accompanying notes 53-68 *supra.*

[71] *See* Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 83 (4th Cir. 1962). To establish that a product was inherently dangerous, the claimant must prove that the defendant knew or should have known of the product's dangerous aspects. *Id.* at 88; *see* text accompanying notes 53-68 *supra.*

[72] *See* note 64 *supra.*

[73] UPLA § 104, 44 Fed. Reg. 2998.

[74] The state of the art is "the safety, technical, mechanical, and scientific knowledge in existence and reasonably feasible for use at the time of manufacture." UPLA § 106(a), 44 Fed. Reg. 2998.

[75] Industry customs are the procedures generally followed by a particular industry in manufacturing or selling a product. *See, e.g.,* Turner v. Manning, Maxwell & Moore, Inc., 216 Va. 245, 251, 217 S.E.2d 863, 868 (1975).

[76] *See* note 84 *infra.*

[77] UPLA §§ 106, 107, 44 Fed Reg. 2998-99. Since construction defects occur when a product does not conform to its own specifications, evidence of the state of the art, industry customs or safety standards are irrelevant. *See* text accompanying notes 32-34 *supra.*

[78] UPLA § 106(b), 44 Fed. Reg. 2998. If the probative value of evidence of subsequent changes in the product's design, the relevant state of the art or industry custom outweighs the potential prejudice, such evidence may be admissible to prove such factors as the defendant's knowledge of the defect. *Id.; see* UPLA § 106 (Analysis), 44 Fed. Reg. 3006-07.

[79] *See* UPLA § 106 (Analysis), 44 Fed. Reg. 3007.

[80] UPLA § 106(c), 44 Fed. Reg. 2999.

tends to show the nonexistence of a safer alternative,[81] the UPLA drafters provided that evidence of such compliance will raise a presumption[82] of the nondefectiveness of the product.[83] Furthermore, a determination by the court that the product conformed with qualifying safety standards[84] also raises a presumption that the product was not defective.[85]

In determining whether a product was unreasonably dangerous, Virginia law similarly requires consideration of relevant safety standards, industry customs and the state of the art.[86] Under both Virginia law and the UPLA,[87] evidence of subsequent changes in the state of the art, safety standards and industry customs is irrelevant and therefore inadmissible if offered to establish the product's defect.[88] Furthermore, the admissibility of safety standards, industry customs and the state of the art depends upon their relevance to the particular product at issue.[89] Unlike the UPLA, however, Virginia creates no presumptions when a product seller has complied with qualifying safety standards or the state of the art.[90] Although

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[81] *See* UPLA § 106 (Analysis), 44 Fed. Reg. 3007.

[82] To rebut the presumption that the product was not defective, the claimant must introduce clear and convincing evidence of the product's defect in light of the factors enumerated in UPLA § 104(B) & (C). UPLA § 106(d), 44 Fed. Reg. 2999; *see* text accompanying notes 43-55 & 53-54 *supra.* The UPLA defines "clear and convincing evidence" as "that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established." UPLA § 102(7), 44 Fed. Reg. 2998.

[83] UPLA § 106(d), 44 Fed. Reg. 2999.

[84] For a safety standard to qualify, the court must find that the agency responsible for its promulgation relied on careful testing and safety evaluation and represented both manufacturing and consumer interests. Additionally, the safety standard must have been considered more than a minimum standard when formulated and have been up to date when the product at issue was manufactured. UPLA §§ 106(e), 107(a), 44 Fed. Reg. 2999.

[85] UPLA §§ 106(e), 107(b), 44 Fed. Reg. 2999. Clear and convincing evidence may rebut the presumption of nondefectiveness raised when a product conforms with qualifying safety standards. *See* note 82 *supra.*

[86] An unreasonably dangerous product may subject the product seller to liability for defective design or inadequate warnings. *See* Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066, 1071-76 (4th Cir. 1974) (defective design); Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 83-84 (4th Cir. 1962) (failure to warn).

[87] *See* UPLA § 106(b), 44 Fed. Reg. 2998; note 94 *infra.*

[88] *See* Turner v. Manning, Maxwell & Moore, Inc., 216 Va. 245, 253, 217 S.E.2d 863, 869 (1975) (post accident change inadmissible). Since the Federal Rules of Evidence preclude admission of evidence of subsequent changes to establish the existence of a defect, such evidence is inadmissible in Virginia products liability cases tried in both federal and state courts. *See* FED. R. EVID. 407.

[89] *See, e.g.,* Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066, 1074 (4th Cir. 1974). In *Dreisonstok,* evidence that an automobile could be designed to withstand collisions better was inadmissible since the vehicle at issue was a van and the safer designs related to other types of vehicles. *Id.*

[90] The trier of fact in Virginia considers compliance or noncompliance with relevant safety standards, industry customs and the state of the art in determining liability. *See, e.g.,* Turner v. Manning, Maxwell & Moore, Inc., 216 Va. 245, 217 S.E.2d 863 (1975). In *Turner,* the plaintiff asserted that the absence of a safety hook on a hoist rendered its design defective. The court held that while evidence of compliance with industry custom does not establish

Virginia law usually requires a high degree of relevance before admitting such evidence,[91] the UPLA presumptions clearly increase the burden on claimants. Under Virginia law, as under the UPLA, the claimant must establish the existence of a product defect by a preponderance of the evidence.[92] Under the UPLA, however, once a presumption is raised, the claimant can overcome it only through clear and convincing evidence.[93] Moreover, since the UPLA does not provide similar presumptions of defectiveness when a product fails to conform to safety standards or the state of the art,[94] the adoption of this provision of the UPLA would benefit product sellers without offering a corresponding benefit to consumers.

To recover from a product seller under the UPLA, a claimant must establish not only that the product causing his injury was defective, but also that the product seller caused the defect.[95] Accordingly, the UPLA provides that a product seller shall not be liable for harm that would not have occurred but for the modification of the product by a third party, unless the product seller reasonably should have anticipated such modification.[96] Under Virginia law, a plaintiff must prove that the product was unreasonably dangerous for its foreseeable uses when it left the product seller's control whether he bases his claim on negligence or breach of warranty.[97] Thus, the product seller is not liable where a product becomes unreasonably dangerous after leaving the product seller's control[98] or when

due care in every case, such compliance will establish due care if the plaintiff does not introduce evidence to show that the custom was unsafe. *Id.* at 251, 217 S.E.2d at 868.

[91] *See* note 89 *supra.*

[92] Collins v. Smith, 198 Va. 778, 782, 96 S.E.2d 818, 822 (1957); UPLA § 104, 44 Fed. Reg. 2998.

[93] *See* note 82 *supra.*

[94] *See* UPLA §§ 106, 107, 44 Fed. Reg. 2998-99. Under Virginia law, violation of a statute or government regulation regarding product safety constitutes negligence per se, thereby obviating proof regarding the applicable standard of due care and foreseeability. *See* Orthopedic Equip. Co. v. Eutsler, 276 F.2d 455, 461 (4th Cir. 1960); McClanahan v. California Spray-Chem. Corp., 194 Va. 842, 851-52, 75 S.E.2d 712, 718 (1953). Since the UPLA does not address the effect of noncompliance with such standards, present Virginia law would remain applicable despite enactment of the UPLA. *See* UPLA § 103(c), 44 Fed. Reg. 2998; § 107 (Analysis), 44 Fed. Reg. 3008.

[95] UPLA § 104, 44 Fed. Reg. 2998.

[96] UPLA § 110, 44 Fed. Reg. 3000. A third party alteration or modification of the product at issue will defeat a claim based upon construction or design defects or inadequate warnings. The UPLA defines alteration or modification to include changes in design, formula, function or use as well as failure to observe routine care and maintenance. UPLA § 110(b), 44 Fed. Reg. 3000. A product seller may be liable despite third party alteration if the alteration either was in accordance with the seller's instructions, was consented to by the seller, or was reasonably anticipatable by the seller. UPLA § 110(a), 44 Fed. Reg. 3000.

[97] *See* Chestnut v. Ford Motor Co., 445 F.2d 967, 968 (4th Cir. 1971); Logan v. Montgomery Ward & Co., 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975).

[98] *See* Tuttle v. United States Slicing Mach. Co., 335 F.2d 63, 64 (4th Cir. 1964); Logan v. Montgomery Ward & Co., 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975). The plaintiff in *Logan* sought damages for injuries caused by an exploding stove. Since an expert had not examined the stove subsequent to the accident, there was no testimony regarding the cause

the product is used in an unforeseeable manner.[99] Noting the broad interpretation of "foreseeability" in some jurisdictions,[100] the UPLA drafters restricted the product seller's potential liability to modifications which the product seller reasonably should have anticipated.[101] Nevertheless, since Virginia narrowly interprets foreseeability, any foreseeable product modification under Virginia law would be "reasonably anticipated" under the UPLA.[102]

In addition to the provisions establishing the substantive requirements of a products liability claim, the UPLA establishes time limitations for bringing such actions. The UPLA imposes liability on the product seller only for those injuries caused by a product during its "useful safe life,"[103] unless the product seller expressly warranted the product for a longer period.[104] The trier of fact determines whether a product's useful safe life expired prior to the injury by considering certain enumerated factors.[105] Current Virginia law does not recognize the "useful safe life" concept. The amount of time between the purchase of the product and the injury, however, is relevant in Virginia in determining whether the defendant has been negligent or has breached a warranty.[106] Although the UPLA limits the product seller's liability by providing specific guidelines for determining a product's useful safe life, the weight attributed to each factor is left to the

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of the explosion. Therefore, the jury could have inferred that faulty installation or the purchaser's own acts caused the explosion rather than an inherent defect in the stove. For this reason, the Virginia Supreme Court upheld the jury's verdict for the product seller. 216 Va. at 428-29, 219 S.E.2d at 687-88.

[99] *See* Turner v. Manning, Maxwell & Moore, Inc., 216 Va. 245, 251, 217 S.E.2d 863, 868 (1975). Although the jury in *Turner* could have found that the plaintiff's injury would not have occurred had the hoist been equipped with a safety hook, the direct cause of the accident was the unforeseeable misuse of the hoist. Since the use of a product in an unforeseeable manner voids the implied warranty of merchantibility and the manufacturer has no duty to warn of the dangers arising from unforeseeable misuse, a verdict for the manufacturer was proper. *Id.* at 251-52, 217 S.E.2d at 868-69; *see* note 57 *supra.*

[100] *See* UPLA § 110 (Analysis), 44 Fed. Reg. 3010, (citing Blim v. Newberry Indus., Inc., 443 F.2d 1126 (10th Cir. 1971)). In *Blim,* the manufacturer was held liable despite the removal of a safety guard by the plaintiff's co-worker because the removal was "foreseeable". 443 F.2d at 1128. In Virginia, the plaintiff in *Blim* would not have recovered. *See* Tuttle v. United States Slicing Mach. Co., 335 F.2d 63, 64 (4th Cir. 1964) (per curiam) (manufacturer not liable when protective grill removed from meat grinder); note 98 *supra.*

[101] UPLA § 110(a)(3), 44 Fed. Reg. 3000. Reasonably anticipated conduct is defined as "conduct which could be expected of an ordinary prudent person who is likely to use the product." UPLA § 102(6), 44 Fed. Reg. 2998.

[102] *See* note 100 *supra.*

[103] A product's useful safe life is defined as the time during which the product reasonably can be expected to perform in a safe manner. UPLA § 109(A)(1), 44 Fed. Reg. 2999.

[104] UPLA § 109(A)(2), 44 Fed. Reg. 2999.

[105] In determining whether a product's useful safe life has expired, the trier of fact may consider the effect of natural deterioration, local conditions, normal repairs and replacements, the product seller's representations regarding useful safe life, and any modifications by third parties. UPLA § 109(A)(1), 44 Fed. Reg. 2999.

[106] *See* Carney v. Sears Roebuck & Co., 309 F.2d 300, 305 (4th Cir. 1962).

judgment of the trier of fact.[107] Since Virginia triers of fact currently consider the same elements in determining product liability,[108] the enactment of this UPLA provision would clarify rather than change Virginia product liability law.

The UPLA also imposes time limitations on product liability claims through statutes of repose.[109] Unlike the statute of limitations which runs from the date a cause of action accrues,[110] the statutes of repose set a limit on the product seller's liability based upon the product's age.[111] Under the UPLA's statute of repose for workplace injuries, a claimant entitled to statutory workmen's compensation may sue the product seller for injuries occurring within ten years after the original delivery of the injury causing product.[112] After ten years, however, a worker may sue only his emloyer.[113] The employer then may seek contribution from the product seller to the extent of the seller's responsibility for the injury.[114]

Enactment of the UPLA statute of repose for workplace injuries would substantially change current Virginia law, since Virginia places no time restrictions on liability apart from applicable statutes of limitations.[115] In addition, Virginia's Workmen's Compensation Act constitutes the employee's sole right against his employer for injuries received in the course of his employment.[116] An employee, however, can proceed against the third party responsible for his injuries.[117] In such a case, the employer, to the extent of his liability under the Workmen's Compensation Act, has a right of subrogation to the employee's claim against the third party.[118] The UPLA provisions reverse this procedure when a product over ten years old causes an injury. In such situations, the UPLA enlarges the employer's

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[107] *See* note 105 *supra.*

[108] *See* note 106 *supra.*

[109] UPLA § 109(B), 44 Fed. Reg. 2999-3000. The statutes of repose set a time limitation on the product seller's potential liability. The purpose of such statutes is to increase the predictability of a product seller's liability and to alleviate the inherent difficulty in defending a claim after the passage of a significant period of time. *See* UPLA § 109(B) (Analysis), 44 Fed. Reg. 3009. Although the statutes of repose limit the potential liability of the product seller in certain situations, they will not always apply. If the seller expressly warrants the product's life for more than ten years, the product seller will be liable during the warranty period. A seller's intentional misrepresentation or concealment, if a substantial cause of the claimant's harm, also will avoid the limits of the statutes. In addition, the statutes do not apply where the injury results from prolonged exposure to the product. Finally, the statutes of repose do not limit actions for contribution or indemnification. UPLA § 109(B)(3), 44 Fed. Reg. 3000; *see* text accompanying notes 195-248 *infra.*

[110] *See* text accompanying note 133 *infra.*

[111] *See* UPLA § 109(B), 44 Fed. Reg. 2999-3000.

[112] UPLA § 109(B)(1)(a), 44 Fed. Reg. 2999.

[113] UPLA § 109(B)(1)(b), 44 Fed. Reg. 2999.

[114] UPLA § 109(B)(1)(d), 44 Fed. Reg. 2999, *see* text accompanying notes 215-229 *infra.*

[115] *See* text accompanying notes 135-138 *infra.*

[116] VA. CODE § 65.1-40 (1973).

[117] *See, e.g.,* Veale v. Norfolk & W. Ry., 205 Va. 822, 139 S.E.2d 797 (1965).

[118] VA. CODE § 65.1-41 (1973).

liability to include all lost wages of the injured employee,[119] and limits the employee's potential recovery for his injuries.[120] Since the product seller would be responsible only for contribution,[121] the UPLA reduces his potential liability at the expense of both the employer and the injured employee.[122]

The UPLA reflects the belief that the employer can prevent most workplace injuries and, therefore, should be liable when such a preventable injury occurs.[123] Where a product causes harm because of misuse or the lack of proper maintenance, therefore, the product seller has no liability under the UPLA.[124] Thus, in most cases where the employer could have prevented injury, the product seller's liability is nonexistent without the protection offered by the UPLA's statute of repose. Finally, although the drafters cite data indicating that few product liability claims arise after ten years,[125] the severe limitation on the injured employee's recovery in such situations is not justifiable.

The UPLA's statute of repose for nonworkplace injuries,[126] also operates to restrict a product seller's liability for products over ten years old. For nonworkplace injuries, the UPLA establishes a rebuttable presumption that a product's useful safe life ends ten years after its sale.[127] Since a product seller is not liable for injuries occurring beyond a product's useful safe life,[128] the presumption effectively limits most product liability claims to products sold recently. Virginia product liability law does not recognize presumptions of nonliability when products reach a certain age. Rather, Virginia law dictates that the product's age at the time of an injury merely is a factor in determining liability.[129] The UPLA provision clearly benefits the product seller by presuming that a ten year-old product has reached the end of its useful life. In setting the ten year limitation, the drafters

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[119] The basic measure of recovery under the Workmen's Compensation Act is two thirds of the employee's average weekly wages during the employee's disability period. *See* VA. CODE § 65.1-54 (1973). Under the UPLA, the employer's liability would include all lost wages. UPLA § 109(B)(1)(b), 44 Fed. Reg. 2999. The UPLA also gives an employer a cause of action against the product seller if the employer is found liable for his employee's injury. *See* UPLA § 109(B)(1)(d), 44 Fed. Reg. 2999-3000; text accompanying notes 230-248 *infra*.

[120] In a Virginia action against a third party, an employee can recover normal damages, including medical expenses, lost wages and pain and suffering. His UPLA recovery, however, is limited to lost wages when a product more than ten years old causes his injury. UPLA § 109(B)(1)(b), 44 Fed. Reg. 2999.

[121] UPLA § 109(B)(1)(d), 44 Fed. Reg. 2999-3000.

[122] *See* note 120 *supra*.

[123] *See* UPLA § 109(B)(1) (Analysis), 44 Fed. Reg. 3009.

[124] *See* UPLA § 110, 44 Fed. Reg. 3000; text accompanying notes 95-102 *supra*.

[125] *See* UPLA § 109 (Analysis), 44 Fed. Reg. 3009.

[126] UPLA § 109(B)(2), 44 Fed. Reg. 3000.

[127] UPLA § 109(B)(2), 44 Fed. Reg. 3000. The presumption that a product's useful safe life has expired can be rebutted by clear and convincing evidence. *Id.; see* note 82 *supra*.

[128] UPLA § 109(A)(1), 44 Fed. Reg. 2999.

[129] *See* text accompanying note 106 *supra*.

hoped to reduce product liability insurance premiums.[130] If few product liability claims arise after ten years, as the drafters assert,[131] the risk of liability would not be decreased significantly by the ten year limitation. Moreover, if the drafters relied on inaccurate data in setting the ten year limitation,[132] injured claimants could be restricted severely in their ability to recover damages.

Finally, the Act establishes a three year statute of limitations for product liability claims which runs from the time that the claimant discovered or should have discovered the facts which gave rise to the claim.[133] This UPLA provision conflicts with the applicable Virginia statutes of limitations. Virginia distinguishes between personal injury claims and claims involving property damage.[134] A two year statute of limitations governs causes of action based upon personal injuries,[135] and runs from the date of the injury.[136] An action for property damage, however, must be commenced within five years[137] after the breach of contract or duty which caused the harm.[138] Thus, the adoption of the UPLA's statute of limitations would increase time limits for instituting personal injury actions while decreasing the limitation for property damage claims. In addition, the UPLA's statute of limitations would not begin to run until the claim is discovered, rather than from the date of the breach itself.[139] Therefore, the UPLA approach would eliminate the confusion resulting from the necessary categorization of a claim as personal injury or property damage,[140] and would eliminate most situations where the statute precludes recovery before the claimant discovers the existence of a cause of action.[141]

The procedural sections of the UPLA seek to accomplish three goals. The first of these goals is to accelerate the process by which an injured consumer receives compensation for his injuries. A six-month notice of claims rule[142] decreases the time usually expended[143] in consumer litigation

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[130] *See* UPLA § 109 (Analysis), 44 Fed. Reg. 3008-09.

[131] *See* UPLA § 109(B)(2) (Analysis), 44 Fed. Reg. 3010.

[132] The UPLA drafters admit that the available data regarding claims for injuries caused by older products is "limited". *See* UPLA § 109 (Analysis), 44 Fed. Reg. 3009.

[133] UPLA § 109(C), 44 Fed. Reg. 3000.

[134] *See* VA. CODE §§ 8.01-230, 8.01-243 (1977).

[135] VA. CODE § 8.01-243(A) (1977).

[136] *Id.* § 8.01-230.

[137] *Id.* § 8.01-243(B).

[138] *Id.* § 8.01-230.

[139] UPLA § 109(C), 44 Fed. Reg. 3000.

[140] *See, e.g.*, Caudill v. Wise Rambler, Inc., 210 Va. 11, 11-13, 168 S.E.2d 257, 259 (1969); Friedman v. Peoples Serv. Drug Stores, Inc., 208 Va. 700, 702-03, 160 S.E.2d 563, 565-66 (1968); Richmond Redev. & Hous. Auth. v. Laburnum Const. Corp., 195 Va. 827, 838-39, 80 S.E.2d 574, 580-81 (1954).

[141] *See, e.g.*, Barnes v. Sears, Roebuck & Co., 406 F.2d 859, 862 (4th Cir. 1969); Caudill v. Wise Rambler, Inc., 210 Va. 11, 13-14, 168 S.E.2d 257, 259-60 (1969).

[142] UPLA § 108, 44 Fed. Reg. at 2999.

[143] Many states adhere to a two or three year statute of limitations for personal injury actions. *Id.* § 108 (Analysis), 44 Fed. Reg. at 3008; *see, e.g.*, VA. CODE § 8.01-243A (1977).

by using sanctions as an incentive for an earlier start of litigation.[144] The UPLA also proposes arbitration as an alternative to litigation for small damage claims.[145] The UPLA's second goal is to emphasize equitable allocation of liability among the parties responsible for a consumer's injury. A major provision designed to reach this goal requires the use of comparative negligence to allow each party's responsibility to be reflected in the final compensation award.[146] Furthermore, the UPLA permits contribution among the parties responsible for paying the consumer's damages.[147] The UPLA's third goal is to reduce the legal costs inherent in a consumer's recovery by preventing extended litigation through arbitration.[148] Several UPLA provisions deter tactical litigation delays and frivolous claims or defenses[149] with financial sanctions.[150]

To facilitate more rapid compensation for consumer injuries, an injured consumer must not delay an unreasonable length of time before entering into an attorney-client relationship after the date of injury.[151] Subsequently, the consumer's attorney must give timely notice of the claim to any known potential defendant within six months of the time the attorney accepted the consumer's case.[152] Similarly, the UPLA requires that a product seller expedite the compensation process by furnishing to the consumer's attorney (upon request) a list of all parties who either manufactured or distributed the product causing the injury.[153] To enforce these notice requirements, the UPLA imposes upon a noncomplying party liability for all legal costs which the delay causes.[154] The UPLA, however, does not bar any party from a claim or defense for failure to meet a notice requirement deadline.[155]

The majority of cases resulting in consumer awards are not brought to the manufacturer's attention until six months after the occurrence of the injury.[156] Such delay impedes a manufacturer's ability to recall or correct defective products before they cause additional injuries.[157] In response to

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[144] *See* text accompanying note 154 *infra.*

[145] UPLA § 116, 44 Fed. Reg. at 3001-02.

[146] *Id.* § 111, 44 Fed. Reg. at 3000.

[147] *Id.* §§ 112-113, 44 Fed. Reg. at 3001-02.

[148] *Id.* § 116, 44 Fed. Reg. at 3001-02.

[149] *See* text accompanying note 246 *infra.*

[150] *See* text accompanying note 247 *infra.*

[151] UPLA § 108(d), 44 Fed. Reg. at 2999.

[152] *Id.* § 108(b), 44 Fed. Reg. at 2999. For UPLA purposes, the attorney-client relationship arises when the attorney or any member or associate of the attorney's firm agrees to represent the claimant's interest regarding the claimant's anticipated claim. *Id.*

[153] UPLA § 108(c), 44 Fed. Reg. at 2999.

[154] *Id.* § 108(e), 44 Fed. Reg. at 2999.

[155] *Id.*, 44 Fed. Reg. at 2999.

[156] *Id.* (Analysis), 44 Fed. Reg. at 3008. The UPLA task force found that cases of consumer injuries which were unreported for at least six months accounted for sixty-eight per cent of all awards. *Id.*

[157] UPLA § 108 (Analysis), 44 Fed. Reg. at 3008; *see* Note, *Reforming the Law of Con-*

this problem, the six-month notice rule provides the manufacturer with the opportunity to correct defects quickly, thereby avoiding the expense of additional litigation arising from similar defects in like products.[158] In addition, the notice rule may benefit the consumer by allowing identification of the proper parties to his suit. Discovery costs may be lowered because the party most capable of identifying possible tortfeasors, the product seller, answers the often time-consuming inquiries regarding who has handled the defective goods.

Virginia does not have a notice requirement broadly applicable to products liability cases. Instead, a two year statute of limitations governs all personal injury claims, and a five year statute of limitations controls claims for property damage.[159] The six-month notice rule would change the time period in which most product liability cases must commence. Products liability suits brought on a breach of warranty theory, however, would not be greatly affected since Virginia law requires such actions to be brought within a "commercially reasonable time".[160] Although not clearly defined, this period is less than that two or five year period for other consumer claims.[161] Adoption of the six-month rule may serve to define a "commercially reasonable time".[162] As an added incentive to file suit quickly, Virginia law provides that failure to give notice within the "commercially reasonable time" bars a claimant from any recovery.[163] Adoption of the UPLA notice rule with its sanction provision would provide the necessary incentive for early filing, without depriving a claimant

sumer Recovery and Enterprise Liability Through the Uniform Commercial Code, 60 VA. L. REV. 1013, 1035 (1974) [hereinafter cited as *Reforming the Law*].

[158] UPLA § 108 (Analysis), 44 Fed. Reg. at 3008; *see Reforming the Law, supra* note 157, at 1035.

[159] VA. CODE § 8.01-243A (1977) (personal injury claims); § 8.01-243B (1977) (property damage claims). The UPLA six-month notice rule governs both types of claims.

[160] *See* VA. CODE § 8.2-607(3)(a) (1977).

[161] *See id.* A "reasonable period" of time for application of § 8.2-607 is determined by applying applicable commercial standards off "reasonable time". *Id.* Although the general terms of the Code comment do not suggest a definite period of time, it is less than one year. *See generally Reforming the Law, supra* note 157, at 1034-35.

[162] Adoption of the UPLA six-month rule may cause a possible conflict as to whether the six-month period supplants the vague "commercially reasonable" period of Va. Code § 8.2-607. The two time period requirements may coexist if the Virginia courts utilize six months as a guide to the length of a commercially reasonable time, retaining the power to extend the period in appropriate circumstances. The major consideration of the UPLA, however, is to allow the consumer to bring his claim within the normal statute of limitations period. Therefore, the Virginia courts should give full effect to the UPLA provision by allowing the UPLA sanction to supplant the Virginia absolute bar for claims not filed within a commercially reasonable time. The courts thereby would have a guide to the length of time reasonable for the filing of a claim before a consumer should be penalized for procrastination while encouraging consumers to file claims quickly so as to afford manufacturers the opportunity to remedy defective goods.

[163] *See* VA. CODE § 8.2-607 (1977).

of his cause of action.[164] Regardless of whether the six-month rule significantly alters the time limit for bringing Virginia products liability suits, the goals of accelerating compensation for injured consumers and facilitating defect correction by manufacturers are reasonable grounds for requiring claimants to file suits well before the normal two to five year period.

The UPLA also proposes to expedite the compensation of a consumer's injury by requiring mandatory but nonbinding arbitration for claims worth less than $30,000.[165] The UPLA arbitration provision is unique since it expressly defers to state law in certain instances. In this statutory scheme, the arbitration board applies the substantive law of the UPLA supplemented by applicable state law.[166] State law controls the procedural aspects of the arbitration board's proceedings, including the rules of evidence.[167] The board returns its findings to the trial court after completing its deliberations.[168] The court then enters the award as if it were the court's judgment.[169] The arbitration boards would consist of an attorney, a technical expert and a layman[170] with authority to conduct arbitration hearings and to make awards consistent with the act.[171]

Virginia arbitration law parallels the UPLA in many respects. Under common and statutory law, civil litigants may submit their disagreements

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[164] One commentator has written that the "commercially reasonable" time requirement of Va. Code § 8.2-607 is a trap for the consumer who is unaware of its time constraints. *See Reforming the Law, supra* note 157, at 1034. This potential result is also contrary to Comment 4 of § 8.2-607 which holds that the "commercially reasonable time period" may be extended to avoid depriving a "good faith consumer of his remedy". VA. CODE § 8.2-607 (Comment 4) (1977).

[165] UPLA § 116(a), 44 Fed. Reg. at 3001. Any party to a consumer injury case may petition the court for arbitration. *Id.* However, the UPLA does not provide a means by which a party may oppose an arbitration motion.

[166] UPLA § 116(b), 44 Fed. Reg. at 3001.

[167] *Id.* § 116(d)(2), & (f), 44 Fed. Reg. at 3001. The UPLA only requires that the board strictly observe state privilege rules. *Id.* § 116(f)(2), 44 Fed. Reg. at 3001. Notwithstanding this strict construction, the UPLA adopts a very flexible attitude towards arbitration procedural rules. *See id.* § 116(f), 44 Fed. Reg. at 3001.

[168] Arbitration proceedings must start within thirty days after the court refers the case to arbitration. *Id.* § 116(e), 44 Fed. Reg. at 3001. The court will grant an extension of this period only upon a showing of good cause. *Id.* The UPLA also requires that the arbitration process conclude as quickly as possible. *Id.* § 116(e) & (h), 44 Fed. Reg. at 3001.

[169] *Id.* § 116(h), 44 Fed. Reg. at 3001. Apparently, the UPLA does not allow the court any discretion to accept the award if the parties do not move for trial de novo.

[170] *Id.* § 116(c), 44 Fed. Reg. at 3001. The UPLA task force concluded that the arbitration board should include a technical expert as a means of expediting arbitration proceedings. *See id.* (Analysis), 44 Fed. Reg. at 3015. The task force reasoned that such an expert could inform the other two arbitrators of technical matters rather than requiring each arbitrator to become versed in the technical matters of the case. In addition, a technical expert is on the board to deter the presentation of biased technical testimony. The task force included a layman on the board to represent the consumer point of view, and a legal expert to insure the correctness of the legal aspects of the arbitration procedure and to advise the board on legal issues involved in the particular case. *Id.*

[171] UPLA § 116(d)(1), 44 Fed. Reg. at 3001.

to an arbitration panel normally composed of two or more persons.[172] Membership on the arbitration panel does not require special qualifications.[173] The panel's powers are specified in the "submission" which the court delivers to the panel before commencing the proceedings.[174] At the conclusion of the panel's deliberations, the court enters the arbitration panel's award as the judgment of the court from which the submission order originated.[175] Thus, while the UPLA would not change Virginia arbitration law significantly, the UPLA would extend certain provisions such as specifying the qualifications of arbitrators, so that arbitration panels would be better adapted to deal with the legal and technical aspects of consumer litigation.

The UPLA award provisions differ from state law procedures on the issue of appealability. The UPLA prohibits appeal of an arbitration award once the court enters the award as a judgment.[176] The nonappealability of the award, however, does not bar a party from all post proceeding remedies. Any party to the award may move for a trial de novo.[177] If such a motion is made timely, the case proceeds as if arbitration had not taken place.[178] Evidence from the arbitration proceedings is inadmissible at trial, except for impeachment purposes, and no party may mention at trial that arbitration has occurred.[179] Certain sanctions in the UPLA would deter disgruntled parties from employing this procedure to gamble on a better result at trial.[180] In contrast, Virginia law does not provide for a trial de novo. Once the court accepts a valid arbitration award, the award bars further action on the original cause.[181] Thereafter, the submission and the

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[172] *See* VA. CODE § 8.01-577 (1977); M. BURKS, PLEADING AND PRACTICE AT COMMON LAW § 10 (4th ed. 1952) [hereinafter cited as BURKS]. Under Virginia common law, parties may present a cause to arbitration without filing suit or obtaining judicial supervison. BURKS, *supra*, § 13. In addition, parties to a pending suit may ask the court to refer the suit to arbitration. Once the arbitrators return an award, the court enforces the award as its own judgment. Under each common law arbitration procedure, however, either party to the pending suit may revoke the arbitration procedure at any point before the award. Under the statutory scheme, however, the parties to arbitration relinquish the right to stop the arbitration proceeding. *Id.*

[173] BURKS, *supra* note 172, § 14. Any citizen of Virginia, including infants and lunatics, may serve as an arbitrator. *Id. See* VA. CODE § 8.01-577 (1977).

[174] A submission is an agreement among the parties to arbitrate. BURKS, *supra* note 172, § 12. In the submission, the parties set forth the matters to be arbitrated and may include procedures for the arbitrators to follow. *Id.* The submission and the Virginia rules of evidence control the panel's proceedings. *See* VA. CODE § 8.01-577 (1977); BURKS, *supra* note 172, § 17.

[175] *See* VA. CODE § 8.01-577 (1977); BURKS, *supra* note 172, § 20.

[176] UPLA § 116(h), 44 Fed. Reg. at 3001.

[177] *Id.* § 116(i), 44 Fed. Reg. at 3001.

[178] *Id.* § 116(i)(2), 44 Fed. Reg. at 3001. A party does not forfeit any right to trial by jury by invoking arbitration. *Id.*

[179] *Id.* § (i)(3), 44 Fed. Reg. at 3001-02.

[180] Any party failing to obtain a better result at the trial de novo than at arbitration is liable for the costs of arbitration. *Id.* § 116(i)(4), 44 Fed. Reg. at 3002.

[181] Sydnor Pump & Well Co. v. County School Bd., 182 Va. 156, 167, 28 S.E.2d 33, 37 (1943). An arbitration award acts as a final judgment on all claims and matters contained in

award provide the only basis for determining the rights of the parties to the award.[182] The final award, however, is appealable to the Virginia Supreme Court.[183]

Despite the apparent differences between the UPLA and Virginia law, the effect achieved by the two laws is very similar. Under the UPLA, a party may be compelled to arbitrate without its consent.[184] Since a disgruntled party may avoid the arbitration award by trial de novo the harshness of this provision is ameliorated.[185] Thus, no party must accept an arbitration award without its consent.[186] Under Virginia law, however, a party must consent to arbitrate before the arbitration process may commence.[187] Under the UPLA, a party to arbitration may have the legal and technical issues of his case evaluated twice, once during arbitration and once in a trial de novo.[188] This procedure effectively provides a party an appeal. In contrast, in Virginia, a party may raise issues on appeal which only affect the arbitration procedure collaterally, such as fraud in the proceedings.[189] As a result a party to arbitration in Virginia has only one opportunity to raise the substantive issues of his case. Both the UPLA and Virginia law, then, allow a consumer an appeal from an initial determination of the merits of his case. The UPLA's appeal provision goes beyond Virginia law, however, by allowing an appellant to relitigate the merits of the case.

The UPLA accomplishes its second goal of placing liability for a consumer's damages on the party responsible for the injury through the use of a comparative negligence system. The UPLA initially divides responsibility between the consumer claimant and the defendants.[190] The UPLA then apportions the liability among the various defendants according to their respective degrees of fault.[191] To implement the comparative negligence system, the UPLA requires the trier of fact to determine the amount of damages that the claimant would receive in the absence of contributing fault.[192] The trier of fact then must determine the degree of each party's negligence, taking into account the nature and quality of each party's acts.[193] Based on these findings, the trial judge enters a verdict allocating

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the submission. *Id.;* Equitable Fire & Marine Ins. Co. v. Stieffens, 154 Va. 281, 289, 153 S.E. 731, 733 (1930); BURKS, *supra* note 172, § 20.

[182] Equitable Fire & Marine Ins. Co. v. Stieffens, 154 Va. 281, 153 S.E. 731 (1930).

[183] *See* Crane v. Crane, 62 Va. 579, 581-82 (1871); 2A M.J., *Arbitration & Award* § 54 (1969).

[184] *See* UPLA § 116(a), 44 Fed. Reg. at 3001.

[185] *Id.* § 116(i), 44 Fed. Reg. at 3001-02.

[186] *Id.*

[187] *See* note 172 *supra.*

[188] *See* UPLA § 116, 44 Fed. Reg. at 3001-02.

[189] 2A M.J., *Arbitration & Award,* § 54 (1964).

[190] UPLA § 111(a), 44 Fed. Reg. at 3000.

[191] *Id.* 111(b), 44 Fed. Reg. at 3000.

[192] *Id.* § 111(b)(1), 44 Fed. Reg. at 3000.

[193] *Id.* § 111(b), 44 Fed. Reg. at 3000. The trier of fact allocates a percentage of the total fault to each party found responsible for the claimant's injury. In its allocation, the trier of

the responsibility for damages among the parties found liable.[194] Although each party's liability is expressed as a percentage of the total liability, all defendants are jointly and severally liable for the total amount of the claimant's award.[195] The UPLA places this burden on the liable defendants to insure that the claimant eventually will receive his full award, even if one of those found liable becomes insolvent or his share becomes otherwise uncollectible.[196]

A claimant's cause is subject to the defense of contributory responsibility. At common law, contributory negligence was an absolute bar to a claimant's recovery.[197] Since Virginia has followed the common law rule, a Virginia claimant's recovery is denied if the defendant proves that the claimant contributed in any way to his own injury.[198] In this examination of the common law, the UPLA task force found that the rule arose from the judicial theory that a plaintiff must have exercised reasonable care for his own safety in order to recover damages for a tortious injury.[199] A person

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fact may assign a percentage of the responsibility for the claimant's damages to the claimant on account of contributing responsibility. The trier of fact, however, will not consider the acts of parties to the accident who are not made defendant parties to the court action when apportioning responsibility for the claimant's damages. *Id.*

[194] UPLA § 111(b)(4), 44 Fed. Reg. at 3000.

[195] *Id.*

[196] If a liable party's obligation becomes uncollectible within one year of the entry of judgment, any party to the original suit may petition the court for a redistribution of the uncollectible obligation. *Id.* § 111(b)(5), 44 Fed. Reg. at 3000. If the court finds the obligation to be uncollectible, it may order a pro rated distribution of the obligation to the other liable parties. *Id.* For example, if a claimant was found to be 25% at fault in the original suit and defendants *A*, *B* and *C* were found to be each 25% at fault the claimant could recover only 75% of his damages. If *A* became insolvent during the next year, either the claimant, *B* or *C* could petition the court for a redistribution of *A*'s liability. Upon a finding of *A*'s insolvency, the court could order the claimant, *B* or *C* to assume responsibility for a pro rata share of *A*'s obligation. Since the claimant, *B* and *C* were equally at fault, each would be liable for one-third of *A*'s obligation. Thus, the claimant would receive only two-thirds of the amount *A* owed him (*A*'s obligation reduced by the 33% of claimant's contributing responsibility). Redistribution of *A*'s liability does not relieve *A* of his responsibility altogether. Instead, *A* still is liable to *B* or *C* for an action for contribution or to the claimant on the original judgment. *See* UPLA § 111(b)(5), 44 Fed. Reg. at 3000.

[197] Looney v. Metropolitan R.R., 200 U.S. 480, 485-86 (1905); Gordon v. Cummings, 152 Mass. 513, 25 N.E. 978 (1890); RESTATEMENT (SECOND) OF TORTS, § 467 (1965).

[198] *See* District of Columbia v. Coleman, 214 Va. 12, 13, 196 S.E.2d 926, 927 (1973); Tazewell Supply Co. v. Turner, 213 Va. 93, 96, 189 S.E.2d 347, 350 (1972); Gottlieb v. Andrus, 200 Va. 114, 118, 104 S.E.2d 743, 747 (1958). Contributory negligence is the failure of a claimant to exercise ordinary care for his own safety which, together with the negligence of another, causes his injury. Yeary v. Holbrook, 171 Va. 266, 285, 198 S.E. 441, 450 (1938). Although the defendant's negligence may have been greater than the plaintiff's, Virginia law recognizes no gradations in fault in cases of contributory negligence. Smith v. Virginia Elec. & Power Co., 204 Va. 128, 133, 129 S.E.2d 655, 659 (1963). Since the law will not allow a party at fault to recover damages, the contributorily negligent plaintiff cannot receive compensation for his injuries. Richmond Traction Co. v. Martin, 102 Va. 209, 213, 45 S.E. 886, 887-88 (1903).

[199] *See* UPLA § 111 (Analysis), 44 Fed. Reg. at 3011. In addition to requiring that a plaintiff have a high regard for his personal safety, the common law contributory negligence

who contributed to his own injury did not exercise reasonable care and thus did not merit compensation.[200] The UPLA concurred that an individual should be obligated to protect himself from harm, but the UPLA task force concluded that an absolute bar to recovery was inequitable.[201] Therefore, the UPLA allows a defendant to raise the issue of contributing negilgence as an affirmative defense to reduce damages; a claimant's contributing negligence, however, will rarely be great enough to foreclose all recovery.[202] Under this defense, a potential reduction in the damages award will act as an incentive for a consumer to exercise care in use of a product.[203] Concurrently, liability for the remaining portion of the claimant's damages would serve as an incentive to prompt manufacturers to use care in the production and distribution of their goods.[204]

The UPLA's comprehensive system for allocation of responsibility

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rule derives from two additional theories. When the English courts originally developed the contributory negligence rule, England was in the early stages of the industrial revolution. Fischer, *Products Liability-Applicability of Comparative Negligence,* 43 Mo. L. Rev. 431, 432 (1978) [hereinafter cited as Fischer]. In response to industry's need for protection from consumer claims, the English courts developed the contributory negligence doctrine as a means of foreclosing most consumer actions. *Id.* Industry has now outgrown the need for judicial protection from consumers. Rather, the proliferation of federal regulation of industry for the consumer's sake indicates that the consumer has a greater need for protection from defective goods. In addition, the common law pronounced that a court is incapable of determining varying degrees of fault. *See* Prosser, *Comparative Negligence,* 51 Mich. L. Rev. 465 (1953). This justification has been undercut as many state courts have held that they do indeed have the ability to apportion fault. *Id.*

[200] *See* UPLA § 111 (Analysis), 44 Fed. Reg. at 3011.

[201] *Id.*

[202] The UPLA sets forth three common situations in which a consumer may be declared contributorily negligent. The first of these situations is when a consumer uses a product which is latently defective. UPLA § 111(c)(i), 44 Fed. Reg. at 3000. At common law a consumer would have the duty to inspect a good before use since his failure to do so would bar recovery. *Id.* (Analysis), 44 Fed. Reg. at 3012. Under modern tort law, however, the consumer has a right to receive a reasonably safe product that he should not have to inspect before purchase or use. Cepeda v. Cumberland Eng. Co., 76 N.J. 152, 386 A.2d 816 (1978); UPLA § 111 (Analysis), 44 Fed. Reg. at 3012; Restatement (Second) of Torts § 402A (1965). Thus, use of a defective product having a latent defect should not be contributory negligence. When the defect is readily discoverable, however, the UPLA task force concluded that a consumer using such a defective product should be charged with contributory responsibility, thereby reducing his compensation award. *See* UPLA § 111(c)(1)(ii), 44 Fed. Reg. at 3000. The misuse of products in a manner unforeseeable to the manufacturer is another common cause of consumer injuries. *Id.* § 111(c)(3)(ii), 44 Fed. Reg. at 3000. The UPLA task force also determined the injured consumer should also be charged with contributory responsibility. *Id.* Thus, a workman using a coke bottle as a hammer would be guilty of contributory responsibility which would result in a reduction of his damage recovery. *See* Fischer, *supra* note 199, at 435. In a third common situation, a consumer may intentionally use a product known to have a defect. UPLA § 111(c)(20), 44 Fed. Reg. at 3000. If the use is unreasonable, such as driving on a highway on a flat tire, then the UPLA denies any compensation for resulting injury. *Id.* If the use was reasonable, however, recovery is appropriate. *Id.* Whether such use was reasonable is a question of fact in each case. *Id.*

[203] UPLA § 111 (Analysis), 44 Fed. Reg. at 3011.

[204] *Id.*

among joint tortfeasors parallels the contribution scheme in Virginia.[205] A claim for contribution under Virginia law arises when one tortfeasor has satisfied a liability shared with another.[206] In addition, the claim for contribution does not require a formal adjudication of liability.[207] Thus, a party seeking contribution need only hold a valid claim against the party from whom contribution is sought.[208] Consistent with its position on contributory negligence, Virginia does not allow a trial court to apportion contribution according to each tortfeasor's degree of fault. Instead, a party liable for contribution is responsible for one half of the damages assessed against the party seeking contribution.[209] Under this scheme, a tortfeasor who is only twenty per cent at fault may pay one hundred per cent of the consumer's claim. In the contribution action, this tortfeasor may recover only fifty per cent of the amount that he paid to the claimant. In effect, the tortfeasor is assuming fifty per cent of the consumer's damages while being only twenty per cent at fault. The UPLA rejects this result as inequitable.[210] Instead, the UPLA provides that each defendant's liability should be determined at trial thereby eliminating the need for a separate action to determine such liability and may obviate the need for a contribution action if all defendants pay their proportionate share of the award.[211] If a party has paid more than its allocated share, however, that party may seek contribution at trial from another party which has not paid its full liability.[212] If for some reason a party's proportionate share of liability is not determined at trial, contribution can be sought in a separate action.[213] Similarly, if contribution is sought from a party absent from the original action, contribution may be enforced in a subsequent proceeding.[214] A party who settles a claim can seek contribution only if the liability of the party against whom contribution is sought has been extinguished, and then only to the extent that the settlement is equitable.[215] Therefore, in each situation, no party bears more responsibility for the consumer's damages than which is in direct proportion to that party's degree of negligence.

The UPLA also addresses problems in the area of contribution claims against an employer covered by a workmen's compensation law.[216] Under

[205] *See* UPLA § 111, 44 Fed. Reg. at 3000; text accompanying notes 208-215 *infra.*

[206] Nationwide Mut. Ins. Co. v. Minnifield, 213 Va. 797, 798, 196 S.E.2d 75, 76 (1973); Nationwide Mut. Ins. Co. v. Jewel Tea Co., 202 Va. 527, 532, 118 S.E.2d 646, 649 (1961).

[207] North River Ins. Co. v. Davis, 274 F. Supp. 146, 149 (W.D. Va. 1967).

[208] *Id.*

[209] *Id.*

[210] *See* UPLA § 112 (Analysis), 44 Fed. Reg. at 3012.

[211] *Id.* § 112 (Analysis), 44 Fed. Reg. at 3012.

[212] *Id.* § 112 (a)-(b), 44 Fed. Reg. at 3000.

[213] *Id.* § 112(c), 44 Fed. Reg. at 3000.

[214] *Id.*

[215] *Id.* § 112(d), 44 Fed. Reg. at 3000-01.

[216] In a hypothetical situation, a manufacturer sells a defective saw to a lumbermill. The lumbermill-employer compounds the saw's potential for injury by failing to install devices to prevent accidents. In this condition, the saw seriously injures a worker. Disregarding

the typical workmen's compensation statute, the employee receives fixed compensation from his employer in return for relinquishing any tort claim he might have against his employer.[217] The employee still may sue the manufacturer for full damages. The manufacturer, however, cannot shift any liability onto the employer since the employer's liability is statutorily limited to compensation payments.[218] Thus an employee may receive a double recovery from compensation payments and a damage award. Furthermore, if an employer is subrogated to the rights of his employee against the manufacturer, the employer may be able to avoid all financial liability for his negligence. The manufacturer, however, is left without recourse and must suffer impact of the employee's damages.[219]

In Virginia, a plaintiff in a contribution action may not sue a fellow joint tortfeasor for contribution unless the party has a valid claim against the other tortfeasor.[220] A party seeking contribution may not bring a suit for contribution against another tortfeasor which the plaintiff in the original action could not sue directly.[221] Moreover, a manufacturer should not be able to seek contribution from an employer because the workmen's compensation law prohibits an employee from suing his employer. This result is based on two grounds. If a plaintiff cannot sue a defendant directly, the plaintiff and a second defendant might settle the cause fraudulently for an amount equal to both the defendants' liability. Thereafter, the second defendant could seek contribution against the first defendant and recover the additional damages representing the first defendant's liability to the plaintiff.[222] Additionally, allowing a manufacturer contribution against an employer would violate the employer's statutory liability limitation.[223] A violation occurs because the manufacturer's claim for contribution arises from the employee's suit against the manufacturer. Thus,

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worker's compensation statutes, the worker could sue both his employer and the manufacturer or the manufacturer alone for his injury, while the manufacturer may sue the employer for contribution. By this two step judicial procedure, each of the two negligent parties has assumed its proper liability for the employee's injury. With the introduction of a workmen's compensation statute, however, the situation changes and the manufacturer normally becomes solely liable for the worker's damages.

[217] *New Policies Bearing on the Negligent Employer's Immunity from Loss Sharing*, 29 MAINE L. REV. 243 (1978).

[218] *Id.*

[219] *Id.*

[220] *See* text accompanying note 208 *supra.*

[221] *See* Norfolk & S. R.R. v. Gretakis, 162 Va. 597, 600, 174 S.E. 841, 842 (1934). In Virginia, only statutory contribution is allowed since contribution is a deviation from the common law that no contribution is allowed. *Id.* The contribution statute does not grant any greater right to recovery than at common law. Therefore, the statute does not allow a contribution action plaintiff to sue a joint tortfeasor who would have been liable to an injured plaintiff in the original action. *Id.*

[222] *Id.*

[223] *See* Jennings v. Franz Torwegge Mach. Works, 347 F. Supp. 1288, 1290 (W.D.Va. 1972).

the employer is paying more for the employee's injury than mere compensation payments.[224]

Although the UPLA recognizes the arguments supporting the no contribution rule, it rejects the rule in part.[225] The UPLA task force found that an equally subscribed to position postulates that the result normally achieved under the workmen's compensation statutes is inequitable.[226] To redress this situation, an employer should be subject to impleading and required to bear some liability for his negligence.[227] In seeking to placate both positions, the UPLA adopted a limited contribution rule.[228] Under this rule, an employer who negligently contributed to an employee's injury is subject to contribution not exceeding the amount of compensation payments made to the employee.[229] Although this proposal does not eliminate the inequity in the present system, it mitigates the application of the no contribution rule to the manufacturer.[230] In addition, the employer's liability is limited to his compensation payments.[231] The UPLA solution also creates a slight incentive for an employer to reduce workplace hazards thereby retaining his immunity from contribution.[232] Although the UPLA system is not yet widely accepted, one state has adopted a similar formula.[233]

The UPLA also defines the liability relationship between a manufacturer of a defective product and the party who actually sells the product to a consumer. The UPLA proposes that a manufacturer of a defective product should be responsible for any defects it creates.[234] Several states

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[224] *Id.*

[225] *See* UPLA § 113 (Analysis), 44 Fed. Reg. at 3013.

[226] *See* Davis, *Third-Party Tortfeasors' Rights Where Compensation-Covered Employers Are Negligent Where Do Dole and Sunspan Lead?* 4 HOFSTRA L. REV. 571, 573, 577 n.26, 591 (1976); Smith, *Products Liability: A Compendium of Reform,* 15 HOUS. L. REV. 871, 882-84 (1978) [hereinafter cited as Smith].

[227] *See* Smith, *supra* note 226, at 882-83. The Pennsylvania Supreme Court considered immunity and subrogation rights of a negligent employer against the rights of a third-party tortfeasor under the Pennsylvania contribution statute in Maio v. Fahs, 339 Pa. 180, 14 A.2d 105 (1940). The Pennsylvania court allowed the plaintiff to implead the negligent employer on the ground that the statutory right to contribution would otherwise be defeated. *Id.* at 188-89, 14 A.2d at 109. The court, however, refused to permit the right of contribution to outweigh the policy of limited employer liability, reasoning that "[i]t would be repugnant to the letter and spirit of the Workmen's Compensation Act and would frustrate its purpose to hold that an employer who brings himself within the Act could notwithstanding that fact be held liable to the payment of a judgment obtained by an employee." *Id.* at 192, 14 A.2d at 111. Therefore, the court limited the third-party's constibution right to an amount for which the employer was liable under the workmen's compensation statute. *Id.; accord,* Lambertson v. Cinncinnatti Corp., 257 N.W.2d 679, 684 (Minn. 1977).

[228] UPLA § 113, 44 Fed. Reg. at 3001.

[229] *Id.*

[230] *See* UPLA § 113 (Analysis), 44 Fed. Reg. at 3013.

[231] *Id.*

[232] *Id.*

[233] *See* Lambertson v. Cincinnatti Corp., 257 N.W.2d 679 (Minn. 1977).

[234] UPLA § 114(a), 44 Fed. Reg. at 3001.

extend this liability to any distributor of the product so that the retailer of a defective product will be liable to the same extent as the manufacturer for injuries resulting from use of the defective product.[235] The UPLA rejects this position because many distributors do not have an opportunity to inspect a product before sale since an imposition of a duty to inspect a product before sale would be economically unfeasible.[236] Such a burden would fall harshly on discount retailers who sell a large volume of goods in sealed containers and who depend on low overhead costs to maintain a profit margin. The UPLA therefore exempts distributors from liability to a consumer when the distributor does not have a reasonable opportunity to inspect the product.[237] This duty of inspection does not include detailed examinations for latent defects, but only such reasonable inspection as the circumstances allow.[238] A distributor or retailer must exercise reasonable care in the handling of goods, including warning consumers of known hazards.

The nonliability of retailers for manufacturer's negligence provision is inapplicable when a claimant cannot pursue his claim against the manufacturer.[239] Specifically, the UPLA provides that the inability to serve process on the manufacturer, the manufacturer's insolvency, or the simple difficulty in obtaining satisfaction of judgment from the manufacturer is sufficient grounds for substitution of the distributor for the manufacturer as the defendant in the consumer's suit.[240] Although the occurrence of one of these three contingencies may place an unfair burden on a distributor, the UPLA task force reasoned that the consumer interest in recovery supersedes the distributor's need for immunity.[241] This position, however, is unsound on two grounds. Economically, this provision is not structured to encourage manufacturers to maximize safety procedures in the production of consumer goods.[242] Instead, it places the entire compensation burden on a distributor who may have no opportunity to correct the defect.[243] In terms of legal cost, the provision increases the necessity for litigation. If a manufacturer is an out-of-state entity not subject to service of process in the consumer's state, the consumer is not forced to file suit in the manufacturer's jurisdiction.[244] Rather, the consumer may file an action against the

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[235] *See, e.g.*, Housman v. C.A. Dawson & Co., 106 Ill. App. 2d 225, 245 N.E.2d 886 (1969); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 789-92 (Tex. 1967); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[236] UPLA § 114 (Analysis), 44 Fed. Reg. at 3014.

[237] *Id.* § 114(a), 44 Fed. Reg. at 3001.

[238] *Id.* (Analysis), 44 Fed. Reg. at 3013.

[239] UPLA § 114(b), 44 Fed. Reg. at 3001.

[240] *Id.*

[241] *See id.* § 114 (Analysis), 44 Fed. Reg. at 1013-14.

[242] *Id.*

[243] *Id.*

[244] *See id.* § 114(b), 44 Fed. Reg. at 3001. Although jurisdiction over out of state manufacturers is possible through the use of many states' long arm statutes, not all states' jurisdic-

distributor who is likely to be in the consumer's state.[245] After the conclusion of the initial suit, the distributor must initiate a second suit for reimbursement from the manufacturer for the distributor's payment of the consumer's damages.[246] Thus, two actions are necessary to adjust the financial burden of the claimant's injury. Therefore, a legislature considering the exemption provision of the manufacturer-distributor relationship statute should carefully consider whether the need to compensate a consumer in certain cases outweighs the distributor's general limitation of liability.

The UPLA achieves its third goal, reduction of legal cost, through a series of provisions dealing with various stages of the legal process. In a section intended to eliminate frivolous legal actions, the UPLA allows a party to recover the costs of either defending against a frivolous claim or overcoming a frivolous defense.[247] In addition, an attorney retained by the claimant on a contingent fee basis may recover reasonable compensation for services rendered in litigating a frivolous defense.[248] To discourage misuse of this cost recovery provision, the UPLA requires a showing, by clear and convincing evidence that a claim or defense was without any reasonable or factual basis.[249]

Although few cases have considered the issue of civil remedies for frivolous legal positions, the UPLA provisions are analagous to several existing rules condemning frivolous suits. The Code of Professional Responsibility prohibits an attorney from filing a suit or asserting a position which serves only to harass or maliciously injure another party.[250] In addition, a lawyer who in bad faith knowingly advances a claim or defense unwarranted under existing law is subject to disciplinary action.[251] Similarly, the Federal Rules of Civil Procedure may subject an attorney to disciplinary action when he files a pleading where no reasonable basis for the pleading exists.[252] Moreover, a party subjected to a frivolous appeal may recover damages and double costs from the offending party.[253] Thus, the UPLA provision serves as an extention of civil liability to conduct prohibited by the Code of Professional Responsibility and in a manner which parallels the Federal Rules of Civil Procedure.

The UPLA frivolous legal action provision exceeds Virginia's remedy for a party burdened with a frivolous legal action. In Virginia, a party's

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tional statutes are broad enough to allow either a direct suit by a consumer or impleading of an out of state manufacturer by a distributor.

[245] *Id.*

[246] *See id.* § 112, 44 Fed. Reg. at 3000-01.

[247] UPLA § 115(a), 44 Fed. Reg. at 3001.

[248] *Id.* § 115(c), 44 Fed. Reg. at 3001.

[249] *Id.* § 115(b)-(c), 44 Fed. Reg. at 3001.

[250] ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(a)(1)(1976).

[251] *Id.* DR 7-102 (a)(2).

[252] FED. R. CIV. P. 11.

[253] FED. R. APP. P. 38.

only recourse is an action for malicious prosecution.[254] Unfortunately, this action has a very limited application to instances where persons have been subjected to a frivolous prosecution.[255] Furthermore, the plaintiff must prove that the frivolous suit was brought with a malicious intent.[256] A frivolous prosecution defendant must also have had no reasonable cause to believe in the propriety of the original action.[257] Moreover, the courts have limited the action to situations involving arrest, seizure of property or other special injuries.[258]

The UPLA provision, however, does find some support in Virginia law. The Virginia Supreme Court has adopted provisions analogous to the Code of Professional Responsibility which make lawyers subject to disciplinary action for asserting bad faith legal positions, claims or suits.[259] The Supreme Court Rules of Virginia also require lawyers to file pleadings in good faith and not to hinder the legal process.[260] Therefore, the Virginia rules which mandate disciplining lawyers for acting in a frivolous manner are similar to those considered by the UPLA task force. Thus, adoption of the UPLA frivolous claims legislation would extend a party's civil liability to the professional liability placed on members of the Virginia bar for asserting frivolous claims or defenses.

The UPLA also reduces litigation costs in consumer cases by limiting recovery of nonpecuniary damages[261] for certain injuries.[262] Where a consumer has not suffered serious disfigurement, permanent impairment of a bodily function, or permanent mental illness resulting from a product related injury, the consumer's nonpecuniary award cannot be greater than $25,000.[263] Several courts have attacked the establishment of any limit on a claimant's recovery on the theory that such a limitation denies equal protection.[264] These courts have reasoned that an arbitrary limit prevents a claimant with a valid claim for an amount exceeding the limit from obtaining a fair recovery.[265] Therefore, such a limit arbitrarily allows some claims to be compensated fairly, while others are reduced to the limitation figure.[266] The UPLA draftsmen noted that the courts attacking limits on

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[254] BURKS, *supra* note 172, § 145.

[255] *See* Wiggs v. Farmer, 205 Va. 149, 152, 135 S.E.2d 829, 831 (1964) (action for malicious prosecution not favored at common law and should have limited use).

[256] *Id.* at 152, 135 S.E.2d at 831.

[257] *Id.*

[258] *See* National Surety Co. v. Page, 68 F.2d 145, 148 (4th Cir. 1932).

[259] *See* VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(a)(1)-(2), 216 Va. 1089 (1976).

[260] VA. SUP. CT. R. 1:4(a) (1977).

[261] Nonpecuniary damages include "pain and suffering", but exclude damages such as hospital costs, doctor's fees and lost wages. UPLA § 118 (Analysis), 44 Fed. Reg. at 3017.

[262] UPLA § 118(b), 44 Fed. Reg. at 3002.

[263] *Id.*

[264] *See, e.g.*, Arneson v. Olson, 270 N.W.2d 125, 136 (N. D. 1978) ($300,000 limitation on recovery in medical malpractice suit violates fourteenth amendment).

[265] *Id.*

[266] *Id.*

recovery are concerned with severely injured claimants not being compensated fairly.[267] Thus, the UPLA rejects a recovery limit on serious injuries.[268] Another court has held that a limit on a claimant's recovery is not violative of equal protection if the limitation is reasonably related to a state purpose,[269] such as reducing uncertainty in litigation.[270] A reduction of uncertainty may lower liability insurance rates since maximum liability is established for many consumer cases resulting in less likelihood of a large payment on policies. A limit on nonpecuniary damages also may tend to lead to more arbitration, resulting in less consumer injury litigation.

The UPLA allows recovery of punitive damages from a defendant by an injured claimant.[271] Although this does not reduce litigation costs directly, the intent is to deter manufacturers from producing unsafe goods.[272] Successfully deterring the production of unsafe products would reduce the amount of consumer claims that require litigation.[273] A consumer may recover punitive damages by presenting clear and convincing evidence that his injury was the result of a product seller's disregard for his safety.[274] Under the UPLA, the trier of fact determines whether to allow punitive damages. If the trier of fact concludes that punitive damages are appropriate, the court then determines the amount of such damages.[275] Virginia law is similar to this point. A Virginia tort plaintiff may recover punitive damages upon proof of malice or recklessness or negligence sufficient to demonstrate a conscious disregard for the rights of others.[276] The trier of fact may award punitive damages, subject to court review only for excessiveness.[277] Adoption of the UPLA would bifurcate the process of awarding punitive damages. Such a change allows a detatched judicial evaluation of the case before, rather than after, damages are awarded which counteracts the possibility that a jury may be swayed by emotion to award excessive and unwarranted punitive damages.[278]

Finally, the UPLA task force favors modification of the collateral source rule to reduce the costs of the legal process necessary to obtain compensation for a consumer's injury. Under the Virginia collateral source

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[267] UPLA § 118 (Analysis), 44 Fed. Reg. at 3017-18.

[268] *Id.*

[269] *See* Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977).

[270] UPLA § 118 (Analysis), 44 Fed. Reg. at 3017.

[271] *Id.* § 120(a), 44 Fed. Reg. at 3002.

[272] *Id.* § 120 (Analysis), 44 Fed. Reg. at 3018-19.

[273] *Id.*

[274] UPLA § 120(a), 44 Fed. Reg. at 3002.

[275] *Id.*

[276] *See* Giant, Inc. v. Pigg, 207 Va. 679, 685-86, 152 S.E.2d 271, 277 (1967). Punitive damages are recoverable only where misconduct or recklessness evinces a conscious disregard for the rights of others. *Id.* Punitive damages are awarded not to compensate a claimant, but to warn others and to punish the wrongdoers. *Id.*

[277] *See* Norfolk & W. R.R. v. Anderson, 90 Va. 1, 8, 17 S.E. 757, 759 (1893).

[278] UPLA § 120 (Analysis), 44 Fed. Reg. at 3018-19.

rule,[279] a claimant's recovery is not subject to reduction because of compensation from other sources.[280] A consumer may recover doctor's bills, hospital expenses and drug expenditures from a product seller even though the consumer's health insurance already has paid the consumer for these items. An injured consumer effectively recovers twice for the same injury.[281] Proponents of this position contend that such a double recovery is not inequitable to the product seller since the consumer has paid a fee, such as an insurance premium, to obtain the benefits of collateral source compensation.[282] Upon the occurrence of an injury, the value previously surrendered by the consumer contractually obligated the collateral source to compensate the consumer's damages.[283] Therefore, the injured consumer receives the benefits regardless of the product seller's liability.[284] Since the consumer has paid for this right, and the obligation on the collateral source to pay is independent of the seller's liability, courts hold that allowing a collateral source reduction unduly benefits a liable product seller because he has not given value to obtain the benefits of a reduction.[285] Convinced of the soundness of this reasoning when the consumer receives compensation from a private source, the UPLA task force adopted this position.[286] When the collateral source is a public fund, however, the UPLA does allow a reduction for benefits received from the public fund.[287] The UPLA task force reasoned that a consumer does not pay a fee to obtain the benefits of public source compensation.[288] The underlying basis of the no reduction rule is not present and the consumer should not get the benefit from a collateral source reduction rule.[289]

Adoption of the UPLA would result in a number of changes in Virginia law, many of which are advantageous. Hitherto, the development of a products liability law in Virgina has occurred by the passage of a melange of statutory provisions found in several different titles of the Virginia Code as well as case law decided over a period of many years. Adoption of the UPLA would consolidate these bits of products liability law into one comprehensive statute. Moreover, adoption would solve several inconsistencies in Virginia consumer law. Injuries to a person may be sued upon two different theories in Virginia, contract or tort.[290] Each theory has some

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[279] *See* Johnson v. Kellam, 162 Va. 757, 764-65, 175 S.E. 634, 636-37 (1934).

[280] UPLA § 119 (Analysis), 44 Fed. Reg. at 3018; *see* Gypsum Carrier, Inc. v. Handelsman, 307 F.2d 525 (9th Cir. 1962); Thompson v. Milam, 115 Ga. App. 396, 154 S.E.2d 721 (1967); Johnson v. Kellam, 162 Va. 757, 175 S.E. 634 (1934).

[281] *See, e.g.*, Johnson v. Kellam, 162 Va. 757, 764-65, 175 S.E. 634, 636-37 (1934).

[282] *Id.* at 764-65, 175 S.E. at 636-37.

[283] *Id.*

[284] *Id.*

[285] *Id.*

[286] UPLA § 119 (Analysis), 44 Fed. Reg. at 3018.

[287] *Id.*, 44 Fed. Reg. at 3018.

[288] *Id.*

[289] *Id.*

[290] *See* text accompanying note 34 *supra*.

distinct elements of proof as well as procedural differences.[291] Therefore, one consumer suing upon a contract theory may not recover compensation for his injury although a second consumer injured under identical circumstances but suing on a negligence theory may gain compensation. The UPLA, however, would merge these causes of action so that the above situation could not occur. Furthermore, the UPLA would provide codified rules of evidence for admission of items of proof in products liability cases.[292] Moreover, a unified theory of action would create one statute of limitations for all causes of action involving personal injuries instead of Virginia's current two.[293]

There are disadvantages, however, to the adoption of the UPLA. Several provisions such as comparative negligence would call for a radical change in Virginia law.[294] Thus, the legislature must carefully weigh the arguments of the UPLA drafters against established state policy to determine whether such changes would be beneficial. In addition, the UPLA would take away from consumers some stronger protective measures which Virginia accords its citizens. For example, evidence of compliance with industry custom or "state of the art" raises a presumption under the UPLA that a product is not defective.[295] Virginia, on the other hand, does not have such a presumption, thereby requiring a lower level of proof to establish that a product was constructed negligently.[296] Therefore, the legislature should consider whether the UPLA should be adopted in its entirety for the sake of uniformity or whether the protection of consumers requires modification of the UPLA to meet the special needs of Virginia consumers.

The final consideration in debating the utility of a uniform products liability law is the balancing of interests involved. In compiling the UPLA, the task force carefully balanced the interests of manufacturers and consumers.[297] This balancing of interests can best be seen in the UPLA's provisions concerning defects in products. The UPLA provides for a manufacturer's strict liability in tort for injuries resulting from products failing to meet the manufacturer's own specifications.[298] This position is easily understood since the manufacturer has control over the production of its products while the consumer normally will not have even the technical wherewithall to determine whether a construction defect is present or the danger it poses. Therefore, the manufacturer's interest in low cost production resulting from the absence of a duty to inspect for defects without adequate testing must give way to the consumer's interests in obtaining

[291] *See* text accompanying notes 32-41 *supra.*
[292] *See* text accompanying notes 74-85 *supra.*
[293] *See* text accompanying notes 159-164 *supra.*
[294] *See* text accompanying notes 190-204 *supra.*
[295] *See* text accompanying notes 73-94 *supra.*
[296] *Id.*
[297] *See* UPLA, Introduction, 44 Fed. Reg. at 2996-97.
[298] *See* text accompanying notes 32-39 *supra.*

defect-free goods.[299] On the other hand, where injury to the consumer occurs from a product produced in accordance with the manufacturer's specifications (which are developed according to the best available technology), the interest shifts.[300] Although a manufacturer should be liable for unsafe goods, it should not be liable for failure to produce a good which is safer than available design technology will allow.[301] Thus, the manufacturer's interest in introducing new products should outweigh the consumer's interest in safe goods since manufacturers are usually responding to consumer's demands when they market new products which have not yet been proven absolutely safe.[302] Similarly, the UPLA task force has determined that a manufacturer's interest in limited liability outweighs a consumer's need for an unlimited recovery for injuries where the injuries are not of a permanent or severe nature.[303] Thus, the UPLA places a $25,000 limit on a consumer's recovery in such cases.[304] Despite the task force's careful attempts to balance the interests of the manufacturers and consumers, the task force's conclusions should not be accepted without debate. Therefore, in considering the adoption of the UPLA, the Virginia legislature should make its own determination of which interests must have priority in any given area.

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[299] *See* UPLA § 104 (Analysis), 44 Fed. Reg. at 3004.
[300] *Id.*
[301] *Id.*, 44 Fed. Reg. at 3005.
[302] *Id.*
[303] UPLA § 118 (Analysis), 44 Fed. Reg. at 3017-18.
[304] *Id.* § 118, 44 Fed. Reg. at 3002.