2023–2024 CASE AND STATUTE SUPPLEMENT TO

PRODUCTS LIABILITY AND SAFETY

CASES AND MATERIALS

EIGHTH EDITION

DAVID G. OWEN

MARY J. DAVIS

UNIVERSITY CASEBOOK SERIES®

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For Blue and Jasmine

PREFACE

Departing from our traditional print format for casebook Supplements, this electronic CASE AND STATUTE SUPPLEMENT accompanies the Eighth Edition of PRODUCTS LIABILITY AND SAFETY: CASES AND MATERIALS. A number of recent principal and note cases are included here to update materials in the casebook. The *Restatement Third of Torts: Products Liability* is set forth, with its comments, as are key portions of the *Second Restatement*, together with pertinent sections of the *Uniform Commercial Code*.

State legislatures continue to enact and amend products liability reform acts of various types, and a comprehensive set of these statutes is included, together with certain federal statutes and other materials important to products liability and safety law. To keep the materials current, update memos will be issued online to address important developments.

We err on the side of over-inclusion in the expectation that teachers will be selective in adapting the Supplement to their preferences. Because the statutes in this volume are reproduced from Westlaw, titles and subtitles of some state reform acts differ slightly from the official compilations.

From time to time we receive comments from users of the book. We value these ideas in our effort to provide the most useful materials on the law of products liability. To that end, we invite suggestions on both the Casebook and Supplement alike.

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UNIVERSITY CASEBOOK SERIES®

2023–2024 CASE AND STATUTE SUPPLEMENT TO

PRODUCTS LIABILITY AND SAFETY

CASES AND MATERIALS

EIGHTH EDITION

CHAPTER 1

PRODUCTS LIABILITY—AN INTRODUCTION

3. EARLY PRODUCTS LIABILITY LAW

B. EARLY ENGLISH LAW

Page 19, Note, replace Chandler v. Lopus at the beginning of the second paragraph of the note with:

Chandelor v. Lopus

4. MODERN PRODUCTS LIABILITY LAW

B. A CASE EXAMPLE

3. THE JUDICIAL RESPONSE

Page 40, Note 6, replace the *Hornbook* citation with:

D. Owen, Products Liability Law (4th ed. 2022).

Page 40, Note 6, replace the *Nutshell* citation with:

D. Owen, Products Liability in a Nutshell (10th ed. 2023).

Page 40, Note 6, add after the line beginning "*Nutshell*":

Other Books: M. Geistfeld, Principles of Products Liability (3d ed., Foundation Press 2020).

PART I

THEORIES OF MANUFACTURER LIABILITY

CHAPTER 2

NEGLIGENCE

2. THE MANUFACTURING PROCESS: FABRICATION AND QUALITY CONTROL

Page 56, Note 5.B, add after "See also":

Farrell v. Johnson & Johnson, 238 A.3d 698, 708 (Conn. 2020) ("manufacturers are 'held to the knowledge of an expert in its field . . . and therefore [have] a duty "to keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby" ' ");

Page 56, Note 5.B, replace "Galinas v. Bayer Corp." with:

Galinis v. Bayer Corp.

3. THE DESIGN PROCESS: THE PRODUCT CONCEPT

Page 71, Note 4, add to the first paragraph of the note after "See, e.g.,":

Burton v. E.I. du Pont de Nemours & Co., Inc., 994 F.3d 791, 818 (7th Cir. 2021) (Wis. law) (negligence claims require proof of product defect);

CHAPTER 3

MISREPRESENTATION

1. FRAUD

Page 87, Note 1, add at the end of the note:

See also Ramey, The Case for Plain Vanilla Gets Its Day in Court, Wall St. J., Feb. 7, 2021, at A1 (describing numerous class actions against numerous defendants alleging misrepresentation of artificial flavoring as "natural" vanilla).

2. NEGLIGENT MISREPRESENTATION

Page 90, Note 3, add to the second paragraph of the note after "*But see*":

Doran v. Glaxosmithkline PLC, 607 F.Supp.3d 192, 205–09 (D. Conn. 2022) (predicting Connecticut Supreme Court would conclude that brand name manufacturer owed duty of care to generic user) (citing *T.H. v. Novartis Pharms. Corp.*, below, this note);

CHAPTER 4

WARRANTY

4. PARTIES: PROPER DEFENDANTS AND PLAINTIFFS

A. VERTICAL PRIVITY

Page 126, Note 2, add to the end of the note:

In Izzetov v. Tesla Inc., 2020 WL 1677333 (N.D. Cal. 2020), a child's finger was trapped in a partially retracted "ice breaker" mechanism designed to assist the electric motor in opening a Tesla Model X front door. The plaintiffs' implied warranty claim failed under California law for lack of vertical privity with Tesla. The Tesla was purchased by the plaintiffs' agent from a retailer in Prague, Czech Republic, and the express warranty exception to California's vertical privity requirement did not apply to the plaintiffs' claims.

5. CONTRACTUAL AVOIDANCE OF RESPONSIBILITY

B. DISCLAIMERS UNDER THE UCC

Page 140, Note 5, add to the end of the note:

Compare Mitchell v. Michael J. Auto Sales, 194 N.E.3d 428, 433 (Ohio Ct. App. 2022) (express warranty of repairs, created by technicians' statement that new fuse would "take care of the problem," not precluded by "as is" disclaimer of implied warranties at time of sale).

CHAPTER 5

STRICT LIABILITY IN TORT

1. THE RISE OF STRICT PRODUCTS LIABILITY IN TORT

Page 176, Note 8, add to the end of the first paragraph of the note:

See, e.g., Burton v. E.I. du Pont de Nemours & Co., Inc., 994 F.3d 791, 818 (7th Cir. 2021) (Wis. law) (negligence and strict liability claims have separate elements, but both claims require proof of product defect).

PART II

THE CONCEPT OF DEFECTIVENESS

CHAPTER 6

MANUFACTURING DEFECTS

3. PROOF—THE MALFUNCTION DOCTRINE

Page 207, Note 6, add to the end of the note:

See, e.g., Heikkila v. Kahr Firearms Grp., 2023 WL 2375082, at *4 (D. Colo. 2023) (citing cases "that appear to apply the malfunction theory, or at least its factors, without necessarily calling the theory by its name").

4. PROOF—EXPERT TESTIMONY

Page 224, add to the end of the section:

As of 2023, at least seven states still purport to follow *Frye*, or at least to reject *Daubert* (Cal., Ill., Minn., N.Y., N.D., Pa., and Wash.). Maryland adopted *Daubert* in Rochkind v. Stevenson, 236 A.3d 630, 645 (Md. 2020) (4–3 decision) (adopting *Daubert* and remanding childhood lead paint exposure case for interpretation of Md. R. 5–702 under the *Daubert* standard; overruling Reed v. State, 391 A.2d 364, 389 (Md. 1978) in which the court adopted *Frye*). The Kansas Supreme Court applied the *Daubert* standard, legislatively adopted in Kan. Stat. Ann. § 60–456(b) (2014), in State v. Lyman, 455 P.3d 393, 409 (Kan. 2020) and Matter of Cone, 435 P.3d 45, 48 (Kan. 2019).

CHAPTER 7

DESIGN DEFECTS

2. DEFECT TESTS

A. CONSUMER EXPECTATIONS

Page 246, add after the *Corbin on Contracts* excerpt:

Owen, Expectations in Tort

43 Ariz. St. L.J. 1287, 1291 (2011).

Expectations are fundamentally important to all sentient beings, including humans. Life forms must adapt their conduct to obtain whatever in the environment fosters life—a frog must find flies and catch them with its tongue, or it will die; a flower must find sunshine and water, or it will die; humans, too, must find food and shelter, or we will die. So, in order to exist, we must learn how the world operates and then apply that knowledge [based on our expectations as to cause and effect] to mold our actions and bend our environment in ways that predictably facilitate existence. . . .

Various factors, of course, often frustrate goal fulfillment. . . . [S]ometimes our most important and reasonable expectations in maintaining our physical and economic security are frustrated in a major way. And when such expectation frustrations are at once substantial and inflicted upon us unfairly by another person, moral theory and tort law both suggest that the other person should give us restitution for our resulting harm.

Page 251, Note 8, add to the end of the note:

Noting the legislative retention of the common law consumer-contemplation standard in Wis. Stat. Ann. § 895.047(1)(b), the Wisconsin Supreme Court declined to adopt the *Restatement Third* § 2 design defect approach, declaring that "the common law pre-2011 continues to provide persuasive authority in products liability cases." Murphy v. Columbus McKinnon Corp., 982 N.W.2d 898, 911–13 (Wis. 2022). See *Murphy*, ch. 10(3), below.

Page 254, Note 8, add to the end of the note:

See also Masterman and Viscusi, The Specific Consumer Expectations Test for Product Defects, 95 Ind. L.J. 183 (2020) (proposing limiting the consumer expectations test to *specific* instances where a consumer expects a product to reduce a particular risk or provide a particular benefit and the product instead increases risk or harms rather than benefits the consumer).

C. ALTERNATIVE TESTS

Page 285, Note 7, add after "see, e.g.,":

Kaiser v. Johnson & Johnson, 947 F.3d 996, 1013 (7th Cir. 2020) ("The Indiana Supreme Court has unambiguously rejected . . . the *Restatement (Third) of Torts* and thus does not 'require proof of any additional or more particular standard of care.' ");

CHAPTER 8

WARNING DEFECTS

4. DELEGATION OF WARNING OBLIGATION

Page 354, Note 9, add to the end of the second paragraph of the note:

See, e.g., Fowler v. Akzo Nobel Chemicals, Inc., 276 A.3d 1146, 1162–64 (N.J. 2022) (dangers of asbestos impose "a special duty on manufacturers and suppliers of asbestos—the concurrent duty to warn not only the employee but also the employer"; reviewing, but not adopting, Products Liability Rest. § 2 cmt. *i*).

Page 356, Note 12, add after "See, e.g.," in the second paragraph of the note:

Coffman v. Armstrong Int'l, Inc., 615 S.W.3d 888, 899 (Tenn. 2021) ("manufacturers have no duty to warn with respect to products manufactured and sold by others" under the Tennessee Products Liability Act);

5. PRESCRIPTION DRUGS AND MEDICAL DEVICES

C. DELEGATION: THE "LEARNED INTERMEDIARY DOCTRINE"

Page 367, add new bullet point 3.5:

3.5. Contraception Exception? Courts have declined to extend *MacDonald*'s birth control pill exception to the learned intermediary doctrine to other modes of contraception. See, e.g., Ideus v. Teva Pharms. USA, Inc., 986 F.3d 1098, 1102 (8th Cir. 2021) (following the "overwhelming majority rule" in cases where doctors have been adequately warned, the court refused to require a direct-to-consumer warning for an IUD that may break too easily on removal); In re Norplant Contraceptive Prods. Liab. Litig., 955 F. Supp. 700, 704 (E.D. Tex. 1997) ("Only a single jurisdiction, Massachusetts, recognizes an exception to the doctrine for prescription contraceptives.").

Page 369, add to the end of the second full paragraph on the page:

See also Dearinger v. Eli Lilly & Co., 510 P.3d 326, 335 (Wash. 2022) ("a drug manufacturer is protected under the learned intermediary doctrine even when they advertise directly to consumers, provided they give adequate warnings to the prescribing physician").

CHAPTER 9

LIMITING DEFECTIVENESS—USER CHOICE

1. OBVIOUS DANGERS

Page 378, Note 2.A., add after "See, e.g.,":

Reichmann v. Whirlpool Corp., 2020 WL 207749, at *6 (E.D.N.Y. 2020) (failing to avoid a puddle of water from a known refrigerator leak);

2. INHERENT DANGERS

Pages 386–87, replace Note 9 with the following:

9. Talc. Is there anything safer than talcum powder? Some number of talcum powder companies have faced claims arising from allegedly asbestos-contaminated talc products, but numerous recent cases involve claims against Johnson & Johnson. Plaintiffs in these cases assert failure to warn, design defect, breach of warranty, civil conspiracy, concert of action, and fraud claims, among others, for ovarian or uterine cancer, caused by contaminated talc powder used in genital areas over long periods, or mesothelioma, caused by exposure to asbestos-contaminated talc dust.

The first causation issue in these cases is whether J & J's talc powder in fact contained any asbestos at all, which the company vigorously denies. Other causation questions are whether such contaminated powder was capable of causing these conditions in anyone, and, if so, whether the powder did so in the plaintiff (general and specific causation).

Some juries have awarded substantial damages in such cases. See, e.g., Olson v. Brenntag N. Am., Inc., 132 N.Y.S.3d 741 (Sup. Ct. 2020) (reviewing extensive proofs that J & J long knew and suppressed evidence that its talc powders sometimes contained dangerous levels of asbestos and that plaintiff's mesothelioma was caused by her inhalation of such powder dust over many years; remitting $20 million compensatory award to victim, $5 million compensatory award to husband, and $300 million punitive damage award to victim and husband to $13.5 million, $1.5 million, and $105 million, respectively).

Although J & J has successfully defended the safety of its talc products in some cases, the company's continued defense of their talc products' safety was challenged by a Reuters investigative report asserting that the company long knew about its talc asbestos contamination, dating at least to 1971. See Girion, Powder Keg: Johnson & Johnson Knew for Decades that Asbestos Lurked in its Baby Powder, Reuters Investigates 3 (Dec. 14, 2018). As litigation continued, the Justice Department and SEC issued subpoenas for J & J documents related to talc product safety. See Loftus, Johnson & Johnson is Subpoenaed for Talc Safety Information, Wall St. J.com (Feb. 20,

2019). While continuing to defend the safety of its talc powder, J&J issued a recall of an asbestos-contaminated Baby Powder lot in October 2019. Griffin and Feeley, J&J Recalls Lot of Baby Powder After Asbestos Trace Found, Prod. Liab. & Toxics L. (Oct. 18, 2019).

In May 2020, "citing a decline in customer demand amid safety concerns," Johnson & Johnson announced that it would replace talc with cornstarch in Baby Powder sold in the U.S. and Canada. Following that announcement and the postponement of trials due to COVID-19 restrictions, Johnson & Johnson's talc litigation strategy appeared to shift from litigating all claims to settling at least some. See Feeley, J&J to Pay More Than $100 Million to End Over 1,000 Talc Suits, Prod. Liab. & Toxics L. (Oct. 5, 2020).

In October 2021, Johnson & Johnson placed its affiliate holding talc liabilities into bankruptcy protection to encourage settlement of the "tens of thousands of lawsuits . . . that are expected to grow for decades to come." Scurria, Johnson & Johnson Places Talc Injury Claims in Bankruptcy, Wall St. J.com (Oct. 14, 2021). However, The Third Circuit dismissed the bankruptcy filing in early 2023, finding that Johnson and Johnson's obligation to fund its affiliate's liabilities "mitigate[d] any financial distress foreseen on [the bankruptcy] petition date." In re LTL Mgmt., LLC, 64 F.4th 84, 110 (3d Cir. 2023). See also Randles, J&J Fails to Win Rehearing of Talc Unit's Bankruptcy Case, Wall St. J.com (Mar. 22, 2023).

On April 4, 2023, Johnson and Johnson offered to resolve asbestos-contaminated talc claims for $8.9 billion, including the resolution of future liabilities through a trust created under its subsidiary's new bankruptcy filing. See, e.g., Loftis and Scurria, Johnson & Johnson Proposes Paying $9 Billion to Settle Talc Lawsuits, Wall St. J.com (April 4, 2023). Opposition to Johnson and Johnson's latest settlement offer may be resolved through mediation, See Church, J&J, Cancer Victims Ordered to Start Mediation in Bankruptcy, Prod. Liab. & Toxics L. (May 3, 2023).

Page 392, Note 3, add after the fourth sentence of the note (prior to "The Child Nicotine Poisoning Prevention Act"):

In March 2020, the FDA issued its final rule requiring graphic warnings on cigarette packages by June 18, 2021. See 85 FR 15,638 (2020). As in 2012, the new rule was challenged on First Amendment grounds by R.J. Reynolds and other manufacturers. In late 2022, a federal district court held that the rule violated cigarette manufacturers' First Amendment rights and granted vacatur of the rule. See R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin., 2022 WL 17489170, *21 (E.D. Tex. 2022), appeal filed (5th Cir. 2023).

Page 393, Note 4, add to the end of the third paragraph of the note:

Johnson & Johnson's appeal of the $465 million award to the state of Oklahoma for remediation of the public nuisance created by opioid overpromotion is reproduced at the end of note 6.

Page 394, Note 4, add to the second paragraph on the page after "See, e.g.,":

Terlep and Nassauer, Walmart to Pay $3.1 Billion to Settle Opioid Lawsuits, Wall St. J.com (Nov. 15, 2022) (settlement of "opioid-crisis" lawsuits brought by states, municipalities, and Native American tribes); Terlep, CVS, Walgreens to Pay More Than $10 Billion to Settle Opioid Lawsuits, Wall St. J.com (Nov. 2, 2022) (same); Feeley, Teva Pharmaceutical to Pay Over $4 Billion in Opioid Accord, Prod. Liab. & Toxics L. (July 26, 2022);

Page 394, Note 4, replace "note 5" in the third paragraph on the page with:

note 6 (Public Nuisance)

Page 394, Note 5, add after the third sentence of the note (immediately before "Compare"):

See also Burton v. E.I. du Pont de Nemours & Co., Inc., 994 F.3d 791, 814 (7th Cir. 2021) (Wis. law) (trial court erred in extending the risk contribution theory to sellers or manufacturers of paint that use the white lead carbonite paint pigment produced by other manufacturers.

Page 395, Note 6, replace the discussion of Oklahoma's public nuisance claims at the end of the note with:

After a 33-day bench trial, the state of Oklahoma in 2019 prevailed in a case against Johnson and Johnson for its sale of prescription opioids in the state. The judge held J & J liable under Oklahoma's public nuisance statute for using false, misleading, and dangerous marketing campaigns to sell its opioids and ordered it to fund a $465 million opioid abatement plan that included 21 state programs to combat opioid abuse. J & J appealed:

State of Oklahoma v. Johnson & Johnson

Supreme Court of Oklahoma, 2021.
499 P.3d 719.

■ WINCHESTER, J.

An opioid drug epidemic exists in the United States. Oklahoma has experienced abuse and misuse of opioid medications, opioid use disorder, and thousands of opioid-related deaths in the past two decades. Specifically, opioid-related deaths increased during the early 2000s, plateaued around 2007, and then declined. What we cannot ignore is that improper use of prescription opioids led to many of these deaths; few deaths occurred when individuals used pharmaceutical opioids as prescribed. We also cannot disregard that chronic pain affects millions of Americans. It is a persistent and costly health condition, and opioids are currently a vital treatment option for pain. The FDA has endorsed properly managed medical use of opioids (taken as prescribed) as safe, effective pain management, and rarely addictive. Yet opioid abuse is still prevalent and has become a complex social problem.

To address this problem, the State of Oklahoma ex rel. Mike Hunter, Attorney General of Oklahoma ("State"), sued three prescription opioid manufacturers . . . for violating Oklahoma's public nuisance statute. The question [here] is whether . . . an opioid manufacturer['s marketing and [sale of] its products constituted a public nuisance under 50 O.S.2011, §§ 1 & 2. We hold that the district court's expansion of public nuisance law went too far. Oklahoma public nuisance law does not extend to the manufacturing, marketing, and selling of prescription opioids.

Since the mid-1990s, Appellant Janssen Pharmaceuticals, Inc. (and its related entities), a wholly-owned subsidiary of Appellant Johnson & Johnson (collectively "J&J"), has manufactured, marketed, and sold prescription opioids in Oklahoma. J&J specifically manufactured two FDA-approved Schedule II[3] opioid medications: (1) Duragesic—a transdermal patch that provides a controlled dose of pharmaceutical fentanyl; and (2) Nucynta and Nucynta ER—tablets with tapentadol. J&J also manufactured a Schedule IV opioid medication: Ultram and Ultram Extended Release—tablets with tramadol. J&J marketed several other medications containing tramadol.

The State presented evidence that J&J used branded and unbranded marketing, which actively promoted the concept that physicians were undertreating pain. Ultimately, the State argued J&J overstated the benefits of opioid use, downplayed the dangers, and failed to disclose the lack of evidence supporting long-term use in the interest of increasing J&J's profits.

J&J no longer promotes any prescription opioids and has not done so for several years. J&J ceased to actively promote its Schedule II branded products by 2015. Specifically, J&J ceased to actively promote Duragesic in 2007, and it divested its U.S. Nucynta product line in 2015. Even with J&J's marketing practices, these two Schedule II medications amounted to less than 1% of all Oklahoma opioid prescriptions. Overall, J&J sold only 3% of all prescription opioids statewide, leaving the other opioid manufacturers named in this suit responsible for selling 97% of all prescription opioids.

On June 30, 2017, the State sued three opioid manufacturers—J&J (and its related entities[8]), Purdue Pharma L.P. (and its related entities), and Teva Pharmaceuticals USA, Inc. (and its related entities) alleging the companies deceptively marketed opioids in Oklahoma. The State

---

[3] The Drug Enforcement Administration ("DEA") classifies drugs that contain controlled substances into five "schedules" based on currently accepted medical use in the U.S. and abuse potential. Schedule I controlled substances have no accepted medical use. Schedules II through V controlled substances do have medical use but range from high potential for abuse (Schedule II) to low potential for abuse (Schedule V). See, e.g., Uniform Controlled Dangerous Substances Act, 63 O.S., §§ 2–201 to –212.

[8] The State sued Johnson & Johnson, Janssen Pharmaceuticals, Inc., Ortho-McNeil Janssen Pharmaceuticals, Inc., n/k/a Janssen Pharmaceuticals, Inc., and Janssen Pharmaceutica, Inc., n/k/a Janssen Pharmaceuticals, Inc.

settled with the other opioid manufacturers[11] and eventually dismissed all claims against J&J except public nuisance. The district court conducted a 33-day bench trial with the single issue being whether J&J was responsible for creating a public nuisance in the marketing and selling of its opioid products. The district court held J&J liable under Oklahoma's public nuisance statute for conducting "false, misleading, and dangerous marketing campaigns" about prescription opioids. The district court ordered that J&J pay $465 million to fund one year of the State's Abatement Plan, which consisted of the district court appropriating money to 21 government programs for services to combat opioid abuse.[12] The amount of the judgment against J&J was not based on J&J's percentage of prescription opioids sold. The district court also did not take into consideration or grant J&J a set-off for the settlements the State had entered into with the other opioid manufacturers. Instead, the district court held J&J responsible to abate alleged harms done by all opioids, not just opioids manufactured and sold by J&J.

J&J appealed. The State cross-appealed contending that J&J should [pay] for 20 years of the State's Abatement Plan, or approximately $9.3 billion to fund government programs. This Court retained the appeal.

The issue before this Court is whether the district court correctly determined that J&J's actions in marketing and selling prescription

---

[11] The State settled with Purdue for $270 million, and [with] Teva for $85 million.

[12] The district court appropriated the funds to the following governmental programs:

Opioid Use Disorder Treatment Program	$232,947,710
Addiction Treatment—Supplementary Services	$ 31,769,011
Public Medication and Disposal Programs	$ 139,883
Screening, Brief Intervention and Referral to Treatment (SBIRT) Program	$ 56,857,054
Pain Prevention and Non-Opioid Pain Management Therapies	$103,277,835
Expanded and Targeted Naloxone Distribution and Overdose Prevention Education	$ 1,585,797
Medical Case Management/Consulting	$ 3,953,832
Developing and Disseminating NAS Treatment Evaluation and Standards	$ 107,683
Development of NAS as a Required Reportable Condition	$ 181,983
Implementing Universal Substance Use Screening for Pregnant Women	$ 1,969,000
Medical Treatment for Infants Born with NAS or Opioid Withdrawal	$ 20,608,847
Investigatory and Regulatory Actions	$ 500,000
Additional Staffing for: OBN; Oklahoma Boards of Licensure, Veterinary, Osteopathic, Nursing, Medical Licensure and Supervision, Dentistry; and Office of the Chief Medical Examiner; and Office of the Attorney General; and Medicaid Fraud Control Unit	$ 11,101,076
TOTAL	**$465,026,711**

opioids created a public nuisance. We hold it did not. The nature of the nuisance claim pled by the State is the marketing, selling, and overprescribing of opioids manufactured by J&J. This Court has not extended the public nuisance statute to the manufacturing, marketing, and selling of products, and we reject the State's invitation to expand Oklahoma's public nuisance law.

In reaching this decision, we do not minimize the severity of the harm that thousands of Oklahoma citizens have suffered because of opioids. However grave the problem of opioid addiction is in Oklahoma, public nuisance law does not provide a remedy for this harm.

I. Origins and History of Oklahoma Public Nuisance Law

Public nuisance began as a criminal remedy primarily employed to protect and preserve the rights and property shared by the public. It originated from twelfth-century England where it was a criminal writ to remedy actions or conditions that infringed on royal property or blocked public roads or waterways. Richards, Pills, Public Nuisance, and Parens Patriae: Questioning the Propriety of the Posture of the Opioid Litigation, 54 U. Rich. L. Rev. 405, 418 (2020). The king had the authority to bring such claims, seeking only injunction or abatement as remedies. [In] the 16th century, other individuals began to bring private nuisance claims seeking only injunctive relief when they had a "special" injury.

Public nuisance came to cover a large [miscellany] of minor criminal offenses. *Restatement (2d) of Torts* § 821B cmt. b (1979). The offenses involved an "interference with the interests of the community at large—interests that were recognized as rights of the general public entitled to protection." The *Restatement* [explained]:

> Interference with the public health, as in the case of keeping diseased animals or the maintenance of a pond breeding malarial mosquitoes; with the public safety, as in the case of the storage of explosives in the midst of a city or the shooting of fireworks in the public streets; with the public morals, as in the case of houses of prostitution or indecent exhibitions; with the public peace, as by loud and disturbing noises; with the public comfort, as in the case of widely disseminated bad odors, dust and smoke; with the public convenience, as by the obstruction of a public highway or a navigable stream; and with a wide variety of other miscellaneous public rights of a similar kind.

Public nuisance evolved into a common law tort. It covered conduct, performed in a location within the actor's control, which harmed those common rights of the general public. It has historically been linked to the use of land by the one creating the nuisance. Nichols v. Mid-Continent Pipe Line Co., 933 P.2d 272, 276 (Okla. 1996). A public entity that proceeds against the one in control of the nuisance may only seek to abate, at the expense of the one in control of the nuisance. Courts have

limited public nuisance claims to these traditional bounds. See, e.g., In re Lead Paint Litig., 924 A.2d 484, 499 (N.J. 2007).

Oklahoma's nuisance statute codifies the common law:

> A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:
>
> First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or
>
> Second. Offends decency; or
>
> Third. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or
>
> Fourth. In any way renders other persons insecure in life, or in the use of property, provided, this section shall not apply to preexisting agricultural activities.

50 O.S.2011, § 1. The Oklahoma Legislature has long defined public nuisance as a nuisance that contemporaneously affects an entire community or large group of people, but need not damage or annoy equally to all. Id. § 2. [The] nuisance and public nuisance statutes became law in 1910. . . .

For the past 100 years, [applying our nuisance statutes, this court] has limited . . . public nuisance liability to defendants (1) committing crimes constituting a nuisance, or (2) causing physical injury to property or participating in an offensive activity that rendered the property uninhabitable.[13] . . .

The State's allegations in this case do not fit within Oklahoma nuisance statutes as construed by this Court. The Court applies the nuisance statutes to unlawful conduct that annoys, injures, or endangers the comfort, repose, health, or safety of others. But that conduct has been criminal or property-based conflict. Applying the nuisance statutes to lawful products as the State requests would create unlimited and unprincipled liability for product manufacturers; this is why our Court has never applied public nuisance law to the manufacturing, marketing, and selling of lawful products.

---

[13] See, e.g., [Numerous case rulings, from 1908–1996, that various conduct/conditions were public nuisances: pollution from leaking oil pipeline; pollution in water from waste disposal facility; obscene works in violation of Oklahoma law; conduct outside of saloon; pollution by crude oil; limestone quarry dust; forty cats in a home; overgrown hedges obstructing street; barn in disrepair; harboring vicious dog in violation of Oklahoma law; installation of toilets causing sewage backflow and pollution to city water; dumping untreated sewage; gambling on dog races, and on horse races, in violation of Oklahoma law; monopoly in violation of Oklahoma law; smoking indoors in violation of Oklahoma law; and dance hall activities in violation of Oklahoma law. But neither an open saloon in violation of Oklahoma law, nor advertising liquor in violation of Oklahoma law, were considered public nuisances.].

II. Oklahoma's Public Nuisance Law Does Not Cover the State's Alleged Harm.

The central focus of the State's complaints is that J&J was or should have been aware and that J&J failed to warn of the dangers associated with opioid abuse and addiction in promoting and marketing its opioid products. This classic articulation of tort law duties—to warn of or to make safe—sounds in product-related liability.[15]

Public nuisance and product-related liability are two distinct causes of action, each with boundaries that are not intended to overlap. State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 456 (R.I. 2008). The Restatement explains as follows:

> Tort suits seeking to recover for public nuisance have occasionally been brought against the makers of products that have caused harm, such as tobacco, firearms, and lead paint. These cases vary in the theory of damages on which they seek recovery, but often involve claims for economic losses the plaintiffs have suffered on account of the defendant's activities; they may include the costs of removing lead paint, for example, or of providing health care to those injured by smoking cigarettes. Liability on such theories has been rejected by most courts, and is excluded by this Section, because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue. Mass harms caused by dangerous products are better addressed through the law of products liability, which has been developed and refined with sensitivity to the various policies at stake.

Restatement (3d) Torts: Liab. for Econ. Harm § 8 cmt. *g* (2020).

The 8th Circuit explained this [in an asbestos case,] Tioga Public School District No. 15 v. US Gypsum Co., 984 F.2d 915 (8th Cir. 1993). [*Tioga*] concluded that North Dakota courts only applied [its] statute in the classic context of a landowner or other person in control of property conducting an activity on his or her land in such a manner as to interfere with the property rights of a neighbor. The [court] determined that the North Dakota Supreme Court would not extend its nuisance statute—which is the source of, and [is] identical to Oklahoma's nuisance statute—to cases involving the sale of products. [T]he *Tioga* court warned:

> Under Tioga's theory, any injury suffered in North Dakota would give rise to a cause of action under [its nuisance statute] regardless of the defendant's degree of culpability or of the availability of other traditional tort law theories of recovery. Nuisance thus would become a monster that would devour in

[15] See, e.g., Kirkland v. Gen. Motors Corp., 521 P.2d 1353 (Okla. 1974) (adopting the Restatement (2d) Torts § 402A (1965)); Cunningham v. Charles Pfizer & Co., Inc., 532 P.2d 1377, 1380–81 (Okla. 1974) (defendant had a duty to warn plaintiff or his parents of the risk of contracting polio from the vaccine and the failure to warn of this risk rendered the vaccine defective under § 402A).

> one gulp the entire law of tort, a development we cannot imagine the North Dakota legislature intended when it enacted the nuisance statute.

Tioga, 984 F.2d at 921. And the court refused to extend public nuisance liability to harms caused by asbestos.

We agree with *Tioga*'s analysis of nuisance law and the sale of products. Public nuisance is fundamentally ill-suited to resolve claims against product manufacturers, including J&J in this case. In reaching this decision, we identify three reasons not to extend public nuisance law to envelop J&J's conduct as an opioid manufacturer: (1) the manufacture and distribution of products rarely cause a violation of a public right, (2) a manufacturer does not generally have control of its product once it is sold, and (3) a manufacturer could be held perpetually liable for its products under a nuisance theory. We address each in turn.

A. The manufacture and distribution of products rarely cause a violation of a public right.

One factor in rejecting the imposition of liability for public nuisance in this case is that the State has failed to show a violation of a public right. A public nuisance involves a violation of a public right; a public right is more than an aggregate of private rights by a large number of injured people. See Territory v. Long Bell Lumber Co., 99 P. 911 (Okla. 1908); Rest. (2d) Torts § 821B cmt. g (1979) . . . . Rather, a public right is a right to a public good, such as "an indivisible resource shared by the public at large, like air, water, or public rights-of-way." *Am. Cyanamid Co.*, 823 N.E.2d at 131 Unlike an interference with a public resource,

> [t]he manufacture and distribution of products rarely, if ever, causes a violation of a public right as that term has been understood in the law of public nuisance. Products generally are purchased and used by individual consumers, and any harm they cause—even if the use of the product is widespread and the manufacturer's or distributor's conduct is unreasonable—is not an actionable violation of a public right. . . . The sheer number of violations does not transform the harm from individual injury to communal injury.

Gifford, Public Nuisance as a Mass Products Liability Tort, 71 U. Cin. L. Rev. 741, 817 (2003); see also *Lead Indus. Ass'n, Inc.*, 951 A.2d at 448, 454 (holding the right of a child to not be poisoned by lead is a nonpublic right). The damages the State seeks are not for a communal injury but are instead more [like] a private tort action for individual injuries . . . from use of a lawful product and in providing medical treatment or preventive treatment to certain, though numerous, individuals.

The State characterizes its suit as an interference with the public right of health. We disagree. See City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110 (Mo. 2007) (rejecting city's argument that its nuisance claim re lead paint was an injury to public health). This case [is

unlike those where] an injury to the public health would occur, e.g., diseased animals, pollution in drinking water, or the discharge of sewer on property. Such property-related conditions have no beneficial use and only cause annoyance, injury, or endangerment. In this case, the lawful products, prescription opioids, have a beneficial use in treating pain.

[In City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2004), Chicago] and Cook County brought public nuisance claims against manufacturers, distributors, and dealers of handguns. The city and county alleged that [manufacturers] knowingly oversupplied the market with their products and marketed [them] to appeal to those who intended to use them for criminal purposes. The state and county sought compensation for the abatement of the nuisance, including costs of medical services, law enforcement efforts, and prosecutions for violations of gun control ordinances. [Rejecting these claims, and despite the tragic consequences of gun violence, the] Illinois Supreme Court sustained the trial court's dismissal of the public nuisance claims[, ruling that] the city and county failed to show an unreasonable interference with a public right. The *Beretta* court ultimately concluded that a public right to be free from the threat that others "may defy [criminal] laws would permit nuisance liability to be imposed on an endless list of manufacturers, distributors, and retailers of manufactured products." It acknowledged the far-reaching effects of a decision otherwise:

> If there is a public right to be free from the threat that others may use a lawful product to break the law, that right would include the right to drive upon the highways, free from the risk of injury posed by drunk drivers. This public right to safe passage on the highways would provide the basis for public nuisance claims against brewers and distillers, distributing companies, and proprietors of bars, taverns, liquor stores, and restaurants with liquor licenses, all of whom could be said to contribute to an interference with the public right.

Id. Similarly, a public right to be free from the threat that others may misuse or abuse prescription opioids—a lawful product—would hold manufacturers, distributors, and prescribers potentially liable for all types of use and misuse of prescription medications. Just as in *Beretta*, the State has failed to show a violation of a public right in this case. Id. at 1116 (holding "there is no authority for the unprecedented expansion of the concept of public rights to encompass the right asserted by plaintiffs"). And as the manufacture and distribution of products rarely cause a violation of a public right, we refuse to expand public nuisance to claims against a product manufacturer.

B. A manufacturer does not have control of its product once it is sold.

Another factor in rejecting the imposition of liability for public nuisance in this case is that J&J, as a manufacturer, did not control the instrumentality alleged to constitute the nuisance at the time it occurred.

See, e.g., City of Manchester v. Nat'l Gypsum Co., 637 F. Supp. 646, 656 (D.R.I. 1986). The State asks this Court to broadly extend the application of the nuisance statute, namely to a situation where a manufacturer sold a product (for over 20 years) that was later alleged to constitute a nuisance. See *Tioga*, 984 F.2d at 920. A product manufacturer's responsibility is to put a lawful, non-defective product into the market. There is no common law tort duty to monitor how a consumer uses or misuses a product after it is sold.[17] Without control, a manufacturer also cannot remove or abate the nuisance—which is the remedy the State seeks from J&J in this case. See, e.g., *Tioga*, 984 F.2d at 920.[18]

A public nuisance claim against a gun manufacturer parallels the State's claims against J&J and its opioid production and distribution. We again find *Beretta* persuasive as it discussed a manufacturer's control of its product in determining public nuisance liability. Federal and state laws regulate the manufacture, distribution, and use of both firearms and opioids. As in *Beretta*, the alleged nuisance in this case is several times removed from the initial manufacture and distribution of opioids by J&J. See *Beretta* at 1137. Multiple agencies and boards across different jurisdictions oversee and enforce statutes and regulations that control the developing, testing, producing, manufacturing, distributing, labeling, advertising, prescribing, selling, possessing, and reselling of prescription opioids; this is a highly regulated industry.

J&J had no control of its products through the multiple levels of distribution, including after it sold the opioids to distributors and wholesalers, which were then dispersed to pharmacies, hospitals, and physicians' offices, and then prescribed by doctors to patients. J&J also had no control over the laws and regulations that govern the disbursement of its prescription opioids or whether prescribers follow the laws. Regulation of prescription opioids belongs to the federal and state legislatures and their agencies. . . .

Even with its influential marketing, J&J ultimately could not control: (1) how wholesalers distributed its products, (2) how regulations and legislation governed the distribution of its products by prescribers

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[17] See Bloomington v. Westinghouse Elec. Corp., 891 F.2d 611, 614 (7th Cir.1989) (noting the absence of cases "holding manufacturers liable for public or private nuisance claims arising from the use of their product subsequent to the point of sale"); see also Gifford, Public Nuisance as a Mass Products Liability Tort, 71 U. Cin. L. Rev. at 820 ("The essence of public nuisance law . . . is ending the harmful conduct. This is impossible for the manufacturer or distributor who has relinquished possession by selling or otherwise distributing the product."); Schwartz & Goldberg, The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort, 45 Washburn L.J. 541, 568 (2006) ("[F]urnishing a product or instrumentality—whether it be chemicals, asbestos, guns, lead paint, or other products—is not the same as having control over that instrumentality."). [See generally Lin, Dodging Public Nuisance, 11 UC Irvine L. Rev. 489, 498–99 (2020); Ausness, Public Tort Litigation: Public Benefit or Public Nuisance?, 77 Temp. L. Rev. 825 (2004)].

[18] A seller loses control of its products when they are sold and "lacks the legal right to abate whatever hazards its products may pose; under these circumstances, the purchaser's proper remedies are products liability actions for negligence or breach of warranty rather than a nuisance action." 63A Am. Jur. 2d Products Liability § 867 (2021).

and pharmacies, (3) how doctors prescribed its products, (4) how pharmacies dispersed its products, and (5) how individual patients used its product or how a patient responded to its product, regardless of any warning or instruction given.[19] Just as in *Beretta*, J&J did not control the instrumentality (prescription opioids) alleged to constitute the nuisance at the time the nuisance occurred. See *Beretta*, 821 N.E.2d at 1138.

Even more, J&J could not control how individuals used other pharmaceutical companies' opioids. A manufacturer traditionally does not have a duty to people who use other manufacturers' products.[20] J&J sold only 3% of all prescription opioids statewide; other pharmaceutical companies [marketed and sold] 97% of the prescription opioids. Yet the district court held J&J responsible for those alleged losses caused by other pharmaceutical companies' opioids. Where the law does not expressly allow, J&J should not be responsible for the harms caused by opioids that it never manufactured, marketed, or sold. To expand public nuisance to cover a manufacturer's production and sale of a product would cause the manufacturer to be responsible for products it did not produce. We refuse to expand Oklahoma's nuisance law so greatly.

Further, J&J cannot abate the alleged nuisance. [O]pioid use and addiction would not cease to exist even if J&J pays for the State's Abatement Plan. *Beretta* (holding the nuisance would not cease to exist even if the defendants stopped selling firearms). The State's Abatement Plan is not an abatement in that it does not stop the act or omission that constitutes a nuisance. The abatement is not the opioids themselves. Neither is it an injunction to halt the promoting and marketing of opioids as J&J has not promoted opioids for several years. It is instead an award to the State to fund multiple governmental programs for medical treatment and preventive services for opioid abuse, investigatory and regulatory activities, and prosecutions for violations of Oklahoma law regarding opioid distribution and use—activities over which J&J has no control. Our Court, over the past 100 years in deciding nuisance cases, has never allowed the State to collect a cash payment from a defendant that the district court line-item apportioned to address social, health, and criminal issues arising from conduct alleged to be a nuisance. We therefore reject the district court's remedy in this case as it does not abate the alleged nuisance; it does not abate the opioid epidemic, any act or omission of J&J, or any act or omission of other opioid manufacturers.

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[19] See also State v. Purdue Pharma, L.P., 2019 WL 2245743, at *13 (N.D. Dist. Ct. 2019) (holding that "Purdue has no control over its product after it is sold to distributors, then to pharmacies, and then prescribed to consumers, i.e. after it enters the market").

[20] See Strange III, A Prescription for Disaster: How Local Governments' Abuse of Public Nuisance Claims Wrongly Elevates Courts and Litigants into A Policy-Making Role and Subverts the Equitable Administration of Justice, 70 S.C. L. Rev. 517, 537 (2019).

C. A manufacturer cannot be held perpetually liable for its products.

The final factor in rejecting the imposition of liability for public nuisance in this case is the possibility that J&J could be held continuously liable for its products. Nuisance claims against products manufacturers sidestep any statute of limitations. See, e.g., Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513 (Mich. Ct. App. 1992). In this case, the district court held J&J responsible for products that entered the stream of commerce more than 20 years ago, shifting the wrong from the manufacturing, marketing, or selling of a product to its continuing presence in the marketplace. The State's public nuisance claims could hold manufacturers perpetually liable for their products; Oklahoma law has rejected such endless liability in all other traditional tort law theories.[21] We again reject perpetual liability here.

III. This Court Will Not Extend Oklahoma Public Nuisance Law to the Manufacturing, Marketing, and Selling of Prescription Opioids.

Extending public nuisance law to the manufacturing, marketing, and selling of products—in this case, opioids—would allow consumers to "convert almost every products liability action into a [public] nuisance claim." County of Johnson v. U.S. Gypsum Co., 580 F. Supp. 284, 294 (E.D. Tenn. 1984). As one court explained:

> All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born.

N.Y. v. Sturm, Ruger & Co., 761 N.Y.S.2d 192, 196 (App. Div. 2003).

Other jurisdictions have refused to allow products-based public nuisance claims, signaling a clear national trend to limit public nuisance to land or property use. See, e.g., *Beretta*, 821 N.E.2d at 1116; *In re Lead Paint Litig.*, 924 A.2d at 505 ("were we to permit these complaints, we would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent . . . limitations of the tort of public nuisance"); Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055 (N.Y. 2001) (rejecting the contention that gun manufacturers have a general duty to lessen the risk of illegal gun trafficking because they have the power to restrict marketing and product distribution); *Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d at 196 (ruling "giving a green light to a common-law public nuisance cause of action will, in our judgment, likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only

[21] For example, a typical Oklahoma negligence action and products liability action have a statute of limitations of two years. 12 O.S.2011, § 95(a)(3); *Kirkland*, 521 P.2d at 1362.

against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities"); *Lead Indus. Ass'n, Inc.*, 951 A.2d at 456 ("[t]he law of public nuisance never before has been applied to products, however harmful"); see also Sills v. Smith & Wesson Corp., 2000 WL 33113806 (Del. Super. Ct. 2000) (unpublished) (holding the design, marketing, and advertising of handguns was not a public nuisance because the state did not recognize a cause of action for public nuisance based upon products).

In the same way, this Court will not extend Oklahoma public nuisance law to J&J's conduct in the manufacturing, marketing, and selling of prescription opioids. We follow North Dakota and South Dakota courts who rejected public nuisance claims against the same defendants for the same conduct as complained of in this case. Although unpublished opinions, we find both courts' reasonings for dismissing the claims persuasive as [they] applied nuisance statutes identical to Oklahoma's nuisance statute. The North Dakota court [reasoned that] public nuisance law does not apply to cases involving the sale of goods. State v. Purdue Pharma, L.P., 2019 WL 2245743 (N.D. Dist. Ct. 2019). The South Dakota court dismissed the public nuisance claim based on the same reason as the North Dakota court and held the defendants did not have control of the instrumentality of the nuisance when the damage occurred.

The common law criminal and property-based limitations have shaped Oklahoma's public nuisance statute. Without these limitations, businesses have no way to know whether they might face nuisance liability for manufacturing, marketing, or selling products, i.e., will a sugar manufacturer or the fast food industry be liable for obesity, will an alcohol manufacturer be liable for psychological harms, or will a car manufacturer be liable for health hazards from lung disease to dementia or for air pollution. We follow the limitations set by this Court for the past 100 years: Oklahoma public nuisance law does not apply to J&J's conduct in manufacturing, marketing, and selling prescription opioids.

CONCLUSION

This case challenges us to rethink traditional notions of liability and causation. Tort law is ever-changing; it reflects the complexity and vitality of daily life. The State presented us with a novel theory—public nuisance liability for marketing and selling a legal product, based on the acts not of one manufacturer, but an industry. [W]e are unconvinced that such actions amount to a public nuisance under Oklahoma law.

The Court allows public nuisance law to address discrete, localized problems, not policy problems. Erasing the traditional limits on nuisance liability leaves Oklahoma's nuisance statute impermissibly vague. The district court's expansion of public nuisance law allows courts to manage public policy matters that should be dealt with by the legislative and executive branches; the branches that are more capable than courts to balance the competing interests at play in societal problems. [Usurping] the Legislature by creating and funding government programs designed

to address social and health issues goes too far. This Court defers policy-making to the legislative and executive branches and rejects the unprecedented expansion of public nuisance law. The district court erred in finding J&J's conduct created a public nuisance.

District Court's Judgment Reversed.

■ KUEHN, J., Specially Concurring.

I agree with the Majority's analysis and conclusion and write to discuss why Oklahoma nuisance law is not, and unless the Legislature amends it, never will be, a tort. . . .

■ EDMONDSON, J., Dissenting.

. . . I would remand to the District Court to recalculate damages based upon J & J's share of the market in the years it sold its opioids in Oklahoma with its deceptive marketing scheme. The Attorney General's basic theory of the case is tenable, both in law and equity. The Court's view of public nuisance is too narrow . . . . I respectfully dissent.

NOTE

In late 2021, a California Superior Court dismissed a similar public nuisance opioid case on causation grounds. See Mann, Oklahoma's Supreme Court tossed out a landmark $465 million opioid ruling (NPR Nov. 9, 2021). See also City of Huntington v. AmerisourceBergen Drug Corp., 609 F.Supp.3d 408, 475 (S.D. W. Va. 2022) (predicting the West Virginia Supreme Court would not extend public nuisance law to opioid sales, distribution, and manufacture). However, in another public nuisance case brought by two Ohio counties, a federal jury found that three major pharmacies, Walmart, CVS, and Walgreens, had created a public nuisance by not properly monitoring opioid prescriptions. See In re National Prescription Opiate Litig., 2022 WL 4099669 (N.D. Ohio 2022) (entering final judgment of $650.6 million for opioid public nuisance abatement fund).

3. MISUSE

Page 416, Note 13, add to the end of the note:

Hackney v. Pendu Mfg., 146 N.E.3d 1016 (Ind. Ct. App. 2020), ch. 14(4) this Supplement, below, may be assigned here or in chapter 14.

CHAPTER 10

LIMITING DEFECTIVENESS—PASSAGE OF TIME

3. STATE OF THE ART

B. TOXIC SUBSTANCES

Page 456, Note 8, add to the end of the note:

In 2022, the Wisconsin Supreme Court, without directly addressing the state-of-the-art defense, declared that the legislature codified "the common law Wisconsin courts have developed and applied for decades" in Wis. Stat. Ann. § 895.047(b)–(e). See Murphy v. Columbus McKinnon Corp., 982 N.W.2d 898, 909 (Wis. 2022) ("the legislature did not adopt the entirety of [Rest. (3d) of Torts] § 2, nor did it enact the *Restatement*'s voluminous comments").

5. POST-SALE DUTIES

Page 474, Note 7, add to the first sentence of the second paragraph after "See also":

Park, Hyundai's $900 Million Recall Shows How Costly EVs Can Be, Prod. Liab. & Toxics L. (Feb. 25, 2021) (fire risks in electric vehicle battery cells);

6. STATUTORY REPOSE

Page 479, add after the first sentence of the first paragraph:

Repairing, reconditioning, or rebuilding a product may not extend the period of repose. See Estabrook v. Mazak Corp., 140 N.E.3d 830, 836–37 (Ind. 2020) ("Indiana Code section 34–20–3–1(b) is a statute of repose that cannot be extended by a manufacturer's post-delivery repair, refurbishment, or reconstruction of the disputed product.").

Page 480, add the following at the end of the section:

Clabo v. Johnson & Johnson Health Care Systems, Inc.

United States Court of Appeals, Sixth Circuit, 2020.
982 F.3d 989.

■ DONALD, CIRCUIT JUDGE.

Beginning in 2003, Leslie Clabo had several procedures performed to correct certain painful and uncomfortable medical issues. To alleviate her suffering, Clabo was implanted with a TVT transvaginal mesh device

that was manufactured by Defendants-Appellees, Johnson & Johnson Health Care Systems, Inc. and Ethicon Endo-Surgery, Inc. (collectively, "the Defendants"). Over time, Clabo was forced to repair and replace the mesh product because it eroded and would intermittently not serve its intended purpose. After Clabo initiated a products liability lawsuit, in which she alleged that the Defendants were liable for her injuries under Tennessee law, Defendants filed a motion for summary judgment, asserting that Clabo's claims were time-barred in accordance with Tennessee's statute of repose. When Clabo subsequently filed a motion to amend her complaint and add new claims related to her injuries, the Defendants argued that her motion was futile because all of her claims were time-barred. The district court ultimately agreed with the Defendants, granted their motion for summary judgment, and denied Clabo's motion to amend her complaint. On appeal, Clabo's primary contention is that the district court erred in determining her date of injury. Because the record undoubtedly demonstrates that Clabo's injuries occurred outside of the applicable statute of repose period, we AFFIRM the district court.

I.

In May 2003, Leslie Clabo underwent surgery to correct two conditions: pelvic organ prolapse and urinary incontinence. To treat these conditions, Clabo's doctor implanted her with a TVT transvaginal mesh sling device that the Defendants manufactured. By 2006, she began experiencing additional discomfort, including pelvic pain, urinary issues, scarring, and pain during sexual intercourse. [Because] the mesh from her device had eroded through her vaginal canal, Clabo had a second procedure in April 2006 to remove the TVT implant. Approximately a month later, Clabo had surgery to implant a mesh sling similar to the one she had removed. In 2011, Clabo had yet another surgery. Again due to mesh erosion, she had pieces of her most recent implant removed and other parts repaired. Though Clabo had several procedures performed to address [these] medical issues, she alleges that it was not until July 2012 that she finally realized (after speaking with a physician-friend) that the TVT mesh product was the likely cause of her persistent pain and suffering.

Seeking compensation for her resulting impairments, on May 6, 2013, Clabo filed a lawsuit against the Defendants, asserting products liability claims under the Tennessee Products Liability Act of 1978 ("TPLA"), Tenn. Code Ann. §§ 29–28–101 et seq. Defendants subsequently filed a motion for summary judgment, arguing that Clabo's claims were barred by Tennessee's statute of repose, which prohibits products liability claims brought more than six years after the date of the injury that gave rise to the suit. See Tenn. Code. Ann. § 29–28–103(a). Clabo responded by filing a motion to amend her complaint, and the Defendants opposed Clabo's motion on futility grounds. The district court denied Clabo's motion to amend and granted summary judgment in favor

of the Defendants, finding that Clabo's initial injury occurred during 2006—making her claims time-barred, and therefore, futile. Clabo timely appealed . . . .

II.

. . . Whether or not the district court erred by granting the Defendants' summary judgment motion can be resolved by answering one question: when exactly was Clabo first injured by the Defendants' product? Defendants argue that, if their product caused Clabo's injury, the injury first occurred in 2006, when she had surgery to remove the eroded mesh. But Clabo asserts that at the earliest, she was not injured by the Defendants' product until after her 2011 surgery. Alternatively, Clabo claims that she was injured by the mesh device in 2012, because at that point, she was informed by a physician that the mesh device was the cause of her medical problems. The resolution to this issue therefore depends on how "injury" is defined.

The term "injury" is not defined in the TPLA, so we "are obliged to decide the case as we believe the [Tennessee] Supreme Court would." [T]he Tennessee Supreme Court would "ascertain and give effect to the legislative intent without unduly restricting or expanding [the] statute's coverage beyond its intended scope." Moreover, if the [statutory language] is unambiguous, we will "apply its ordinary and plain meaning."

Because the text of Tenn. Code Ann. § 29–28–103(a)—"[a]ny action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition . . . must be brought within six (6) years of the date of injury"—is rather unambiguous, we give "injury" its plain meaning. Black's Law Dictionary defines "injury" as "[a]ny harm or damage" or "[a]nything said or done in breach of a duty not to do it, if harm results to another in person." Injury, Black's Law Dictionary (11th ed. 2019). Because "harm" is defined by Black's Law Dictionary as "[i]njury, loss, damage; material or tangible detriment," Harm, Black's Law Dictionary (11th ed. 2019), "date of injury," in this context, refers to the instance when an individual was first physically affected by a particular defect in a seller or manufacturer's product in a manner that was to his or her detriment.

This definition aligns with the Tennessee legislature's intent behind enacting the TPLA. The Tennessee legislature intended the TPLA to "limit the time within which a suit alleging products liability may be brought and thereby address the actuarial concerns of the insurance industry and allow for accurate assessment of liability exposure for insurance purposes." [T]he Tennessee legislature chose to set forth a specific limitations period for such actions, rather than exclusively rely on other more general limitations periods, because it demonstrates that while this provision might lead to harsh results, it is necessary to achieve the Tennessee legislature's desired outcomes. See Penley v. Honda Motor Co., 31 S.W.3d 181, 187 (Tenn. 2000). . . .

The evidence in the record reveals that Clabo was injured by Defendants' product as early as 2006. Clabo's own testimony confirms this finding:

> Q: [I]s it correct that a doctor informed you that the mesh had begun to erode through the vaginal canal?
>
> A: That's correct.
>
> Q: And is that the reason that you then had surgery with Dr. [Frederick] Klein in April of 2006 to remove the eroded mesh?
>
> A: Yes. . . .
>
> Q: And after that surgery with Dr. Klein, you then a month later had another sling implanted by Dr. Klein?
>
> A: Correct. . . .
>
> Q: And I've got a note from Dr. Klein about mid-May of '06 where you were wanting to have that mesh replaced ASAP. Does that sound right?
>
> A: It probably does.

Clabo additionally makes similar admissions in a fact sheet that she filed in connection with a related multidistrict litigation matter. On the fact sheet, in response to a question regarding when she was first injured by the Defendants' product, Clabo replied that in 2006, she first realized that she could feel exposed tape from the mesh device. Clabo also admitted that in 2006, her partner felt something scratch him during sexual intercourse. The evidence [thus] proves that she was "injured" by Defendants' product in April 2006. It was by this time that Defendants' TVT mesh device began to erode, and caused Clabo to have surgery to replace the damaged product. . . .

Furthermore, Clabo's two proposed dates of injury are inaccurate. First, Clabo asserts that the earliest possible date of her injury is July 2011, because that is when she had additional surgeries for removal of parts of the sling that had perforated tissue into her vaginal walls. Though Clabo did have a procedure in 2011 to yet again correct a problem she was having with her mesh sling device, she does not explain why her 2011 surgery was any different than the one she underwent in April 2006. Both procedures transpired due to an ineffective TVT mesh device, and Clabo fails to distinguish these two surgeries in a way that could lead the Court to accept that she was first injured by Defendants' device in July 2011. Second, Clabo contends that in the alternative, she was injured by the Defendants' mesh device in July 2012, when she was "advised by a medical doctor friend of the probable association of TVT mesh and her continuing problems." By making this argument, Clabo is essentially requesting that the Court apply the discovery rule to excuse her from being subjected to Tennessee's statute of repose restrictions. See

Potts v. Celotex Corp., 796 S.W.2d 678, 680 (Tenn. 1990).[1] However, Tennessee courts have declined to extend the discovery rule to toll the Tennessee statute of repose. See Calaway ex rel. Calaway v. Schucker, 193 S.W.3d 509, 515 (Tenn. 2005) ("A statute of repose . . . limits the time within which an action may be brought and is unrelated to the accrual of any cause of action."). And thus, Clabo has not demonstrated that she was first injured in 2011 or 2012.

[Thus], the Court affirms the district court's grant of summary judgment in favor of the Defendants because Clabo filed her initial complaint on May 6, 2013—more than six years after her injury in 2006—[so that] her claims are time-barred by Tennessee's statute of repose. . . .

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment. . . .

[1] "Under the 'discovery rule' applicable in tort actions, including but not restricted to products liability actions predicated on negligence, strict liability or misrepresentation, the cause of action accrues and the statute of limitations begins to run when the injury occurs or is discovered, or when in the exercise of reasonable care and diligence, it should have been discovered." *Potts*, 796 S.W.2d at 680.

CHAPTER 11

REGULATING DEFECTIVENESS

2. THE EFFECT OF AGENCY REGULATION ON PRIVATE LITIGATION

B. FEDERAL PREEMPTION

Page 523, Note 4.B, add to the end of the note:

See also Varela v. FCA US LLC, 505 P.3d 244, 262 (Ariz. 2022) (state negligence and products liability claims against manufacturer of vehicle lacking automatic emergency braking (AEB) technology were not impliedly preempted; reviewing NHTSA "commitment to partnering with states to facilitate the ongoing development and safe deployment of automated vehicle and automated driving system technology, of which AEB is a component").

PART III

CAUSATION

CHAPTER 12

CAUSE IN FACT

3. SPECIAL CAUSATION PROBLEMS

A. WARNINGS AND RELIANCE

Page 548, Note 1, add after "Accord" in the second sentence:

Burton v. E.I. du Pont de Nemours & Co., Inc., 994 F.3d 791, 824 (7th Cir. 2021) (no evidence that warning of lead poisoning from childhood exposure to lead paint would have changed consumer behavior in the early twentieth century);

B. TOXIC SUBSTANCES

2. *SPECIFIC* CAUSATION—WHETHER THE AGENT *DID* CAUSE THE DISEASE IN THE *PLAINTIFF*

Page 584, Note 3, add to the end of the note:

See also Burton v. E.I. du Pont de Nemours & Co., Inc., 994 F.3d 791, 827 (7th Cir. 2021) (plaintiffs required to prove that childhood lead paint exposure was a substantial factor causing lead poisoning injuries).

Page 585, Note 6, add to the end of the note:

See also Fowler v. Akzo Nobel Chems., Inc., 276 A.3d 1146, 1166 (N.J. 2022) (frequency, regularity, and proximity "of exposure to a toxic substance necessary to cause a disease . . . will depend on the peculiar characteristics of the toxic substance and the disease induced. . . . There is no evidence of a threshold level below which there is no risk for mesothelioma"; reviewing cases and reinstating $2.3 million jury verdict for mesothelioma sufferer's estate); Jolly v. Gen. Elec. Co., 869 S.E.2d 819, 837 (S.C. Ct. App. 2021) (experts' specific causation evidence based on cumulative dose theory was reliable and supported by "numerous peer-reviewed, published epidemiological studies, case series, and case reports"), cert. granted (S.C. 2023).

3. IDENTIFYING THE PARTY RESPONSIBLE FOR THE AGENT

Page 589, Note 3A, add to the end of the note:

Burton v. American Cyanamid Co. was reversed and remanded for new trial in Burton v. E.I. du Pont de Nemours & Co., Inc., 994 F.3d 791, 814 (7th Cir. 2021) (trial court erred in extending the risk contribution theory to sellers or manufacturers of paint that use the white lead carbonite paint pigment produced by other manufacturers).

PART IV

DEFENSES AND DAMAGES

CHAPTER 14

DEFENSES BASED ON PLAINTIFF'S CONDUCT

4. MISUSE

Page 659, add to the end of the page:

As you read the following case applying Ind. Code Ann. § 34–20–6–4 (reproduced in the *State Reform Statutes* section, below), consider whether you agree with the court's holding.

Hackney v. Pendu Manufacturing, Inc.

Court of Appeals of Indiana, 2020.
146 N.E.3d 1016.

■ KIRSCH, J.

This [is] an action by Kyle Hackney ("Hackney") against Pendu Mfg., Inc. ("Pendu"), alleging that a piece of machinery manufactured by Pendu contained a design defect that made it unreasonably dangerous under the Indiana Product Liability Statute. Hackney appeals the trial court's entry of summary judgment in favor of Pendu and raises several issues, of which we find the following issue dispositive: whether the trial court erred in granting summary judgment to Pendu because the defense of misuse barred any liability by Pendu.

We affirm.

Facts and Procedural History

On November 17, 2015, Hackney was an employee of American Fibertech ("Fibertech"), working at the Mitchell, Indiana facility that produces boards for wooden pallets. On that date, Hackney was working at [the] Pendu Edger 3000 ("the Machine"), manufactured by Pendu and [delivered] to Fibertech in July or August 2015. The Machine trimmed edges off the boards [cut] to make 4" and 6" boards used to build the wooden pallets, and the Machine was comprised of three separate components: (1) the infeed; (2) the edger itself, and (3) the custom built outfeed ("the Outfeed"). The Outfeed is the only component at issue in this case. The Machine was a part of Fibertech's much larger production line and fed into Fibertech's main conveyor belt.

[Pendu had no contact with the Machine after its sale to Fibertech.] Included with the Machine was the Pendu Safety Manual ("the Safety Manual"), which expressly advised all operators on the safe use and operation of the Machine. The Safety Manual was in Fibertech's

possession at all relevant times, and . . . was available to any and all operators of the Machine, including Hackney.

The Outfeed of the Machine was custom built and its design was based on photos provided by Fibertech of an older edger it was using and other custom requirements of Fibertech. Pendu was not told how Fibertech intended to incorporate the Outfeed into its main production line/conveyor belt. Pendu [understood] that Fibertech was going to install any guarding as part of its incorporation of the Outfeed into its main production line. That understanding/agreement was established by the parties' course of dealing and memorialized by the language on their contract/change order. Fibertech did all installation and configuration of the Outfeed into its production line, made several changes, and added guarding to the top of the Machine as part of its configuration.

Pendu testified that installing a guard on the Outfeed when it manufactured the Machine for Fibertech was not feasible "[b]ecause [Pendu] didn't know exactly what [Fibertech's] belt conveyor's going to look like." Pendu "had no idea what [Fibertech was] putting up for guarding or how they're manufacturing" from where the Outfeed ended. [So], Pendu "built exactly what [Fibertech] wanted[,]" and Fibertech never said it wanted any guarding on the Outfeed . . . . per industry standards for custom machinery, like the Outfeed.[1]

Fibertech was "very capable of doing their own installation" of equipment and employed their own riggers and installation personnel or would retain contractors to assist them with the install or modifications. It was common for Fibertech to make modifications to the Machine after delivery. Fibertech made at least the following known modifications to the Machine since delivery (see Appellant's App. Vol. IV at 132–33):

1. Performed or oversaw the entire installation of the Machine and incorporation into its production line;
2. Added an extensive catwalk in front of the Machine, and over its main conveyor system, stairs, and countless other modifications shown in photos, with some contractor assistance;
3. Added a guard on top of the Machine that was in place at the time of Hackney's accident;
4. Added poles to the side of the Machine;
5. Removed the guards that surround the chain conveyors on the outfeed and replaced them with central chain support;
6. Altered the shaft involved in Hackney's accident by damaging it with the improper use of a pipe wrench.

[1] ANSI industry standards 4.3 for custom machinery states that "the user shall communicate its specific safety requirements as part of the machinery purchase. . . . The supplier and user shall develop a set of specifications suited to the user's location and application specifics of the machine." Appellant's App. Vol. IV at 101–02.

Hackney's normal position while working was at the rear of the Machine at the infeed area, where he would feed boards into the Machine, which would be edged or trimmed inside the Machine and then come out of the Machine via the Outfeed. Occasionally, . . ., Hackney would notice scrap wood that would get caught in the Outfeed at the opposite end of the Machine, and the scrap wood would need to be removed so it would not cause a jam. Both the Safety Manual and Fibertech required a person to turn off the Machine before reaching into it or servicing it in any way. On Nov. 17, 2015, the date of the incident, Hackney was operating the Machine when he noticed a piece of scrap wood standing vertically in the Machine. He then walked around to the end of the Machine to remove the piece of wood. On his way to remove the scrap wood, Hackney walked past both the E-Stop and Main Control box, which both had buttons that would have stopped the Machine; Hackney testified that turning off the Machine first would have "obviously" prevented his accident. When Hackney got to the end of the Machine, he reached his body over the still-operating Machine while balancing on one foot. Seconds later, the shirttail of Hackney's sweatshirt got caught in the Machine and became entangled until the sweatshirt was removed from Hackney's body, causing injury to Hackney's arm and shoulder.

Fibertech trained Hackney to either use the E-Stop or the lockout/tagout procedure to stop the machine before removing scrap wood from the Outfeed. Fibertech taught Hackney that failure to follow the safety rules could result in serious personal injury. Hackney stated that he was trained to turn off the machine before removing a jam, and if he had hit one of those two stop buttons that he walked past, the accident would not have happened. The Safety Manual, the safety training Hackney received twice a week and signed attendance forms for attending, and the Fibertech Safety Policy, which he signed and initialed, all required him to stop the Machine before reaching into the machine to service it, such as removing scrap wood.

Fibertech testified that the Safety Manual was available to "any and all operators" of that same machine. [Page 2] of the Safety Manual, under "Introduction," [reads]: "Maintenance personnel and operators should read this manual thoroughly and become familiar with the various assemblies and sub-assemblies. This will be helpful when ordering replacement parts and reduce the possibility of errors." [Page 3] reads in all capital letters and bold font: "**WARNING: FAILURE TO FOLLOW THESE RULES MAY RESULT IN SERIOUS PERSONAL INJURY**" [and] under the heading "**SAFETY RULES FOR ALL MACHINES**" [states]: "FOR YOUR OWN SAFETY, READ INSTRUCTION MANUAL BEFORE OPERATING THE MACHINE. Learn the machine application and limitations as well as the specific hazards peculiar to it." It further states . . .: "WEAR PROPER APPAREL. Loose clothing, gloves, neckties, rings, bracelets, or jewelry can get caught in moving parts." [Page 4] states . . . : "DO NOT OVERREACH. Keep proper footing and balance at

all times." [Page 5] under the heading, "**WEAR PROTECTIVE CLOTHING**," [states] "Wear close-fitting clothing and safety equipment appropriate to the job[,]" [and] also reads: "Follow OSHA approved, documented lockout/tagout procedures when cleaning, servicing, adjusting, or doing any maintenance on a machine. The lockout/tagout procedures should be permanently attached to each machine." Additionally, [page 7 states] that "During operation:"

> 5. Follow the instructions below before performing inspections, adjustments, repairs, or removing lodged material:
>
> a) Push the emergency stop button located on the operator's console,
>
> b) Turn the key switch to the off position and remove the key.
>
> c) Follow approved lockout/tagout procedures specific to the machine.
>
> d) Be sure material feed has stopped and the arbors have stopped turning.

Fibertech kept the "lockout/tagout" procedures attached to the Machine, and part of new employee training . . . included instruction on lockout/tagout procedures specific to the machines an employee [used in his or her] job duties. Employees additionally were required to attend safety meetings twice/week where a variety of general workplace hazards were discussed. Lockout/tagout procedures were listed or discussed in all of the bi-weekly safety meetings due to their "paramount" importance. On Oct. 9, 2015, Hackney initialed and signed that he read and understood the Fibertech Safety Policy. Hackney testified in his deposition that he understood the lockout/tagout rules and that the lockout/tagout rules would have required him to turn the Machine off prior to attempting to remove a scrap of wood.

After Hackney's accident . . ., Fibertech investigated and determined the accident was caused by Hackney's behavior, violation of safety rules, and failure to first turn off the Machine. The report concluded that the "incident's root cause was behavioral in nature" [in that Hackney] was injured "when his jacket got entangled in [the Machine's shaft.]"

When [Pendu shipped the Machine] to Fibertech, the Outfeed had a smooth and machine-polished shaft. Pendu's expert opinion stated that this would have made the shaft resistant to friction, but that the post-accident photos of the Outfeed's shaft showed that it had been damaged and was no longer smooth. The expert stated that the damage to the shaft notched and serrated the shaft, enabling it "to grab [Hackney's] loose clothing." The expert also opined that it appeared that someone had used a pipe wrench on the shaft, causing the damage. . . .

On June 8, 2016, Hackney filed his complaint against Pendu, alleging that the Machine was negligently designed and that, under

Indiana's Product Liability Act ("IPLA"), the Machine was unreasonably dangerous and a defective product. On June 21, 2018, Pendu filed a motion for summary judgment, arguing that Hackney's injuries were caused by Hackney's misuse of the Machine, which included failure to read the Safety Manual and failure to follow several safety warnings, that Pendu did not breach its duty to Hackney and was not the proximate cause of Hackney's injuries, and Hackney should be barred from recovery because he had prior knowledge of the Machine's danger. Hackney filed his response in opposition to Pendu's motion for summary judgment, contending that summary judgment should be denied because material issues of fact existed as to whether Pendu acted negligently and whether the Machine had a design defect. Pendu filed a response arguing that Hackney's accident was not caused by a design defect, the violation of safety rules and warnings by Hackney was misuse that constituted a complete defense under IPLA, alterations to the shaft of the Machine constituted a complete defense under IPLA, and Hackney's incurred risk and knowledge of the danger of reaching into the Machine constituted a complete bar to recovery, among other things.

After a hearing, the trial court [granted] summary judgment in favor of Pendu on Feb. 1, 2019, and held that the "issues of misuse and alterations of the equipment as they relate to the holding in Campbell Hausfeld/Scott Fetzer Co. v. Johnson, 109 N.E.3d 953 (Ind. 2018) are dispositive.". . . Hackney now appeals.

Discussion and Decision

. . . Summary judgment is appropriate only where the designated evidence shows there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. . . . [All pleadings and facts] are construed in favor of the non-moving party. . . .

Hackney's complaint claimed that the Machine was unreasonably dangerous and a defective product under the IPLA. . . . In an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions. Ind. Code § 34–20–2–2. To establish a prima facie case . . ., the plaintiff must show that (1) the product is defective and unreasonably dangerous, (2) the defective condition existed at the time the product left the defendant's control, and (3) the defective condition is the proximate cause of the plaintiff's injuries.

The IPLA provides three non-exclusive defenses to a products liability action: incurred risk under Ind. Code § 34–20–6–3; misuse of the product under Ind. Code § 34–20–6–4; and modification or alteration of the product under Indiana Code § 34–20–6–5. All three statutory defenses act as a complete bar to recovery in a products liability action . . . .

Here, in response to Hackney's complaint alleging that the Machine was [defectively designed], Pendu filed a motion for summary judgment, arguing that, among other reasons, Hackney's injuries were caused by his misuse of the Machine, which included failure to read the Safety Manual and failure to follow several safety warnings. After a hearing, the trial court issued an order granting summary judgment in favor of Pendu and held that the "issues of misuse and alterations of the equipment as they relate to the holding in Campbell Hausfeld/Scott Fetzer Co. v. Johnson, 109 N.E.3d 953 (Ind. 2018) are dispositive." It further concluded, "the undisputed evidence is clear that Hackney misused the machine in multiple ways that together could not be reasonably expected by Pendu (including failing to follow lockout procedures to turn off the machine before he attempted to remove a scrap piece from the machine) and that misuse was the cause of his injuries."

Hackney contends on appeal that it was error for the trial court to grant summary judgment on the basis of the misuse defense. Specifically, he asserts that a jury should decide whether the violations of warnings and instructions alleged by Pendu even constitute violations and whether they combine in the aggregate to constitute misuse. . . . Hackney maintains that there is no other reason why Pendu would warn against operating the Machine without guards under any circumstances, other than that Pendu understood that its other written warnings on how to operate the Machine might not be followed.

Misuse is typically a question of fact for a jury to decide. *Campbell*. However, summary judgment based on misuse is appropriate when the undisputed evidence proves that the plaintiff misused the product in an unforeseeable manner. Misuse is established as a matter of law when the undisputed evidence proves that plaintiff used the product in direct contravention of the product's warnings and instructions. "[I]n order to successfully employ misuse as a defense, the seller must show both that the misuse of the product is: 1) the cause of the harm; and 2) not reasonably expected by the seller." Therefore, if "a plaintiff misuses a product but it is not the cause of the harm and/or the misuse can reasonably be expected by the seller, then the misuse would not serve as a complete defense and comparative fault principles would apply."

Here, the trial court granted summary judgment in favor of Pendu and held that the "issues of misuse and alterations of the equipment as they relate to the holding in *Campbell* . . . are dispositive." In *Campbell*, Johnson was seriously injured while using a hand-held grinder designed by Campbell Hausfeld. "The [g]rinder is an approximately eight-inch, hand-held, air-powered tool intended for grinding, polishing, deburring, and smoothing sharp surfaces." Johnson did not use the tool for any of those intended purposes and, instead, used it to help a friend do some work on the friend's truck by "cut[ting] around the truck's headlight opening to accommodate larger headlights." Johnson "took the [g]rinder and attached a cut-off disc to it using a mandrel. Johnson's friend

expressed concern about him using the cut-off disc, which was rated lower than 25,000 RPM, but Johnson used the cut-off disc anyway." Johnson wore his prescription glasses as he cut around the headlights with the grinder, believing they were sufficient to serve as safety glasses. While using the grinder, the cut-off disc came apart and a piece struck him in the left side of his face, breaking his eyeglasses and causing serious injuries to his cheek and eye.

Johnson sued Campbell Hausfeld, alleging the tool was defective in its design and that the manufacturer failed to provide adequate warnings, and Campbell Hausfeld sought summary judgment, contending, among other things, that Johnson had misused the tool by failing to follow its instructions. Specifically, Campbell Hausfeld alleged that Johnson "misused the [g]rinder in three ways [in violation of its instructions]: he did not wear proper safety glasses; he attached and used a cut-off disc without a safety guard in place; and the cut-off disc had an inadequate RPM rating."

Our Supreme Court determined that the misuse statutory defense turned on "whether Johnson's failure to follow the instructions was reasonably expected by Campbell Hausfeld." The Court found, "while Campbell Hausfeld could have perhaps reasonably expected a user to not use proper eyewear or for a user to attach a cut-off disc without a guard, or for a user to attach something with an improper RPM rating, it was not reasonably expected for a user to disregard the safety instructions in all three of these ways."

Here, Pendu alleges that Hackney committed multiple violations of the warnings and instructions for the Machine and misused the Machine in several ways. Specifically, Pendu asserts that: (1) Hackney failed to turn off the Machine before reaching into it; (2) Hackney overreached and did not maintain proper balance and footing when he reached into the Machine; (3) Hackney leaned over and in front of the Machine, putting his body in front of the Outfeed, which was not otherwise accessible due to the placement of the conveyor belt; (4) Hackney failed to wear proper apparel by wearing a baggy sweatshirt; (5) Hackney ignored his training about the nip points of the Machine and his belief that someone had previously lost a finger on the Machine; (6) Fibertech failed to ensure that Hackney reviewed the Safety Manual, contrary to the warnings that all operators must review it; and (7) Fibertech damaged the shaft by using a pipe wrench on it.

. . . Hackney testified that turning off the Machine first would have "obviously" prevented his accident and that he was trained to turn off the Machine before removing a jam, and if he had hit one of those two stop buttons that he walked past on the way to remove the scrap of wood, the accident would not have happened. [T]he Safety Manual, the safety training Hackney received twice a week and signed attendance forms for attending, and the Fibertech Safety Policy, which he signed and initialed, all required him to stop the Machine before reaching into the machine to

perform service on it, such as removing scrap wood. [O]n the day of the accident, Hackney left his normal position at the infeed area of the Machine and walked to the end of the Machine where the Outfeed was located to remove the scrap wood and reached his body over the still-operating Machine while balancing on one foot. As he leaned over the moving Machine, the shirttail of [his] loose-fitting sweatshirt got caught in the Machine and became entangled. After Hackney's accident and injury, Fibertech investigated and determined the accident was caused by Hackney's behavior, violation of safety rules, and failure to first turn off the Machine. . . .

The evidence therefore showed that the accident would not have occurred if, by Hackney's own admission, he had turned the Machine off before going to remove the scrap wood. Further leading to the accident was the fact that Hackney leaned over the moving Machine while not being properly balanced on two feet and allowed his sweatshirt to come in contact with the shaft of the Machine. It is clear that if Hackney had turned off the Machine, the accident would not have occurred, and even if he had not done so, the accident may have been avoided if he did not lean directly across the moving Machine, had maintained proper footing, and was not wearing a loose-fitting shirt that easily caught in the moving shaft. Thus, Hackney's failure to follow the instructions and warnings was the cause of his injuries.

We must then determine whether Hackney's failure to follow the instructions and warnings was reasonably expected by Pendu. The trial court found that "the undisputed evidence is clear that Hackney misused the [M]achine in multiple ways that together could not be reasonably expected by Pendu (including failing to follow lockout procedures to turn off the [M]achine before he attempted to remove a scrap piece from the [M]achine) and that misuse was the cause of his injuries." Hackney argues that because Pendu included a warning on the Machine that stated "DO NOT OPERATE WITHOUT GUARDS," it expected an operator like Hackney to fail to follow instructions and reach into the Machine while it was operating. He claims that there is no other reason why Pendu would include such a warning against operating the Machine without guards, other than that Pendu understood that its warnings and instructions on how to operate the Machine might not be followed.

We find the present case to be similar to *Campbell*, where our Supreme Court found that Johnson's multiple failures to follow the grinder's instructions were the cause of his injuries and taken together, could not be reasonably expected by a seller. Here, Hackney also had multiple failures to follow the Machine's warnings and instructions that were the cause of his accident and injury. While Pendu could have perhaps reasonably expected an operator to not follow one of the warnings or instructions, it could not have reasonably expected an operator to disregard the safety warnings and instructions in all of the ways that Hackney did. Hackney could have avoided injury if he had shut

the Machine off before reaching into it to remove the piece of scrap wood or if he not leaned directly in front of the moving Machine or maintained proper footing or worn proper attire that would not have gotten caught in the Machine. His multiple failures to follow the Machine's warnings and instructions were the cause of his injuries and taken together, could not be reasonably expected by Pendu. We, therefore, conclude that the trial court did not err in granting summary judgment in favor of Pendu.

Affirmed.

CHAPTER 15

DAMAGES

1. PERSONAL INJURY AND DEATH

Page 668, Note 5, add after "See, e.g.,":

Brown v. Saint-Gobain Performance Plastics Corp., ___ A.3d ___, ___, 2023 WL 2577257, at *3 (N.H. 2023) (increased risk of future disease from exposure to toxic substance without present injury does not "constitute a legal injury for purposes of stating a claim for the costs of medical monitoring as a remedy or as a cause of action"; answering certified question);

Page 668, Note 5, add at the end of the note:

See also Vt. Stat. Ann. tit. 12, § 7202 (2021) (medical monitoring cause of action in the absence of present injury or disease allowable if: "(1) exposure at a rate significantly greater than the general population; (2) to a proven toxic substance; (3) as a result of tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiffs have suffered an increased risk of contracting a serious disease; (5) the increased risk makes it medically necessary for the plaintiffs to undergo periodic medical examination different from that prescribed for the general population in the absence of exposure; and (6) monitoring procedures exist that are reasonable in cost and safe for use").

3. ECONOMIC LOSS AND PROPERTY DAMAGE

Page 684, add the following after Note 6:

Cities and states have filed a number of recent cases against Monsanto, which for many decades manufactured PCBs that have been polluting waters across the nation. Consider one such case:

Baltimore v. Monsanto Company

United States District Court, D. Maryland, 2020.
2020 WL 1529014.

■ BENNETT, J.

The Mayor and City Council of Baltimore ("the City") filed a five-count Complaint against Monsanto Company ["Defendants," alleging that Monsanto contaminated] its streets, drainage systems, storm water and water bodies with Polychlorinated Biphenyls ("PCBs"), chemical compounds used in industrial and commercial applications. The Complaint alleges common law tort claims: public nuisance (Count I); strict product liability based on defective design and manufacture (Count II); strict product liability based on failure to warn (Count III); trespass

(Count IV); and negligence (Count V). [Defendants moved to dismiss. Motion hereby denied.]

BACKGROUND

I. PCBs and Contamination

PCBs are man-made chemical compounds that have been found to contaminate bays, oceans, rivers, streams, soil, and air. As a result, PCBs [are] in the tissues of all living beings, including marine life, animals, birds, plants, trees, and humans. Exposure to PCBs can lead to various adverse health effects, including cancer, effects on the immune system, reproductive system, nervous system, endocrine system, and more.

A. Monsanto and PCBs

The City alleges that Monsanto was the sole manufacturer of PCBs in the United States from 1935 to 1977 and trademarked the name "Aroclor" for its PCB compounds. [About 1997, Monsanto subdivided into 3] separate corporations: Monsanto [agricultural products]; Solutia [chemical products]; and Pharmacia [pharmaceuticals].

Monsanto used PCBs in industrial and commercial applications, including electrical equipment such as transformers, motor start capacitors, and lighting ballasts, and other products such as caulks, paints, and sealants. PCBs regularly leach, leak, off-gas, and escape their intended applications, contaminating runoff during storms and other rain events, [contaminating] streets, drainage systems, stormwater, and water bodies. Humans are exposed to PCBs through ingestion, inhalation, and dermal contact. The EPA has determined that PCBs [probably are carcinogenic and] are associated with serious non-cancer health effects on the immune system, reproductive system, nervous system, and endocrine system[:] PCB exposure leads to decreased birth weight, decrease in gestational age, reduced sperm counts, deficits in neurological development affecting visual recognition, short-term memory, learning, and decreased thyroid hormone levels [damaging] hearing. PCBs are also toxic to aquatic species and wildlife [and can] cause changes in community and ecosystem structure and function.

B. Monsanto's knowledge of PCB contamination

The City alleges that Monsanto has known for decades that PCBs are toxic and that their regular and intended uses would result in widespread contamination of the environment. The City attaches as exhibits to its Complaint several internal Monsanto documents [revealing] Monsanto's knowledge of the harmful effects of PCBs. An October 11, 1937 Monsanto Memorandum notes that experimental work in animals shows that prolonged exposure to Aroclor vapors will lead to systemic toxic effects. [A 1955 memo] from Monsanto's Medical Director states, "[w]e know Aroclors are toxic, but the actual limit has not been precisely defined." (Exhibit 2.) In 1966, Monsanto's Medical Director reviewed a [report detecting] PCBs in the tissues of fish and wildlife in

Sweden and indicat[ing] that the likely source was from industrial uses of PCBs.

In 1969, Monsanto formed an Ad Hoc Committee on Aroclor, with the objective of continuing sales and profits of Aroclor in light of the fact that PCBs may be a global contaminant. In meeting minutes, the Committee noted that "[t]hrough abrasion and leaching we can assume that nearly all of this Aroclor winds up in the environment." (Exhibit 10) Despite the growing evidence of widespread contamination, it is alleged that Monsanto refused to stop production of Aroclor: "there is too much customer/market need and selfishly too much Monsanto profit to go out." (Exhibit 12.) In 1970, PCB production in the United States peaked at 85 million pounds.

[A U.S. study of PCBs in the early 1970s generated a 1972 report concluding] that PCBs were highly persistent, could bioaccumulate to relatively high levels, and could have serious adverse health effects in humans. In 1976, after . . . a study to assess PCB levels in the environment on a national basis, the EPA revealed that PCBs were "a more serious and continuing environmental threat than had been originally realized."

C. Monsanto's concealment of PCB contamination

The City alleges that Monsanto actively concealed the toxic nature of PCBs from governmental entities and the public, misrepresenting that the compounds were not toxic and that Monsanto did not expect to find PCBs in the environment in a widespread manner. In a 1969 letter to the L.A. County Air Pollution Control District, Monsanto explained that PCBs "are not particularly toxic by oral ingestion or skin absorption." (Exhibit 17.) Also in 1969, a Monsanto employee spoke with a representative from the National Air Pollution Control Administration who promised to relay the message to Congress that Monsanto "cannot conceive how the PCBs can be getting into the environment in a widespread fashion." (Exhibit 19.) It is further alleged that similar messages were conveyed to the Regional Water Quality Control Board [and] the New Jersey Department of Conservation, as well as to inquiring customers.

D. Current national concern over PCB contamination

Many major municipalities across the nation have filed lawsuits against Monsanto in the wake of the environmental and health concerns over PCBs. [Citing cases filed in federal courts by San Diego, San Jose, Oakland, Spokane, Berkeley, Seattle, Long Beach, Portland, and Chula Vista.] In addition, several state attorneys general have [filed claims in state courts] for injuries to natural resources as a result of Monsanto's conduct [including Washington, Oregon, and Ohio]. Some of those actions remain pending, and Monsanto's efforts to have them be initially dismissed on motions have been unsuccessful.

II. Claims and Procedural History

Baltimore City alleges that such PCB contamination has also occurred within the boundaries of Baltimore. The City, in its governmental capacity, owns and operates a municipal stormwater system ("MS4") that captures precipitation that falls on impervious surfaces such as streets, sidewalks, and roofs. The stormwater system includes gutters, inlets, pipes, outfalls, catch basins, and other stormwater infrastructure and features. . . .

According to Maryland water quality data from 2016, [about] 921 square miles of Maryland's estuarine waters were "impaired" by PCB contamination with PCB levels in excess of levels determined to be safe for human beneficial uses, and approximately 223 miles of Maryland's rivers and streams and approximately 3,150 acres of Maryland's lakes and reservoirs are similarly impaired. The PCB-contaminated waters in Maryland include Baltimore's Inner Harbor, the Patapsco River, Lake Roland, and the Back River.

The City asserts several negative consequences it has experienced because of PCB contamination in its waters. The State of Maryland's fish consumption advisories show that fish from rivers, creeks, harbors, reservoirs, lakes, and other waterbodies in Maryland, including Lake Roland in Baltimore City, have exhibited PCB contamination levels higher than the impairment level specified by water quality standards. These advisories also recommend restricted consumption of Striped Bass from the Patapsco River and Jones Falls and warn that certain fish from the Back River should be avoided completely. In addition, the City alleges that environmental research suggests that high concentrations of PCBs in local waters likely caused the declining size of the Baltimore Harbor heron colony.

On February 19, 2019, the City, [having responsibility for the] municipal stormwater and other water systems and waterbodies, brought this action solely in its governmental capacity and solely for the public benefit. The City asserts [the five tort claims against Defendants listed above, seeking actual and punitive damages,] in addition to declaratory and injunctive relief.

On April 15, 2019, Defendants filed the presently pending Motion to Dismiss, which has been fully briefed. On September 12, 2019, the City filed a Notice of Supplemental Authority, providing notice of a decision by Judge Ellen L. Hollander of this Court on Sept. 4, 2019 in State of Maryland v. Exxon Mobil Corp., et al., 406 F. Supp. 3d 420 (D. Md. 2019) [contamination of State's waters by gasoline additive, MTBE]. Defendants filed a response to the City's notice, requesting the Court disregard the notice and the *Exxon* decision [as distinguishable]. As discussed below, Judge Hollander's decision in *Exxon* is clearly relevant and instructive to the issues before this Court, and no further briefing on this question is necessary.

STANDARD OF REVIEW

I. Motion to Dismiss under Rule 12(b)(1)

A [Fed. R. Civ. Pro. 12(b)(1) motion to dismiss] for lack of subject-matter jurisdiction challenges a court's authority to hear the matter [alleged in the] complaint. . . .

II. Motion to Dismiss under Rule 12(b)(6)

Fed. R. Civ. Pro. 8(a)(2) provides that a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Rule 12(b)(6) authorizes the dismissal of a complaint if it fails to state a claim upon which relief can be granted. The purpose of Rule 12(b)(6) is "to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." The U.S. Supreme Court's opinions in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009), "require that complaints in civil actions be alleged with greater specificity than previously was required." Walters v. McMahen, 684 F.3d 435, 439 (4th Cir. 2012). In *Twombly*, the Supreme Court articulated "[t]wo working principles" that courts must employ when ruling on Rule 12(b)(6) motions to dismiss. *Iqbal*, 556 U.S. at 678. First, while a court must accept as true all factual allegations contained in the complaint, legal conclusions drawn from those facts are not afforded such deference. Id. (stating that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Second, a complaint must be dismissed if it does not allege "a plausible claim for relief." *Iqbal*, 556 U.S. at 679.

ANALYSIS

The Defendants seek dismissal of the City's Complaint on both procedural and substantive grounds. They contend that the City lacks Article III standing because it has not adequately pled damages. In addition, Defendants argue that the economic loss doctrine bars the City's strict liability and negligence claims. Defendants also argue that the City failed to state a viable damages claim. Finally, Defendants assert that the City has failed to state any of its claims for relief.

At this stage of the proceedings, the Defendants' arguments are without merit. In evaluating the sufficiency of the City's Complaint, this Court is guided by Judge Hollander's comprehensive opinion in the *Exxon* [case, cited above], denying Exxon's motion to dismiss identical claims asserted by the State of Maryland. Furthermore, this Court is mindful of the numerous lawsuits filed by major municipalities against Monsanto alleging similar claims based on the environmental and health effects of PCB contamination. See, e.g., [cases referred to above]. Notably, Monsanto has failed to secure a dismissal of any of these actions, some of which remain pending.

I. Standing

Defendants assert that the City lacks standing under Article III of the United States Constitution to bring this action because of the wholly speculative nature of its claimed damages. To establish Article III standing, a plaintiff must (1) show an injury in fact, (2) demonstrate a causal connection between the defendants' actions and the alleged injury, and (3) show that the injury will likely be redressed by a favorable outcome. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1995). . . .

[The City's] allegations suffice to plead injury in fact. While the precise extent of the damages is unknown at this point, the City has Article III standing to sue because it has adequately alleged actual, present, and concrete injuries to its storm water system as a result of PCB contamination.

II. Economic Loss Doctrine

Defendants also assert that this Court should not permit the City's strict liability and negligence claims because of Maryland's economic loss doctrine. The Court of Appeals of Maryland has delineated three possible types of losses related to products liability: "(1) personal injuries, (2) physical harm to tangible things, and (3) intangible economic loss resulting from the inferior quality of unfitness of the product to serve adequately the purpose for which it was purchased." A.J. Decoster Co. v. Westinghouse Elec. Corp., 634 A.2d 1330, 1332 (Md. 1994). Plaintiffs alleging only the third type, economic loss, are generally barred from bringing their claims under a products liability or any other type of tort theory. However, Maryland courts have [a] public safety exception for plaintiffs bringing claims alleging only economic loss. See Morris v. Osmose Wood Preserving, 667 A.2d 624 (Md. 1995).

Defendants argue that the economic loss doctrine bars the City from bringing its strict liability and negligence claims because the City does not allege any injuries to property, and because the City cannot avail itself of the public safety exception. First, the City has plainly alleged a property interest in the MS4 stormwater system that it owns and operates in a governmental capacity. Further, the City has alleged harm to that property interest by the excessive presence of PCBs in the water systems, requiring the City to take measures to reduce the volume of PCBs in its stormwater by implementing impervious surface restoration efforts, among other measures. Such allegations have been found sufficient to support a finding of a property interest in similar cases against Monsanto. . . .

Even if the City's harm alleged was purely economic, the City has sufficiently pled that the public safety exception would apply to preclude the application of the economic loss doctrine. To determine whether the public safety exception applies, Maryland courts examine "the nature of the damage threatened and the probability of damage occurring to

determine whether the two, viewed together, exhibit a clear, serious, and unreasonable risk of death or personal injury.". . .

At this early stage, this Court is satisfied that the City has sufficiently alleged a "real probability that damage or harm [will] occur" as a result of the PCB contamination in its waters. The City has alleged that such contamination has already occurred, and that the City's waters contain fish that are unsafe for human consumption because of their high levels of PCBs. Even more concerning are the City's allegations of the dangerous effects of PCB in animals and humans alike, including the EPA's determination that PCBs are probable human carcinogens, and that PCBs are associated with serious non-cancer health effects on the immune system, reproductive system, nervous system, and endocrine system [and other damages listed above].

[Thus], the Court finds that the economic loss doctrine does not [preclude] the City from bringing its strict liability or negligence claims. However, even if the economic loss doctrine does apply, the City has sufficiently alleged that the public safety exception allows the City to bring its claims for strict liability and negligence.

III. Damages Claim

[W]hatever Defendants may argue is the proper measure of damages in this case, the Court is satisfied that the City has properly pled damages at this stage. It is simply premature to rule upon the issue of damages in the context of a motion to dismiss as there has been no discovery or development of a record in this case.

IV. Public Nuisance (Count I)

Defendants assert that the City's public nuisance claim must fail because the City lacks standing and because the City has not pled that Monsanto had actual control over the alleged nuisance.

A. The City has sufficiently pled standing over its water bodies.

The thrust of Defendants' public nuisance standing argument is that the City has no ownership or proprietary interest in the water bodies and that the City has not alleged any special harm. Defendants recognize that a public official or public agency authorized to represent the State or a political subdivision may have standing to sue for public nuisance under Maryland law. . . . The City has provided its City Charter, adopted pursuant to the Constitution of Maryland, which adequately alleges its authority over its waters. [T]he Charter grants the City "full power and authority" to "prevent any material, refuse or matter of any kind from being . . . deposited in or placed where the same may fall, or be washed into [the Patapsco] river or tributaries." The Charter also grants the City "full power and authority" to "provide for the preservation of the health of all persons within the City . . . and to prevent and remove nuisances." . . . This Court is satisfied that the City has alleged its authority over all of its waters.

As to whether the City must allege a special harm, the City argues that it need not allege a special harm because such requirement is only for "individual action" and not actions brought by governmental plaintiffs. The *Rest. (2d) of Torts* provides that "a public official or public agency" that "represent[s] the state or a political subdivision in the matter" need not show special harm. *Rest. (2d) Torts* § 821C(1). Accordingly, the City, bringing this suit in its governmental capacity, need not allege the special harm that is required for a private individual bringing a public nuisance claim.

Even if the City was required to show special harm, it has done so. The City alleges that it suffered harm of a kind different from that suffered by members of the general public, namely the costly damage to its stormwater system and waters which it constructs and/or maintains for the public welfare. . . . These allegations suffice to allege standing to bring a public nuisance claim at this stage.

B. The City has sufficiently pled public nuisance.

"A public nuisance is an unreasonable interference with a right common to the general public." Tadjer v. Montgomery, 479 A.2d 1321, 1327 (Md. 1984) (quoting *Rest. of Torts (2d)* § 821B(1) (1979)); *Exxon*. Section 821B of the *Restatement* provides:

> Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Widespread water pollution is a public nuisance. *Exxon* (citing Rhode Island v. Atl. Richfield Co., 357 F. Supp. 3d 129, 142 (D.R.I. 2018); *Restatement* § 832).

Despite Defendants' assertion that the City has failed to plead Monsanto's control over the alleged nuisance, control is not a required element to plead public nuisance under Maryland law. In the recent opinion in *Exxon*, Judge Hollander . . . explained that "Maryland courts have never adopted the 'exclusive control' rule for public nuisance liability . . . ." Instead, "Maryland courts have found that a defendant who created or substantially participated in the creation of the nuisance may be held liable even though he (or it) no longer has control over the nuisance-causing instrumentality."

The City has sufficiently alleged that Defendants created or substantially participated in the creation of PCBs, even though Defendants may not have maintained control over the contaminants once disseminated in the City's waters. The City has alleged that Monsanto manufactured, distributed, marketed, and promoted PCBs, resulting in the creation of a public nuisance that is harmful to health and obstructs the free use of the City's stormwater and other water systems and waters. The City further alleges that Monsanto had extensive knowledge about PCB's harmful effects; intentionally withheld this information and misrepresented to the public and government officials that PCBs were safe; and manufactured and distributed PCBs in Baltimore's waters, causing harm to the City's humans, animals, and environment. . . .

V. Strict Product Liability—Defective Design and Manufacture (Count II)

. . . . Maryland has adopted the theory of strict liability for product liability, as set forth in the *Rest. (2d) of Torts* § 402A. *Exxon*, (citing Phipps v. Gen. Motors Corp., 363 A.2d 955, 963 (Md. 1976)). . . .

Under the consumer expectation test, the City has plausibly alleged that Monsanto defectively designed and manufactured PCBs from 1935 to 1977 and that it was foreseeable to Monsanto that PCBs would contaminate the environment in a widespread manner, reaching the City's stormwater systems, waterways, and waterbodies. Defendants argue that the City cannot recover under this theory because it was only a bystander and not a "user" or "consumer" of PCBs. Contrary to this assertion, "Maryland courts have never limited recovery in strict liability for design defect to ultimate users of the product." In *Exxon*, Judge Hollander noted that "the majority of courts that have addressed the issue have allowed bystanders to recover in strict liability against sellers for foreseeable injuries caused by defective products." Moreover, the Court noted that allowing such claims is supported by policy considerations because it "places the risk of harm on the entity most capable of controlling the risk."

[T]he City has adequately pled that PCB contamination in the nation's waters was a foreseeable risk of Defendants' design, manufacture, and distribution of PCBs. The City alleges that Monsanto's PCBs were unsafe as designed as demonstrated by Congress banning the production and sale of PCBs, and that due to their toxicity and inability to be contained, Monsanto knew its PCBs were not safe at the time the product was manufactured because it knew that the product, even when used as intended, would become a global contaminant and cause toxic contamination of waterways and wildlife, such as the City's stormwater system. These allegations suffice to state a claim for design defect.

VI. Strict Product Liability—Failure to Warn (Count III)

Defendants also argue that the City's strict liability failure to warn claim fails because Defendants owed no duty to warn the City of the

danger of PCBs. A seller of a product has a duty to warn of its dangers "if the item produced has an inherent and hidden danger that the producer knows or should know could be a substantial factor in causing an injury.". . .

As was explained in *Exxon*, "there is no duty to 'warn the world,' " but the duty does extend "to third persons whom the supplier should expect to be endangered by its use." Consequently, Judge Hollander found that Exxon "had a duty to warn the State of dangers associated with MTBE because they created and controlled a market for products in the State that posed unique, substantial harms to its resources." Similarly, here, the City alleges that the Defendants, as the sole manufacturer of PCBs, knew and expected that PCBs would cause widespread water contamination and failed to provide any warnings to the public. Accordingly, the City has sufficiently pled a claim for strict product liability of failure to warn based on Defendants' duty to warn the general public, whom they allegedly knew and expected would be endangered by PCBs.

VII. Trespass (Count IV)

Defendants assert that the City cannot state a claim for trespass because Defendants lacked control over the PCBs that caused the trespass. A trespass occurs "when a defendant interferes with a plaintiff's interest in the exclusive possession of the land by entering or causing something to enter the land." Here, again, the decision in *Exxon* is useful. In analyzing the State's assertion of a trespass claim based on the widespread contamination of its waters, Judge Hollander determined that the State was proceeding in "its *parens patriae* capacity," representing all of its citizens. Accordingly, this Court found that the State plausibly alleged a claim for trespass to the extent it is based on properties within its exclusive possession, but not "to the extent that it is based on properties outside of its exclusive possession—i.e., its natural waters and the properties of its citizens."

Here, too, the City is proceeding in its *parens patriae* capacity. Yet the concern over the extent of the trespass in *Exxon* is inapplicable here, where the City specifically alleges trespass only to "the City's public water systems, which the City operates and maintains for the public welfare," and which "suffer contamination with toxic PCBs." Accordingly, the City has sufficiently alleged a cause of action for trespass.

VIII. Negligence (Count V)

. . . This Court has already determined, above, Section VI, that the City has sufficiently pled Defendants' duty to warn the City and the public of the dangers of PCBs. The City has also sufficiently alleged Defendants' breach in failing to warn of the dangers, and that the City suffered actual harm to the City's waters and water systems as a result of Defendants' failure to warn of the dangers of PCBs. Consequently, the City has sufficiently alleged a cause of action for negligence.

IX. Continuing Harm Doctrine

Under the continuing harm doctrine, "each new repetition of the wrong creates further liability . . . and a new statute of limitations begins to run after each wrong perpetuated." SPS Ltd. P'ship, LLLP v. Sparrows Point, LLC, 122 F. Supp. 3d 239, 245 (D. Md. 2015).

[This doctrine does not apply here because the City's claims are not subject to the statute of limitations. Political subdivisions of the State, such as the City, are exempt from statutes of limitations in actions "aris[ing] out of a strictly governmental function." Goldberg. v. Howard Co. Welfare Bd., 272 A.2d 397, 400–401 (Md. 1971). . . .

CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss is DENIED.

Middlesex Water Company v. 3M Company

United States District Court, D. New Jersey, 2022.
2022 WL 16552920.

■ PADIN, J.

Defendant 3M Company moves for summary judgment on all claims in Plaintiff Middlesex Water Company's Second Amended Complaint [per] Fed. R. Civ. P. 56. [Motion denied.]

Plaintiff Middlesex Water Company . . . owns and operates regulated water utility and wastewater systems in New Jersey, Delaware, and Pennsylvania, including a public water system in Middlesex, NJ that serves over 60,000 customers. Defendant 3M [makes and sells] more than 60,000 products [e.g. Post-it notes, Scotch Tape, scouring pads, Ace bandages, and insulation].

This is a case about water contamination. Plaintiff alleges that Defendant [made and] sold products containing perfluorooctanoic acid ("PFOA") and perfluorooctanesulfonic acid ("PFOS") to more than a dozen key customers in New Jersey [which] led to the discharge of these chemicals into the environment, which contaminated Plaintiff's public drinking water supply.

PFOA and PFOS [are] manmade chemicals . . . referred to as per- and polyfluoroalkyl substances ["PFAS]," made and used in the US since at least the 1940s. PFAS are very persistent in the environment and in the blood of animals and humans . . . as they are extremely resistant to degradation, are able to migrate (e.g., from soil to groundwater), are not easily removed from the environment, and [which] typical water treatment plants are unable to filter or treat. [Sometimes dubbed "forever chemicals," PFAS have a wide array of harmful effects on humans, including kidney and testicular cancer, ulcerative colitis,

decreased immune system responses to vaccines, adverse effects on fetal development during pregnancy, and an increased risk of cancer.]

3M [produced PFOA and PFOS from the 1940s to] the early 2000s. Plaintiff alleges that as early as the 1950s, Defendant learned that PFAS are toxic [and] that its PFAS bioaccumulate in the human body [and, by] the 1960s and 70s, [3M] understood that PFAS persist in the environment and do not degrade. [Yet, Plaintiff also claims that Defendant actively sought to suppress scientific research on the hazards of PFAS and] mounted a campaign to control the scientific dialogue on [their] effects on human health, and ecological risks. . . .

In May 2016, the Environmental Protection Agency ("EPA") announced Drinking Water Health Advisories for PFOA and PFOS of 14 ppt.[1],[2] In June 2020, New Jersey's Dept. of Public Environ'l Protection ("NJDEP") adopted enforceable[3] Maximum Contaminant Level ("MCL") standards for PFOA and PFOS of 14 ppt and 13 ppt, respectively, for public drinking water.

. . . Plaintiff's public drinking water wells at its Park Ave. Treatment Plant ("Park Ave. Wells"), [in] South Plainfield, NJ, revealed levels in excess of EPA's advisories and NJDEP's guidelines[, e.g. water in the] Park Ave. Wells contained . . . PFOA in the first three quarters of 2020: 25 ppt; 23 ppt; and 36 ppt. Plaintiff alleges that Defendant has known of the toxicity and persistence of PFOA and PFOS for decades, but has knowingly and intentionally manufactured and distributed PFAS-containing products to the detriment of Plaintiff and New Jersey citizens.

Plaintiff['s] claims against 3M are: [Count 1, negligence; Count 2, negligent failure to warn; Count 3, strict liability failure to warn; Count 4, private nuisance; and Count 5, trespass.] Plaintiff seeks [damages for investigation, clean-up, abatement, remediation, engineering, treatment and monitoring to comply with federal and state regulatory advisories and standards, attorneys' fees, punitive damages, and any other appropriate equitable relief.

Defendant moves for summary judgment as to all five claims . . . .

A. Defendant is Not Entitled to Summary Judgment on Count One

[3M argues that Plaintiff cannot establish that Defendant proximately caused the contamination of the Park Avenue Wells because] (1) Defendant was not the only manufacturer who used electrochemical fluorination ("ECF") to manufacture PFOA and PFOS; (2) chromatograms cannot differentiate between ECF products by [different] manufacturer[s]; and (3) Plaintiff improperly relies on Defendant's substantial share of the PFOA and PFOS market. Plaintiff, in response,

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[1] Parts per trillion ("ppt").

[2] On September 15, 2022, the parties note in a status letter to the Court that EPA drastically lowered its advisories for PFOA to .004 ppt and PFOS to .002 ppt in June 2022. . . .

[3] Whereas, EPA's advisories are recommendations, NJDEP's MCLs are enforceable.

[argues] that it is more likely than not that Defendant manufactured the PFAS in the Park Avenue Wells [because] (1) Defendant was the primary global manufacturer of both PFOA and PFOS until the early 2000s; (2) Defendant's long-time toxicologist, Dr. John Butenhoff, testified that based on what he knows about the manufacturing and persistence of PFOS that it's a matter of mathematical probability that . . . 3M is more likely than not to be the source [of any PFOS particle found in the United States]; (3) Defendant is the only entity known to have distributed PFOA or PFOS-containing products to businesses in and around the Park Avenue Wells, . . . and the PFOA and PFOS in the Park Avenue Wells are highly correlated [with] PFAS present in Defendants' products; and (4) Defendant is reportedly responsible for 85 percent of global PFOA manufacturing and is the only known manufacturer of PFOS in the United States. . . . [Thus, 3M's] assertions do not, as a matter of law, stand up against the facts in the record.[7]

Defendant also claims that even if Plaintiff could demonstrate that [it] manufactured the PFOA and PFOS in the Park Avenue Wells that Plaintiff cannot establish proximate cause because it has not demonstrated that its harms were a natural and continuous consequence of Defendant's alleged tortious conduct. Specifically, Defendant asserts that Plaintiff has not identified a particular third-party user of Defendant's products whose use or disposal of those products in New Jersey caused the contamination of the Park Avenue Wells. [But Plaintiff persuasively rebuts] that it need only establish that Defendant's conduct made it foreseeable that a third-party's use and disposal of Defendant's PFAS would contaminate the water in the Park Avenue Wells (citing recent cases against 3M from Ohio, W. Va., and Ga).

[Thus, 3M's motion for summary judgement on negligence and proximate cause fails.]

B. Defendant is Not Entitled to Summary Judgment on Counts Two and Three

[Nor is 3M entitled to summary judgment on Plaintiff's negligence and strict liability claims that it] failed to warn Plaintiff and the public of the dangers of the PFAS in its products.

[A manufacturer is subject to liability in both negligence and strict liability for damages caused by its failure to provide adequate warnings to foreseeable users of a foreseeable danger in its products. . . . 3M] asserts that it is entitled to [summary] judgment because Plaintiff has not identified "what" product was dangerous and defective. Plaintiff

[7] [Defendant argues] that Plaintiff is asserting a market share theory of liability by proffering evidence that Defendant is the primary manufacturer of PFOA and PFOS in the US is misplaced. . . . Plaintiff merely provides evidence that Defendant holds such a large portion of the market that it would be inappropriate for the Court to determine as a matter of law that Defendant is not responsible for the contamination of the Park Avenue Wells. [Plaintiff still must establish] that Defendant proximately caused its damages, which is what the market share theory of liability does . . . .

responds that there is "no requirement that a warning be placed on a specific product to succeed" on a failure to warn claim . . . . The Court agrees with Plaintiff. . . . Specifically, Defendant's duty to warn foreseeable users is not limited to one product, but rather, it reasonably extends to any products containing PFAS that Defendant places into the market, and which Defendant knows or has reason to know contain PFAS. In fact, in N.J. Dep't of Envtl. Prot. v. E.I. du Pont de Nemours & Co., 2021 WL 6144081, at *4 (D.N.J. 2021), in a similar case brought by NJDEP against 3M, and others, the district court explicitly found that 3M owed a duty to warn NJDEP that "3M's PFAS-containing products could endanger New Jersey's citizens and environment." There, the district court emphasized that imposing a duty to warn on 3M—who was the party with the relevant knowledge to protect New Jersey's citizens and resources—was consistent with the foreseeability of the harm caused by PFAS and fairness. The [court there cited] Maryland v. Exxon Mobil Corp., 406 F. Supp. 3d 420 (D. Md. 2019), [where the court ruled] that the defendant owed a duty to warn the state about the dangers of methyl tertiary butyl ether ("MTBE") [which was mixed in gasoline and] could foreseeably end up in the environment through, inter alia, disposals, spills, and evaporative releases. . . . [T]he fact that Plaintiff does not identify a particular product manufactured by Defendant is not fatal to its failure to warn claims at this juncture.

Accordingly, [Defendant's summary judgment motion on Plaintiff's negligent and strict liability failure to warn claims is denied.]

C. Defendant is Not Entitled to Summary Judgment on the Scope of Plaintiff's Damages

. . . The Court concludes that a genuine dispute exists as to the scope of Plaintiff's damages [so that] Defendant is not entitled to judgment as a matter of law [with respect to damages].

D. Dismissal of Counts Four and Five

[The court noted that these claims properly had been dismissed.]

IV. CONCLUSION

. . . Defendant's motion for summary judgment will be denied [as to all of Plaintiff's claims above and] Defendant's claim to limit the scope of Plaintiff's potential damages. . . .

Maher, EPA Acts to Limit 'Forever Chemicals'

The Wall Street Journal A3, March 15, 2023.

The Environmental protection Agency [has just] proposed the first federal limits on so-called forever chemicals in public drinking water, a move . . . expected to cost water utilities billions of dollars to filter out [substances contaminating] water supplies of millions of people.

[PFAS, known] as forever chemicals because they take a long time to break down, . . . were used for decades in carpeting, clothing, food packaging, firefighting foam and other consumer and industrial products.

Once prized as innovative substances that could resist stains, water, grease and heat, PFAS are increasingly viewed as a threat because they persist in the environment and have been found in roughly 99% of the U.S. population. . . .

[The] EPA Administrator [remarked] "What began as a so-called miracle, groundbreaking technology meant for practicality and convenience quickly devolved into one of the most pressing environmental and public health concerns in the modern world . . . ."

NOTES

1. Other Liability Theories. As the court in *Middlesex*, other courts have dismissed trespass claims on various grounds, including absence of intent.

2. Defective Design. In New Jersey Dep't of Env't Prot. v. E.I. du Pont de Nemours & Co., 2021 WL 6144081, at *9 (D.N.J. 2021), where plaintiff argued that "the foreseeable risk to public health and welfare posed by 3M's PFAS outweighed the cost to 3M of reducing or eliminating such risk," the court refused to dismiss the defective design claim. See also note 3, below.

3. Public Nuisance. In a similar case to *Middlesex*, Utilities Board of Tuskegee v. 3M Co., Inc., 2023 WL 1870912, at *14–15 (M.D. Ala. 2023), the court rejected a claim for private nuisance but approved one for public nuisance:

> Contamination of a public water way is a public nuisance. Typically, a 'public nuisance gives no right of action to any individual' and 'must be abated by a process instituted in the name of the state.' However, private plaintiffs have standing to bring a claim for public nuisance, if they show 'special damage . . . different in kind and degree from the damage suffered by the public in general.' . . .
>
> While the public is certainly damaged by contaminated water in UBT's public water source, UBT suffers 'special damage[s]' because it uses the water in a unique way that most of the public does not or cannot: it draws, treats, and sells the water for consumption. UBT is, by definition, an entity that has a special right of use to the water that is not granted to the public at large, and UBT alleges that the water contamination has inconvenienced that right ('UBT's "special damages" include . . . expenses associated with the future installation and operation of a filtration system capable of removing Defendants' chemicals from the water; expenses incurred to monitor PFAS contamination levels; expenses incurred to purchase water from any other water system; expenses

> to properly dispose of PFAS removed from drinking water; and lost profits and sales . . . . These damages are unique and different from those who merely "use and enjoy" the water.'). Unlike general public use, UBT's facility is practically rendered useless as long as the nuisance persists absent abatement.

4. Problems with Various Claims. Other courts have been less receptive to some of these claims. In Suez Water N.Y. Inc. v. DuPont de Nemours & Co., 2023 WL 2601161, at *9, 19 (S.D.N.Y. 2023), defendant DuPont used PFAS to make Teflon and other products and could foresee that its industrial customers would cause PFAS to contaminate drinking water in the plaintiff's wells. But foreseeability of the harm, held the court, was not enough proof of plaintiff's public and private nuisance claims, which require intent. Nor did DuPont owe a duty of care to Suez to sustain a negligence claim, nor did it trespass upon the plaintiff's wells, since it had no control over its industrial customers, and since it did not *intend* for them to act to pollute plaintiff's wells. Yet the court did decline to dismiss plaintiff's defective design claim because plaintiff alleged that DuPont had developed a reasonable alternative design by 1980: "a replacement polymerizing agent that presumably did not leave trace amounts of PFOA on Teflon."

PART V

SPECIAL TYPES OF DEFENDANTS, TRANSACTIONS, AND PRODUCTS

CHAPTER 16

SPECIAL TYPES OF DEFENDANTS

1. RETAILERS, WHOLESALERS, AND DISTRIBUTORS

Page 718, Note 9, add after "*But see*":

KeraLink Int'l, Inc. v. Geri-Care Pharms. Corp., 60 F.4th 175, 184 (4th Cir. 2023) (Md. law) (sealed container defense inapplicable to apparent manufacturer who made express warranty that defective eye wash was sterile);

Page 729, Note 1, add to the end of the note:

See also Berkley Reg'l Ins. Co. v. John Doe Battery Mfr., 2023 WL 375934, at *4 (D. Minn. 2023) (Amazon's actions as a distribution facilitator of a defective third-party battery were not subject to strict products liability under Products Liability Rest. § 20 cmt. *g*).

Page 730, Note 3, add after the sentence beginning "In the next Case and Statute Supplement to this book":

Recall that the Third Circuit en banc vacated the *Oberdorf v. Amazon.com Inc*. panel decision in the casebook when it took the case for reconsideration. Following oral arguments, the en banc court decided to leave the matter to the Pennsylvania Supreme Court, certifying the question of whether an e-commerce business could be held strictly liable for a defective third-party product purchased on its platform. Oberdorf v. Amazon.com Inc., 818 Fed. Appx. 138, 143 (3d Cir. 2020). Although the Pennsylvania Supreme Court agreed to grant certification, the case was discontinued after the parties reached a settlement. See Barash, Amazon Seller Liability Issue Dropped at Pennsylvania High Court, Prod. Liab. & Toxics L. (Sept. 25, 2020).

Page 730, Note 4, add at the end of the note:

Compare A.M. v. Omegle.com, LLC, 614 F.Supp.3d 814, 821 (D. Or. 2022) (§ 230 immunity inapplicable; design defect and warning claims against chat room provider did not rest on publication of third-party content), with Anderson v. TikTok, Inc., ___ F. Supp. 3d ___, ___, 2022 WL 14742788, *4 (E.D. Pa. 2022) (dismissing products liability and negligence claims against TikTok under § 230 immunity; TikTok's algorithm promoted, but did not publish, the "Blackout Challenge" that led to child's death), appeal filed (3d Cir. 2022); Doe through Next Friend Roe v. Snap, Inc., 2022 WL 2528615, *14 (S.D. Tex. 2022) (dismissing design defect claims against Snapchat under § 230 immunity; illicit communications from teacher to student), appeal filed (5th Cir. 2022).

Page 730, add new Note 4.5:

4.5 Internet Provider Immunity—Social Media Algorithms and the CDA. In 2015, a U.S. citizen studying in Paris was mortally wounded during a terrorist attack on a café. ISIS claimed responsibility for the attack in a video posted on YouTube, which is owned by Google, and two of the terrorists participating in the attack were allegedly recruited to ISIS through social media posts linking to YouTube videos. Surviving family members sued Google for their loss, but the district court ruled that § 230 barred the claims. On appeal, the Ninth Circuit affirmed in part, ruling that § 230 immunity applied to Google's "use of content-neutral algorithms . . . for content posted by a third-party." Gonzalez v. Google LLC, 2 F.4th 871, 896, 899 (9th Cir. 2021).

On appeal in Gonzalez v. Google LLC, 143 S. Ct. 1191, 1192 (2023) the Supreme Court declined to consider whether § 230 immunity applied to interactive computer services that make targeted recommendations based on information provided by another information content provider, remanding for consideration under Twitter, Inc., v. Taamneh, 143 S. Ct. 1206, 1227 (2023), which, similar to the Ninth Circuit's decision, ruled unanimously that the "algorithms appear agnostic as to the nature of the content, matching any content (including ISIS' content) with any user who is more likely to view that content."

In short, the Supreme Court made no apparent inroads into internet providers' § 230 immunity to content provided by third parties on their platforms.

Page 730, add to the end of Section 1:

State Farm Fire & Cas. Co. v. Amazon.com, Inc.

United States Court of Appeals, Ninth Circuit, 2020.
835 Fed. Appx. 213.

■ SMITH, J. and NELSON, J.

MEMORANDUM

Plaintiff State Farm Fire and Casualty Co. ("State Farm") appeals the district court's grant of summary judgment, on cross motions for summary judgment, to Defendants, Amazon.com, Inc. and Amazon.com, LLC (jointly, "Amazon") on State Farm's strict liability and negligence claims.[1] We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

"We review de novo the district court's order granting summary judgment and its interpretation of state law." Diaz v. Kubler Corp., 785 F.3d 1326, 1329 (9th Cir. 2015) (citations omitted). "We determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the

[1] Other claims and defendants were either previously dismissed or are not at issue in this appeal.

district court correctly applied the relevant substantive law." L.F. v. Lake Wash. Sch. Dist. #414, 947 F.3d 621, 625 (9th Cir. 2020).

State Farm contends the district court erred in its interpretation and application of Arizona's strict liability laws. Specifically, it asserts the court articulated a "rigid" seven-factor balancing test, which it argues is incompatible with Arizona's emphasis on conducting a "totality of the circumstances" and "realities of the marketplace" approach to strict liability. State Farm also argues the district court erred by weighing all factors in favor of Amazon, thereby violating the mandate of Federal Rule of Civil Procedure 56 to weigh all facts and inference on a motion for summary judgment in favor of the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

Arizona adopted the *Second Restatement of Torts* § 402A ("Restatement § 402A") to impose "strict liability o[n] manufacturers and sellers of defective products that were unreasonably dangerous and caused physical harm to the consumer or his property." Torres v. Goodyear Tire & Rubber Co., 786 P.2d 939, 942 (Ariz. 1990). Arizona courts avoid the "technical limitations of the term seller or manufacturer as used in *Restatement* § 402A." Id. at 943. Rather, for strict liability to apply, an entity must be an "integral part of an enterprise" that resulted in the defective product being placed in the stream of commerce. Dillard Dep't Stores, Inc. v. Associated Merch. Corp., 782 P.2d 1187, 1193 (Ariz. Ct. App. 1989) (Claborne, J., dissenting) (collecting cases). In determining whether an entity is integral, the court "must also acknowledge the realities of the marketplace." *Torres*, 786 P.2d at 944 (finding Goodyear liable for a defective "Goodyear GB" tire where it was "designed to be a Goodyear tire, produced, packaged, advertised, and sold as a Goodyear tire, and warranted by Goodyear").

Arizona courts have repeatedly applied a contextual analysis and balanced multiple factors to determine whether a company "participate[d] significantly in the stream of commerce." Grubb v. Do It Best Corp., 279 P.3d 626, 627–28 (Ariz. Ct. App. 2012) (discussing cases and the various factors Arizona courts have used to determine whether strict liability applies); see also Antone v. Greater Ariz. Auto Auction, Inc., 155 P.3d 1074, 1076–80 (Ariz. Ct. App. 2007) (discussing cases and weighing factors). The district court accurately summarized the law when it stated that Arizona weighs

> a number of factors when determining if entities participate significantly in the stream of commerce and are therefore subject to strict liability, including whether they: (1) provide a warranty for the product's quality; (2) are responsible for the product during transit; (3) exercise enough control over the product to inspect or examine it; (4) take title or ownership over the product; (5) derive an economic benefit from the transaction; (6) have the capacity to influence a product's design and

> manufacture; or (7) foster consumer reliance through their involvement.

The court's decision to enumerate the existing factors was neither a novel approach to the law nor overly rigid. Rather, the court's articulation of the various strict liability factors was entirely consistent with existing Arizona case law.

In applying these factors, the district court found that the majority of factors weighed in favor of Amazon. We agree. First, Amazon expressly disclaims any warranties in its Business Services Agreement, which applied to the third-party seller of the allegedly defective hoverboards here. Not providing a warranty indicates that Amazon does not take responsibility for the quality of the product. Cf. *Torres*, 786 P.2d at 942 (finding strict liability where Goodyear "honors valid warranty claims" even for tires "manufactured by a subsidiary"). Second, while Amazon facilitated the shipping of the third-party seller's hoverboards from the warehouse to the consumer, this did not make Amazon the seller of the product any more than the U.S. Postal Service or United Parcel Service are when they take possession of an item and transport it to a customer. See *Grubb*, 279 P.3d at 629 (finding the company that sued under a strict products liability theory did not "participate significantly in the stream of commerce" as it "would not have been responsible if [a product] had been lost or damaged in transit"); *Dillard*, 782 P.2d at 1191 (same). Third, while Amazon could theoretically use its market power to inspect third-party sellers' products, in practice it does not. Instead, Amazon relies on sellers' representations regarding the contents of the packages it stores before placing them in an Amazon box for shipping. See *Antone*, 155 P.3d at 1079. Fourth, while Amazon did store and then mail the hoverboards to the customer on behalf of the third-party seller, at no time did Amazon take title to the hoverboards, which supports the conclusion that it is not the seller of the product. See id. (noting lack of ownership and control as significant factors against finding strict liability on the part of the automobile auction company). Fifth, Amazon derives only a small benefit from each of the transactions of the third-party sellers that use its services, suggesting that Amazon's interest in the transaction is limited. See *Grubb*, 279 P.3d at 629 (citing *Antone*, 155 P.3d at 1079). Sixth, while Amazon undoubtedly has the capacity, due to its market power, to influence third-party sellers' design and manufacturing decisions, State Farm shows little to support the conclusion that Amazon does so in practice. Cf. *Torres*, 786 P.2d at 942 (noting Goodyear's ability to control directly and indirectly the production of the allegedly defective tires). Seventh, the consumer reliance factor weighs in Amazon's favor because the third party is listed as the seller on the website and receipt, and State Farm does not cite to any cases that support its contention that an injured party's subjective belief about the identity of the seller weighs in favor of finding that entity strictly liable.

In sum, taking all of alleged facts in State Farm's favor, we conclude that under Arizona's existing body of case law, which requires us to balance various factors and provide a contextual analysis of whether the non-moving party participated significantly in the stream of commerce, summary judgment for Amazon is appropriate here. While Amazon provides a website for third-party sellers and facilitates sales for those sellers, it is not a "seller" under Arizona's strict liability law for the third-party hoverboard sales at issue here.

Because we conclude that Amazon was not the "seller" for purposes of strict liability, State Farm's negligence claim also fails.[2] Absent a duty to defendant and a breach of that duty, a negligence action fails. See Quiroz v. ALCOA Inc., 416 P.3d 824, 827–28 (Ariz. 2018). Here, Amazon did not owe a special duty to the injured party because it was not the seller. **AFFIRMED.**

■ CLIFTON, J., dissenting:

The questions presented by this case are questions of Arizona law. My colleagues have tried to answer the questions based on prior Arizona court decisions, as did the district court. Their answers are plausible, but different answers would also be plausible. See, e.g., Bolger v. Amazon.com, LLC, 267 Cal. Rptr. 3d 601, 612–25 (Ct. App. 2020). Amazon's responsibility for the transaction before us is not, in my view, clearly covered by prior Arizona cases. The role played by Amazon here was not contemplated in those decisions.

These questions are certain to reoccur, given the transformation Amazon has wrought on the marketplace. They should be answered by Arizona for itself. I would certify the questions to the Supreme Court of Arizona, the ultimate authority for interpretation of Arizona law. See Oberdorf v. Amazon.com, Inc., 818 Fed. Appx. 138, 143 (3d Cir. 2020) (certifying similar questions to the Supreme Court of Pennsylvania).

I respectfully dissent.

Bolger v. Amazon.com, LLC

Court of Appeal, Fourth District, Division 1, California, 2020.
267 Cal.Rptr.3d 601.

■ GUERRERO, J.

Plaintiff Angela Bolger bought a replacement laptop computer battery on Amazon, the popular online shopping website operated by

[2] Although it is not entirely clear, State Farm seems to raise new arguments on appeal regarding the source of the duty in negligence Amazon allegedly owed to the injured party. "Absent exceptional circumstances, we generally will not consider arguments raised for the first time on appeal, although we have discretion to do so." El Paso City v. Am. W. Airlines, Inc. (In re Am. W. Airlines, Inc.), 217 F.3d 1161, 1165 (9th Cir. 2000). Here, we find that no exceptional circumstances warrant considering these new arguments.

defendant Amazon.com, LLC. The Amazon listing for the battery identified the seller as "E-Life," a fictitious name used on Amazon by Lenoge Technology (HK) Ltd. (Lenoge). Amazon charged Bolger for the purchase, retrieved the laptop battery from its location in an Amazon warehouse, prepared the battery for shipment in Amazon-branded packaging, and sent it to Bolger. Bolger alleges the battery exploded several months later, and she suffered severe burns as a result.

Bolger sued Amazon and several other defendants, including Lenoge. She alleged causes of action for strict products liability, negligent products liability, breach of implied warranty, breach of express warranty, and "negligence/negligent undertaking." Lenoge was served but did not appear, so the trial court entered its default.

Amazon moved for summary judgment. It primarily argued that the doctrine of strict products liability, as well as any similar tort theory, did not apply to it because it did not distribute, manufacture, or sell the product in question. It claimed its website was an "online marketplace" and E-Life (Lenoge) was the product seller, not Amazon. The trial court agreed, granted Amazon's motion, and entered judgment accordingly.

Bolger appeals. She argues that Amazon is strictly liable for defective products offered on its website by 3d-party sellers like Lenoge. In the circumstances of this case, we agree.

As a factual and legal matter, Amazon placed itself between Lenoge and Bolger in the chain of distribution of the product at issue here. Amazon accepted possession of the product from Lenoge, stored it in an Amazon warehouse, attracted Bolger to the Amazon website, provided her with a product listing for Lenoge's product, received her payment for the product, and shipped the product in Amazon packaging to her. Amazon set the terms of its relationship with Lenoge, controlled the conditions of Lenoge's offer for sale on Amazon, limited Lenoge's access to Amazon's customer information, forced Lenoge to communicate with customers through Amazon, and demanded indemnification as well as substantial fees on each purchase. Whatever term we use to describe Amazon's role, be it "retailer," "distributor," or merely "facilitator," it was pivotal in bringing the product here to the consumer.

Strict products liability "was created judicially because of the economic and social need for the protection of consumers in an increasingly complex and mechanized society, and because of the limitations in the negligence and warranty remedies." Daly v. General Motors Corp., 20 Cal.3d 725, 733 (1978). It "arose from dissatisfaction with the wooden formalisms of traditional tort and contract principles in order to protect the consumer of manufactured goods." Id. The scope of strict liability has been expanded, where necessary, to account for "market realities" and to cover new transactions in "widespread use . . . in today's business world." Price v. Shell Oil, 2 Cal.3d 245, 252 (1970).

The structure of Amazon's relationship with Lenoge, on one hand, and Bolger, on the other, presents just such a new transaction now in widespread use. We must therefore return to the principles underlying the doctrine of strict products liability to determine whether it applies. See O'Neil v. Crane Co., 53 Cal.4th 335, 362 (2012); Jimenez v. Superior Court, 29 Cal.4th 473, 479–480 (2002). Those principles compel the application of the doctrine to Amazon under the circumstances here. As noted, Amazon is a direct link in the chain of distribution, acting as a powerful intermediary between the 3d-party seller and the consumer. Amazon is the only member of the enterprise reasonably available to an injured consumer in some cases, it plays a substantial part in ensuring the products listed on its website are safe, it can and does exert pressure on upstream distributors (like Lenoge) to enhance safety, and it has the ability to adjust the cost of liability between itself and its 3d-party sellers. Under established principles of strict liability, Amazon should be held liable if a product sold through its website turns out to be defective. See Vandermark v. Ford Motor, 61 Cal.2d 256 (1964). Strict liability "affords maximum protection to the injured plaintiff and works no injustice to defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship." Id. at [Further,] Amazon is not shielded from liability by 47 US Code § 230. That section of the Communications Decency Act of 1996 generally prevents Internet service providers from being held liable as a speaker or publisher of 3d-party content. It does not apply here because Bolger's strict liability claims depend on Amazon's own activities, not its status as a speaker or publisher of content provided by Lenoge for its product listing.

We therefore reverse the trial court's judgment in favor of Amazon. On remand, the court shall vacate its order granting Amazon's motion for summary judgment and enter an order granting the motion in part and denying it in part, as discussed more fully below.

FACTUAL AND PROCEDURAL BACKGROUND

. . . Many [are] familiar with the Amazon website. It is the world's most popular e-commerce website. In the US, approximately half of all online shopping dollars are spent on Amazon. The Amazon website is, in some sense, " 'the world's largest store' " in the Internet age.

Products sold on the Amazon website fall into two general categories. In one category are the products Amazon itself selects, buys from manufacturers or distributors, and sells to consumers at a price established by Amazon. These products, which make up approximately 40 percent of the website's sales, are not at issue in this appeal. In the second category are the products ostensibly sold by third parties through Amazon's website. These "3d-party sellers" select their own products, source them from manufacturers or distributors, set the purchase price, and use Amazon's website to reach consumers. They pay either a monthly fee or a per item fee for the opportunity to sell on Amazon's website.

[P]roduct listings for the two categories are often similar. The main distinction is that products not sold directly by Amazon include the words "Sold by" and the name of the 3d-party seller instead of Amazon. . . .

To purchase a product offered by a 3d-party seller, the customer adds it to his or her Amazon cart. At checkout, the order confirmation page again identifies the product as "Sold by" the 3d-party seller. To complete the purchase, Amazon charges the customer's credit card or other payment information in its files. Amazon informs sellers it collects all sales proceeds and accepts the risk that a customer's payment information will turn out to be fraudulent. After Amazon collects the payment, it deducts a referral fee (and other potential fees, discussed below), [and periodically] remits the [remainder] to the 3d-party seller.[1]

Some 3d-party sellers participate in the "Fulfilled by Amazon" (FBA) program. The FBA program allows 3d-party sellers to reach customers on a global basis. Third-party sellers must apply to register any product included in the FBA program, and Amazon may refuse registration for various reasons. Bolger's e-commerce expert [explained]: "This service allowed companies [to ship their] products to Amazon's warehouses [and then be offered for sale on] the Amazon.com Web site, and, if and when sold, would be shipped by Amazon to the buyer." Amazon may ship a product offered by one 3d-party seller together with products offered by other 3d-party sellers or by Amazon itself. Amazon controls the packaging for the shipment, which may include Amazon branding and Amazon-specific messaging.

To return an FBA product, the customer ships it back to Amazon, not the 3d-party seller. Amazon inspects the product and determines whether the product can be resold. If so, it will return it to the 3d-party seller's inventory at the Amazon warehouse. If not, the 3d-party seller can have it sent back to its own facilities.

In the FBA program, as Bolger's expert explained, "Amazon 'owns' the customer. This means that Amazon owns and controls the relationship with the buyer; the individual or company supplying products to the FBA program does not. The supplier has no direct relationship with the buyer, and indeed in most cases does not even have an indirect relationship with the buyer. That is, in most cases there are no communications between FBA supplier and buyer; the FBA supplier simply discovers in a report or some other form of notification that a product has been sold to the buyer." Amazon does not contact the seller for approval of the purchase; Amazon itself decides whether to allow the transaction to go through.

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[1] Although Amazon normally remits the sales proceeds on a schedule, it reserves the right to withhold or delay payment if it concludes the 3d-party seller's actions or performance "may result in customer disputes, chargebacks or other claims" related to its Amazon sales. Amazon also requires sellers to provide bank account and credit card information, which Amazon may use to obtain any amounts payable by the seller to Amazon.

Bolger's expert continued, "On occasions when communications between FBA suppliers and buyers, or between FBA suppliers and potential buyers, is necessary—when, for instance, a buyer has a problem with the product or a potential buyer has a pre-purchase question—communication is 'anonymized.' That is, Amazon provides a message console on the Amazon Marketplace Web site that sends messages between the two parties['] e-mail addresses, though neither party is provided with the other party's actual email address." Amazon requires 3d-party sellers to use only the tools and methods [it designates] to communicate with Amazon customers. Amazon prohibits 3d-party sellers from contacting customers to collect payments or influence their purchasing decisions. Indeed, 3d-party sellers may not use Amazon customer or transaction information "for any marketing or promotional purposes whatsoever."

Third-party sellers in the FBA program pay storage and fulfillment fees to Amazon, in addition to the general seller and referral fees paid by all 3d-party sellers[, together with] other fees in specific circumstances, such as for processing returns. Third-party sellers can also use the FBA program to fulfill orders placed through non-Amazon channels.

Amazon [governs] its contractual relationship with 3d-party sellers . . . by its Business Solutions Agreement (BSA), which Amazon requires all 3d-party sellers to accept. The BSA states that Amazon and a 3d-party seller are independent contractors, with no agency or employment relationship. Under the BSA, a 3d-party seller must represent that it is a duly organized business existing in good standing and will comply with all applicable laws. A 3d-party seller must indemnify Amazon for any claim related to its products sold through Amazon. If its sales are above a certain threshold, a 3d-party seller must obtain general commercial liability insurance, listing Amazon as an additional named insured.

The BSA prohibits 3d-party sellers from offering certain products [on] the Amazon website [and] generally prohibits sellers from listing a product at a higher price than the seller offers through other channels. If a 3d-party seller violates Amazon's policies or applicable law, Amazon may take corrective action, including suspending the seller, destroying inventory without compensation, and permanently [keeping] payments.

Amazon provides its customers with an "A-to-z Guarantee" for purchases made on its website, including from 3d-party sellers. The guarantee states, "We want you to buy with confidence anytime you make a purchase on the Amazon.com website or use Amazon Pay; that's why we guarantee purchases from 3d-party sellers when payment is made via the Amazon.com website . . . . The condition of the item you buy and its timely delivery are guaranteed under the Amazon A-to-z Guarantee." The A-to-z Guarantee covers defective products sold by 3d-party sellers. If a customer encounters a problem, he or she is required to attempt to contact the 3d-party seller through Amazon, but if the 3d-party seller does not respond, Amazon will refund the customer the product cost, the

original shipping cost, and the return shipping cost. Amazon may seek reimbursement of this refund from the 3d-party seller.

In addition, Amazon attempts to ensure the products offered by 3d-party sellers are safe. Amazon states that customer safety is a top priority. As Amazon's person-most-knowledgeable explained at his deposition, "[W]e've got a long and well-developed product-safety process, and that starts from the very beginning. When a 3d-party seller signs up to sell on the platform, [it has] to agree to the [BSA], which contains very clear language that says they have to sell products that meet all the compliance requirements for the jurisdictions that they're going to be selling the product in. Once products are being sold, we have a robust and active process to monitor for any customer complaints that come in. Regardless of the format that those come in, we track those, we log those, we report those things to [the Consumer Products Safety Commission]. And as—depending on the severity of the scope, the frequency, variety of factors, we will decide whether or not we're going to continue to sell a particular product or not. And that's an ongoing process. That happens every single day for every single product on the website . . . ." Later, he stated, "You know, Amazon does everything in its power and goes above and beyond to make sure that we're providing the best customer experience, including safe products. And, you know, I want that for all of our customers and for myself when I buy from Amazon, so I hope people believe that."[2]

Lenoge registered with Amazon as a 3d-party seller in December 2012. It chose to use the name "E-Life" on Amazon. Amazon's person-most-knowledgeable explained, "Sellers oftentimes don't want to use whatever the corporate entity name is, so they're allowed to specify a display name or a friendly name." Lenoge participated in Amazon's FBA program and later, pursuant to that program, offered the laptop battery at issue here for sale.

Bolger was part of Amazon's membership program, Amazon Prime, and often purchased products on Amazon. In August 2016, Bolger searched for replacement laptop batteries on the Internet, followed a link to Amazon's website, and purchased the Lenoge battery. Amazon charged her credit card for the $12.30 purchase price. The battery was stored at an Amazon fulfillment center in Oakland, California. Because Bolger was an Amazon Prime member, Amazon sent her the battery via free two-day shipping. She received the battery a few days later in Amazon packaging, including an Amazon-branded box with Amazon-branded shipping tape.

[2] Perhaps contradictorily, Amazon's consumer "Conditions of Use" state, "Parties other than Amazon operate stores, provide services, or sell product lines through the Amazon Services. . . . We are not responsible for examining or evaluating, and we do not warrant the offerings of, any of these businesses or individuals or the content of their Web sites. Amazon does not assume any responsibility or liability for the actions, product, and content of all these and any other third parties." The conditions go on to inform customers, in all capital letters, that "YOU EXPRESSLY AGREE THAT YOUR USE OF THE AMAZON SERVICES IS AT YOUR SOLE RISK."

Throughout the process, Bolger had no contact with Lenoge or anyone other than Amazon. She believed Amazon sold her the battery. Amazon's total fee for the transaction was $4.87, or approximately 40 percent of the purchase price.

The next month, Amazon suspended Lenoge's selling privileges because it became aware of a "grouping" of safety reports on Lenoge's laptop batteries and Lenoge did not respond to Amazon's requests for documentation. Three weeks later, Amazon permanently blocked Lenoge's account.

Less than a month after Amazon [blocked] Lenoge's account, Bolger was using her laptop when the replacement battery exploded. Bolger suffered serious burns and was hospitalized for two weeks.

Bolger filed this lawsuit in January 2017. As noted, her operative complaint alleges causes of action for strict products liability, negligent products liability, breach of implied warranty, breach of express warranty, and "negligence/negligent undertaking." She named Amazon and several other companies allegedly involved in the design, manufacture, distribution, or sale of the battery as defendants. Eventually Bolger added Lenoge as a defendant as well. She served Lenoge with her complaint, but it did not appear. The trial court entered its default. Another defendant, Herocell Inc., was also served and defaulted. Yet another defendant, Shenzhen Uni-Sun Electronics Co., is located in the People's Republic of China. Bolger initiated service of process but was informed it could take two to three years to complete.

Bolger's lawsuit was the first safety report Amazon received for the specific replacement battery model Bolger purchased. Soon after Bolger filed her complaint, Amazon "suppressed" the listing for the battery, i.e., it could no longer be offered for sale on Amazon. It is Amazon's standard practice to "purge" or destroy inventory in its possession for a product that has been suppressed.

Three months later, Amazon sent Bolger an email warning her that Amazon had learned that the Lenoge replacement battery "may present a fire hazard or not perform as expected[," and stating that] "we strongly recommend that you stop using [it] immediately." It directed her to dispose of the battery at a recycling center or waste disposal facility [and told] her that Amazon had provided a credit of the purchase price to her Amazon account. It concluded, "We trust you will understand the safety and satisfaction of our customers is our highest priority. Thanks for shopping at Amazon.com." The email was apparently sent to other customers who had purchased the battery as well.[3]

[3] Amazon's person-most-knowledgeable explained, "So as part of ongoing analysis of various products on the website, the safety team decided to—started to look at laptop batteries specifically. And rather than looking at just [product] by [product], they started to aggregate across other, you know, vectors including seller. They found there was a pattern with certain batteries and sellers of complaints. And so as a result of that for those specific sellers and [products], they made the decision to message customers and let them know that there was

After almost two years of litigation, Amazon filed its motion for summary judgment[, arguing] that it could not be held liable for defects in the replacement battery because it did not manufacture, distribute, or sell the battery to Bolger. It claimed it was merely a provider of services, namely an online marketplace and logistics operation. Amazon also argued that the CDA shielded it from liability because Bolger's causes of action were based on Amazon's publication of Lenoge's sales listing.[4]

In support of its motion, Amazon submitted documentation of Bolger's purchase, the BSA, Amazon's consumer "Conditions of Use," and its A-to-z Guarantee. It also submitted a declaration from an Amazon senior manager responsible for product safety, investigations, and recalls [who] described Amazon's business and the Lenoge battery transaction at issue. She stated, "Amazon operates an online marketplace at www.amazon.com. Though Amazon retails some products on its marketplace, the marketplace has more than a million 3d-party sellers selling their own products." Specifically, she explained, "E-life sourced the battery from the manufacturer or upstream distributors, sold the battery to [Bolger], set the price, provided any warranty, and controlled the terms of its offer. Amazon did not design or manufacture the product, sell or distribute the battery, set the price, provide a warranty, or control the terms of the product offer. Similarly, Amazon was not involved in sourcing the subject battery from the manufacturer or upstream distributor." The manager asserted that "E-life retained title to the battery at all times," and "E-life was also responsible for ensuring the battery that it sold to [Bolger] was properly packaged and complied with all applicable laws." The manager acknowledged Amazon's A-to-z Guarantee, but she denied it was a warranty. She stated, "The only warranty provided for a product comes from the 3d-party seller."

Bolger opposed Amazon's summary judgment motion. She argued that, regardless whether Amazon was technically the seller of the replacement battery, it was part of the chain of production and distribution and therefore strictly liable for any defects[; that] it was liable under California's marketing enterprise doctrine (Bay Summit Community Assn. v. Shell Oil Co., 51 Cal.App.4th 762, 776 (1996)); and that the CDA [did not apply] to shield Amazon from liability.

Bolger submitted several declarations, including her own, in opposition to Amazon's motion. Two of the declarations were from retained expert witnesses, one in the field of e-commerce and the other in the field of engineering. Bolger also submitted excerpts from the

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potential safety concerns and that we were refunding their money." Amazon now requires additional documentation, including Underwriters Laboratories certification, from new sellers who would like to offer replacement batteries on Amazon.

[4] Amazon challenged Bolger's cause of action for negligent undertaking on the additional grounds that it had no duty to warn Bolger of safety issues with Lenoge's replacement batteries, that Bolger did not rely on any allegedly negligent undertaking by Amazon, and that Amazon's suspension of Lenoge's selling privileges did not increase the risk of harm to Bolger. Bolger does not challenge the trial court's order to the extent it summarily adjudicated her negligent undertaking cause of action in Amazon's favor.

deposition transcripts of several Amazon employees, including its designated person-most-knowledgeable.[5]

After argument, the trial court granted Amazon's [summary judgment motion, ruling] that Amazon was not strictly liable for defective products offered by 3d-party sellers on its website. Amazon was not a seller or distributor of the replacement laptop battery [but] was a "provider of services by maintaining an online marketplace, warehousing and shipping goods and processing payments." The court also found that Amazon was not strictly liable under the marketing enterprise doctrine. It likewise found that Bolger's warranty and negligent undertaking claims had no merit, and Bolger had not offered any contrary arguments. The court entered judgment in favor of Amazon, and Bolger now appeals.

DISCUSSION

I. Summary Judgment Standards

"A defendant's motion for summary judgment should be granted if no triable issue exists as to any material fact and the defendant is entitled to a judgment as a matter of law. . . .

II. Strict Products Liability

"[T]he concept of strict products liability was created and shaped judicially. In its evolution, the doctrinal encumbrances of contract and warranty, and the traditional elements of negligence, were stripped from the remedy, and a new tort emerged which extended liability for defective product design and manufacture beyond negligence but short of absolute liability." *Daly,* 20 Cal.3d at 733. Our Supreme Court first recognized the doctrine of strict liability for defective products more than 50 years ago. See Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 62 (1963). Initially limited to manufacturers, the doctrine reflected judicial concern that "the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market, rather than by the injured persons who are powerless to protect themselves." Id.

Soon after, the Supreme Court extended strict liability to retailers: "Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety. Strict liability on the manufacturer and

[5] Amazon objected on various grounds to much of Bolger's evidence. The trial court sustained a number of these objections, including to portions of Bolger's e-commerce expert declaration and the entirety of Bolger's engineering expert declaration. Bolger has not challenged these evidentiary rulings on appeal. We therefore do not consider the merits of these rulings, and we likewise do not consider any evidence to which objections were sustained.

retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship." *Vandermark,* 61 Cal.2d at 262–63.

Our Supreme Court has "given [the] rule of strict liability a broad application." *Price,* 2 Cal.3d at 250. "Such a broad philosophy evolves naturally from the purpose of imposing strict liability . . . . Essentially the paramount policy to be promoted by the rule is the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them." Id. In its first decade, the rule was made applicable to numerous businesses in the chain of distribution of a product, including bailors and lessors, wholesalers and distributors, and sellers of mass-produced homes.

Interpreting these foundational precedents, courts have generally applied the doctrine of strict products liability to entities "involved in the vertical distribution of consumer goods," where the policies of the doctrine support its application. *Bay Summit,* 51 Cal.App.4th at 773. "Although these defendants were not necessarily involved in the manufacture or design of the final product, each was responsible for passing the product down the line to the consumer. Thus, the parties were 'able to bear the cost of compensating for injuries' and 'play[ed] a substantial part in insuring that the product [was] safe or . . . [were] in a position to exert pressure on the manufacturer to that end.' " Id. "Beyond manufacturers, anyone identifiable as 'an integral part of the overall producing and marketing enterprise' is subject to strict liability." Arriaga v. CitiCapital Commercial Corp., 167 Cal.App.4th 1527, 1534 (2008).

The doctrine of strict products liability, while broad, is not unlimited. It does not cover injuries caused by a defective product in all situations where the product was in some sense distributed or provided by the defendant. For example, in Peterson v. Superior Court, 10 Cal.4th 1185 (1995), our Supreme Court rejected prior precedent extending the doctrine to hotel proprietors and residential landlords whose guests or tenants are injured by a defect in the leased dwelling or other premises. And courts have repeatedly found that dealers in used products are not strictly liable for defects in those products, unless they rebuild or recondition them and thereby assume a role [similar] to a manufacturer.

"[R]ecovery [for] strict liability is limited solely to 'physical harm to person or property.' Damages available under strict products liability do not include economic loss . . . ." *Jimenez,* 29 Cal.4th at 482.

To determine whether the doctrine of strict products liability should be applied in a situation that has not been considered by previous precedents, courts primarily look to the purposes of the doctrine. *O'Neil,* 53 Cal.4th at 362. "The strict liability doctrine derives from judicially perceived public policy considerations, i.e., enhancing product safety, maximizing protection to the injured plaintiff, and apportioning costs among the defendants. Where these policy justifications are not

applicable, courts have refused to hold the defendant strictly liable even if that defendant could technically be viewed as a ' "link in the chain" ' in getting the product to the consumer market. In other words, the facts must establish a sufficient causative relationship or connection between the defendant and the product so as to satisfy the policies underlying the strict liability doctrine." *Arriaga,* 167 Cal.App.4th at 1535.

Although the precise transaction at issue here is a matter of first impression in California, two analogous (albeit substantially pre-Internet) cases are instructive: Canifax v. Hercules Powder Co., 237 Cal.App.2d 44 (1965) and Barth v. B.F. Goodrich Tire Co., 265 Cal.App.2d 228 (1968).

In *Canifax*, the plaintiff was injured when an allegedly defective fuse caused dynamite to accidentally explode during excavation of an underground tunnel. The defendant acted as an intermediary between the "jobber" who sold the fuse and the manufacturer. The customer purchased the fuse (and related supplies) from the jobber, who in turn placed an order with the defendant. The defendant passed on the order for the fuse to the manufacturer, who shipped [it] directly to the jobber. "[Defendant] never had possession of the fuse, [but it did 'subsequently . . . bill the customer and pay the manufacturer's invoice.' " Id.

The appellate court held that the rule of strict products liability applies "to 'any person engaged in the business of selling,' and therefore applies not only to manufacturers but 'to any wholesale or retail dealer or distributor.' Thus, with the operations of [the defendant] described, it should undoubtedly be included within the rule. The fact that it chooses to delegate the manufacture of [the] fuse to another and that it causes the manufacturer to ship the product directly to the consumer cannot be an escape hatch to avoid liability." *Canifax,* 237 Cal.App.2d at 52, quoting Rest.2d Torts, § 402A, com. *f*.

Like the defendant in *Canifax*, Amazon [was] an intermediary between an upstream supplier and [the] consumer. Amazon accepted an order for a product, billed the consumer, and remitted the proceeds to the upstream supplier. Indeed, in this case Amazon went further. It took possession of the product, so it fulfilled the consumer's order directly.

In *Barth*, a woman was killed and her passengers injured when the station wagon the woman was driving crashed, allegedly as a result of a defective tire. The station wagon had been provided to the woman's husband by his employer [who] had an agreement with B.F. Goodrich to supply replacement tires, on a national basis, to the employer's fleet of vehicles. [A Goodrich distributor, Perry & Whitelaw,] retrieved two tires from its inventory and installed them on the station wagon. . . .

In the trial court, the jury rejected plaintiffs' cause of action for strict products liability against Perry & Whitelaw. On appeal, the plaintiffs argued the trial court erred by instructing the jury that Perry & Whitelaw could be strictly liable only if it "sold" the tire in question to

the employer. The trial court defined a sale as " 'a transfer or an agreement to transfer goods to a buyer for a price.' "

The appellate court reversed the judgment. It held that a sale, as defined by the trial court, was not required for strict liability to apply [because the doctrine] extended to "any person engaged in the business of selling products for use or consumption therefore including any manufacturer, wholesaler or retail dealer or distributor as well as operators of restaurants." Id., citing Rest.2d Torts, § 420A, com. *f*. The appellate court concluded, "Clearly, Perry & Whitelaw was a distributor within the *Restatement* definition of the term seller for the purpose of the application of the doctrine of strict liability . . . ."

The appellate court specifically rejected Perry & Whitelaw's argument that "it was not a 'seller' of the tire to [the employer] but only served as a conduit for the sale that was made by Goodrich through [a 3d party] to [the employer]; that the situation is analogous to a transaction where Perry & Whitelaw merely installed a tire ordered by a customer from another retailer or wholesaler." *Barth,* 265 Cal.App.2d at 251. The court held that "neither the transfer of title to the goods nor a sale is required" for strict liability to apply. Perry & Whitelaw retrieved the tires from its inventory and benefitted from the transaction in the form of a fee (service charge) from B.F. Goodrich, reimbursement for the tires, and the continued ability to service Goodrich's national accounts.

Moreover, the [safety] rationale for the doctrine of strict liability supported its application to Perry & Whitelaw. . . . Citing *Canifax*, the court pointed out, "[A] wholesaler distributor who neither manufactures the product nor has possession of the goods can be held to the doctrine of strict liability." In general, "all suppliers in the chain of getting goods from the manufacturer to the consumer should be held" strictly liable. Id.

Like the defendant in *Barth*, Amazon was a link in the chain of product distribution even if it was not a seller as commonly understood. Pursuant to a contract with the seller, Amazon retrieved the product from its warehouse and supplied it to the consumer. And again, Amazon went further. Its business model compels the consumer to interact directly with Amazon, not the seller, to place the order for the product and pay the purchase price.

Ultimately, however, neither *Canifax* nor *Barth* fully anticipated the details of Amazon's involvement in the transaction at issue here. Our review of the record shows that Amazon played an even more meaningful role in this transaction than the defendant in either of those earlier cases.

Amazon created the environment (its website) that allowed Lenoge to offer the replacement battery for sale. Amazon attracted customers through its own activities, including its direct offers for sales and its Amazon Prime membership program, which includes benefits for some products offered by 3d-party sellers (including the Lenoge replacement battery at issue here). Amazon set the terms of Lenoge's involvement,

and it demanded fees in exchange for Lenoge's participation. Amazon required Lenoge to indemnify it and, assuming Lenoge met the sales threshold, to obtain general commercial liability insurance listing Amazon as an additional named insured. Because Lenoge participated in the FBA program, Amazon accepted possession of Lenoge's products, registered them in its inventory system, and stored them in an Amazon warehouse awaiting sale. Amazon created the format for Lenoge's offer for sale and allowed Lenoge to use a fictitious name in its product listing. The listing itself conforms to requirements set by Amazon. Even setting aside the use of a fictitious name, the listing does not conspicuously inform the consumer of the identity of the 3d-party seller or the nature of Amazon's relationship to the sale.

To purchase the product, the consumer adds it to her Amazon cart, not her Lenoge or E-Life cart. The consumer pays Amazon for the product, not Lenoge or E-Life. And, in the FBA program, Amazon personnel retrieve the product from its place in an Amazon warehouse and ship it to the consumer in Amazon-branded packaging. If convenient, Amazon will ship the product together with products sold by other 3d-party sellers or by Amazon itself.

Lenoge is not involved in the sales transaction. It does not approve the sale before it is made. It may not even know a sale has occurred until it receives a report from Amazon. It does not receive payment until Amazon chooses to remit the proceeds. Its use of any customer or transaction information, if it even receives any from Amazon, is strictly limited. But it accepts the burden of substantial fees for Amazon's participation, approximately 40 percent here.

If a customer wishes to return the product, she ships it back to Amazon under the FBA program. Amazon personnel inspect the product, determine whether it can be resold, and if so return it to inventory in the Amazon warehouse. Third-party sellers like Lenoge are prohibited from communicating with Amazon customers except through the Amazon website, where such interactions are anonymized.

Given these facts, Amazon is an "integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products." *Vandermark,* 61 Cal.2d at 262. Amazon was "involved in the vertical distribution of consumer goods" and "responsible for passing the product down the line to the consumer." *Bay Summit,* 51 Cal.App.4th at 773. It was one of the entities "responsible for placing a defective product into the stream of commerce." *O'Neil,* 53 Cal.4th at 349. Amazon enabled Lenoge to offer the replacement battery for sale, inventoried and stored the replacement battery, accepted Bolger's order for the battery, billed Bolger the purchase price for the battery, received her payment, retrieved the battery from its inventory, and shipped the battery to her in Amazon-branded packaging.

Our consideration of the policies underlying the doctrine of strict products liability confirm that the doctrine should apply here. Amazon is

" 'an integral part of the overall producing and marketing enterprise,' may in a particular case 'be the only member of that enterprise reasonably available to the injured plaintiff,' and may be in the best position to ensure product safety." *Jimenez*. Amazon can, and indeed already does, "adjust the costs of liability in the course of [its] continuing business relationship with other participants in the overall manufacture and marketing enterprise." For each of these policies, Amazon functions in much the same manner as a conventional retailer. Because the " 'overriding policy considerations' " are similar for each, Amazon should be held strictly liable. We will discuss each policy in turn.

First, Amazon, like conventional retailers, may be the only member of the distribution chain reasonably available to an injured plaintiff who purchases a product on its website. *Vandermark,* 61 Cal.2d at 262. The Amazon website, and especially the FBA program, enables manufacturers and sellers who have little presence in the United States to sell products to customers here. In fact, the Amazon-designed features described above facilitate such a limited presence. The dilemma for an injured plaintiff is illustrated by this litigation, where two defendants have been served and failed to appear, and a third defendant can only be served in China. Other plaintiffs have encountered similar obstacles. See, e.g., Fox v. Amazon.com, Inc., 930 F.3d 415, 424 (6th Cir. 2019). Because imposing strict liability on Amazon would help compensate some injured plaintiffs who would otherwise go uncompensated, Amazon's inclusion within the rule would promote its purposes. "By extending liability to entities farther down the commercial stream than the manufacturer, the policy of compensating the injured plaintiff is preserved, and retailers and distributors remain free to seek indemnity against the manufacturer of the defective product." Kaminski v. Western MacArthur Co., 175 Cal.App.3d 445, 456 (1985).

Second, Amazon, again like conventional retailers, "may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety." *Vandermark,* 61 Cal.2d at 262. Amazon's current efforts in this area show it has the capacity to exert its influence on 3d-party sellers to enhance product safety. It has "a robust and active process" to monitor, track, and log consumer complaints. It analyzes these complaints and determines whether to continue allowing a product to be offered for sale on Amazon. Amazon requires 3d-party sellers, as a contractual matter, to comply with all applicable laws and regulations. It has the power to demand proof of such compliance, or of additional certifications, before a 3d-party seller may offer products for sale. For example, Amazon recently imposed a requirement for Underwriters Laboratory certification for 3d-party sellers that intend to offer replacement batteries. If Amazon is unsatisfied with a 3d-party seller's response, or if its products turn out to be defective, Amazon has the power to suspend sales of certain

products or block a 3d-party seller from offering products for sale—as it did with Lenoge. [L]ike a conventional retailer, Amazon can use its power as a gatekeeper between an upstream supplier and the consumer to exert pressure on those upstream suppliers (here, 3d-party sellers) to enhance safety. It therefore serves the purposes of the doctrine to impose strict liability on Amazon, by adding an extra incentive for Amazon to do so.

Relatedly, the record shows that products sold on Amazon enjoy an "implied representation of safety," which also supports the imposition of strict liability under the circumstances here. *Peterson,* 10 Cal.4th at 1202. As Amazon's person-most-knowledgeable claimed at his deposition, "Amazon does everything in its power and goes above and beyond to make sure that we're providing the best customer experience, including safe products. And, you know, I want that for all of our customers and for myself when I buy from Amazon, so I hope people believe that." Because Amazon customers have an expectation of safety—and Amazon specifically encourages that expectation—it is appropriate to hold Amazon strictly liable when a defective product is sold through its website.

Third, Amazon, like conventional retailers, has the capacity to adjust the cost of compensating injured plaintiffs between itself and the 3d-party sellers in the course of their ongoing relationship. *Vandermark,* 61 Cal.2d at 263. Amazon already imposes continuing contractual duties on 3d-party sellers, including the requirement that 3d-party sellers broadly indemnify Amazon. Amazon requires 3d-party sellers to provide credit card and bank account information to ensure those duties are enforced. Additionally, Amazon can delay or withhold payments to a 3d-party seller if it determines the seller's actions or performance "may result in customer disputes, chargebacks or other claims" related to its Amazon sales. If a 3d-party seller's revenues exceed a certain threshold, the 3d-party seller must also obtain general commercial liability insurance, listing Amazon as an additional named insured. These provisions already distribute costs between Amazon and the 3d-party sellers. We note these provisions are merely illustrative of Amazon's *ability* to adjust the costs of liability between itself and 3d-party sellers; the imposition of strict liability does not depend on the current existence of any of these provisions. Because Amazon has the ability to adjust the cost of compensating injured plaintiffs between itself and 3d-party sellers, imposing strict liability on Amazon along with other members of the chain of distribution serves the purposes of the doctrine. See, e.g., State Farm Fire & Casualty Co. v. Amazon.com, Inc., 390 F.Supp.3d 964, 972 (W.D. Wis. 2019) ("The undisputed facts show that Amazon is an integral part of the chain of distribution, an entity well-positioned to allocate the risks of defective products to the participants in the chain.").

In its contrary arguments, Amazon focuses on dictionary definitions of "seller" and "distributor" and claims it cannot be held strictly liable because those definitions do not apply to it. It characterizes its business

as a service, i.e., a forum for others to sell their products, and therefore outside the rule of strict liability. It also contends the policy considerations behind the rule do not support its application here. Amazon's arguments are unpersuasive.

Dictionary definitions of seller and distributor do not define the scope of strict liability in California. Nor does Commercial Code section 2106, defining a "sale" for purposes of the law of sales. Amazon has not cited any California precedent applying such definitions to determine the scope of strict liability. Out-of-state authorities relying on such definitions (see, e.g., Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 141 (4th Cir. 2019)) or the sales requirement of title transfer are inapplicable.[6]

The doctrine of strict liability in California was intended to cut through such technicalities and compensate plaintiffs for injuries caused by defective products. See *Price,* 2 Cal.3d at 251; *Daly,* 20 Cal.3d at 733; see also *Kaminski,* 175 Cal.App.3d at 457 ("The constant theme of strict tort liability has been 'to elevate justice and equity above the exact contours of a mathematical equation. . . .' "). The doctrine applies to every entity involved in the vertical distribution of consumer goods, so long as the policies of the doctrine support its application. *Arriaga,* 167 Cal.App.4th at 1534–35; *Bay Summit,* 51 Cal.App.4th at 773. Where an entity is "an integral part of the overall producing and marketing enterprise" for a consumer product, it should bear the cost of injuries resulting from product defects. *Vandermark,* 61 Cal.2d at 262; accord, *Jimenez,* 29 Cal.4th 479.

In a similar vein, Amazon argues that sellers have control over a product, and "control is the touchstone for product liability." To support this proposition, Amazon quotes *O'Neil,* 53 Cal.4th at page 349: "It is fundamental that the imposition of liability requires a showing that the plaintiff's injuries were caused by an act of the defendant or an instrumentality under the defendant's control." *O'Neil* has no application here, since it involved an attempt to hold a manufacturer responsible for defects in *another* manufacturer's product. Unlike Amazon, the defendant in *O'Neil* had no involvement with the other manufacturer's product and was not part of the product's chain of distribution. But accepting the quoted statement at face value, it does not support Amazon's position. Amazon had control over both the product [and] the transaction that resulted in its sale to Bolger. It constructed the Amazon website, accepted Lenoge as a 3d-party seller, marketed Lenoge's offer

[6] The issue of Amazon's strict liability for 3d-party sales has been, and continues to be, litigated in state and federal courts across the country. The parties have cited numerous published and unpublished authorities from other jurisdictions. Some hold Amazon strictly liable (see, e.g., *State Farm,* 390 F.Supp.3d at 973), while others do not (see, e.g., *Erie,* 925 F.3d at 144). Ultimately these authorities are of limited utility. Many [are] factually distinguishable, including because the product at issue was not sold through Amazon's FBA program. Many [are] legally distinguishable, including because other state statutes or case law have limited strict liability in a manner inconsistent with California law. . . .

for sale, took possession of the replacement battery, accepted Bolger's order for the battery, billed her for the purchase price, and shipped her the battery in Amazon-branded packaging. But for Amazon's own acts, Bolger would not have been injured. Amazon's own acts, and its control over the product in question, form the basis for its liability.[7]

Amazon relies heavily on the suggestion that it did not *choose* to offer the Lenoge replacement battery for sale[, which is true]. But that fact is not determinative here for two reasons. First, regardless whether Amazon selected this particular battery for sale, it chose to host Lenoge's product listing, accept Lenoge into the FBA program, take possession of the battery, accept Bolger's order, take her payment, and ship the battery to her. Amazon is therefore part of the chain of distribution even if it did not consciously select the Lenoge replacement battery for sale. Second, and more fundamentally, Amazon *did* choose to offer the Lenoge replacement battery for sale. Amazon is no mere bystander to the vast digital and physical apparatus it designed and controls. It chose to set up its website in a certain way, it chose certain terms and conditions for 3d-party sellers and their products, it chose to create the FBA program, it chose to market 3d-party sellers' products in a certain manner, it chose to regulate 3d-party sellers' contact with its customers, it chose to extend certain benefits to its customers and members who purchase 3d-party sellers' products, and most importantly it chose to allow the sale at issue here to occur in the manner described above. Amazon made these decisions consciously, and if it had made different decisions, the mix of products offered and sold on its website would have been different. The Lenoge replacement battery might not even have been offered for sale—as indeed it currently is not because of safety concerns. Nothing aside from Amazon's own choices required it to allow Lenoge to offer its product for sale, to store Lenoge's product at its warehouse, to accept Bolger's order, or to ship the product to her. It made these choices for its own commercial purposes. It should share in the consequences.

Amazon analogizes its role to an auctioneer or finance lessor, which California courts have found not strictly liable for product sales that they merely facilitate. This analogy is inapt.

The auctioneer precedents apparently involve the sale of *used* goods, which for obvious reasons are distinguishable. One opinion suggested in dicta that an auctioneer who was the exclusive sales agent for *new* consumer goods would be strictly liable. In any event, the role of the auctioneers in these opinions was much more limited than Amazon's role. The auctioneers played no more than a "random and accidental role" in transferring the goods from the seller to the buyer. They had no

[7] As one commentator has explained, "All those involved in the distribution chain play a part in stimulating consumer demand for the product through advertising and marketing techniques in order to enhance their own profits. By so doing, they necessarily increase the number of persons exposed to risk of injury from the product. Having increased the risk, they should bear the burden of resulting injuries." Zerne et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2019) ¶ 2:1178.

continuing relationship with anyone in the original chain of distribution to the consumer and therefore could not exert any influence on product safety. Here, Amazon was part of the original chain of distribution, and its role was anything but random and accidental. The auctioneer precedents are inapposite.

Finance lessors were at issue in *Arriaga,* 167 Cal.App.4th 1527. The court summarized their commercial role as follows: "To a substantial extent, the role of a finance lessor may be analogized to the role of a bank that loans money to its clients. However, rather than simply loaning the money for the purchase to the ultimate user of the equipment, the transaction is set up as a 'lease,' with the lessor 'purchasing' the equipment for the specific purpose of 'renting' it to the user. Accordingly, the finance lease can be thought of as a 'disguised' security agreement, a secured installment sales contract, or a lease ' " 'intended as security.' " ' Normally, the lessor is unfamiliar with the particular equipment involved. Further, although this security agreement is written in lease form, the finance lessor does not expect to retake the equipment at the end of the lease period. Therefore, the parties generally execute a contemporaneous option whereby the user can purchase title to the equipment from the lessor at the end of the lease period for an amount less than the then expected value of the equipment."

Arriaga accepted that finance lessors may be a link in the vertical chain of distribution. But, as noted above, "strict liability is not imposed even if the defendant is technically a 'link in the chain' in getting the product to the consumer market if the judicially perceived policy considerations are not satisfied[, to wit, unless imposing strict liability] will enhance product safety, maximize protection to the injured plaintiff, and apportion costs among the defendants."

Arriaga found that a critical policy consideration behind the doctrine of strict liability, enhancing product safety, would not be satisfied by imposing liability on finance lessors. *Arriaga,* 167 Cal.App.4th at 1538. "A finance lessor . . . does not select the specific machine or manufacturer of the machine. Accordingly, unlike a retailer or a commercial lessor, the finance lessor does not maintain an ongoing relationship with a particular manufacturer. Thus, the finance lessor is not in any position to either directly or indirectly exert pressure on the manufacturer to enhance the safety of the product." Here, unlike a finance lessor, Amazon *does* have a continuing relationship with its 3d-party sellers. Lenoge was an Amazon seller for four years before the sale at issue here. Amazon can and does exert pressure on those sellers to enhance the safety of their products. *Arriaga* is therefore inapplicable.[8]

[8] Amazon also compares itself variously to a shopping mall landlord, a credit card issuer, a trucking company, an Internet search provider, or a newspaper running classified advertisements. Amazon claims that holding it strictly liable would lead to strict liability for these entities as well. Amazon does not support this claim with any legal argument, and the obvious differences between Amazon and those entities do not need to be elucidated here.

Amazon also cites *Products Liability Restatement* § 20, cmt. *g*, which states, "Persons assisting or providing services to product distributors, while indirectly facilitating the commercial distribution of products, are not subject to liability under the rules of this *Restatement*. Thus, commercial firms engaged in advertising products are outside the rules of this *Restatement*, as are firms engaged exclusively in the financing of product sale or lease transactions. Sales personnel and commercial auctioneers are also outside the rules of this *Restatement*."

Amazon does not explain how this exclusion [helps it], nor whether the exclusion is consistent with California law. Our Supreme Court, which originated the doctrine of strict products liability, has not hesitated to disagree with the *Restatement* where it has unduly limited the doctrine. See, e.g., [citations]. . . . In any event, Amazon's activities go far beyond "indirectly facilitating the commercial distribution of products," as described in the *Restatement*.

Regarding the policies to be served by the doctrine, Amazon first claims that the Legislature, not this court, is the appropriate forum to address whether those policies would be served in new contexts. Amazon does not cite any California authority for this claim, which is unsurprising because it runs directly contrary to California law. Strict liability is a common law doctrine in California. It was created by the courts, which have expanded and contracted the doctrine where warranted by its purposes. Amazon implies that e-commerce is somehow different. But the fact that the Legislature has enacted laws regulating e-commerce in other ways (see, e.g., Rev. & Tax. Code, § 6042 [sales tax collection]; Civ. Code, § 1798.91.04 et seq. [data security and software downloads])—just as it regulates conventional commerce—does not mean courts should defer to the Legislature on strict liability.[9]

Amazon next contends that "expanding strict liability to websites for products sold by others would not serve, and may even frustrate," the policies underlying the doctrine of strict liability. We note first that the issue [here] is not whether "websites for products sold by others" should generally be held strictly liable. It is whether Amazon may be held strictly liable for the defective [battery] here. Other factual situations involving "websites for products sold by others," including other sales through Amazon, may be distinguishable. We express no opinion [on] whether strict liability should or should not apply in such situations.

[As for] product safety, Amazon [asserts] that it does not have relationships with manufacturers of 3d-party products, so it cannot "directly" pressure the manufacturer. [But this assertion has no] record

[9] Amazon claims the Legislature [is] best positioned to assess allegedly countervailing policies including "consumer interest in a broad selection of products and the fairness of imposing a tax on e-commerce, including millions of upstanding sellers and small businesses, to insure against isolated personal injuries." Concerns over costs and the availability of goods are not unique to e-commerce, however. California courts have examined the applicability of strict liability in numerous diverse contexts, including those discussed above. Amazon [offers] no reason why the courts cannot examine the doctrine in this context as well.

citation, so we may disregard it. But even [if this were sometimes true,] a direct relationship with a *manufacturer* is [un]necessary to promote product safety. See *Kaminski,* 175 Cal.App.3d at 456–57. A conventional retailer, for example, is not shielded from liability merely because it has an ongoing relationship with a product's distributor rather than its manufacturer. Amazon, like a conventional retailer, can exert pressure on manufacturers indirectly through the parties with whom it does have ongoing relationships, i.e., third party sellers.[10]

Regarding compensation, Amazon notes that expanding strict liability to new defendants (thereby spreading losses more broadly throughout society) is insufficient in itself to justify such expansion. See *Peterson,* 10 Cal.4th at 1207. But, as discussed above, strict liability for Amazon under the circumstances here would promote each of the policies underlying the doctrine. It is not solely predicated on Amazon's availability as a defendant.

Regarding cost allocation, Amazon claims that strict liability would force it to be an insurer for consumers of 3d-party products. Amazon is incorrect. Strict liability is not absolute liability. *Daly,* 20 Cal.3d at 733. "On the contrary, the plaintiff's injury must have been caused by a 'defect' in the product." Id. Amazon also claims that strict liability would operate as a tax on "millions of faultless 3d-party sellers who have never sold a defective or dangerous product" and lead to higher prices for products sold on Amazon. This claim is somewhat tangential to the primary policy at issue. The primary policy of cost allocation is promoted where participants in the chain of distribution can adjust costs between themselves, i.e., for the products they handle in common. See *O'Neil,* 53 Cal.4th at 363; *Vandermark,* 61 Cal.2d at 263. *Peterson*, on which Amazon relies, held that this policy was not met in the case of residential landlords because "[a] landlord or hotel owner, unlike a retailer, often cannot exert pressure upon the manufacturer to make the product safe and cannot share with the manufacturer the costs of insuring the safety of the tenant, because a landlord or hotel owner generally has no 'continuing business relationship' with the manufacturer of the defective product." [There], " '[t]he cost of insuring risk will not be distributed along the chain of commerce but will probably be absorbed by tenants who will pay increased rents.' " Id. Here, by contrast, Amazon has a continuing business relationship with the upstream supplier (3d-party seller) and the consumer will not necessarily absorb any increased costs.

[10] In its response to an amicus curiae brief, Amazon goes further. It claims that *existing* products liability law has had no effect on consumer safety. It argues that the policy considerations underlying then-Justice Traynor's seminal concurring opinion in Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal.2d 453 (1944), which was later adopted by the Supreme Court in *Greenman,* 59 Cal.2d at 63, no longer apply to many modern retail transactions, including those on Amazon. Needless to say, as an intermediate appellate court, we cannot entertain the wholesale dismantling of California's strict products liability doctrine, even if we were inclined to do so (and we are not).

There is, of course, a risk that the upstream supplier and other entities in the chain of distribution will be insolvent or unavailable. But that circumstance is precisely why the doctrine of strict liability has been expanded to include the entire chain of distribution, including retailers, where the policies of the doctrine are otherwise served. See *Vandermark,* 61 Cal.2d at 262. The risk of nonpayment, in such a circumstance, should fall on an entity that benefited from the sale of the product rather than the injured plaintiff. Id.; *Greenman,* 59 Cal.2d at 63. Amazon can choose how to absorb that risk. Nothing in the record supports its assertions that it would be forced to indiscriminately raise its fees on "millions of faultless 3d-party sellers who have never sold a defective or dangerous product," or that the burden of such a hypothetical fee increase would ultimately fall on Amazon customers rather than be absorbed by sellers themselves in form of reduced profits.[11]

Both parties in this appeal recognize that the application [of] strict liability to Amazon [here] presents important issues that have not been fully addressed in prior precedents. But the novelty of these issues does not prevent us from applying the doctrine where, as here, it is warranted. "Law, as an instrument of justice, has infinite capacity for growth to meet changing needs and mores. Nowhere is this better illustrated than in the recent developments in the field of products liability. The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping legal principles abreast of the times. Ancient distinctions that make no sense in today's society and that tend to discredit the law should be readily rejected as they were step by step in *Greenman* and *Vandermark*." Kriegler v. Eichler Homes, Inc., 269 Cal.App.2d 224, 227 (1969).

The record does not demonstrate as a matter of law that Amazon cannot be held strictly liable for defects in 3d-party products sold through its website, at least under the circumstances here. The trial court therefore erred by summarily adjudicating Bolger's causes of action for strict products liability on this basis. See *Jimenez,* 29 Cal.4th at 485.[12]

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[11] In somewhat contradictory fashion, Amazon argues that it does not set the price for 3d-party products and therefore cannot "spread the cost of defects across units sold." But as Amazon itself notes, it does control its fees. If it desires, it can increase fees on high-risk products, or all products, and thereby spread the cost of compensating consumers injured by such products. That is not inconsistent with the purposes of strict liability, and it is not predicated on Amazon's particular financial strength or bargaining position. " 'The rationale of [*Greenman*] does not rest on the analysis of the financial strength or bargaining power of the parties to the particular action. It rests, rather, on the proposition that "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." ' " *Price;* see Kesner v. Superior Court (2016) 1 Cal.5th 1132, 1153. Amazon also controls access to its website. As outlined above, if it desires, it can limit the sale of products that create a commercially unreasonable risk of injury.

[12] In her briefing, Bolger also contends the court erred by summarily adjudicating her "negligence" cause of action. But, as Amazon points out, Bolger limited her opposition in the trial court to her strict products liability claims . . ., and she provides no persuasive reason why we should consider her arguments for the first time on appeal. We decline to do so. Bolger also does not substantively address her causes of action for negligent products liability, breach of

III. Immunity Under Section 230

Amazon contends that, regardless of its liability under California law, it is shielded by the Communications Decency Act of 1996 (CDA), 47 U.S.C. § 230 [which] provides, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Id. (c)(1). "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." Id. (e)(3).

"Taken together, these provisions bar state-law plaintiffs from holding interactive computer service providers legally responsible for information created and developed by third parties. Congress thus established a general rule that providers of interactive computer services are liable only for speech that is properly attributable to them. State-law plaintiffs may hold liable the person who creates or develops unlawful content, but not the interactive computer service provider who merely enables that content to be posted online." Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 254 (4th Cir. 2009).

"[T]he reason for excluding interactive computer services from liability for republication was 'to promote the continued development of the Internet and other interactive computer services . . . [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.' To that end, CDA immunity is to be construed broadly, 'to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.' " Cross v. Facebook, Inc., 14 Cal.App.5th 190, 206 (2017).

Immunity under section 230 extends to " '(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.' " HomeAway.com, Inc. v. City of Santa Monica, 918 F.3d 676, 681 (9th Cir. 2019). The first element is not at issue here. The dispositive question is whether Bolger's strict liability cause of action seeks to treat Amazon as a publisher or speaker of information provided by another.

"In evaluating whether a claim treats a provider as a publisher or speaker of user-generated content, 'what matters is not the name of the cause of action'; instead, 'what matters is whether the cause of action inherently requires the court to treat the defendant as the "publisher or speaker" of content provided by another.' Put slightly differently, 'courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a "publisher or speaker." If it does, section 230(c)(1) precludes liability.' " *Cross*.

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express warranty, or breach of implied warranty. Thus, Bolger has not met her burden of showing the court erred by summarily adjudicating those claims.

Courts have declined to apply § 230 to strict products liability claims. In Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135 (4th Cir. 2019), the court rejected Amazon's argument that § 230 shielded it from products liability claims: "The products liability claims asserted [are] not based on the publication of another's speech. The underpinning of Erie's claims is its contention that Amazon was the *seller* of the headlamp and therefore was liable as the seller of a defective product. There no claim is based on the *content of speech published* by Amazon—such as a claim that Amazon had liability as the publisher of a misrepresentation of the product or of defamatory content. While the [CDA] protects interactive computer service providers from liability *as a publisher of speech*, it does not protect them from liability as the seller of a defective product." *Erie*. Similarly, in *State Farm*, the federal district court held, " 'In strict product liability actions, the "act" to which the seller's responsibility attaches is not an act of negligence. If indeed it is an act at all, it is simply the act of placing or maintaining a defective product in the stream of commerce.' Amazon's active participation in the sale, through payment processing, storage, shipping, and customer service, is what makes it strictly liable. This is not activity immunized by the CDA." *State Farm,* 390 F.Supp.3d at 973.

We agree with *Erie* and *State Farm* on this issue. Bolger's strict products liability claims target Amazon's role in "the vertical distribution of consumer goods" (*Bay Summit,* 51 Cal.App.4th at 773) as an "integral part of the overall producing and marketing enterprise" for the Lenoge replacement laptop battery (*Vandermark,* 61 Cal.2d at 262). It is based on Amazon's own conduct, as described above, not the content of Lenoge's product listing. Bolger's claims do not require a court to treat Amazon as the speaker or publisher of content provided by Lenoge. . . . The content of the product listing is not determinative, and it need not be attributed to Amazon to support strict liability. Instead, Amazon's own involvement in the distribution of an allegedly defective product supports strict liability for the reasons we have already discussed.

Amazon relies on Gentry v. eBay Inc., 99 Cal.App.4th 816 (2002), but it is distinguishable. [There], plaintiffs sued the online shopping website eBay for its role in hosting 3d-party sales listings for allegedly counterfeit sports memorabilia. Plaintiffs alleged causes of action for (1) violation of Civil Code section 1739.7, subdivision (b), which requires a dealer who "provides [a] description[ ] of [a] collectible[ ] as being autographed" to furnish a certificate of authenticity at the time of sale; (2) negligence in allowing false and misleading sales listings or user reviews to be posted; and (3) derivative unfair competition claims. *Gentry*, at 822–23.

Gentry held that § 230 applied to each cause of action. As to the Civil Code violation, this court explained, "The substance of [plaintiffs'] allegations reveal they ultimately seek to hold eBay responsible for conduct falling within the reach of section 230, namely, eBay's dissemination of representations made by [others], or the posting of

compilations of information generated by those defendants and other third parties." This court explained that eBay "merely made the individual defendant's false product descriptions available to other users on its Web site, or provided the Web site on which the individual defendants designated their collectibles as autographed," and holding eBay liable would put it "in the shoes of the individual defendants, making it responsible for their publications or statements." Similarly, § 230 shielded eBay against plaintiffs' negligence claims because they were based on "false and/or misleading content created by the individual defendants and other coconspirators" or not taking editorial action against the individual defendants' false and misleading content.

Here, by contrast, Bolger's strict products liability claims do not depend on the content of Lenoge's product listing, e.g., whether it was false or misleading. Bolger's claims are based on Amazon's role in the chain of production and distribution of an allegedly defective product. The fact that some content provided by Lenoge was posted on the Amazon website does not automatically immunize Amazon for its own choices and activities unrelated to that content. *HomeAway.com,* 918 F.3d at 682–83.

The other authorities cited by Amazon are similarly distinguishable because they depend on the content of 3d-party postings. [Citations.] The content of Lenoge's product listing is not determinative here. Section 230 does not shield Amazon from liability.

DISPOSITION

The judgment is reversed. The trial court is directed to (1) vacate its order granting summary judgment, (2) enter a new order denying summary adjudication of Bolger's strict products liability claims and granting summary adjudication of Bolger's remaining claims, and (3) conduct further proceedings not inconsistent with this opinion. Bolger shall recover her costs on appeal.

WE CONCUR:

■ BENKE, ACTING P. J., O'ROURKE, J.

NOTE

Courts continue to split on whether Amazon is subject to strict liability for harm from "selling" defective third-party products that injure consumers. As a matter of first impression, the California Court of Appeal decided *Bolger*, above, in August 2020, whereupon Amazon petitioned the California Supreme Court for *Bolger*'s review. In November 2020, the 9th Circuit Court of Appeals rendered *State Farm*, above. One day later, the California Supreme Court denied Amazon's petition for *Bolger*'s review, which left the *Bolger* precedential ruling undisturbed. See also New Jersey Manufacturers Ins. Grp. v. Amazon.com Inc., 2022 WL 2357430, *8 (D.N.J. 2022) (Amazon liable as a "seller" of the defective third-party hoverboard under New Jersey products liability law).

But most courts continue to rule mechanistically the other way, without due consideration of the policy implications of shielding Amazon from responsibility, despite Amazon's nearly full control over third-party sales transactions on its internet platform. In Steiner v. Amazon.com, Inc., 164 N.E.3d 394, 401 (Ohio 2020), the Ohio Supreme Court ruled that Amazon was not the "supplier" of a third-party caffeine powder product that led to the death of a high school student. Further, in a case in which a child swallowed a third-party seller's remote control battery purchased on Amazon's website under the "Fulfillment by Amazon" program, Amazon.com, Inc. v. McMillan, 625 S.W.3d 101, 112 (Tex. 2021) (5–2 decision), the Texas high court ruled that Amazon was not a seller because it "did not hold or relinquish title . . . even though it controlled the process of the transaction and the delivery of the product." Also, in Great Northern Ins. Co. v. Amazon.com, 524 F.Supp.3d 852 at *857–58 (N.D. Ill. 2021), the court held that Amazon, which did not take possession of the allegedly defective third-party hoverboard sold under Amazon's "Business Solutions Agreement," was not a "seller" under Rest. (2d) Torts § 402A. And in Berkley Reg'l Ins. Co. v. John Doe Battery Mfr., 2023 WL 375934, at *5 (D. Minn. 2023), the court held that Amazon, as a "distribution facilitator," was not subject to strict products liability as the "manufacturer" or "seller" of a defective cell phone battery (citing the *Second* and *Third Restatements*).Should every state decide this critical issue for itself? If so, should states do so by judicial decision or by statute? Or should Congress, perhaps by amending 47 U.S.C.A § 230 of the Communications Decency Act, decide this question as a matter of national law?

Consider the following:

> Today's "stream of commerce" has been profoundly altered by product sales on the internet. Just as traditional business models of how products are distributed and "sold" have adjusted to this modern platform, so too must the law evolve its conception of a product "seller" when internet providers move defective products through the internet. Thus, in view of Amazon's substantial control of third-party sales of products on its website, Amazon fairly may be viewed as their "seller," rendering it responsible for harm from design and manufacturing defects such products may contain. Indeed, one might plausibly argue further that § 230 of the CDA should be amended—or maybe even interpreted—to allow claims against internet providers for warning defects and misrepresentations in third-party sales.
>
> To protect itself financially from all defective product claims, Amazon can ensure that its suppliers and vendors are appropriately insured to reimburse it for resulting losses, as such sellers already promise contractually to do. Such a fairly modest change in Amazon's business model might well be a sensible way to protect consumers, as well as Amazon itself, from undue financial harm from third-party internet sales of defective products.

D. Owen, Products Liability Law § 15.2, at 966–67 (4th ed. 2022) (citations omitted). See also a forthcoming article by Edward Janger and Aaron Twerski, Functional Tort Principles for Internet Platforms: Duty, Relationship and Control (February 2023 draft) (persuasively explaining how holding Amazon subject to liability for injuries from defective products sold on its website by third parties conforms to underlying principles of modern tort law).

5. PARENT AND APPARENT MANUFACTURERS

Page 752, Note 5, add after "See, e.g.,":

KeraLink Int'l, Inc. v. Geri-Care Pharms. Corp., 60 F.4th 175, 182–83 (4th Cir. 2023) (Md. law) (supplier of defective eye wash to network of eye banks that "held itself out as the manufacturer," placed its logo on the bottle, and registered the product with the FDA was an apparent manufacturer; sealed container defense to strict products liability inapplicable to apparent manufacturer);

CHAPTER 17

SPECIAL TYPES OF TRANSACTIONS AND PRODUCTS

1. LEASES AND BAILMENTS

Page 790, Note 3, add after "See also":

King v. Wal-Mart Stores E., LP, 2023 WL 156856, at *2 (E.D. Mo. 2023) (UCC inapplicable to bailment of shopping cart that tipped, causing plaintiff's injury);

2. SERVICES

Page 791, substitute the following for *Cafazzo v. Central Med. Health Servs., Inc.*:

Sharufa v. Festival Fun Parks, LLC

Court of Appeal, Sixth District, California, 2020.
263 Cal.Rptr.3d 112.

■ GROVER, J.

Plaintiff Sean Sharufa was injured at a waterslide theme park. He sued the park on theories of negligence, negligent misrepresentation, and products liability. The trial court summarily adjudicated all but the negligent misrepresentation cause of action in defendant's favor. As to Sharufa's negligence cause of action, we conclude the waterslide park owes a heightened duty of care as a common carrier; but given the absence of any evidence of breach, summary adjudication of the negligence claim was appropriate. As to Sharufa's products liability causes of action, we conclude the record is insufficient to show the park provided primarily a service rather than use of a product [and so reverse and remand as to those claims].

Sean Sharufa fractured his hip and pelvis riding a waterslide at Raging Waters, a theme park operated by defendant, Festival Fun Parks, LLC. While going down the slide, he inadvertently slipped from a seated position on an inner tube onto his stomach. When he entered the splash pool below, his feet hit the bottom with enough force to cause his injuries.

Sharufa sued for negligence, products liability (including breach of express and implied warranties), and negligent misrepresentation. Festival Fun Parks moved for summary judgment. Sharufa's opposition included a declaration from a mechanical engineer who opined that going

down the slide on one's stomach could lead to injury because it would cause a person to enter the water with more velocity than sliding on one's back. [Ruling that the engineer did not qualify as an expert on the relevant subject matter, the trial] court granted summary adjudication for Festival Fun Parks on all but the negligent misrepresentation claim. Sharufa dismissed that cause of action without prejudice to allow entry of judgment and this appeal. . . .

NEGLIGENCE

. . . The parties . . . dispute the legal issue of what duty Festival Fun Parks owed to Sharufa. Neither party believes it to be the default standard of ordinary care. (See Civ. Code, § 1714, subd. (a) [everyone has a duty to use ordinary care to avoid injuring others].) Sharufa asserts a waterslide is the equivalent of an amusement park ride making Festival Fun Parks a common carrier, subject to a higher standard of care. (See Civ. Code, § 2100 [common carrier must use the utmost care and diligence for the safety of its passengers].) Festival Fun Parks counters that the duty it owes is actually lower than ordinary care, because riding a waterslide carries with it certain inherent risks that Sharufa assumed by engaging in the activity. (See Nalwa v. Cedar Fair, L.P., 290 P.3d 1158 (Cal. 2012) ([Under the doctrine of primary assumption of risk, a participant in an inherently dangerous recreational activity is not owed a duty of ordinary care, only a duty to not increase the inherent risks of the activity.]).

We first consider the question of whether a waterslide operator is a common carrier, something no California court has yet decided. . . . Civil Code section 2168 defines the term common carrier as anyone "who offers to the public to carry persons, property, or messages [ ] is a common carrier of whatever he thus offers to carry." It is safe to say that the statute's enacting Legislature in 1872 did not have recreational waterslides in mind. The definition has since been broadly construed, however, to include not only traditional modes of transport like buses, planes, and cars but also elevators, escalators, and ski resort chair lifts. The policy reason for holding common carriers to a higher standard of care is that one who profits from transporting the public should also bear responsibility for making the transportation safe.

In Gomez v. Superior Court, 113 P.3d 41 (Cal. 2005), the Supreme Court held that the definition of common carrier includes "the operator of a roller coaster or similar amusement park ride." As a result, we must decide whether the waterslide in this case is an amusement park ride similar to a roller coaster, given the relevant criteria. *Gomez* found Disneyland to be a common carrier after a woman was injured on the Indiana Jones attraction, an amusement ride that combines "the ups and downs of a roller coaster with jarring jumps, drops, and unpredictable movements." The court observed that operators of that kind of amusement park ride are comparable to traditional common carriers such as buses or trains in the sense that they too are entrusted with the

lives and safety of large numbers of people. "Riders of roller coasters and other 'thrill' rides seek the illusion of danger while being assured of their actual safety."

Nalwa v. Cedar Fair, L.P., 290 P.3d 1158 (Cal. 2012) clarified the [relevant] considerations [explaining that] it is the lack of rider control that makes a roller coaster subject to common carrier principles: riders "surrender their freedom of movement" and "the amusement park predetermines any ascents, drops, accelerations, decelerations, turns or twists of the ride." Applying that reasoning, *Nalwa* found the operator of a bumper car attraction is not a common carrier because bumper car riders have complete control over steering and acceleration rather than being "passively carried or transported from one place to another."

Festival Fun Parks argues the waterslide at issue here is a participatory activity—more like driving bumper cars than riding a roller coaster—but we are not persuaded. As described by Festival Fun Parks, the waterslide on which Sharufa was injured is "intended to be a moderate 'thrill type' attraction, offering patrons the experience of riding upon a single inner tube, down twisting and turning flumes with the flow of water." It is composed of "three separate slides or 'flumes' that twist and turn as the participant descends from the top of the attraction, into a common pool of water at the bottom." As we see it, a waterslide is a "thrill ride" precisely because riders do not control their movements as they are transported to the pool below, experiencing manufactured ascents, drops, turns and twists along the way. If the rider could control those things, it would be a different kind of recreational experience. Waterslide riders, like roller coaster riders, expect the sensation of danger without actually being in danger. Applying the standards of *Gomez* and *Nalwa*, we conclude a waterslide operator is a common carrier. . . .

We acknowledge that riding a waterslide is more participatory than the purely passive activity of riding a roller coaster—on a waterslide one has at least some freedom of movement, even if no significant control over the speed and ultimate direction of travel. But we do not see that as enough to make a waterslide appreciably different from a roller coaster for purposes of the common carrier analysis. In the end, the rider relies on the operator of the attraction for safe passage. A rider having slight control over the transportation does not eliminate the common carrier relationship. A waterslide is an amusement ride similar to a roller coaster in that the rider surrenders control while being transported from one place to another. It follows that a waterslide operator owes riders the heightened duty of a common carrier.

Having determined a waterslide operator is a common carrier, we necessarily find the doctrine of primary assumption of risk inapplicable. To conclude otherwise would be a logical impossibility: one cannot simultaneously owe both a higher duty (as a common carrier) and a lower duty (based on primary assumption of risk). *Nalwa*, [where public policy

supports applying the higher duty of a common carrier, primary assumption of risk doctrine is precluded].

But holding Festival Fun Parks to a higher standard of care does not mean summary adjudication of the negligence cause of action was improper. For Sharufa to avoid summary adjudication, the record must contain evidence from which a reasonable trier of fact could find that Festival Fun Parks' conduct failed to meet the applicable standard of care. Common carrier status does not trigger strict liability, which imposes liability for injury regardless of the care exercised by a defendant. [E]ven under the heightened common carrier standard, Sharufa must show that Festival Fun Parks did, or failed to do, something to cause his injury [that breached the applicable standard of care—which is a duty to act with the " 'utmost care and vigilance of a very cautious person.' "] The controlling question is whether the record contains evidence from which a reasonable trier of fact could determine that Sharufa's injury occurred because Festival Fun Parks failed to act with the vigilance of a very cautious person.

We find no such evidence here. Sharufa's theory is that Festival Fun Parks breached a duty by failing to warn him that going down the slide feet first on his stomach would be more dangerous than sliding on his back. But the only evidence to support the premise that sliding in such a position would increase risk is the opinion of Sharufa's expert witness to that effect, which was excluded by the trial court in response to an objection. Sharufa has not challenged that ruling on appeal. (We note the ruling also appears to be correct, as the expert's declaration contains no indication of expertise in waterslides or in how rider body position affects velocity.) [In the absence of any evidence of the defendant's negligence, summary judgment on that claim was proper.]

PRODUCTS LIABILITY

Sharufa [makes products liability claims for] negligence, strict liability, and breach of express and implied warranties. He alleges the waterslide was a defective product that caused his injuries. "Products liability" refers to tort liability imposed on "those who supply goods or products for the use of others to purchasers, users, and bystanders for losses of various kinds resulting from so-called defects in those products." (Merrill v. Navegar, Inc., 28 P.3d 116 (Cal. 2001), quoting Keeton, Dobbs, Keeton & Owen, Prosser & Keeton, Torts (5th ed.1984) § 95, p. 677.) The doctrine "provides generally that manufacturers, retailers, and others in the marketing chain of a product are strictly liable in tort for personal injuries caused by a defective product." (Peterson v. Superior Court, 899 P.2d 905 (Cal. 1995).) The defendant need not be the manufacturer of the product, but must at least be part of the " 'chain of distribution.' " Liability extends to the entire distribution chain because the purpose of products liability is to hold responsible all who place a defective product into the stream of commerce. However, products liability does not reach a party who is delivering a service to the consumer rather than supplying

the product at issue. (Pierson v. Sharp Memorial Hospital, Inc., 264 Cal. Rptr. 673 (Ct. App. 1989) [hospital was a service provider, not a supplier of defective carpet on its premises].)

Festival Fun Parks argues that Sharufa's products liability claims fail because Raging Waters patrons receive a service, not a product. We must therefore determine whether the primary objective of the transaction between Sharufa and Festival Fun Parks was to deliver the use of a product or a service. If Raging Waters guests pay the park's admission fee primarily to use the waterslides, products liability applies; but if the fee is paid primarily to obtain a service [involving] use of the waterslides, products liability is not a viable theory of recovery. . . .

Here, the record is undeveloped regarding the nature of the theme park's offerings. Competing inferences can be drawn about the primary objective of visiting the park. It would be reasonable to infer that the purpose of a guest's transaction with Festival Fun Parks is to use the Raging Waters waterslides, not to receive a service. Indeed, Festival Fun Parks seems to acknowledge as much in its brief when describing what it provides in exchange for the price of admission: "Appellant, along with every other guest, received a non-exclusive license to use the waterslides, in consideration of the admission price." On the other hand, we can surmise (though the record contains little evidence on this point) that the park also offers services to patrons who use the slides, such as food and beverage service, ride attendants, lifeguards, retail sales, and the like. More facts are needed to determine whether those services are ancillary to a patron's primary objective of using the waterslides, or the other way around.

We reject Festival Fun Parks' argument that it is entitled to summary adjudication based on the bare assertion that it "provided the subject water flume ride[ ] as part of its overall recreational and entertainment services." . . . Nor are we persuaded by Festival Fun Parks' related argument that it is not a product supplier at all, but rather the end user of its waterslides, which it then uses to provide "amusement services" to park patrons. The rider of a theme park waterslide—not the park itself—is the end user of the product and the party most likely to suffer physical injury in the event of a defect.

Festival Fun Parks cites Ferrari v. Grand Canyon Dories, 38 Cal. Rptr. 2d 65 (Ct. App. 1995), which held that products liability did not apply to a river rafting tour company when a participant was injured by an allegedly defective raft. The defendant there provided predominately a service: recreational raft transportation. The company supplied "all the materials for the trip, instructions on rafting safety, and guides to perform the labor and conduct the activities." As a result, the court viewed the raft itself as incidental to the transportation service. But that situation differs from this case, where the use of waterslides may be the primary, if not sole, purpose of the transaction. In *Ferrari*, the plaintiff

was not merely paying for the use of a raft; she was paying for a guided rafting trip down the Colorado River.

Also distinguishable is Ontiveros v. 24 Hour Fitness USA, Inc., 86 Cal.Rptr.3d 767 (Ct. App. 2008), in which a fitness club was found not to be the supplier of a defective piece of exercise equipment the plaintiff used at the club. The dominant purpose of the transaction between the plaintiff and the club was the delivery and receipt of fitness services [including participation] in aerobics, yoga, and dance classes, and use testing centers to check her weight.

The situation here appears closer to Garcia v. Halsett, 82 Cal. Rptr. 420 (Ct. App. 1970), which applied products liability in a suit against a laundromat from a customer injured by a defective washing machine. The court noted that although laundromats do not engage in the traditional distribution of a product, they "provide the product to the public for use by the public, and consequently [ ] play more than a random and accidental role in the overall marketing enterprise of the product[.]" Just as the patron of a laundromat has the primary objective of using a washing machine, so too, could a waterslide park patron have the primary objective of using a waterslide. It is conceivable Festival Fun Parks offers services to its patrons to such a degree as to make the use of waterslides secondary, like the exercise equipment in *Ontiveros*, but evidence of that does not appear in the existing record. As the record is insufficiently developed to answer the legal question of whether the primary purpose of the parties' transaction was to use a product, summary adjudication should have been denied on the products liability causes of action based on strict liability and negligence theories.[3]

Regarding the warranty-based products liability causes of action, Festival Fun Parks argues the trial court was correct to summarily adjudicate those claims because "[a]n essential element to impose liability on a product warranty theory is the sale of a good between buyer and seller," citing Shepard v. Alexian Brothers Hospital, Inc., 109 Cal. Rptr. 132 (Ct. App. 1973), and no sale occurred here. Sharufa's reply briefing contains no argument on that point, which we take as a concession that the trial court's ruling was correct.

We note the trial court also summarily adjudicated a cause of action brought by Sharufa's wife for loss of consortium. As she did not appeal, the judgment as to her will remain unchanged.

[Reversed and remanded for a denial of] summary adjudication [on the] causes of action for products liability based on strict liability and products liability based on negligence . . . .

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[3] Of course, even if it is ultimately determined that Festival Fun Parks supplied a product rather than a service, that does not necessarily mean Sharufa's products liability causes of action will succeed. Issues of liability remain, including whether the waterslide was defective and whether it was fit for its intended use. We have no occasion to address those questions here.

3. AUTOMOTIVE VEHICLES

Page 810, add to the end of Note 1:

The following opinion provides a good review of the principles discussed in chapter 7(4) as experts debate the efficacy of a "drive-by-wire" system. What advice would you have given the plaintiff's expert and the plaintiff's lawyer to change the outcome?

Kesse v. Ford Motor Company

United States District Court, N.D. Illinois, Eastern Division, 2020.
2020 WL 832363.

■ ALONSO, J.

After plaintiff John A. Kesse ("Kesse") was involved in a car accident while driving a vehicle manufactured by defendant Ford Motor Company ("Ford"), plaintiff sued Ford. Defendant has filed a motion for summary judgment and a motion *in limine* to exclude the testimony of plaintiff's proposed expert witness. For the reasons set forth below, the Court grants defendant's motion *in limine* and grants the motion for summary judgment.

I. BACKGROUND

The following facts are undisputed unless otherwise noted.

Plaintiff Kesse was working as a taxi driver on August 14, 2012 when he was involved in an automobile accident. At the time of the accident, Kesse was driving a 2007 Crown Victoria sedan that he leased on a day-to-day basis from its owner, BMX-Chicago and Associates. The accident occurred on the second day that Kesse had leased the 2007 Crown Victoria. The first day, Kesse had experienced no mechanical problems while driving the 2007 Ford Crown Victoria.

On the morning of August 14, 2012, Kesse was driving a passenger southbound on Milwaukee Avenue at a speed of approximately 20–25 miles per hour. As Kesse approached the intersection of Milwaukee and Noble, plaintiff heard the car make a "voom" sound and the car began accelerating quickly. Plaintiff claims he attempted to brake repeatedly (Ford disputes this), but no bystanders noticed brake lights on the car. After traveling another eight tenths of a mile, plaintiff attempted to stop the car by hitting a pole on the sidewalk. The car proceeded to hit another pole, as well as a pedestrian, who was killed. The 2007 Crown Victoria that plaintiff had been driving burned as a result of the accident.

The 2007 Crown Victoria that Kesse was driving at the time of the accident was manufactured by defendant Ford, which had sold the vehicle to an independently-owned Ford dealership on October 12, 2006. That dealership, in turn, sold the vehicle to a private owner on January 5, 2007. The 2007 Crown Victoria was sold with a three-year warranty, which expired on January 5, 2010.

The remaining evidence the parties have put forth in connection with defendant's motion for summary judgment is opinion evidence from their respective expert witnesses. The experts—Samual J. Sero ("Sero") on behalf of plaintiff and Thomas G. Livernois ("Livernois") on behalf of defendant—agree on a few details but disagree as to the cause of the accident.

The experts seem to agree that automobile engines require, among other things, air in order to operate. Opening a vehicle's throttle is what allows air to reach a vehicle's engine and, thus, the vehicle to accelerate. Traditionally, the throttle was opened by a cable connected to the accelerator pedal. Like most vehicles at the time, the 2007 Crown Victoria utilized not a cable connection between the accelerator pedal and the throttle but instead a drive-by-wire system, also known as an electronic-throttle-control ("ETC") system.

Neither Livernois nor Sero examined the 2007 Crown Victoria that Kesse had driven during the accident. Instead, after the accident, the 2007 Crown Victoria was examined by Ryan Welsch ("Welsch"), a master technician. The parties' experts agree that Welsch found that there were no problems with the braking system or the electronic throttle control system, and both proposed experts relied on Welsch's analysis in reaching their own opinions.

Sero's opinion

Sero explains in his report that "[t]he drive-by-wire system eliminated the driver's direct mechanical connection to the throttle and placed the throttle control under the control of the vehicles [sic] electronic engine controller or EEC thereby creating a condition in which a sudden acceleration can occur at any time during the operation of a vehicle." (Sero Report at 2/Docket 128-5 at 2). That is so, because, according to Sero:

> Under the hood of a car exists not only one of the harshest physical environments for electronics with heat, dirt, moisture and corrosives; but one of the harshest EMI [electromagnetic interference] environments. Numerous EMI generating devices are in constant close proximity. The electronic components under the hood are not only receptors of EMI they are generators of EMI. The uncontrolled interconnection of electronic and electrical components creates a condition for uncontrolled conductive and radiated EMI.

(Sero Report at 3/Docket 128-5 at 3). Sero opines that electromagnetic interference can cause the throttle to open and, thus, can cause sudden acceleration. He says "[t]he hazards associated with EMI have been around since the advent of electricity." (Id.).

Sero opines "to a reasonable degree of engineering certainty that the 2007 Ford Crown Victoria taxi cab that Mr. Kesse was driving experienced a sudden acceleration event." (Sero Report at 5/Docket 128-

5 at 5). Sero eliminated the possibility of other mechanical failure, because Welsch found no mechanical failures in the vehicle. Sero also eliminated the possibility of driver error, because "Mr. Kesse had no logical or sane reason to slam the accelerator pedal or the brake pedal for that matter for the driving maneuver that he was doing." (Sero Report at 6/Docket 128-5 at 6). Sero opined that:

> Mr. Kesse was at the time of the incident an experienced and professional driver. He was accustomed to the universally, inherently safe design and orientation of the brake and acceleration pedals. . . . With the design of the two pedals being universal it becomes a motor memory and the movement of the foot from one pedal to the other is an automatic safe response.

(Id.).

Sero opines that customers should be warned, in the event of sudden acceleration, to put the vehicle in neutral and apply the brakes without pumping. (Sero Report at 4/Docket 128-5 at 4). He opines the problem could be eliminated by "[e]liminat[ing] the cruise control and drive-by-wire functions." (Sero Report at 5/Docket 128-5 at 5).

According to his curriculum vitae, Sero received a Bachelor of Science degree in electrical engineering from Carnegie Institute of Technology in 1967. Sero does not name any of his prior employers on his C.V., but the C.V. reflects that he has been self-employed since about 1975.

Livernois's opinion

Defendant's expert, Thomas G. Livernois ("Livernois") disagrees with Sero's opinion. Livernois, who received a Ph.D. in electrical engineering from the University of Michigan in 1991, opines that the "2007 Ford Crown Victoria electronic throttle control system is neither defective nor unreasonably dangerous" and that "[t]here is no evidence that electromagnetic interference caused the throttle control system in the subject vehicle to malfunction before or during the subject accident." (Livernois Report at 22/Docket 129-9 at 27).

Livernois first describes how the engine operates:

> Vehicle engines need fuel, spark, and air in order to operate. The subject 2007 Ford Crown Victoria's 4.6 liter eight-cylinder engine is factory-equipped with an electronically controlled sequential multiport fuel injection (SFI) system. With this system, the vehicle's powertrain control module (PCM) individually controls the delivery of fuel to each of the eight engine cylinders through fuel injectors. The spark is delivered to the cylinders via spark plugs that receive electrical energy through individual coils on each cylinder (coil-per-plug). Finally, air is provided to the engine's cylinders via a throttle valve mounted to the intake manifold. The PCM controls the amount

> of fuel injected into the cylinders based on the amount of air flowing into the cylinders.

(Livernois Report at 4/Docket 129-9 at 9).

> Livernois described the throttle control system as follows:
>
> Like most vehicles produced in the model year 2007 timeframe, the subject Ford Crown Victoria was equipped with an electronic throttle control (ETC) system, also referred to as a drive-by-wire system, which controlled the throttle valve. In this system, the accelerator pedal is not physically connected to the throttle valve as in mechanical throttle systems. Rather, the driver-commanded accelerator pedal (APP) sensors are hardwired to the PCM [powertrain control module], which calculates a target throttle valve position and controls the throttle valve position through commands to the throttle body motor.

(Livernois Report at 5/Docket 129-9 at 10). Livernois believes "[e]lectronic throttle control (ETC) provides a number of advantages over conventional cable systems including more precise control of airflow leading to lower emissions and better fuel economy, reduced maintenance due to fewer moving parts and mechanical interconnections, and the ability to implement more responsive and effective powertrain-dependent vehicle features such as electronic stability control." (Id.).

According to Livernois, the electronic throttle control works as follows:

> The accelerator pedal contains three sensors, also known as a three-track system. . . . Each track set is provided with five-volt power and ground by the PCM. Metal wipers moving along the tracks as the accelerator pedal position is changed cause a change in voltage to be sent to the PCM. . . . [T]he use of the three independent pedal position signals ensures that the PCM receives correct driver input even if one sensor signal has a concern.

(Livernois Report at 5–6/Docket 129-9 at 10–11). Livernois notes the system is designed to overcome problems. Livernois states:

> The PCM continuously monitors the ETC system performance, and engages fail-safe operation modes if abnormalities are detected within the system. This monitoring is distributed across two separate processor integrated circuit chips in the PCM: 1) the main powertrain control processor unit (CPU), and 2) the monitoring processor, which Ford calls an enhanced-quizzer or E-Quizzer. The primary monitoring function is performed by the independent plausibility check (IPC) software on the main processor. If the generated engine output torque exceeds driver demand by a set amount, the IPC takes corrective action. The E-Quizzer redundantly monitors select PCM inputs

> and acts as a watchdog to monitor the performance of the IPC and main processor.

(Livernois Report at 8/Docket 129-9 at 13).

Livernois does not doubt the concept of electromagnetic interference. (Livernois Report at 12/Docket 129-9 at 17) ("The automotive industry is well aware of the EMI environment under the hood of a vehicle and has developed engineering requirements to mitigate EMI risk."). He believes, however, that electromagnetic interference cannot cause sudden acceleration. Livernois opined:

> Mr. Sero claims that the large number of wires connected to the PCM can electromagnetically share their signals by radiation. He claims that the throttle operation may have been activated by these cross connections by somehow providing a normal operating signal consistent with a command to open throttle. This is unsubstantiated speculation. In the 2007 Crown Victoria, multi-signal coupling is filtered out and/or mitigated by the PCM and throttle control system before an uncommanded throttle opening occurs. Furthermore, circuits terminated in low impedance loads, such as a throttle motor, do not efficiently couple radiated electromagnetic energy and are inherently immune to EMI as a result.
>
> It has been shown that the simultaneous effects of multiple EMI sources provide an additive EMI effect only when there is phase coincidence among the sources at the point of reception, which occurs only for very brief time periods, if at all. If an additive effect did occur, it would start and finish before any noticeable effects to vehicle actuators occurred; this includes the throttle motor.
>
> If EMI were to somehow open the throttle without driver command, as speculated by Mr. Sero, the throttle position sensors and other sensors would provide data to the PCM. The PCM would detect the discrepancy in demanded versus actual engine output torque, set one or more throttle control fault codes, and put the vehicle in reduced power, limp home mode. As a result, the vehicle would quickly come to a stop with typical brake application force.

(Livernois Report at 10–11, 12/Docket 129-9 at 15–16, 17).

Livernois's firm conducted testing on an exemplar 2007 Ford Crown Victoria. Livernois "intentionally applied" to the exemplar vehicle numerous "throttle control electrical system faults (e.g., open-circuiting a wire, shorting together two wires)," including "[a]ccelerator pedal sensor faults involving two or more of the three sensors." (Livernois Report at 19/Docket 129-9 at 24). The result "was that the vehicle reacted in a safe manner every time." (Livernois Report at 19/Docket 129-9 at 24). Livernois noted that, in his testing:

> [A] single accelerator pedal sensor being artificially pulled to a voltage consistent with a large and normal operating accelerator pedal applied input was, by design, ignored by the PCM, because the remaining two sensors were functioning properly. The vehicle did not accelerate without driver input. This shows that a hypothetical EMI source affecting an APP input would not cause the vehicle to accelerate, as speculated by Mr. Sero.

(Livernois Report at 20/Docket 129-9 at 25).

Livernois, like Sero, relied on the Welsch report, because the actual vehicle was not available for analysis. Livernois noted that Welsch's report "shows that the subject vehicle's accelerator pedal position and throttle position sensors were functioning properly." (Livernois Report at 10/Docket 129-9 at 15). Livernois's "conclusion from the review of the inspection summary is that the electronic throttle control components were functioning as designed during the crash sequence in response to driver input." (Id.).

Finally, Livernois states that "Mr. Sero's opinions have been directly rebutted by the National Highway Transportation Safety Administration (NHTSA) in cases where the NHTSA has been petitioned to perform investigations into certain allegations of unintended acceleration." (Livernois Report at 15/Docket 129-9 at 20). He cited NHTSA reports, including one that stated, "SAIs [sudden acceleration incidents] typically involve vehicles that are relatively unfamiliar to the driver and occur much more frequently as driver age increases: there is a 100–600% over-involvement of drivers older than 60 years (normalized for miles driven per year) and under-involvement for drivers 15–40 years of age." (Id.).

Thus, in Livernois's opinion, EMI did not cause sudden acceleration of plaintiff's vehicle. Instead, Livernois opines that Sero should not have ruled out driver error as a cause of the accident. Livernois states, "The phenomenon of pedal misapplication in motor vehicles has been studied by several individuals and entities over the years." (Livernois Report at 16/Docket 129-9 at 21). In his report, Livernois cited and summarized several such studies. One study concluded "For [sudden acceleration events] in which there is no evidence of throttle sticking or cruise-control malfunction, the inescapable conclusion is that these definitely involve the driver inadvertently pressing the accelerator instead of, or in addition to, the brake pedal." (Id.). Livernois cited another study that found "three general populations of drivers who make pedal application errors: (1) those with sensory defects in their feet; (2) those with cognitive limitations; and (3) those with no specific medical conditions or functional impairments, but who are influenced by situational factors that overwhelm everything else (inexperience; misfit in the vehicle; new vehicle; distraction)." (Livernois Report at 17/Docket 129-9 at 22). Livernois opined, "contrary to Mr. Sero's assertions, pedal misapplication is a well-studied human factors related phenomenon that does occur." (Id.). Livernois concluded that "Mr. Kesse's lack of familiarity with the

subject vehicle contributed to pedal misapplication." (Livernois Report at 21/Docket 129-9 at 26).

II. STANDARD ON A MOTION FOR SUMMARY JUDGMENT

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When considering a motion for summary judgment, the Court must construe the evidence and make all reasonable inferences in favor of the non-moving party. Hutchison v. Fitzgerald Equip. Co., Inc., 910 F.3d 1016, 1021 (7th Cir. 2018). Summary judgment is appropriate when the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." Celotex v. Catrett, 477 U.S. 317, 322 (1986). "A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party." Brummett v. Sinclair Broadcast Group, Inc., 414 F.3d 686, 692 (7th Cir. 2005).

III. DISCUSSION

A. Plaintiff's objection to Livernois's report

Plaintiff has not filed a *Daubert* motion to exclude plaintiff's expert on the grounds that he is not qualified to offer an expert opinion. Instead, plaintiff has objected to certain portions on the grounds that Livernois did not attach to his report all of the materials he claims to have reviewed in forming his opinion. Specifically, plaintiff takes issue with Livernois's comments on the findings of the National Highway Transportation Safety Administration ("NHTSA"), because Livernois did not attach to his report the documents he cites.

Rule 26 sets out the requirements for contents of expert reports. Pursuant to Rule 26(a)(2)(B), an expert report must contain:

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
>
> (ii) the facts or data considered by the witness in forming them;
>
> (iii) any exhibits that will be used to summarize or support them;
>
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
>
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
>
> (vi) a statement of the compensation to be paid for the study and testimony in the case.

Fed. R. Civ. P. 26(a)(2)(B). The Court does not see in Rule 26(a)(2)(B) a requirement that the expert attach to his report every publication he cites. Such publications do not constitute exhibits to support his opinion. Nor has plaintiff suggested that he did not have access to the cited materials. The NHTSA reports Livernois cites are published in the Federal Register. See 65 FR 25026–01; 80 FR 27835–01. Accordingly, plaintiff's objection to the admission of Livernois's report is overruled.

B. Defendant's motion to exclude plaintiff's proposed expert

Defendant has moved to exclude the testimony of Samuel J. Sero ("Sero"), who plaintiff has hired to provide expert testimony.

Pursuant to Rule 702 of the Federal Rules of Evidence, a "witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Before allowing the admission of expert testimony, a district court must perform a gatekeeping function to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993). Like scientific testimony, testimony based on technical or other specialized knowledge must also be reliable to be admissible. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147 (1999) ("[T]he Rule applies its reliability standard to all 'scientific,' 'technical,' or 'other specialized' matters within its scope"). As the Supreme Court said in *Kumho*, "[e]ngineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases." *Kumho*, 526 U.S. at 150.

In performing its gatekeeping function, a district court makes "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592–93. The Supreme Court outlined factors that may be considered by district courts. First, the Supreme Court noted:

> Ordinarily, a key question to be answered . . . will be whether it can be (and has been) tested. 'Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.'

Daubert, 509 U.S. at 593. Second, the Supreme Court explained:

> Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. . . . Some propositions . . . are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected. The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration.

Daubert, 509 U.S. at 593. Third, the Supreme Court suggested "the court ordinarily should consider the known or potential rate of error" and "the existence and maintenance of standards controlling the technique's operation." *Daubert*, 509 U.S. at 594. Finally, the Supreme Court said, "Widespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique which has been able to attract only minimal support within the community,' may properly be viewed with skepticism." *Daubert*, 509 U.S. at 594 (citations omitted).

The standard is flexible, and, in applying these factors, a district court "must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho*, 526 U.S. at 152. "Thus, whether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Kumho*, 526 U.S. at 153. It is the "proponent of the expert testimony" who has the burden of establishing its relevance and reliability." Robinson v. Davol, Inc., 913 F.3d 690, 695 (7th Cir. 2019).

In this case, Sero opined that the vehicle plaintiff drove experienced sudden acceleration due to electromagnetic interference. He reached that conclusion, because:

> The Welsch report from the criminal trial effectively eliminated any of the mechanical aspects of the investigation as causation. This effectively leaves only the driver and the electronic control aspects of the vehicle.

(Sero Report at 6/Docket 128-5 at 6). Once Sero eliminated driver error as a possibility, he was left with electromagnetic interference.

In other words, the methodology Sero applied is essentially "differential diagnosis." As the Seventh Circuit has explained: "[A] differential diagnosis 'provides a framework in which all reasonable hypotheses are "ruled in" as possible causes of a medical problem and some of these possible causes are then "ruled out" to the extent scientific evidence makes it appropriate to do so.' " *Robinson*, 913 F.3d at 696 (quoting Ervin v. Johnson & Johnson, Inc., 492 F.3d 901, 903 (7th Cir.

2007). "The goal is to find the last remaining, or most probable, 'ruled in' cause of a medical problem." *Ervin*, 492 F.3d at 903.[3]

The Seventh Circuit has also said that "though differential diagnosis is widely accepted as a general matter, an expert's decision to 'rule in' or 'rule out' potential causes must itself be 'scientifically valid.' " *Robinson*, 913 F.3d at 696 (quoting *Ervin*, 492 F.3d at 904).

That is where Sero's opinion falls short. His decisions to rule in electro-magnetic interference as a cause of the accident and to rule out driver error as a cause of the accident are not reliable. As defendant points out, Sero is not a human-factors expert, and his report makes no mention of the studies that found pedal misapplication as the most likely cause of sudden acceleration. In addition, Sero ruled out driver error without knowing how many times plaintiff had driven the vehicle. This fact does not enhance the reliability of Sero's conclusion, given that the accident occurred on plaintiff's second day driving the vehicle and that the literature includes drivers of new vehicles among the most likely to make pedal errors.

The most glaring problem with Sero's opinion, though, is the decision to rule in electro-magnetic interference as a potential cause of plaintiff's accident. Sero has done none of the things that would suggest his opinion is reliable. Sero testified that he has done no testing for this case. More specifically, Sero has *never* performed any testing on a vehicle with electronic throttle control. Sero has never been able to cause an unintended acceleration event with electromagnetic interference in an automobile. Not only has Sero not done his own testing, but he also does not rely on testing done by anyone else. In fact, Sero is not aware of anyone else who has been able to use electromagnetic interference to open a throttle in a vehicle with electronic throttle control. Sero's hypothesis is simply untested.

In addition, although Sero claims to have been a proponent of this theory since 1997, Sero testified at his deposition that he has never published a peer-reviewed article on unintended acceleration, on electro-magnetic interference in automobiles or on electronic throttle controls. Nor does the record contain any evidence that Sero's theory has achieved widespread acceptance. To the contrary, Sero admits that the National Highway Transportation Safety Administration has concluded that Sero's theory has no merit. These factors cut strongly against a finding of reliability.

Instead of the usual scientific method (testing, publishing, widespread acceptance), Sero relies on anecdotal evidence: his report mentions two instances where drivers reported sudden acceleration in drive-by-wire vehicles they drove. Sero does not claim to have

[3] Differential diagnosis is a method of determining a medical diagnosis. The Court assumes, without deciding, that the method is valid outside of medicine. The Tenth Circuit has said that, outside of medicine, the method is "more aptly characterized as a process of reasoning to the best inference." Bitler v. A.O. Smith Corp., 400 F.3d 1227, 1237 (10th Cir. 2005).

investigated those incidents. Sero's theory remains a mere hypothesis, and hypotheses alone are not admissible. Nease v. Ford Motor Co., 848 F.3d 219, 232 (4th Cir. 2017) ("Sero's failure to test his hypothesis renders his opinions on the cause of Howard's accident unreliable. Although Sero's theory is plausible and 'may even be right[,] . . . it is no more than a hypothesis, and it thus is not knowledge' ") (quoting Tamraz v. Lincoln Elec. Co., 620 F.3d 665, 670 (6th Cir. 2010)).

In sum, Sero's opinion that Kesse's accident in the 2007 Crown Victoria resulted from sudden acceleration due to electro-magnetic interference is not reliable and is mere speculation. Accordingly, it is not admissible. *Daubert*, 509 U.S. at 590 ("[K]nowledge" in Rule 702, "connotes more than subjective belief or unsupported speculation."). This Court is not alone in excluding testimony that electro-magnetic interference caused sudden acceleration. See Baker v. Mercedes Benz of North Am., 163 F.3d 1356 (5th Cir. 1998) (affirming exclusion of expert testimony that electromagnetic interference caused accident, because the theory had not been tested); Buck v. Ford Motor Co., 810 F.Supp.2d 815, 831 (N.D. Ohio 2011) ("Sero has not reliably ruled in EMI as a potential cause of sudden acceleration, because he has not 'supplemented his conclusions based on general engineering principles with reliable methodology.'. . . Sero's opinion lacks the indicia of reliability as set forth in *Daubert*. Sero's theory has not been: 1) verified through testing; 2) published or peer reviewed; 3) generally accepted.").

Accordingly, defendant's motion to exclude Sero's opinion and testimony is granted.

IV. CONCLUSION

For all of these reasons, the Court grants defendant's motion to exclude the testimony of plaintiff's expert witness and grants defendant's motion for summary judgment. Civil case terminated.

Page 825, Note 3, add to the end of the note:

The Uniform Automated Operation of Vehicles Act "is intended to explicitly accommodate and specifically regulate the automated operation of automated vehicles." National Conference of Commissioners on Uniform State Laws, Uniform Automated Operation of Vehicles Act 1 (July 2019). As of early 2023, no state has adopted the Act, and at least "thirty-eight states and the District of Columbia have enacted legislation or issued executive orders that pertain to autonomous vehicles. The differences in how state governments have chosen to regulate automated vehicles are profound . . . ." Hocksted and Fisher, Automated Unity: Evaluating the Uniform Law Commission's Autonomous Vehicle Act, 61 Washburn L.J. 275, 294 (2022).

Page 825, Note 4, add to the second sentence after "See, e.g.,":

Kubica, Autonomous Vehicles and Liability Law, 70 Am. J. Comp. L. (2022); Lemann, The Duty to Warn in the Age of Automation, 110 Ky. L.J. 469 (2022); Marchant and Bazzi, Autonomous Vehicles and Liability: What Will Juries Do?, 26 B.U. J. Sci. & Tech. L. 67 (2020) (projecting that automated

vehicle liability risks such as punitive damages may deter realization of public safety benefits, requiring policy interventions to mitigate developer risks);

Page 826, add to the end of Note 5:

Jing Wang v. Tesla, Inc.

United States District Court, E.D. New York, 2021.
2021 WL 3023088.

■ GARAUFIS, J.

Wai-Leung Chan was involved in a car accident while driving a vehicle he purchased from Defendant Tesla, Inc. ("Tesla") . . . . Plaintiffs brought this action for breach of express and implied warranties, failure to warn, deceptive and misleading business practices and false advertising, common law fraud, and negligent misrepresentation against Tesla. Before the court is Tesla's Motion to Dismiss Plaintiffs' fraud claim and Plaintiffs' prayer for [punitive] damages pursuant to Fed. R. Civ. P. 12(b)(6), and Defendant's Motion to Strike several paragraphs of the Amended Complaint pursuant to Fed. R. Civ. P. 12(f).

. . . The court grants dismissal of Plaintiffs' fraud claim, but denies Defendant's motion to dismiss Plaintiffs' prayer for [punitive] damages and Defendant's motion to strike portions of Plaintiffs' Amended Complaint [hereinafter "Complaint"].

I. BACKGROUND

In or around 2015, Plaintiff Chan became interested in purchasing a Tesla vehicle for his daily commutes through Long Island traffic. He was especially intrigued by Tesla's Autopilot feature, which, according to Tesla, is designed to help drivers navigate "the burdensome parts of driving." Tesla vehicles equipped with Autopilot technology assist drivers in a number of ways: the cars can steer, accelerate, and brake automatically; they can match their speed to surrounding traffic; they are able to accelerate and decelerate to maintain a specified distance behind the nearest vehicle; they can change lanes on the highway; and they can detect nearby cars to prevent accidents. Tesla touts one of its vehicles equipped with Autopilot, the Model X, as "the safest, quickest, and most capable sport utility vehicle in history" and "the safest SUV ever."

Prior to [buying a Tesla], Plaintiff Chan . . . visited Tesla's website almost weekly to learn about Tesla vehicles' capabilities. Based on his research on the company's website, Chan believed that a Tesla vehicle would be uniquely suited to his [driving] needs. [He] visited showrooms in Syosset, N.Y. and Manhasset, N.Y. [the wellspring of the finest legal scholars] to test drive the Model S and Model X vehicles . . . . During Plaintiff's visit to the Manhasset showroom, an agent assured him that the Autopilot feature [was] well-suited to his commutes and that "he

could take the Tesla into the HOV [High-Occupancy Vehicle] lane . . . and then close his eyes and 'relax.' "

Relying on . . . Tesla's website and from his showroom visits, Chan purchased a Model X . . . in September 2016. Plaintiffs allege that neither Tesla nor its representatives ever warned [them] about the limitations of Model X and the Autopilot feature or provided proper instructions on operating Model X and the Autopilot feature, either through Tesla's website or during Plaintiff Chan's visits to Tesla's showrooms.

On December 13, 2017, Plaintiff Chan got into an accident while driving the Model X on the Long Island Expressway through dense traffic. Plaintiffs contend that as a white Audi merged in between Chan's car and a tractor-trailer in front of him, the Autopilot feature failed to react, warn Chan of an impending collision, or operate its "Automatic Emergency Breaking" [AEB] function. With just one second to react, Plaintiff Chan steered to the left, attempting to avoid a collision, and he instead collided with two other cars. The Autopilot feature did not recognize this impending collision, either, and it again failed to engage its ["AEB"] function. Plaintiff Chan claims he operated the vehicle in a reasonable manner and was alert the entire time. The collision caused severe damage to Plaintiffs' Model X, which was deemed a total loss, and damage to two other vehicles; there is no allegation that it caused bodily injury.

II. LEGAL STANDARD

[Omitted.]

III. DISCUSSION

Tesla moves to dismiss on two grounds. First, Tesla argues that Plaintiffs fail to state a claim for fraud under Fed. R. Civ. P. 12(b)(6). Second, Tesla argues that the Complaint does not state a cognizable claim that permits [punitive] damages. Tesla also moves to strike several paragraphs from the Complaint as immaterial and impertinent to Plaintiffs' claims.

A. Motion to Dismiss Plaintiffs' Fraud Claim

. . . Plaintiffs allege that Tesla has "intentionally made false representations of material fact regarding its vehicles, including that its Autopilot function is safe and ready to be used in common traffic situations and specifically in heavy highway traffic." They argue that the statements Tesla has made directly to Plaintiffs and to the public, through Tesla's website and showroom agents, "were likely to deceive a reasonable consumer and did deceive Plaintiffs into purchasing a Tesla vehicle." Furthermore, according to Plaintiffs, these misrepresentations about the Model X and its . . . failure to perform as represented [proximately caused] Chan's accident.

To state a claim for fraud, Plaintiffs must establish "a misrepresentation or a material omission of fact which was false and

known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." Additionally, Fed. R. Civ. P. 9(b) requires that, "[i]n alleging fraud . . . , a party must state with particularity the circumstances constituting fraud[.]" In order to satisfy this particularity standard, a complaint alleging fraud must ordinarily: "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." United States ex rel. Ladas v. Exelis, Inc., 824 F. 3d 16, 25 (2d Cir. 2016). Fed. R. Civ. P. 9(b) "is designed to provide a defendant with fair notice of a plaintiff's claim, to safeguard a defendant's reputation from improvident charges of wrongdoing, and to protect a defendant against the institution of a strike suit." O'Brien v. Nat'l Prop. Analysts Partners, 936 F.2d 674, 676 (2d Cir. 1991).

Tesla argues that Plaintiffs have failed to state a claim for fraud, as they have not pleaded all the requisite elements of a common law fraud claim. Tesla also argues that Plaintiffs have made only vague allegations that fail to satisfy the particularity standard of Federal Rule of Civil Procedure 9(b). Moreover, Tesla contends that even if Plaintiffs did make out a claim for fraud and meet the particularity standard, their claim still fails because the alleged fraud is predicated on an omission and there is no fiduciary relationship between the two parties.

Plaintiffs allege that they justifiably relied on misrepresentations about the Autopilot technology made on Tesla's website. The Complaint cites specific statements touting the safety and efficacy of the Model X and Autopilot Technology that appeared on Tesla's website at the time Plaintiffs drafted their complaint, including that the Model X is the "safest, quickest, and most capable sport utility vehicle in history" and "the safest SUV ever" and that the Autopilot feature assumes "the burdensome parts of driving." However, the Complaint does not allege that Plaintiffs viewed and relied upon these specific statements on Tesla's website in 2015 or 2016, when they made the decision to purchase a Model X. Indeed, it is not clear from the complaint what representations on Tesla's website Chan read and allegedly relied upon prior to Plaintiffs' purchase of the Model X. Because Plaintiffs do not identify the specific representations on Tesla's website that they relied upon, their fraud allegations regarding Tesla's website fall short of Rule 9(b)'s particularity requirement.

Plaintiffs also allege that they were misled by statements made by Tesla representatives in the Manhasset and Syosset showrooms, including "routine[ ] misrepresent[ations] and overstate[ments of] the capabilities of Autopilot and the required operator involvement," such as representations that the Model X was uniquely suited to Plaintiff Chan's needs, that it would perform well in traffic, and that Chan could close his eyes and relax after putting the car in Autopilot. . . . However, aside from

the alleged statement by a Manhasset showroom agent that Chan could "close his eyes and relax" when utilizing the Autopilot technology, Plaintiffs do not allege specific misrepresentations that were made during Chan's visits to the showrooms. That statement, by itself, does not meet the elements of a fraud claim. Plaintiffs have failed to present facts that "give rise to a strong inference of fraudulent intent." . . .

Plaintiffs also allege that Tesla committed fraud by failing to adequately disclose the defects or limitations of the Autopilot technology. To allege fraud based on a failure to disclose under New York law, one party must have "information that the other party is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." A fiduciary relationship "may exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge, but an arms-length business relationship does not give rise to a fiduciary obligation." . . .

"However, there may be a relationship of trust and confidence sufficient to give rise to a duty to disclose under the 'special facts doctrine.' " [Citation.] " 'Under [the special facts doctrine], a duty to disclose arises where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair' " [in] that: "(1) one party has superior knowledge of certain information; (2) that information is not readily available to the other party; and (3) the first party knows that the second party is acting on the basis of mistaken knowledge." [Citation.]

Because Plaintiffs and Tesla were engaged in an arm's-length transaction, Tesla had an affirmative duty to disclose only if the special facts doctrine applied. Plaintiffs argue that Tesla's superior knowledge of essential facts regarding the Autopilot technology's limitations and defects established a duty to disclose. Plaintiffs, however, have not alleged with any specificity what alleged defects were concealed from them, nor have they adequately alleged that information regarding the limitations of the technology was unavailable to them via Tesla's website, the Model X owner's manual, or other publicly available sources. Accordingly, the facts alleged do not give rise to a claim that Tesla committed fraud by failing to affirmatively disclose "special facts" that were known to Tesla and unknowable by Plaintiffs.

B. Motion to Dismiss Prayer for Punitive Damages

[T]he court denies Tesla's motion to dismiss Plaintiffs' prayer for punitive damages as procedurally premature.

C. Motion to Strike Portions of Plaintiffs' Complaint

Tesla also moves to strike [several] paragraphs of the Complaint which [concern] the safety of Tesla's vehicles, including a 2019 car accident involving a different Tesla model and a 2020 report by the NTSB. Specifically, Plaintiffs allege in the relevant paragraphs that: . . .

15. Rather than providing transparent disclosures, Tesla tells its customers and regulators that when Autopilot fails, the driver is the fallback option to resume control of the vehicle. This fallback plan is unreliable and unsafe. Not only has Tesla been warned by the NTSB that drivers of their automobiles may become overly reliant on the Autopilot technology, but Tesla also knows or should know, based on scientific and engineering publications, that drivers have a limited ability to execute a "take over response" when Autopilot does not measure up. Indeed, the "takeover response" time for humans varies greatly depending on the circumstances: the type of stimuli, the type of control necessary, and the driving situation. Even the most attentive drivers need a certain amount of time to perform a takeover response. The malfunctioning and defective Autopilot system does not allow for that margin of time, nor does it provide a sufficient warning to enable the driver to properly respond. In other words, Tesla knows that reasonable drivers will not [and] perhaps cannot safely use Autopilot . . . .

18. The NTSB has investigated several Tesla-related fatalities. For example, in Mountain View, California, a Tesla's Autopilot malfunctioned, and the vehicle accelerated into a cement median at a merge point of two intersecting highways, killing the driver. The NTSB investigation resulted in a report published on March 23, 2020 which stated, in part:

> . . . The NTSB determines that the probable cause of [this] crash was the Tesla Autopilot system steering the sport utility vehicle into a highway gore area due to system limitations, and the driver's lack of response due to distraction likely from a cell phone game application and overreliance on the Autopilot partial driving automation system. Contributing to the crash was the Tesla vehicle's ineffective monitoring of driver engagement, which facilitated the driver's complacency and inattentiveness.

19. Furthermore, the NTSB's report noted the following:

a. The Tesla Autopilot did not provide an effective means of monitoring the driver's level of engagement with the driving task;

b. Because monitoring of driver-applied steering wheel torque [from holding the steering wheel] is an ineffective surrogate measure of driver engagement, performance standards should be developed pertaining to an effective method of ensuring driver engagement; and

c. In order for driving automation systems to be safely deployed in a high-speed operating environment, collision avoidance systems must be able to effectively

> detect and respond to potential hazards, including roadside traffic safety hardware and be able to execute forward collision avoidance at high speeds.
>
> 20. The NTSB ultimately recommended that Tesla incorporate system safeguards that limit the use of automated vehicle control systems to those conditions for which they were designed . . . .
>
> 21. [I]n March 2019, in Delray Beach, Florida, a 2018 Tesla Model 3 struck a semi-trailer truck when the truck entered the highway without stopping. [T]he Tesla's Autopilot system was active . . . . The Autopilot system and collision avoidance systems did not classify the crossing truck as a hazard, did not attempt to slow the vehicle, and did not provide a warning to the driver of the approaching [truck, nor did the driver] take evasive action in response to the crossing truck.

Tesla argues that these paragraphs should be struck from the Amended Complaint because they do not directly pertain to, and [hence are irrelevant] to, the vehicle that Plaintiffs purchased or the accident in which that vehicle was involved. Plaintiffs argue, in response, that these factual allegations "directly bear[ ] on Plaintiff's claims that Tesla's automated features (including Autopilot) do not operate as expressly and implicitly represented to consumers."

While the challenged factual allegations are at most tangentially relevant to Plaintiffs' legal claims, they do relate to the subject matter of the litigation: alleged defects with Tesla's Autopilot technology and the extent to which Tesla knew of and disclosed those alleged defects. In addition, evidence of similar accidents may be relevant to illustrate that the incident was not an isolated occurrence. Thus, [because] Tesla cannot meet the high standard for success on a Rule 12(f) motion to strike[, its motion to strike the above paragraphs of the] Complaint is denied.

IV. CONCLUSION

. . . Tesla's Partial Motion to Dismiss is GRANTED IN PART, with respect to Plaintiffs' fraud claim, and DENIED IN PART, with respect to Plaintiffs' prayer for [punitive] damages. Tesla's Motion to Strike certain factual allegations from Plaintiffs' Complaint is DENIED.

So Ordered.

7. ELECTRONIC TECHNOLOGY

C. COMPUTER SOFTWARE

Page 849, Note 3, add after "See, e.g.,":

Peck, The Coming Connected-Products Liability Revolution, 73 Hastings L.J. 1305 (2022); S. Elvy, A Commercial Law of Privacy and Security for the Internet of Things ch. 5 (Cambridge University Press 2021);

Page 850, Note 5, add after the citation to *Flynn v. FCA* that follows the block quotation:

After the retirement of Judge Reagan, who decided Flynn v. FCA US LLC, 327 F.R.D. 206 (S.D. Ill. 2018), the newly assigned judge dismissed plaintiffs' claims for failure to show an injury. Flynn v. FCA US LLC, 2020 WL 1492687, at *5 (S.D. Ill. 2020) ("Ultimately, Plaintiffs have not suffered any injury in fact. They received what they bargained for—vehicles equipped with infotainment services—and do not plausibly allege that they were financially harmed by virtue of their vehicle purchases."), aff'd as modified, 39 F.4th 946 (7th Cir. 2022).

RESTATEMENT (SECOND) OF TORTS

SELECTED SECTIONS*

CHAPTER 14

LIABILITY OF PERSONS SUPPLYING CHATTELS FOR THE USE OF OTHERS

TOPIC 1. RULES APPLICABLE TO ALL SUPPLIERS

TOPIC 3. MANUFACTURER OF CHATTELS

TOPIC 4. SELLERS OF CHATTELS MANUFACTURED BY THIRD PERSONS

TOPIC 5. STRICT LIABILITY

TOPIC 1. RULES APPLICABLE TO ALL SUPPLIERS

Scope Note: This Topic states the rules which are equally applicable to all persons who in any way or for any purpose supply chattels for the use of others or permit others to use their chattels. There are other rules which impose upon the suppliers of chattels additional duties because of the purpose for which or the manner in which the chattels are supplied or because the chattel has been made by them or put out as their product. These rules are stated hereafter. The peculiar rules which determine the liability of one who supplies a chattel or permits its use for purposes in which he himself has a business interest are stated in §§ 391–393. The peculiar rules applicable to those who manufacture the chattels which they supply are stated in §§ 394–398. The rules which determine the peculiar liability of vendors of chattels manufactured by others are stated in §§ 399–402. A special rule of strict

liability applicable to sellers of articles for consumption is stated in § 402A, and a special rule as to liability for misrepresentations made by a seller of goods to the consumer is stated in § 402B.

The peculiar rules applicable to independent contractors and repairmen are stated in §§ 403 and 404. The peculiar rules applicable to donors, lenders, and lessors of chattels are stated in §§ 405–408.

In many instances the rules stated in the Sections in this Chapter may overlap, and the plaintiff may recover under the rules stated in two or more Sections. No attempt has been made to indicate, by way of cross-reference under any one Section, the other Sections upon which recovery may possibly be based.

§ 388. Chattel Known to Be Dangerous for Intended Use

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Comment:

a. The words "those whom the supplier should expect to use the chattel" and the words "a person for whose use it is supplied" include not only the person to whom the chattel is turned over by the supplier, but also all those who are members of a class whom the supplier should expect to use it or occupy it or share in its use with the consent of such person, irrespective of whether the supplier has any particular person in mind. Thus, one who lends an automobile to a friend and who fails to disclose a defect of which he himself knows and which he should recognize as making it unreasonably dangerous for use, is subject to liability not only to his friend, but also to anyone whom his friend permits to drive the car or chooses to receive in it as passenger or guest, if it is understood between them that the car may be so used. So too, one entrusting a chattel to a common carrier for transportation must expect that the chattel will be handled by the carrier's employees.

In the cases thus far decided, the rule stated in this Section has been applied only in favor of those who are injured while the chattel is being used by the person to whom it is supplied, or with his consent. In all probability the rule stated would not apply in favor of a thief of the chattel, or one injured while the thief is using it. Nor would it apply, for example, in favor of a trespasser who entered an automobile and was injured by its condition. On the other hand, no reason is apparent for limiting the rule to exclude persons who are for any reason privileged to use the chattel without the consent of the person to whom it is supplied, as in the case of a police officer who commandeers an automobile to pursue a criminal, or moves it in order to avoid danger to the public safety.

b. This Section states that one who supplies a chattel for another to use for any purpose is subject to liability for physical harm caused by his failure to exercise reasonable care to give to those whom he may expect to use the chattel any information as to the character and condition of the chattel which he possesses, and which he should recognize as necessary to enable them to realize the danger of using it. A fortiori, one so supplying a chattel is subject to liability if by word or deed he leads those who are to use the chattel to believe it to be of a character or in a condition safer for use than he knows it to be or to be likely to be.

Illustration:

1. A sells to B a shotgun, knowing that B intends to give it to his son C as a birthday present. A knows, but does not tell B, that the trigger mechanism of the gun is so defective that it is likely to be discharged by a slight jolt. B gives the gun to C. While C is using the gun it is discharged, and C is injured, by reason of the defective mechanism. A is subject to liability to C.

c. *Persons included as "suppliers."* The rules stated in this Section and throughout this Topic apply to determine the liability of any person who for any purpose or in any manner gives possession of a chattel for another's use, or who permits another to use or occupy it while it is in his own possession or control, without disclosing his knowledge that the chattel is dangerous for the use for which it is supplied or for which it is permitted to be used. These rules, therefore, apply to sellers, lessors, donors, or lenders, irrespective of whether the chattel is made by them or by a third person. They apply to all kinds of bailors, irrespective of whether the bailment is for a reward or gratuitous, and irrespective of whether the bailment is for use, transportation, safekeeping, or repair. They also apply to one who undertakes the repair of a chattel and who delivers it back with knowledge that it is defective because of the work which he is employed to do upon it. (See § 403.)

d. One supplying a chattel to be used or dealt with by others is subject to liability under the rule stated in this Section, not only to those for whose use the chattel is supplied but also to third persons whom the supplier should expect to be endangered by its use.

e. Ambit of liability. The liability stated in this Section exists only if physical harm is caused by the use of the chattel by those for whose use the chattel is supplied, and in the manner for which it is supplied. Except possibly where there is a privilege to use the chattel, the one who supplies a chattel for another's use is not subject to liability for bodily harm caused by its use by a third person without the consent of him for whose use it is supplied. This is true although the chattel is one of a sort notoriously likely to be so used. So too, the supplier is not subject to liability for bodily harm caused by its use by a third person who uses it even with the consent of him for whom it is supplied, if the supplier has no reason to expect that such a third person may be permitted to use it.

In order that the supplier of a chattel may be subject to liability under the rule stated in this Section, not only must the person who uses the chattel be one whom the supplier should expect to use it with the consent of him to whom it is supplied, but the chattel must also be put to a use to which the supplier has reason to expect it to be put. Thus, one who lends a chattel to another to be put to a particular use for which, though defective, it is safe, is not required to give warning of the defect, although he knows of its existence and knows that it makes the chattel dangerous for other uses, unless he has reason to expect such other uses.

f. As pointed out in § 5, the phrase "subject to liability" is used to indicate that the person whose conduct is in question is liable if, but only if, there also exist the other conditions necessary to liability. The person using the chattel may disable himself from bringing an action either by his contributory negligence in voluntarily using the chattel with knowledge of its dangerous condition, or by his contributory negligence in failing to make a proper inspection which would have disclosed the defect, or in failing to use the precautions obviously necessary to the safe use of the chattel.

Comment on Clause (a):

g. The duty which the rule stated in this Section imposes upon the supplier of a chattel for another's use is to exercise reasonable care to give to those who are to use the chattel the information which the supplier possesses, and which he should realize to be necessary to make its use safe for them and those in whose vicinity it is to be used. This information enables those for whom the chattel is supplied to determine whether they shall accept and use it. Save in exceptional circumstances, as where the chattel, no matter how carefully dealt with, is incapable of any safe use, or where the person to whom it is supplied is obviously likely to misuse it, the supplier of a chattel who has given such information is entitled to assume that it will not be used for purposes for which the information given by him shows it to be unfit and, therefore, is relieved of liability for harm done by its misuse to those in the vicinity of its probable use.

A chattel may be so imperfect that it is unlikely to be safe for use for any purpose, no matter how great the care which is exercised in using it. As to the rule which determines liability in such case, see § 389.

There are many chattels which, even though perfect, are unsafe for any use or for the particular use for which they are supplied unless their properties and capabilities are known to those who use them. If such a chattel is supplied to another whom the supplier should realize to be unlikely to know its properties and capabilities, the supplier is required to exercise reasonable care to give to the other such information thereof as he himself possesses.

Illustration:

2. A is a guest in B's house. A is taken suddenly ill. B gives him a drug which B knows can only be safely used if taken in certain doses and under certain conditions. B gives the drug to A, but forgets to instruct him as to the manner in which it is to be used. A takes it in a larger dose than is proper, or fails to take the precautions which are necessary to make it safe. In consequence A's illness is increased. B is subject to liability to A.

Comment:

h. There are many articles which are so defective as to be incapable of safe use for any of the purposes for which they are normally fit or for use in the manner in which such articles are normally capable of safe use, but which are safe for limited uses or if used with particular precautions. If the appearance of such a chattel does not disclose its defective condition, the supplier is under a duty to exercise reasonable care to disclose its condition, in so far as it is known to him, to those who are to use it, or to inform them that it is fit only for these limited uses, or if used with the particular precautions.

The supplier of a defective chattel may have had peculiar experience with such chattels, and he may, therefore, be required to realize that a disclosure of the actual condition of the chattel will not be enough to inform the user of the danger of using it except for limited purposes or with particular precautions. If such is the case, it is not enough for the supplier to inform those who are to use the chattel of its actual condition. He must exercise reasonable care to apprise them of the danger of using it otherwise than for the particular purposes for which he should know it to be fit or with the particular precautions which he should realize to be necessary to make its use safe.

i. Where lot of chattels contains a few defective ones. It is not necessary in order that a supplier of a chattel for another's use be liable under the rule stated in this Section that he should know that the particular chattel is dangerous for the use for which it is supplied. It is enough that he knows of facts which make it likely that the particular chattel may be dangerous, as where he knows that it is part of a lot, some of which he has discovered to be so imperfect as to be dangerous. If so, he

is required to exercise reasonable care to acquaint those for whose use the chattel is supplied of these facts, in order that they may realize the risk they will run in using the chattel and may make an intelligent choice as to the advisability of doing so.

Illustration:

3. A sells or gives to B a can of baking powder. A knows that several, though not all, of the lot of cans of which this can is a part have exploded when opened. He does not inform B of this fact. While C, B's cook, is attempting to open the can, it explodes, causing harm to C's eyes and also the eyes of D, B's kitchen maid, who is standing nearby. A is subject to liability to C and D.

j. So too, one may put into a stock of chattels which he intends subsequently to supply for the use of others, articles which he then knows to be, or to be likely to be, dangerous for the use for which they are to be supplied. It may, however, subsequently be impossible to tell which of the chattels are of this character, and, therefore, at the time the particular article is supplied the supplier may not know that it is dangerous. He is, however, subject to liability, since he knows that it may be one of the chattels which is dangerous. This situation usually arises where the supplier is a manufacturer whose business is divided into different departments. In such a case the operative department may discover a defect in a particular chattel which the subsequent processes of manufacture may make it difficult or impossible to detect. So too, defective material may be knowingly used in the manufacture of a lot of chattels so that it is obvious that some, though not all, of these must be defective. Here again the process of manufacture may make it impossible to tell, at the time the particular chattel is supplied, which of the lot are dangerous and which safe.

Illustration:

4. The A Manufacturing Company makes a lot of ladders out of a shipment of wood of which some is knotted. It is impossible to see the knots after the ladders have been painted. One of the ladders is sold to B. While C, B's servant, is using the ladder, it breaks because of the knots in the wood of which it is made. The A Company is subject to liability to C, although at the time the ladder was sold it appeared perfectly sound and the sales department which sold the ladder had not been informed that defective material had been used in the construction of this lot of ladders.

Comment on Clause (b):

k. When warning of defects unnecessary. One who supplies a chattel to others to use for any purpose is under a duty to exercise reasonable care to inform them of its dangerous character in so far as it is known to him, or of facts which to his knowledge make it likely to be dangerous, if, but only if, he has no reason to expect that those for whose use the chattel is supplied will discover its condition and realize the

danger involved. It is not necessary for the supplier to inform those for whose use the chattel is supplied of a condition which a mere casual looking over will disclose, unless the circumstances under which the chattel is supplied are such as to make it likely that even so casual an inspection will not be made. However, the condition, although readily observable, may be one which only persons of special experience would realize to be dangerous. In such case, if the supplier, having such special experience, knows that the condition involves danger and has no reason to believe that those who use it will have such special experience as will enable them to perceive the danger, he is required to inform them of the risk of which he himself knows and which he has no reason to suppose that they will realize.

Comment on Clause (c):

l. The supplier's duty is to exercise reasonable care to inform those for whose use the article is supplied of dangers which are peculiarly within his knowledge. If he has done so, he is not subject to liability, even though the information never reaches those for whose use the chattel is supplied. The factors which determine whether the supplier exercises reasonable care by giving this information to third persons through whom the chattel is supplied for the use of others, are stated in Comment *n*.

m. Inspection. The fact that a chattel is supplied for the use of others does not of itself impose upon the supplier a duty to make an inspection of the chattel, no matter how cursory, in order to discover whether it is fit for the use for which it is supplied. Such a duty may be imposed because of the purpose for which the chattel is to be used by those to whom it is supplied. (See § 392.) A manufacturer of a chattel may be under a duty to inspect the materials and parts out of which it is made and to subject the finished article to such an inspection as the danger involved in an imperfect article makes reasonable. (See § 395 and Comment *e* under that Section.) Under certain conditions, stated in §§ 403, 404, and 408, an independent contractor or lessor may be under a similar duty of inspection.

n. Warnings given to third person. Chattels are often supplied for the use of others, although the chattels or the permission to use them are not given directly to those for whose use they are supplied, as when a wholesale dealer sells to a retailer goods which are obviously to be used by the persons purchasing them from him, or when a contractor furnishes the scaffoldings or other appliances which his subcontractor and the latter's servants are to use, or when an automobile is lent for the borrower to use for the conveyance of his family and friends. In all such cases the question may arise as to whether the person supplying the chattel is exercising that reasonable care, which he owes to those who are to use it, by informing the third person through whom the chattel is supplied of its actual character.

Giving to the third person through whom the chattel is supplied all the information necessary to its safe use is not in all cases sufficient to relieve the supplier from liability. It is merely a means by which this information is to be conveyed to those who are to use the chattel. The question remains whether this method gives a reasonable assurance that the information will reach those whose safety depends upon their having it. All sorts of chattels may be supplied for the use of others, through all sorts of third persons and under an infinite variety of circumstances. This being true, it is obviously impossible to state in advance any set of rules which will automatically determine in all cases whether one supplying a chattel for the use of others through a third person has satisfied his duty to those who are to use the chattel by informing the third person of the dangerous character of the chattel, or of the precautions which must be exercised in using it in order to make its use safe. There are, however, certain factors which are important in determining this question. There is necessarily some chance that information given to the third person will not be communicated by him to those who are to use the chattel. This chance varies with the circumstances existing at the time the chattel is turned over to the third person, or permission is given to him to allow others to use it. These circumstances include the known or knowable character of the third person and may also include the purpose for which the chattel is given. Modern life would be intolerable unless one were permitted to rely to a certain extent on others' doing what they normally do, particularly if it is their duty to do so. If the chattel is one which if ignorantly used contains no great chance of causing anything more than some comparatively trivial harm, it is reasonable to permit the one who supplies the chattel through a third person to rely upon the fact that the third person is an ordinary normal man to whose discredit the supplier knows nothing, as a sufficient assurance that information given to him will be passed on to those who are to use the chattel.

If, however, the third person is known to be careless or inconsiderate or if the purpose for which the chattel is to be used is to his advantage and knowledge of the true character of the chattel is likely to prevent its being used and so to deprive him of this advantage—as when goods so defective as to be unsalable are sold by a wholesaler to a retailer—the supplier of the chattel has reason to expect, or at least suspect, that the information will fail to reach those who are to use the chattel and whose safety depends upon their knowledge of its true character. In such a case, the supplier may well be required to go further than to tell such a third person of the dangerous character of the article, or, if he fails to do so, to take the risk of being subjected to liability if the information is not brought home to those whom the supplier should expect to use the chattel. In many cases the burden of doing so is slight, as when the chattel is to be used in the presence or vicinity of the person supplying it, so that he could easily give a personal warning to those who are to use the chattel. Even though the supplier has no practicable opportunity to give this information directly and in person to those who are to use the

chattel or share in its use, it is not unreasonable to require him to make good any harm which is caused by his using so unreliable a method of giving the information which is obviously necessary to make the chattel safe for those who use it and those in the vicinity of its use.

Here, as in every case which involves the determination of the precautions which must be taken to satisfy the requirements of reasonable care, the magnitude of the risk involved must be compared with the burden which would be imposed by requiring them (see § 291), and the magnitude of the risk is determined not only by the chance that some harm may result but also the serious or trivial character of the harm which is likely to result (see § 293). Since the care which must be taken always increases with the danger involved, it may be reasonable to require those who supply through others chattels which if ignorantly used involve grave risk of serious harm to those who use them and those in the vicinity of their use, to take precautions to bring the information home to the users of such chattels which it would be unreasonable to demand were the chattels of a less dangerous character.

Thus, while it may be proper to permit a supplier to assume that one through whom he supplies a chattel which is only slightly dangerous will communicate the information given him to those who are to use it unless he knows that the other is careless, it may be improper to permit him to trust the conveyance of the necessary information of the actual character of a highly dangerous article to a third person of whose character he knows nothing. It may well be that he should take the risk that this information may not be communicated, unless he exercises reasonable care to ascertain the character of the third person, or unless from previous experience with him or from the excellence of his reputation the supplier has positive reason to believe that he is careful. In addition to this, if the danger involved in the ignorant use of a particular chattel is very great, it may be that the supplier does not exercise reasonable care in entrusting the communication of the necessary information even to a person whom he has good reason to believe to be careful. Many such articles can be made to carry their own message to the understanding of those who are likely to use them by the form in which they are put out, by the container in which they are supplied, or by a label or other device, indicating with a substantial sufficiency their dangerous character. Where the danger involved in the ignorant use of their true quality is great and such means of disclosure are practicable and not unduly burdensome, it may well be that the supplier should be required to adopt them. There are many statutes which require that articles which are highly dangerous if used in ignorance of their character, such as poisons, explosives, and inflammables, shall be put out in such a form as to bear on their face notice of their dangerous character, either by the additional coloring matter, the form or color of the containers, or by labels. Such statutes are customarily construed as making one who supplies such articles not so marked liable, even though he has disclosed their actual

character to the person to whom he directly gives them for the use of others, and even though the statute contains no express provisions on the subject.

o. Under the rule stated in this Section one who supplies a chattel to a third person for use is subject to the liability stated in this Section if he fails to exercise reasonable care to inform those for whose use the chattel is supplied of its dangerous condition. It follows that the supplier is equally liable if he actually conceals a defect in the chattel by painting it over or by a pretense of repair, or if by express words he represents it to be safe, knowing that it is not so.

TOPIC 3. MANUFACTURER OF CHATTELS

§ 395. Negligent Manufacture of Chattel Dangerous Unless Carefully Made

A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.

Comment:

a. History. The original common law rule was contrary to that stated in this Section. The case of Winterbottom v. Wright, 10 M. & W. 109, 152 Eng.Rep. 402 (1842), in which a seller who contracted with the buyer to keep a stagecoach in repair after the sale was held not to be liable to a passenger injured when he failed to do so, was for a long time misconstrued to mean that the original seller of a chattel could not be liable, in tort or in contract, to one other than his immediate buyer. To this rule various exceptions developed, the first of which involved the rule stated in §§ 388, 390, and 394, that a manufacturer who knew that the chattel was dangerous for its expected use and failed to disclose the danger became liable to a third person injured by the defect.

The most important of these exceptions, however, made the seller liable to a third person for negligence in the manufacture or sale of an article classified as "inherently" or "imminently" dangerous to human safety. By degrees this category was redefined to include articles "intended to preserve, destroy, or affect human life or health." For more than half a century, however, the category remained vague and imperfectly defined. It was held to include food, drugs, firearms, and explosives, but there was much rather pointless dispute in the decisions as to other articles, and as to whether, for example, such a product as chewing tobacco was to be classified as a food.

In 1916 the leading modern case of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F, 696, Am.Ann.Cas. 1916C, 440, 13 N.C.C.A. 1029 (1916), discarded the general rule of non-liability, by holding that "inherently dangerous" articles included any article which would be dangerous to human safety if negligently made. After the passage of more than forty years, this decision is now all but universally accepted by the American courts. Although some decisions continue to speak the language of "inherent danger," it has very largely been superseded by a recognition that what is involved is merely the ordinary duty of reasonable care imposed upon the manufacturer, as to any product which he can reasonably expect to be dangerous if he is negligent in its manufacture or sale.

b. This Section states the rule thus generally adopted. The justification for it rests upon the responsibility assumed by the manufacturer toward the consuming public, which arises, not out of contract, but out of the relation resulting from the purchase of the product by the consumer; upon the foreseeability of harm if proper care is not used; upon the representation of safety implied in the act of putting the product on the market; and upon the economic benefit derived by the manufacturer from the sale and subsequent use of the chattel.

c. *Not necessary that chattel be intended to affect, preserve, or destroy human life*. In order that the manufacturer of a chattel shall be subject to liability under the rule stated in this Section, it is not necessary that the chattel be one the use of which is intended to affect, preserve, or destroy human life. The purpose which the article, if perfect, is intended to accomplish is immaterial. The important thing is the harm which it is likely to do if it is imperfect.

d. *Not necessary that chattel be inherently dangerous*. In order that the manufacturer shall be subject to liability under the rule stated in this Section, it is not necessary that the chattel be "inherently dangerous," in the sense of involving any degree of risk of harm to those who use it even if it is properly made. It is enough that the chattel, if not carefully made, will involve such a risk of harm. It is not necessary that the risk be a great one, or that it be a risk of death or serious bodily harm. A risk of harm to property, as in the case of defective animal food, is enough. All that is necessary is that the risk be an unreasonable one, as stated in § 291. The inherent danger, or the high degree of danger, is merely a factor to be considered, as in other negligence cases, as bearing upon the extent of the precautions required.

Illustration:

1. A manufactures a mattress. Through the carelessness of one of A's employees a spring inside of the mattress is not properly tied down. A sells the mattress to B, a dealer, who resells it to C. C sleeps on the mattress, and is wounded in the back by the sharp point of the spring. The wound becomes infected, and C suffers serious illness. A is subject to liability to C.

e. When inspections and tests necessary. As heretofore pointed out (§ 298, Comment *b*), the precaution necessary to comply with the standard of reasonable care varies with the danger involved. Consequently the character of harm likely to result from the failure to exercise care in manufacture affects the question as to what is reasonable care. It is reasonable to require those who make or assemble automobiles to subject the raw material, or parts, procured from even reputable manufacturers, to inspections and tests which it would be obviously unreasonable to require of a product which, although defective, is unlikely to cause more than some comparatively slight, though still substantial, harm to those who use it. A garment maker is not required to subject the finished garment to anything like so minute an inspection for the purpose of discovering whether a basting needle has not been left in a seam as is required of the maker of an automobile or of high speed machinery or of electrical devices, in which the slightest inaccuracy may involve danger of death.

f. Particulars which require care. A manufacturer is required to exercise reasonable care in manufacturing any article which, if carelessly manufactured, is likely to cause harm to those who use it in the manner for which it is manufactured. The particulars in which reasonable care is usually necessary for protection of those whose safety depends upon the character of chattels are (1) the adoption of a formula or plan which, if properly followed, will produce an article safe for the use for which it is sold, (2) the selection of material and parts to be incorporated in the finished article, (3) the fabrication of the article by every member of the operative staff no matter how high or low his position, (4) the making of such inspections and tests during the course of manufacture and after the article is completed as the manufacturer should recognize as reasonably necessary to secure the production of a safe article, and (5) the packing of the article so as to be safe for those who must be expected to unpack it.

Illustration:

2. The A Motor Company incorporates in its car wheels manufactured by the B Wheel Company. These wheels are constructed of defective material, as an inspection made by the A Company before putting them on its car would disclose. The car is sold to C through the D Company, an independent distributor. While C is driving the car the defective wheel collapses and the car swerves and collides with that of E, causing harm to C and E, and also to F and G, who are guests in the cars of C and E respectively. The A Motor Company is subject to liability to C, E, F, and G.

g. The exercise of reasonable care in selecting raw material and parts to be incorporated in the finished article usually requires something more than a mere inspection of the material and parts. A manufacturer should have sufficient technical knowledge to select such a type of material that its use will secure a safe finished product. So too,

a manufacturer who incorporates a part made by another manufacturer into his finished product should exercise reasonable care to ascertain not only the material out of which the part is made but also the plan under which it is made. He must have sufficient technical knowledge to form a reasonably accurate judgment as to whether a part made under such a plan and of such material is or is not such as to secure a safe finished product. The part is of his own selection, and it is reasonable for the users of the product to rely not only upon a careful inspection but also sufficient technical knowledge to make a careful inspection valuable in securing an article safe for use. In all of these particulars the amount of care which the manufacturer must exercise is proportionate to the extent of the risk involved in using the article if manufactured without the exercise of these precautions. Where, as in the case of an automobile or high speed machinery or high voltage electrical devices, there is danger of serious bodily harm or death unless the article is substantially perfect, it is reasonable to require the manufacturer to exercise almost meticulous precautions in all of these particulars in order to secure substantial perfection. On the other hand, it would be ridiculous to demand equal care of the manufacturer of an article which, no matter how imperfect, is unlikely to do more than some comparatively trivial harm to those who use it.

h. Persons protected. The words "those who use the chattel" include not only the vendee but also all persons whose right or privilege to use the article is derived from him, unless the nature of the article or the conditions of the sale make it improbable that the article will be resold by the vendee or that he will permit others to use it or to share in its use. Unless the article is made to special order for the peculiar use of a particular person, the manufacturer must realize the chance that it may be sold. This becomes a substantial certainty where the article is sold to a jobber, wholesaler, or retailer. So too, many articles are obviously made for the use of several persons or are sold under conditions which make it certain that they will be used by persons other than the purchaser. Thus the manufacturer of a seven-seated automobile which is obviously intended to carry persons other than the purchaser and his chauffeur should recognize it as likely to be used by any persons whom, as members of his family, guests, or pedestrians picked up on the road, the purchaser chooses to receive in his car. A threshing machine sold to the owner of a large farm is obviously intended for the use of his employees.

The words "those who use the chattel" include, therefore, all persons whom the vendee or his subvendee or donee permits to use the article irrespective of whether they do so as his servants, as passengers for hire or otherwise, to serve his business purposes, or as licensees permitted to use a car purely for their own benefit. They also include any person to whom the vendee sells or gives the chattel, or to whom such subvendee or donee sells or gives the chattel ad infinitum, and also all persons whom such subvendee or subdonee permits to use the chattel or to share in its

use. Thus they include a person to whom an improperly prepared drug is hypodermically administered by a physician who has bought it from a drugstore which has purchased it from a wholesaler or jobber.

i. Persons endangered by use. The words "those whom he should expect to be endangered by its probable use" may likewise include a large group of persons who have no connection with the ownership or use of the chattel itself. Thus the manufacturer of an automobile, intended to be driven on the public highway, should reasonably expect that, if the automobile is dangerously defective, harm will result to any person on the highway, including pedestrians and drivers of other vehicles and their passengers and guests; and he should also expect danger to those upon land immediately abutting on the highway. Likewise the manufacturer of a cable to be used in the transmission of high voltage electric current should reasonably anticipate that if its insulation is defective its use may endanger even persons miles away from the cable itself.

j. Unforeseeable use or manner of use. The liability stated in this Section is limited to persons who are endangered and the risks which are created in the course of uses of the chattel which the manufacturer should reasonably anticipate. In the absence of special reason to expect otherwise, the maker is entitled to assume that his product will be put to a normal use, for which the product is intended or appropriate; and he is not subject to liability when it is safe for all such uses, and harm results only because it is mishandled in a way which he has no reason to expect, or is used in some unusual and unforeseeable manner. Thus a shoemaker is not liable to an obstinate lady who suffers harm because she insists on wearing a size too small for her, and the manufacturer of a bottle of cleaning fluid is not liable when the purchaser splashes it into his eye.

Illustration:

3. A manufactures and sells to a dealer an automobile tire, which is in all respects safe for normal automobile driving. B, an automobile racer, buys the tire from the dealer and installs it on his racing car. In the course of the race the tire blows out because of the excessive speed, and B is injured. A is not liable to B.

k. Foreseeable uses and risks. The manufacturer may, however, reasonably anticipate other uses than the one for which the chattel is primarily intended. The maker of a chair, for example, may reasonably expect that someone will stand on it; and the maker of an inflammable cocktail robe may expect that it will be worn in the kitchen in close proximity to a fire. Likewise the manufacturer may know, or may be under a duty to discover, that some possible users of the product are especially susceptible to harm from it, if it contains an ingredient to which any substantial percentage of the population are allergic or otherwise sensitive, and he fails to take reasonable precautions, by giving warning or otherwise, against harm to such persons.

l. The fact that the article is leased, given, or loaned to the user rather than sold or leased does not affect the liability of the manufacturer for his negligence in making the article.

m. Manufacturer of raw material or parts of article to be assembled by third person. It is not necessary that the manufacturer should expect his product to be used in the form in which it is delivered to his immediate buyer. A manufacturer of parts to be incorporated in the product of his buyer or others is subject to liability under the rule stated in this Section, if they are so negligently made as to render the products in which they are incorporated unreasonably dangerous for use. So too, a manufacturer of raw material made and sold to be used in the fabrication of particular articles which will be dangerous for use unless the material is carefully made, is subject to liability if he fails to exercise reasonable care in its manufacture. As to the effect to be given to the fact that the defect could have been discovered before the part or material was incorporated in the finished article, see § 396.

Illustration:

4. Under the facts stated in Illustration 2, the B Wheel Company is subject to liability to C, E, F, and G.

n. The rule stated in this Section applies where the only harm which results from the manufacturer's failure to exercise reasonable care is to the manufactured chattel itself.

Illustration:

5. A manufactures and sells to a dealer an automobile, which is purchased from the dealer by B. Because of A's failure to exercise reasonable care in manufacture the car has a defective steering gear. While B is driving the steering gear gives way, and the car goes into the ditch and is damaged. B is not injured, and there is no other damage of any kind. A is subject to liability to B for the damage to the automobile.

§ 398. Chattel Made Under Dangerous Plan or Design

A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

Comment:

a. The rule stated in this Section, like that stated in § 397, is a special application of the rule stated in § 395.

b. When dangerous plan or design known to user. If the dangerous character of the plan or design is known to the user of the chattel, he may be in contributory fault if the risk involved in using it is unreasonably

great or if he fails to take those special precautions which the known dangerous character of the chattel requires.

Illustration:

1. The A Stove Company makes a gas stove under a design which places the aperture through which it is lighted in dangerous proximity to the gas outlet. As a result of this B, a cook employed by C, who has bought one of these stoves from a dealer to whom A has sold it, while attempting to light the stove is hurt by an explosion of gas. The A Stove Company is subject to liability to B.

TOPIC 4. SELLERS OF CHATTELS MANUFACTURED BY THIRD PERSONS

§ 400. Selling as Own Product Chattel Made by Another

One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer.

Comment:

a. The words "one who puts out a chattel" include anyone who supplies it to others for their own use or for the use of third persons, either by sale or lease or by gift or loan.

b. The rules which determine the liability of a manufacturer of a chattel are stated in §§ 394–398.

c. One who puts out as his own product chattels made by others is under a duty to exercise care, proportionate to the danger involved in the use of the chattels if improperly made, to secure the adoption of a proper formula or plan and the use of safe materials and to inspect the chattel when made. But he does not escape liability by so doing. He is liable if, because of some negligence in its fabrication or through lack of proper inspection during the process of manufacture, the article is in a dangerously defective condition which the seller could not discover after it was delivered to him.

d. The rule stated in this Section applies only where the actor puts out the chattel as his own product. The actor puts out a chattel as his own product in two types of cases. The first is where the actor appears to be the manufacturer of the chattel. The second is where the chattel appears to have been made particularly for the actor. In the first type of case the actor frequently causes the chattel to be used in reliance upon his care in making it; in the second, he frequently causes the chattel to be used in reliance upon a belief that he has required it to be made properly for him and that the actor's reputation is an assurance to the user of the quality of the product. On the other hand, where it is clear that the actor's only connection with the chattel is that of a distributor of it (for example, as a wholesale or retail seller), he does not put it out as his own product and the rule stated in this section is inapplicable. Thus,

one puts out a chattel as his own product when he puts it out under his name or affixes to it his trade name or trademark. When such identification is referred to on the label as an indication of the quality or wholesomeness of the chattel, there is an added emphasis that the user can rely upon the reputation of the person so identified. The mere fact that the goods are marked with such additional words as "made for" the seller, or describe him as a distributor, particularly in the absence of a clear and distinctive designation of the real manufacturer or packer, is not sufficient to make inapplicable the rule stated in this Section. The casual reader of a label is likely to rely upon the featured name, trade name, or trademark, and overlook the qualification of the description of source. So too, the fact that the seller is known to carry on only a retail business does not prevent him from putting out as his own product a chattel which is marked in such a way as to indicate clearly it is put out as his product. However, where the real manufacturer or packer is clearly and accurately identified on the label or other markings on the goods, and it is also clearly stated that another who is also named has nothing to do with the goods except to distribute or sell them, the latter does not put out such goods as his own. That the goods are not the product of him who puts them out may also be indicated clearly in other ways.

Illustrations:

1. A puts out under his own name a floor stain which is manufactured under a secret formula by B, to whom A entrusts the selection of the formula. The stain made under this formula is inflammable, as a competent maker of such articles would have known. Of this both A and B are ignorant, and neither the advertisements nor the directions contain any warning against using it near unguarded lights. C purchases from a retail dealer a supply of this stain and while D, C's wife, is applying it to the floor of the kitchen, C strikes a match to light the gas. An explosion follows, causing harm to D and to E, a friend who is watching D stain the floor. A is subject to liability to D and E.

2. A, a wholesale distributor, sells canned corned beef labeled with A's widely known trademark and also labeled "Packed for A" and "A, distributor". The beef was negligently packed by B and is unwholesome. C buys a can of it from D, a retail grocer, and serves it to her guest, E, who is made ill. A is liable to E.

TOPIC 5. STRICT LIABILITY

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate 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.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Caveat:

The Institute expresses no opinion as to whether the rules stated in this Section may not apply

(1) to harm to persons other than users or consumers;

(2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or

(3) to the seller of a component part of a product to be assembled.

Comment:

a. This Section states a special rule applicable to sellers of products. The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product. The Section is inserted in the Chapter dealing with the negligence liability of suppliers of chattels, for convenience of reference and comparison with other Sections dealing with negligence. The rule stated here is not exclusive, and does not preclude liability based upon the alternative ground of negligence of the seller, where such negligence can be proved.

b. History. Since the early days of the common law those engaged in the business of selling food intended for human consumption have been held to a high degree of responsibility for their products. As long ago as 1266 there were enacted special criminal statutes imposing penalties upon victualers, vintners, brewers, butchers, cooks, and other persons

who supplied "corrupt" food and drink. In the earlier part of this century this ancient attitude was reflected in a series of decisions in which the courts of a number of states sought to find some method of holding the seller of food liable to the ultimate consumer even though there was no showing of negligence on the part of the seller. These decisions represented a departure from, and an exception to, the general rule that a supplier of chattels was not liable to third persons in the absence of negligence or privity of contract. In the beginning, these decisions displayed considerable ingenuity in evolving more or less fictitious theories of liability to fit the case. The various devices included an agency of the intermediate dealer or another to purchase for the consumer, or to sell for the seller; a theoretical assignment of the seller's warranty to the intermediate dealer; a third party beneficiary contract; and an implied representation that the food was fit for consumption because it was placed on the market, as well as numerous others. In later years the courts have become more or less agreed upon the theory of a "warranty" from the seller to the consumer, either "running with the goods" by analogy to a covenant running with the land, or made directly to the consumer. Other decisions have indicated that the basis is merely one of strict liability in tort, which is not dependent upon either contract or negligence.

Recent decisions, since 1950, have extended this special rule of strict liability beyond the seller of food for human consumption. The first extension was into the closely analogous cases of other products intended for intimate bodily use, where, for example, as in the case of cosmetics, the application to the body of the consumer is external rather than internal. Beginning in 1958 with a Michigan case involving cinder building blocks, a number of recent decisions have discarded any limitation to intimate association with the body, and have extended the rule of strict liability to cover the sale of any product which, if it should prove to be defective, may be expected to cause physical harm to the consumer or his property.

c. On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

d. The rule stated in this Section is not limited to the sale of food for human consumption, or other products for intimate bodily use, although it will obviously include them. It extends to any product sold in the condition, or substantially the same condition, in which it is expected to reach the ultimate user or consumer. Thus the rule stated applies to an automobile, a tire, an airplane, a grinding wheel, a water heater, a gas stove, a power tool, a riveting machine, a chair, and an insecticide. It applies also to products which, if they are defective, may be expected to and do cause only "physical harm" in the form of damage to the user's land or chattels, as in the case of animal food or a herbicide.

e. Normally the rule stated in this Section will be applied to articles which already have undergone some processing before sale, since there is today little in the way of consumer products which will reach the consumer without such processing. The rule is not, however, so limited, and the supplier of poisonous mushrooms which are neither cooked, canned, packaged, nor otherwise treated is subject to the liability here stated.

f. Business of selling. The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. Thus the rule applies to the owner of a motion picture theatre who sells popcorn or ice cream, either for consumption on the premises or in packages to be taken home.

The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam or a pound of sugar. Nor does it apply to the owner of an automobile who, on one occasion, sells it to his neighbor, or even sells it to a dealer in used cars, and this even though he is fully aware that the dealer plans to resell it. The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods. This basis is lacking in the case of the ordinary individual who makes the isolated sale, and he is not liable to a third person, or even to his buyer, in the absence of his negligence. An analogy may be found in the provision of the Uniform Sales Act, § 15, which limits the implied warranty of merchantable quality to sellers who deal in such goods; and in the similar limitation of the Uniform Commercial Code, § 2–314, to a seller who is a merchant. This Section is also not intended to apply to sales of the stock of merchants out of the usual course of business, such as execution sales, bankruptcy sales, bulk sales, and the like.

g. Defective condition. The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

Safe condition at the time of delivery by the seller will, however, include proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner.

h. A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger (see Comment *j*), and a product sold without such warning is in a defective condition.

The defective condition may arise not only from harmful ingredients, not characteristic of the product itself either as to presence or quantity, but also from foreign objects contained in the product, from decay or deterioration before sale, or from the way in which the product is prepared or packed. No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole. Where the container is itself dangerous, the product is sold in a defective condition. Thus a carbonated beverage in a bottle which is so weak, or cracked, or jagged at the edges, or bottled under such excessive pressure that it may explode or otherwise cause harm to the person who handles it, is in a defective and dangerous condition. The container cannot logically be separated from the contents when the two are sold as a unit, and the liability stated in this Section arises not only when the consumer drinks the beverage and is poisoned by it, but also when he is injured by the bottle while he is handling it preparatory to consumption.

i. Unreasonably dangerous. The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under

Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

j. Directions or warning. In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.

But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. Again the dangers of alcoholic beverages are an example, as are also those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart.

Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

k. Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the

use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

l. User or consumer. In order for the rule stated in this Section to apply, it is not necessary that the ultimate user or consumer have acquired the product directly from the seller, although the rule applies equally if he does so. He may have acquired it through one or more intermediate dealers. It is not even necessary that the consumer have purchased the product at all. He may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser. The liability stated is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant.

"Consumers" include not only those who in fact consume the product, but also those who prepare it for consumption; and the housewife who contracts tularemia while cooking rabbits for her husband is included within the rule stated in this Section, as is also the husband who is opening a bottle of beer for his wife to drink. Consumption includes all ultimate uses for which the product is intended, and the customer in a beauty shop to whose hair a permanent wave solution is applied by the shop is a consumer. "User" includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased.

Illustration:

1. A manufactures and packs a can of beans, which he sells to B, a wholesaler. B sells the beans to C, a jobber, who resells it to D, a retail grocer. E buys the can of beans from D, and gives it to F. F serves the beans at lunch to G, his guest. While eating the beans, G breaks a tooth, on a pebble of the size, shape, and color of a bean, which no reasonable inspection could possibly have discovered.

There is satisfactory evidence that the pebble was in the can of beans when it was opened. Although there is no negligence on the part of A, B, C, or D, each of them is subject to liability to G. On the other hand E and F, who have not sold the beans, are not liable to G in the absence of some negligence on their part.

m. "Warranty." The liability stated in this Section does not rest upon negligence. It is strict liability, similar in its nature to that covered by Chapters 20 and 21. The basis of liability is purely one of tort.

A number of courts, seeking a theoretical basis for the liability, have resorted to a "warranty," either running with the goods sold, by analogy to covenants running with the land, or made directly to the consumer without contract. In some instances this theory has proved to be an unfortunate one. Although warranty was in its origin a matter of tort liability, and it is generally agreed that a tort action will still lie for its breach, it has become so identified in practice with a contract of sale between the plaintiff and the defendant that the warranty theory has become something of an obstacle to the recognition of the strict liability where there is no such contract. There is nothing in this Section which would prevent any court from treating the rule stated as a matter of "warranty" to the user or consumer. But if this is done, it should be recognized and understood that the "warranty" is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales.

The rule stated in this Section does not require any reliance on the part of the consumer upon the reputation, skill, or judgment of the seller who is to be held liable, nor any representation or undertaking on the part of that seller. The seller is strictly liable although, as is frequently the case, the consumer does not even know who he is at the time of consumption. The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to "buyer" and "seller" in those statutes. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by the Uniform Act. The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands. In short, "warranty" must be given a new and different meaning if it is used in connection with this Section. It is much simpler to regard the liability here stated as merely one of strict liability in tort.

n. Contributory negligence. Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies.

Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Comment on Caveat:

o. Injuries to non-users and non-consumers. Thus far the courts, in applying the rule stated in this Section, have not gone beyond allowing recovery to users and consumers, as those terms are defined in Comment *l.* Casual bystanders, and others who may come in contact with the product, as in the case of employees of the retailer, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery. There may be no essential reason why such plaintiffs should not be brought within the scope of the protection afforded, other than that they do not have the same reasons for expecting such protection as the consumer who buys a marketed product; but the social pressure which has been largely responsible for the development of the rule stated has been a consumers' pressure, and there is not the same demand for the protection of casual strangers. The Institute expresses neither approval nor disapproval of expansion of the rule to permit recovery by such persons.

p. Further processing or substantial change. Thus far the decisions applying the rule stated have not gone beyond products which are sold in the condition, or in substantially the same condition, in which they are expected to reach the hands of the ultimate user or consumer. In the absence of decisions providing a clue to the rules which are likely to develop, the Institute has refrained from taking any position as to the possible liability of the seller where the product is expected to, and does, undergo further processing or other substantial change after it leaves his hands and before it reaches those of the ultimate user or consumer.

It seems reasonably clear that the mere fact that the product is to undergo processing, or other substantial change, will not in all cases relieve the seller of liability under the rule stated in this Section. If, for example, raw coffee beans are sold to a buyer who roasts and packs them for sale to the ultimate consumer, it cannot be supposed that the seller will be relieved of all liability when the raw beans are contaminated with arsenic, or some other poison. Likewise the seller of an automobile with a defective steering gear which breaks and injures the driver, can scarcely expect to be relieved of the responsibility by reason of the fact that the car is sold to a dealer who is expected to "service" it, adjust the brakes, mount and inflate the tires, and the like, before it is ready for

use. On the other hand, the manufacturer of pig iron, which is capable of a wide variety of uses, is not so likely to be held to strict liability when it turns out to be unsuitable for the child's tricycle into which it is finally made by a remote buyer. The question is essentially one of whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes. No doubt there will be some situations, and some defects, as to which the responsibility will be shifted, and others in which it will not. The existing decisions as yet throw no light upon the questions, and the Institute therefore expresses neither approval nor disapproval of the seller's strict liability in such a case.

q. Component parts. The same problem arises in cases of the sale of a component part of a product to be assembled by another, as for example a tire to be placed on a new automobile, a brake cylinder for the same purpose, or an instrument for the panel of an airplane. Again the question arises, whether the responsibility is not shifted to the assembler. It is no doubt to be expected that where there is no change in the component part itself, but it is merely incorporated into something larger, the strict liability will be found to carry through to the ultimate user or consumer. But in the absence of a sufficient number of decisions on the matter to justify a conclusion, the Institute expresses no opinion on the matter.

§ 402B. Misrepresentation by Seller of Chattels to Consumer

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and

(b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

Caveat:

The Institute expresses no opinion as to whether the rule stated in this Section may apply

(1) where the representation is not made to the public, but to an individual, or

(2) where physical harm is caused to one who is not a consumer of the chattel.

Comment:

a. The rule stated in this Section is one of strict liability for physical harm to the consumer, resulting from a misrepresentation of the

character or quality of the chattel sold, even though the misrepresentation is an innocent one, and not made fraudulently or negligently. Although the Section deals with misrepresentation, it is inserted here in order to complete the rules dealing with the liability of suppliers of chattels for physical harm caused by the chattel. A parallel rule, as to strict liability for pecuniary loss resulting from such a misrepresentation, is stated in § 552D.*

b. The rule stated in this Section differs from the rule of strict liability stated in § 402A, which is a special rule applicable only to sellers of products for consumption and does not depend upon misrepresentation. The rule here stated applies to one engaged in the business of selling any type of chattel, and is limited to misrepresentations of their character or quality.

c. History. The early rule was that a seller of chattels incurred no liability for physical harm resulting from the use of the chattel to anyone other than his immediate buyer, unless there was privity of contract between them. (See § 395, Comment *a.*) Beginning with Langridge v. Levy, 2 M. & W. 519, 150 Eng.Rep. 863 (1837), an exception was developed in cases where the seller made fraudulent misrepresentations to the immediate buyer, concerning the character or quality of the chattel sold, and because of the fact misrepresented harm resulted to a third person who was using the chattel. The remedy lay in an action for deceit, and the rule which resulted is now stated in § 557A.

Shortly after 1930, a number of the American courts began, more or less independently, to work out a further extension of liability for physical harm to the consumer of the chattel, in cases where the seller made misrepresentations to the public concerning its character or quality, and the consumer, as a member of the public, purchased the chattel in reliance upon the misrepresentation and suffered physical harm because of the fact misrepresented. In such cases the seller was held to strict liability for the misrepresentation, even though it was not made fraudulently or negligently. The leading case is Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 88 A.L.R. 521 (1932), adhered to on rehearing, 168 Wash. 456, 15 P.2d 1118, 88 A.L.R. 521, second appeal, 179 Wash. 123, 35 P.2d 1090 (1934), in which the manufacturer of an automobile advertised to the public that the windshield glass was "shatterproof," and the purchaser was injured when a stone struck the glass and it shattered. In the beginning various theories of liability were suggested, including strict liability in deceit, and a contract resulting from an offer made to the consumer to be bound by the representation, accepted by his purchase.

d. "Warranty." The theory finally adopted by most of the decisions, however, has been that of a non-contractual "express warranty" made to

* Section 552D, in tentative form at the time § 402B was adopted, was ultimately rejected by The American Law Institute.—Eds.

the consumer in the form of the representation to the public upon which he relies. The difficulties attending the use of the word "warranty" are the same as those involved under § 402 A, and Comment *m* under that Section is equally applicable here so far as it is pertinent. The liability stated in this Section is liability in tort, and not in contract; and if it is to be called one of "warranty," it is at least a different kind of warranty from that involved in the ordinary sale of goods from the immediate seller to the immediate buyer, and is subject to different rules.

e. Sellers included. The rule stated in this Section applies to any person engaged in the business of selling any type of chattel. It is not limited to sellers of food or products for intimate bodily use, as was until lately the rule stated in § 402 A. It is not limited to manufacturers of the chattel, and it includes wholesalers, retailers, and other distributors who sell it.

The rule stated applies, however, only to those who are engaged in the business of selling such chattels. It has no application to anyone who is not so engaged in business. It does not apply, for example, to a newspaper advertisement published by a private owner of a single automobile who offers it for sale.

f. Misrepresentation of character or quality. The rule stated applies to any misrepresentation of a material fact concerning the character or quality of the chattel sold which is made to the public by one so engaged in the business of selling such chattels. The fact misrepresented must be a material one, upon which the consumer may be expected to rely in making his purchase, and he must justifiably rely upon it. (See Comment *j*.) If he does so, and suffers physical harm by reason of the fact misrepresented, there is strict liability to him.

Illustration:

1. A manufactures automobiles. He advertises in newspapers and magazines that the glass in his cars is "shatterproof." B reads this advertising, and in reliance upon it purchases from a retail dealer an automobile manufactured by A. While B is driving the car, a stone thrown up by a passing truck strikes the windshield and shatters it, injuring B. A is subject to strict liability to B.

g. Material fact. The rule stated in this Section applies only to misrepresentations of material facts concerning the character or quality of the chattel in question. It does not apply to statements of opinion, and in particular it does not apply to the kind of loose general praise of wares sold which, on the part of the seller, is considered to be "sales talk," and is commonly called "puffing"—as, for example, a statement that an automobile is the best on the market for the price. As to such general language of opinion, see § 542, and Comment *d* under that Section, which is applicable here so far as it is pertinent. In addition, the fact misrepresented must be a material one, of importance to the normal

purchaser, by which the ultimate buyer may justifiably be expected to be influenced in buying the chattel.

h. "To the public." The rule stated in this Section is limited to misrepresentations which are made by the seller to the public at large, in order to induce purchase of the chattels sold, or are intended by the seller to, and do, reach the public. The form of the representation is not important. It may be made by public advertising in newspapers or television, by literature distributed to the public through dealers, by labels on the product sold, or leaflets accompanying it, or in any other manner, whether it be oral or written.

Illustrations:

2. A manufactures wire rope. He issues a manual containing statements concerning its strength, which he distributes through dealers to buyers, and to members of the public who may be expected to buy. In reliance upon the statements made in the manual, B buys a quantity of the wire rope from a dealer, and makes use of it to hoist a weight of 1,000 pounds. The strength of the rope is not as great as is represented in the manual, and as a result the rope breaks and the weight falls on B and injures him. A is subject to strict liability to B.

3. A manufactures a product for use by women at home in giving "permanent waves" to their hair. He places on the bottles labels which state that the product may safely be used in a particular manner, and will not be injurious to the hair. B reads such a label, and in reliance upon it purchases a bottle of the product from a retail dealer. She uses it as directed, and as a result her hair is destroyed. A is subject to strict liability to B.

i. Consumers. The rule stated in this Section is limited to strict liability for physical harm to consumers of the chattel. The Caveat leaves open the question whether the rule may not also apply to one who is not a consumer, but who suffers physical harm through his justifiable reliance upon the misrepresentation.

"Consumer" is to be understood in the broad sense of one who makes use of the chattel in the manner which a purchaser may be expected to use it. Thus an employee of the ultimate purchaser to whom the chattel is turned over, and who is directed to make use of it in his work, is a consumer, and so is the wife of the purchaser of an automobile who is permitted by him to drive it.

j. Justifiable reliance. The rule here stated applies only where there is justifiable reliance upon the misrepresentation of the seller, and physical harm results because of such reliance, and because of the fact which is misrepresented. It does not apply where the misrepresentation is not known, or there is indifference to it, and it does not influence the purchase or subsequent conduct. At the same time, however, the misrepresentation need not be the sole inducement to purchase, or to use

the chattel, and it is sufficient that it has been a substantial factor in that inducement. (Compare § 546 and Comments.) Since the liability here is for misrepresentation, the rules as to what will constitute justifiable reliance stated in §§ 537–545 A are applicable to this Section, so far as they are pertinent.

The reliance need not necessarily be that of the consumer who is injured. It may be that of the ultimate purchaser of the chattel, who because of such reliance passes it on to the consumer who is in fact injured, but is ignorant of the misrepresentation. Thus a husband who buys an automobile in justifiable reliance upon statements concerning its brakes, and permits his wife to drive the car, supplies the element of reliance, even though the wife in fact never learns of the statements.

Illustration:

4. The same facts as in Illustration 2, except that the harm is suffered by C, an employee of B, to whom B turns over the wire rope without informing him of the representations made by A. The same result.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY*

CHAPTER 1

LIABILITY OF COMMERCIAL PRODUCT SELLERS BASED ON PRODUCT DEFECTS AT TIME OF SALE

TOPIC 1

LIABILITY RULES APPLICABLE TO PRODUCTS GENERALLY

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CHAPTER 1

LIABILITY OF COMMERCIAL PRODUCT SELLERS BASED ON PRODUCT DEFECTS AT TIME OF SALE

TOPIC 1. LIABILITY RULES APPLICABLE TO PRODUCTS GENERALLY

§ 1. Liability of Commercial Seller or Distributor for Harm Caused by Defective Products

One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.

Comment:

a. History. This Section states a general rule of tort liability applicable to commercial sellers and other distributors of products generally. Rules of liability applicable to special products such as prescription drugs and used products are set forth in separate Sections in Topic 2 of this Chapter.

The liability established in this Section draws on both warranty law and tort law. Historically, the focus of products liability law was on manufacturing defects. A manufacturing defect is a physical departure from a product's intended design. See § 2(a). Typically, manufacturing defects occur in only a small percentage of units in a product line. Courts early began imposing liability without fault on product sellers for harm caused by such defects, holding a seller liable for harm caused by manufacturing defects even though all possible care had been exercised by the seller in the preparation and distribution of the product. In doing

so, courts relied on the concept of warranty, in connection with which fault has never been a prerequisite to liability.

The imposition of liability for manufacturing defects has a long history in the common law. As early as 1266, criminal statutes imposed liability upon victualers, vintners, brewers, butchers, cooks, and other persons who supplied contaminated food and drink. In the late 1800s, courts in many states began imposing negligence and strict warranty liability on commercial sellers of defective goods. In the early 1960s, American courts began to recognize that a commercial seller of any product having a manufacturing defect should be liable in tort for harm caused by the defect regardless of the plaintiff's ability to maintain a traditional negligence or warranty action. Liability attached even if the manufacturer's quality control in producing the defective product was reasonable. A plaintiff was not required to be in direct privity with the defendant seller to bring an action. Strict liability in tort for defectively manufactured products merges the concept of implied warranty, in which negligence is not required, with the tort concept of negligence, in which contractual privity is not required. See § 2(a).

Questions of design defects and defects based on inadequate instructions or warnings arise when the specific product unit conforms to the intended design but the intended design itself, or its sale without adequate instructions or warnings, renders the product not reasonably safe. If these forms of defect are found to exist, then every unit in the same product line is potentially defective. See § 2, Comments *d, f,* and *i*. Imposition of liability for design defects and for defects based on inadequate instructions or warnings was relatively infrequent until the late 1960s and early 1970s. A number of restrictive rules made recovery for such defects, especially design defects, difficult to obtain. As these rules eroded, courts sought to impose liability without fault for design defects and defects due to inadequate instructions or warnings under the general principles of § 402A of the Restatement, Second, of Torts. However, it soon became evident that § 402A, created to deal with liability for manufacturing defects, could not appropriately be applied to cases of design defects or defects based on inadequate instructions or warnings. A product unit that fails to meet the manufacturer's design specifications thereby fails to perform its intended function and is, almost by definition, defective. However, when the product unit meets the manufacturer's own design specifications, it is necessary to go outside those specifications to determine whether the product is defective.

Sections 2(b) and 2(c) recognize that the rule developed for manufacturing defects is inappropriate for the resolution of claims of defective design and defects based on inadequate instructions or warnings. These latter categories of cases require determinations that the product could have reasonably been made safer by a better design or instruction or warning. Sections 2(b) and 2(c) rely on a reasonableness test traditionally used in determining whether an actor has been

negligent. See Restatement, Second, Torts §§ 291–293. Nevertheless, many courts insist on speaking of liability based on the standards described in §§ 2(b) and 2(c) as being "strict."

Several factors help to explain this rhetorical preference. First, in many design defect cases, if the product causes injury while being put to a reasonably foreseeable use, the seller is held to have known of the risks that foreseeably attend such use. See § 2, Comment *m*. Second, some courts have sought to limit the defense of comparative fault in certain products liability contexts. In furtherance of this objective, they have avoided characterizing the liability test as based in negligence, thereby limiting the effect of comparative or contributory fault. See § 17, Comment *d*. Third, some courts are concerned that a negligence standard might be too forgiving of a small manufacturer who might be excused for its ignorance of risk or for failing to take adequate precautions to avoid risk. Negligence, which focuses on the conduct of the defendant-manufacturer, might allow a finding that a defendant with meager resources was not negligent because it was too burdensome for such a defendant to discover risks or to design or warn against them. The concept of strict liability, which focuses on the product rather than the conduct of the manufacturer, may help make the point that a defendant is held to the expert standard of knowledge available to the relevant manufacturing community at the time the product was manufactured. Finally, the liability of nonmanufacturing sellers in the distributive chain is strict. It is no defense that they acted reasonably and did not discover a defect in the product, be it from manufacturing, design, or failure to warn. See Comment *e*.

Thus, "strict products liability" is a term of art that reflects the judgment that products liability is a discrete area of tort law which borrows from both negligence and warranty. It is not fully congruent with classical tort or contract law. Rather than perpetuating confusion spawned by existing doctrinal categories, §§ 1 and 2 define the liability for each form of defect in terms directly addressing the various kinds of defects. As long as these functional criteria are met, courts may utilize the terminology of negligence, strict liability, or the implied warranty of merchantability, or simply define liability in the terms set forth in the black letter. See § 2, Comment *n*.

b. Sale or other distribution. The rule stated in this Section applies not only to sales transactions but also to other forms of commercial product distribution that are the functional equivalent of product sales. See § 20.

c. One engaged in the business of selling or otherwise distributing. The rule stated in this Section applies only to manufacturers and other commercial sellers and distributors who are engaged in the business of selling or otherwise distributing the type of product that harmed the plaintiff. The rule does not apply to a noncommercial seller or distributor of such products. Thus, it does not apply to one who sells foodstuffs to a

neighbor, nor does it apply to the private owner of an automobile who sells it to another.

It is not necessary that a commercial seller or distributor be engaged exclusively or even primarily in selling or otherwise distributing the type of product that injured the plaintiff, so long as the sale of the product is other than occasional or casual. Thus, the rule applies to a motion-picture theater's routine sales of popcorn or ice cream, either for consumption on the premises or in packages to be taken home. Similarly, a service station that does mechanical repair work on cars may also sell tires and automobile equipment as part of its regular business. Such sales are subject to the rule in this Section. However, the rule does not cover occasional sales (frequently referred to as "casual sales") outside the regular course of the seller's business. Thus, an occasional sale of surplus equipment by a business does not fall within the ambit of this rule. Whether a defendant is a commercial seller or distributor within the meaning of this Section is usually a question of law to be determined by the court.

d. Harm to persons or property. The rule stated in this Section applies only to harm to persons or property, commonly referred to as personal injury and property damage. For rules governing economic loss, see § 21.

e. Nonmanufacturing sellers or other distributors of products. The rule stated in this Section provides that all commercial sellers and distributors of products, including nonmanufacturing sellers and distributors such as wholesalers and retailers, are subject to liability for selling products that are defective. Liability attaches even when such nonmanufacturing sellers or distributors do not themselves render the products defective and regardless of whether they are in a position to prevent defects from occurring. See § 2, Comment *o*. Legislation has been enacted in many jurisdictions that, to some extent, immunizes nonmanufacturing sellers or distributors from strict liability. The legislation is premised on the belief that bringing nonmanufacturing sellers or distributors into products liability litigation generates wasteful legal costs. Although liability in most cases is ultimately passed on to the manufacturer who is responsible for creating the product defect, nonmanufacturing sellers or distributors must devote resources to protect their interests. In most situations, therefore, immunizing nonmanufacturers from strict liability saves those resources without jeopardizing the plaintiff's interests. To assure plaintiffs access to a responsible and solvent product seller or distributor, the statutes generally provide that the nonmanufacturing seller or distributor is immunized from strict liability only if: (1) the manufacturer is subject to the jurisdiction of the court of plaintiff's domicile; and (2) the manufacturer is not, nor is likely to become, insolvent.

In connection with these statutes, two problems may need to be resolved to assure fairness to plaintiffs. First, as currently structured, the statutes typically impose upon the plaintiff the risk of insolvency of the manufacturer between the time an action is brought and the time a

judgment can be enforced. If a nonmanufacturing seller or distributor is dismissed from an action at the outset when it appears that the manufacturer will be able to pay a judgment, and the manufacturer subsequently becomes insolvent and is unable to pay the judgment, the plaintiff may be left to suffer the loss uncompensated. One possible solution could be to toll the statute of limitations against nonmanufacturers so that they may be brought in if necessary. Second, a nonmanufacturing seller or distributor occasionally will be responsible for the introduction of a defect in a product even though it exercised reasonable care in handling or supervising the product in its control. In such instances, liability for a § 2(a) defect should be imposed on the nonmanufacturing seller or distributor. See § 2, Illustration 2.

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§ 2. Categories of Product Defect

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

(a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;

(b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

(c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Comment:

a. Rationale. The rules set forth in this Section establish separate standards of liability for manufacturing defects, design defects, and defects based on inadequate instructions or warnings. They are generally applicable to most products. Standards of liability applicable to special product categories such as prescription drugs and used products are set forth in separate sections in Topic 2 of this Chapter.

The rule for manufacturing defects stated in Subsection (a) imposes liability whether or not the manufacturer's quality control efforts satisfy

standards of reasonableness. Strict liability without fault in this context is generally believed to foster several objectives. On the premise that tort law serves the instrumental function of creating safety incentives, imposing strict liability on manufacturers for harm caused by manufacturing defects encourages greater investment in product safety than does a regime of fault-based liability under which, as a practical matter, sellers may escape their appropriate share of responsibility. Some courts and commentators also have said that strict liability discourages the consumption of defective products by causing the purchase price of products to reflect, more than would a rule of negligence, the costs of defects. And by eliminating the issue of manufacturer fault from plaintiff's case, strict liability reduces the transaction costs involved in litigating that issue.

Several important fairness concerns are also believed to support manufacturers' liability for manufacturing defects even if the plaintiff is unable to show that the manufacturer's quality control fails to meet risk-utility norms. In many cases manufacturing defects are in fact caused by manufacturer negligence but plaintiffs have difficulty proving it. Strict liability therefore performs a function similar to the concept of res ipsa loquitur, allowing deserving plaintiffs to succeed notwithstanding what would otherwise be difficult or insuperable problems of proof. Products that malfunction due to manufacturing defects disappoint reasonable expectations of product performance. Because manufacturers invest in quality control at consciously chosen levels, their knowledge that a predictable number of flawed products will enter the marketplace entails an element of deliberation about the amount of injury that will result from their activity. Finally, many believe that consumers who benefit from products without suffering harm should share, through increases in the prices charged for those products, the burden of unavoidable injury costs that result from manufacturing defects.

An often-cited rationale for holding wholesalers and retailers strictly liable for harm caused by manufacturing defects is that, as between them and innocent victims who suffer harm because of defective products, the product sellers as business entities are in a better position than are individual users and consumers to insure against such losses. In most instances, wholesalers and retailers will be able to pass liability costs up the chain of product distribution to the manufacturer. When joining the manufacturer in the tort action presents the plaintiff with procedural difficulties, local retailers can pay damages to the victims and then seek indemnity from manufacturers. Finally, holding retailers and wholesalers strictly liable creates incentives for them to deal only with reputable, financially responsible manufacturers and distributors, thereby helping to protect the interests of users and consumers. For considerations relevant to reducing nonmanufacturers' liability, see § 1, Comment *e*.

In contrast to manufacturing defects, design defects and defects based on inadequate instructions or warnings are predicated on a different concept of responsibility. In the first place, such defects cannot be determined by reference to the manufacturer's own design or marketing standards because those standards are the very ones that plaintiffs attack as unreasonable. Some sort of independent assessment of advantages and disadvantages, to which some attach the label "risk-utility balancing," is necessary. Products are not generically defective merely because they are dangerous. Many product-related accident costs can be eliminated only by excessively sacrificing product features that make products useful and desirable. Thus, the various trade-offs need to be considered in determining whether accident costs are more fairly and efficiently borne by accident victims, on the one hand, or, on the other hand, by consumers generally through the mechanism of higher product prices attributable to liability costs imposed by courts on product sellers.

Subsections (b) and (c), which impose liability for products that are defectively designed or sold without adequate warnings or instructions and are thus not reasonably safe, achieve the same general objectives as does liability predicated on negligence. The emphasis is on creating incentives for manufacturers to achieve optimal levels of safety in designing and marketing products. Society does not benefit from products that are excessively safe—for example, automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits from products that are too risky. Society benefits most when the right, or optimal, amount of product safety is achieved. From a fairness perspective, requiring individual users and consumers to bear appropriate responsibility for proper product use prevents careless users and consumers from being subsidized by more careful users and consumers, when the former are paid damages out of funds to which the latter are forced to contribute through higher product prices.

In general, the rationale for imposing strict liability on manufacturers for harm caused by manufacturing defects does not apply in the context of imposing liability for defective design and defects based on inadequate instruction or warning. Consumer expectations as to proper product design or warning are typically more difficult to discern than in the case of a manufacturing defect. Moreover, the element of deliberation in setting appropriate levels of design safety is not directly analogous to the setting of levels of quality control by the manufacturer. When a manufacturer sets its quality control at a certain level, it is aware that a given number of products may leave the assembly line in a defective condition and cause injury to innocent victims who can generally do nothing to avoid injury. The implications of deliberately drawing lines with respect to product design safety are different. A reasonably designed product still carries with it elements of risk that must be protected against by the user or consumer since some risks cannot be designed out of the product at reasonable cost.

Most courts agree that, for the liability system to be fair and efficient, the balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution. To hold a manufacturer liable for a risk that was not foreseeable when the product was marketed might foster increased manufacturer investment in safety. But such investment by definition would be a matter of guesswork. Furthermore, manufacturers may persuasively ask to be judged by a normative behavior standard to which it is reasonably possible for manufacturers to conform. For these reasons, Subsections (b) and (c) speak of products being defective only when risks are reasonably foreseeable.

b. The nonexclusiveness of the definitions of defect in this Section. When a plaintiff seeks recovery under the general rule of liability in § 1, in most instances the plaintiff must establish a prima facie case of product defect by satisfying the requirements of § 2. Section 2 is not, however, the exclusive means by which the plaintiff may establish liability in a products case based on the general rule in § 1. Some courts, for example, while recognizing that in most cases involving defective design the plaintiff must prove the availability of a reasonable alternative design, also observe that such proof is not necessary in every case involving design defects. Sections 3 and 4 and Comment *e* to § 2 provide approaches to the establishment of defective design other than that provided in § 2(b).

Section 3 provides that when circumstantial evidence supports the conclusion that a defect was a contributing cause of the harm and that the defect existed at the time of sale, it is unnecessary to identify the specific nature of the defect and meet the requisites of § 2. Section 3 frees the plaintiff from the strictures of § 2 in circumstances in which common experience teaches that an inference of defect may be warranted under the specific facts, including the failure of the product to perform its manifestly intended function. When the defect established under § 3 may involve product design, some courts recognize consumer expectations as an adequate test for defect, in apparent conflict with the reasonable alternative design requirement in § 2(b). But when the claims involve a product's failure to perform its manifestly intended function and the other requisites of § 3 are met, the apparent conflict disappears.

Section 4, dealing with violations of statutory and regulatory norms, also provides an alternate method of establishing defect. A plaintiff is not required to establish the standard for design or warning under § 2, but merely to identify a government-imposed standard.

Comment *e* provides a further qualification of the rule in § 2(b). This Restatement recognizes the possibility that product sellers may be subject to liability even absent a reasonable alternative design when the product design is manifestly unreasonable. When § 2(b) is read in conjunction with these other provisions that allow for other avenues for

determining defective design, it reflects the substantial body of case law suggesting that reasonable alternative design is the predominant, yet not exclusive, method for establishing defective design.

c. Manufacturing defects. As stated in Subsection (a), a manufacturing defect is a departure from a product unit's design specifications. More distinctly than any other type of defect, manufacturing defects disappoint consumer expectations. Common examples of manufacturing defects are products that are physically flawed, damaged, or incorrectly assembled. In actions against the manufacturer, under prevailing rules concerning allocation of burdens of proof the plaintiff ordinarily bears the burden of establishing that such a defect existed in the product when it left the hands of the manufacturer.

Occasionally a defect may arise after manufacture, for example, during shipment or while in storage. Since the product, as sold to the consumer, has a defect that is a departure from the product unit's design specifications, a commercial seller or distributor down the chain of distribution is liable as if the product were defectively manufactured. As long as the plaintiff establishes that the product was defective when it left the hands of a given seller in the distributive chain, liability will attach to that seller. Such defects are referred to in this Restatement as "manufacturing defects" even when they occur after manufacture. When the manufacturer delegates some aspect of manufacture, such as final assembly or inspection, to a subsequent seller, the manufacturer may be subject to liability under rules of vicarious liability for a defect that was introduced into the product after it left the hands of the manufacturer. Although Subsection (a) calls for liability without fault, a plaintiff may seek to recover based upon allegations and proof of negligent manufacture. See Comment *n*. For the rule governing food products that contain impurities or foreign matter, see § 7. For the rule governing commercial used-product sellers' liability for harm caused by manufacturing defects, see § 8.

d. Design defects: general considerations. Whereas a manufacturing defect consists of a product unit's failure to meet the manufacturer's design specifications, a product asserted to have a defective design meets the manufacturer's design specifications but raises the question whether the specifications themselves create unreasonable risks. Answering that question requires reference to a standard outside the specifications. Subsection (b) adopts a reasonableness ("risk-utility balancing") test as the standard for judging the defectiveness of product designs. More specifically, the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design by the seller or a predecessor in the distributive chain rendered the product not reasonably safe. (This is the primary, but not the exclusive, test for defective design. See Comment *b*.) Under prevailing rules concerning allocation of burden

of proof, the plaintiff must prove that such a reasonable alternative was, or reasonably could have been, available at time of sale or distribution. See Comment *f*.

Assessment of a product design in most instances requires a comparison between an alternative design and the product design that caused the injury, undertaken from the viewpoint of a reasonable person. That approach is also used in administering the traditional reasonableness standard in negligence. See Restatement, Second, Torts § 283, Comment *c*. The policy reasons that support use of a reasonable-person perspective in connection with the general negligence standard also support its use in the products liability context.

How the defendant's design compares with other, competing designs in actual use is relevant to the issue of whether the defendant's design is defective. Defendants often seek to defend their product designs on the ground that the designs conform to the "state of the art." The term "state of the art" has been variously defined to mean that the product design conforms to industry custom, that it reflects the safest and most advanced technology developed and in commercial use, or that it reflects technology at the cutting edge of scientific knowledge. The confusion brought about by these various definitions is unfortunate. This Section states that a design is defective if the product could have been made safer by the adoption of a reasonable alternative design. If such a design could have been practically adopted at time of sale and if the omission of such a design rendered the product not reasonably safe, the plaintiff establishes defect under Subsection (b). When a defendant demonstrates that its product design was the safest in use at the time of sale, it may be difficult for the plaintiff to prove that an alternative design could have been practically adopted. The defendant is thus allowed to introduce evidence with regard to industry practice that bears on whether an alternative design was practicable. Industry practice may also be relevant to whether the omission of an alternative design rendered the product not reasonably safe. While such evidence is admissible, it is not necessarily dispositive. If the plaintiff introduces expert testimony to establish that a reasonable alternative design could practically have been adopted, a trier of fact may conclude that the product was defective notwithstanding that such a design was not adopted by any manufacturer, or even considered for commercial use, at the time of sale.

Early in the development of products liability law, courts held that a claim based on design defect could not be sustained if the dangers presented by the product were open and obvious. Subsection (b) does not recognize the obviousness of a design-related risk as precluding a finding of defectiveness. The fact that a danger is open and obvious is relevant to the issue of defectiveness, but does not necessarily preclude a plaintiff from establishing that a reasonable alternative design should have been adopted that would have reduced or prevented injury to the plaintiff.

The requirement in Subsection (b) that the plaintiff show a reasonable alternative design applies in most instances even though the plaintiff alleges that the category of product sold by the defendant is so dangerous that it should not have been marketed at all. See Comment *e*. Common and widely distributed products such as alcoholic beverages, firearms, and above-ground swimming pools may be found to be defective only upon proof of the requisite conditions in Subsection (a), (b), or (c). If such products are defectively manufactured or sold without reasonable warnings as to their danger when such warnings are appropriate, or if reasonable alternative designs could have been adopted, then liability under §§ 1 and 2 may attach. Absent proof of defect under those Sections, however, courts have not imposed liability for categories of products that are generally available and widely used and consumed, even if they pose substantial risks of harm. Instead, courts generally have concluded that legislatures and administrative agencies can, more appropriately than courts, consider the desirability of commercial distribution of some categories of widely used and consumed, but nevertheless dangerous, products.

e. Design defects: possibility of manifestly unreasonable design. Several courts have suggested that the designs of some products are so manifestly unreasonable, in that they have low social utility and high degree of danger, that liability should attach even absent proof of a reasonable alternative design. In large part the problem is one of how the range of relevant alternative designs is described. For example, a toy gun that shoots hard rubber pellets with sufficient velocity to cause injury to children could be found to be defectively designed within the rule of Subsection (b). Toy guns unlikely to cause injury would constitute reasonable alternatives to the dangerous toy. Thus, toy guns that project ping-pong balls, soft gelatin pellets, or water might be found to be reasonable alternative designs to a toy gun that shoots hard pellets. However, if the realism of the hard-pellet gun, and thus its capacity to cause injury, is sufficiently important to those who purchase and use such products to justify the court's limiting consideration to toy guns that achieve realism by shooting hard pellets, then no reasonable alternative will, by hypothesis, be available. In that instance, the design feature that defines which alternatives are relevant—the realism of the hard-pellet gun and thus its capacity to injure—is precisely the feature on which the user places value and of which the plaintiff complains. If a court were to adopt this characterization of the product, and deem the capacity to cause injury an egregiously unacceptable quality in a toy for use by children, it could conclude that liability should attach without proof of a reasonable alternative design. The court would declare the product design to be defective and not reasonably safe because the extremely high degree of danger posed by its use or consumption so substantially outweighs its negligible social utility that no rational, reasonable person, fully aware of the relevant facts, would choose to use, or to allow children to use, the product.

f. Design defects: factors relevant in determining whether the omission of a reasonable alternative design renders a product not reasonably safe. Subsection (b) states that a product is defective in design if the omission of a reasonable alternative design renders the product not reasonably safe. A broad range of factors may be considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe. The factors include, among others, the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing. See Comment *g*. The relative advantages and disadvantages of the product as designed and as it alternatively could have been designed may also be considered. Thus, the likely effects of the alternative design on production costs; the effects of the alternative design on product longevity, maintenance, repair, and esthetics; and the range of consumer choice among products are factors that may be taken into account. A plaintiff is not necessarily required to introduce proof on all of these factors; their relevance, and the relevance of other factors, will vary from case to case. Moreover, the factors interact with one another. For example, evidence of the magnitude and probability of foreseeable harm may be offset by evidence that the proposed alternative design would reduce the efficiency and the utility of the product. On the other hand, evidence that a proposed alternative design would increase production costs may be offset by evidence that product portrayal and marketing created substantial expectations of performance or safety, thus increasing the probability of foreseeable harm. Depending on the mix of these factors, a number of variations in the design of a given product may meet the test in Subsection (b). On the other hand, it is not a factor under Subsection (b) that the imposition of liability would have a negative effect on corporate earnings or would reduce employment in a given industry.

When evaluating the reasonableness of a design alternative, the overall safety of the product must be considered. It is not sufficient that the alternative design would have reduced or prevented the harm suffered by the plaintiff if it would also have introduced into the product other dangers of equal or greater magnitude.

While a plaintiff must prove that a reasonable alternative design would have reduced the foreseeable risks of harm, Subsection (b) does not require the plaintiff to produce expert testimony in every case. Cases arise in which the feasibility of a reasonable alternative design is obvious and understandable to laypersons and therefore expert testimony is unnecessary to support a finding that the product should have been designed differently and more safely. For example, when a manufacturer sells a soft stuffed toy with hard plastic buttons that are easily removable and likely to choke and suffocate a small child who foreseeably attempts to swallow them, the plaintiff should be able to reach the trier of fact with

a claim that buttons on such a toy should be an integral part of the toy's fabric itself (or otherwise be unremovable by an infant) without hiring an expert to demonstrate the feasibility of an alternative safer design. Furthermore, other products already available on the market may serve the same or very similar function at lower risk and at comparable cost. Such products may serve as reasonable alternatives to the product in question.

In many cases, the plaintiff must rely on expert testimony. Subsection (b) does not, however, require the plaintiff to produce a prototype in order to make out a prima facie case. Thus, qualified expert testimony on the issue suffices, even though the expert has produced no prototype, if it reasonably supports the conclusion that a reasonable alternative design could have been practically adopted at the time of sale.

The requirements in Subsection (b) relate to what the plaintiff must prove in order to prevail at trial. This Restatement takes no position regarding the requirements of local law concerning the adequacy of pleadings or pretrial demonstrations of genuine issues of fact. It does, however, assume that the plaintiff will have the opportunity to conduct reasonable discovery so as to ascertain whether an alternative design is practical.

A test that considers such a broad range of factors in deciding whether the omission of an alternative design renders a product not reasonably safe requires a fair allocation of proof between the parties. To establish a prima facie case of defect, the plaintiff must prove the availability of a technologically feasible and practical alternative design that would have reduced or prevented the plaintiff's harm. Given inherent limitations on access to relevant data, the plaintiff is not required to establish with particularity the costs and benefits associated with adoption of the suggested alternative design.

In sum, the requirement of Subsection (b) that a product is defective in design if the foreseeable risks of harm could have been reduced by a reasonable alternative design is based on the commonsense notion that liability for harm caused by product designs should attach only when harm is reasonably preventable. For justice to be achieved, Subsection (b) should not be construed to create artificial and unreasonable barriers to recovery.

The necessity of proving a reasonable alternative design as a predicate for establishing design defect is, like any factual element in a case, addressed initially to the courts. Sufficient evidence must be presented so that reasonable persons could conclude that a reasonable alternative could have been practically adopted. Assuming that a court concludes that sufficient evidence on this issue has been presented, the issue is then for the trier of fact. This Restatement takes no position regarding the specifics of how a jury should be instructed. So long as jury instructions are generally consistent with the rule of law set forth in Subsection (b), their specific form and content are matters of local law.

g. Consumer expectations: general considerations. Under Subsection (b), consumer expectations do not constitute an independent standard for judging the defectiveness of product designs. Courts frequently rely, in part, on consumer expectations when discussing liability based on other theories of liability. Some courts, for example, use the term "reasonable consumer expectations" as an equivalent of "proof of a reasonable, safer design alternative," since reasonable consumers have a right to expect product designs that conform to the reasonableness standard in Subsection (b). Other courts, allowing an inference of defect to be drawn when the incident is of a kind that ordinarily would occur as a result of product defect, observe that products that fail when put to their manifestly intended use disappoint reasonable consumer expectations. See § 3. However, consumer expectations do not play a determinative role in determining defectiveness. See Comment *h*. Consumer expectations, standing alone, do not take into account whether the proposed alternative design could be implemented at reasonable cost, or whether an alternative design would provide greater overall safety. Nevertheless, consumer expectations about product performance and the dangers attendant to product use affect how risks are perceived and relate to foreseeability and frequency of the risks of harm, both of which are relevant under Subsection (b). See Comment *f*. Such expectations are often influenced by how products are portrayed and marketed and can have a significant impact on consumer behavior. Thus, although consumer expectations do not constitute an independent standard for judging the defectiveness of product designs, they may substantially influence or even be ultimately determinative on risk-utility balancing in judging whether the omission of a proposed alternative design renders the product not reasonably safe.

Subsection (b) likewise rejects conformance to consumer expectations as a defense. The mere fact that a risk presented by a product design is open and obvious, or generally known, and that the product thus satisfies expectations, does not prevent a finding that the design is defective. But the fact that a product design meets consumer expectations may substantially influence or even be ultimately determinative on risk-utility balancing in judging whether the omission of a proposed alternative design renders the product not reasonably safe. It follows that, while disappointment of consumer expectations may not serve as an independent basis for allowing recovery under Subsection (b), neither may conformance with consumer expectations serve as an independent basis for denying recovery. Such expectations may be relevant in both contexts, but in neither are they controlling.

h. Consumer expectations: food products and used products. With regard to two special product categories consumer expectations play a special role in determining product defect. See § 7 (food products) and § 8 (used products). On occasion it is difficult to determine whether a given food component is an inherent aspect of a product or constitutes an

adulteration of the product. Whether, for example, a fish bone in commercially distributed fish chowder constitutes a manufacturing defect within the meaning of § 2(a) is best determined by focusing on reasonable consumer expectations.

Regarding commercially distributed used products, the rules set forth in § 2 are not adequate to the task of determining liability. Variations in the type and condition of used products are such that the stringent rules for imposition of liability for new products are inappropriate. On occasion the seller of a used product may market the product in a manner that would cause a reasonable person in the position of the buyer to expect the used product to present no greater risk of defect than if it were new; or a used product may be remanufactured, justifying heightened seller's responsibility. In these limited settings it is appropriate to treat the sale under rules similar to those applicable to new products. See §§ 8(b) and 8(c).

i. Inadequate instructions or warnings. Commercial product sellers must provide reasonable instructions and warnings about risks of injury posed by products. Instructions inform persons how to use and consume products safely. Warnings alert users and consumers to the existence and nature of product risks so that they can prevent harm either by appropriate conduct during use or consumption or by choosing not to use or consume. In most instances the instructions and warnings will originate with the manufacturer, but sellers down the chain of distribution must warn when doing so is feasible and reasonably necessary. In any event, sellers down the chain are liable if the instructions and warnings provided by predecessors in the chain are inadequate. See Comment *o*. Under prevailing rules concerning allocation of burdens of proof, plaintiff must prove that adequate instructions or warnings were not provided. Subsection (c) adopts a reasonableness test for judging the adequacy of product instructions and warnings. It thus parallels Subsection (b), which adopts a similar standard for judging the safety of product designs. Although the liability standard is formulated in essentially identical terms in Subsections (b) and (c), the defectiveness concept is more difficult to apply in the warnings context. In evaluating the adequacy of product warnings and instructions, courts must be sensitive to many factors. It is impossible to identify anything approaching a perfect level of detail that should be communicated in product disclosures. For example, educated or experienced product users and consumers may benefit from inclusion of more information about the full spectrum of product risks, whereas less-educated or unskilled users may benefit from more concise warnings and instructions stressing only the most crucial risks and safe-handling practices. In some contexts, products intended for special categories of users, such as children, may require more vivid and unambiguous warnings. In some cases, excessive detail may detract from the ability of typical users and consumers to focus on the important aspects of the

warnings, whereas in others reasonably full disclosure will be necessary to enable informed, efficient choices by product users. Product warnings and instructions can rarely communicate all potentially relevant information, and the ability of a plaintiff to imagine a hypothetical better warning in the aftermath of an accident does not establish that the warning actually accompanying the product was inadequate. No easy guideline exists for courts to adopt in assessing the adequacy of product warnings and instructions. In making their assessments, courts must focus on various factors, such as content and comprehensibility, intensity of expression, and the characteristics of expected user groups.

Depending on the circumstances, Subsection (c) may require that instructions and warnings be given not only to purchasers, users, and consumers, but also to others who a reasonable seller should know will be in a position to reduce or avoid the risk of harm. There is no general rule as to whether one supplying a product for the use of others through an intermediary has a duty to warn the ultimate product user directly or may rely on the intermediary to relay warnings. The standard is one of reasonableness in the circumstances. Among the factors to be considered are the gravity of the risks posed by the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user. Thus, when the purchaser of machinery is the owner of a workplace who provides the machinery to employees for their use, and there is reason to doubt that the employer will pass warnings on to employees, the seller is required to reach the employees directly with necessary instructions and warnings if doing so is reasonably feasible.

In addition to alerting users and consumers to the existence and nature of product risks so that they can, by appropriate conduct during use or consumption, reduce the risk of harm, warnings also may be needed to inform users and consumers of nonobvious and not generally known risks that unavoidably inhere in using or consuming the product. Such warnings allow the user or consumer to avoid the risk warned against by making an informed decision not to purchase or use the product at all and hence not to encounter the risk. In this context, warnings must be provided for inherent risks that reasonably foreseeable product users and consumers would reasonably deem material or significant in deciding whether to use or consume the product. Whether or not many persons would, when warned, nonetheless decide to use or consume the product, warnings are required to protect the interests of those reasonably foreseeable users or consumers who would, based on their own reasonable assessments of the risks and benefits, decline product use or consumption. When such warnings are necessary, their omission renders the product not reasonably safe at time of sale. Notwithstanding the defective condition of the product in the absence of adequate warnings, if a particular user or consumer would have decided to use or consume even if warned, the lack of warnings is not a legal cause

of that plaintiff's harm. Judicial decisions supporting the duty to provide warnings for informed decisionmaking have arisen almost exclusively with regard to those toxic agents and pharmaceutical products with respect to which courts have recognized a distinctive need to provide risk information so that recipients of the information can decide whether they wish to purchase or utilize the product. See § 6, Comment *d*.

j. Warnings: obvious and generally known risks. In general, a product seller is not subject to liability for failing to warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users. When a risk is obvious or generally known, the prospective addressee of a warning will or should already know of its existence. Warning of an obvious or generally known risk in most instances will not provide an effective additional measure of safety. Furthermore, warnings that deal with obvious or generally known risks may be ignored by users and consumers and may diminish the significance of warnings about non-obvious, not-generally-known risks. Thus, requiring warnings of obvious or generally known risks could reduce the efficacy of warnings generally. When reasonable minds may differ as to whether the risk was obvious or generally known, the issue is to be decided by the trier of fact. The obviousness of risk may bear on the issue of design defect rather than failure to warn. See Comments *d* and *g*.

k. Warnings: adverse allergic or idiosyncratic reactions. Cases of adverse allergic or idiosyncratic reactions involve a special subset of products that may be defective because of inadequate warnings. Many of these cases involve nonprescription drugs and cosmetics. However, virtually any tangible product can contain an ingredient to which some persons may be allergic. Thus, food, nonprescription drugs, toiletries, paint, solvents, building materials, clothing, and furniture have all been involved in litigation to which this Comment is relevant. Prescription drugs and medical devices are also capable of causing allergic reactions, but they are governed by § 6.

The general rule in cases involving allergic reactions is that a warning is required when the harm-causing ingredient is one to which a substantial number of persons are allergic. The degree of substantiality is not precisely quantifiable. Clearly the plaintiff in most cases must show that the allergic predisposition is not unique to the plaintiff. In determining whether the plaintiff has carried the burden in this regard, however, the court may properly consider the severity of the plaintiff's harm. The more severe the harm, the more justified is a conclusion that the number of persons at risk need not be large to be considered "substantial" so as to require a warning. Essentially, this reflects the same risk-utility balancing undertaken in warnings cases generally. But courts explicitly impose the requirement of substantiality in cases involving adverse allergic reactions.

The ingredient that causes the allergic reaction must be one whose danger or whose presence in the product is not generally known to consumers. When both the presence of an allergenic ingredient in the product and the risks presented by such ingredient are widely known, instructions and warnings about that danger are unnecessary. When the presence of the allergenic ingredient would not be anticipated by a reasonable user or consumer, warnings concerning its presence are required. Similarly, when the presence of the ingredient is generally known to consumers, but its dangers are not, a warning of the dangers must be given.

Finally, as required in Subsection (c), warnings concerning risks of allergic reactions that are not reasonably foreseeable at the time of sale need not be provided. See Comment *m*.

l. Relationship between design and instruction or warning. Reasonable designs and instructions or warnings both play important roles in the production and distribution of reasonably safe products. In general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks. For example, instructions and warnings may be ineffective because users of the product may not be adequately reached, may be likely to be inattentive, or may be insufficiently motivated to follow the instructions or heed the warnings. However, when an alternative design to avoid risks cannot reasonably be implemented, adequate instructions and warnings will normally be sufficient to render the product reasonably safe. Compare Comment *e*. Warnings are not, however, a substitute for the provision of a reasonably safe design.

The fact that a risk is obvious or generally known often serves the same function as a warning. See Comment *j*. However, obviousness of risk does not necessarily obviate a duty to provide a safer design. Just as warnings may be ignored, so may obvious or generally known risks be ignored, leaving a residuum of risk great enough to require adopting a safer design. See Comment *d*.

m. Reasonably foreseeable uses and risks in design and warning claims. Subsections (b) and (c) impose liability only when the product is put to uses that it is reasonable to expect a seller or distributor to foresee. Product sellers and distributors are not required to foresee and take precautions against every conceivable mode of use and abuse to which their products might be put. Increasing the costs of designing and marketing products in order to avoid the consequences of unreasonable modes of use is not required.

In cases involving a claim of design defect in a mechanical product, foreseeability of risk is rarely an issue as a practical matter. Once the plaintiff establishes that the product was put to a reasonably foreseeable use, physical risks of injury are generally known or reasonably knowable

by experts in the field. It is not unfair to charge a manufacturer with knowledge of such generally known or knowable risks.

The issue of foreseeability of risk of harm is more complex in the case of products such as prescription drugs, medical devices, and toxic chemicals. Risks attendant to use and consumption of these products may, indeed, be unforeseeable at the time of sale. Unforeseeable risks arising from foreseeable product use or consumption by definition cannot specifically be warned against. Thus, in connection with a claim of inadequate design, instruction, or warning, plaintiff should bear the burden of establishing that the risk in question was known or should have been known to the relevant manufacturing community. The harms that result from unforeseeable risks—for example, in the human body's reaction to a new drug, medical device, or chemical—are not a basis of liability. Of course, a seller bears responsibility to perform reasonable testing prior to marketing a product and to discover risks and risk-avoidance measures that such testing would reveal. A seller is charged with knowledge of what reasonable testing would reveal. If testing is not undertaken, or is performed in an inadequate manner, and this failure results in a defect that causes harm, the seller is subject to liability for harm caused by such defect.

n. Relationship of definitions of defect to traditional doctrinal categories. The rules in this Section and in other provisions of this Chapter define the bases of tort liability for harm caused by product defects existing at time of sale or other distribution. The rules are stated functionally rather than in terms of traditional doctrinal categories. Claims based on product defect at time of sale or other distribution must meet the requisites set forth in Subsection (a), (b), or (c), or the other provisions in this Chapter. As long as these requisites are met, doctrinal tort categories such as negligence or strict liability may be utilized in bringing the claim.

Similarly, a product defect claim satisfying the requisites of Subsection (a), (b), or (c), or other provisions in this Chapter, may be brought under the implied warranty of merchantability provisions of the Uniform Commercial Code. It is recognized that some courts have adopted a consumer expectations definition for design and failure-to-warn defects in implied warranty cases involving harm to persons or property. This Restatement contemplates that a well-coordinated body of law governing liability for harm to persons or property arising out of the sale of defective products requires a consistent definition of defect, and that the definition properly should come from tort law, whether the claim carries a tort label or one of implied warranty of merchantability.

In connection with a claim under §§ 1 and 2 and related provisions of this Restatement, the evidence that the defendant did or did not conduct adequately reasonable research or testing before marketing the product may be admissible (but is not necessarily required) regardless of whether the claim is based on negligence, strict liability, or implied

warranty of merchantability. Although a defendant is held objectively responsible for having knowledge that a reasonable seller would have had, the fact that the defendant engaged in substantial research and testing may help to support the contention that a risk was not reasonably foreseeable. Conversely, the fact that the defendant engaged in little or no research or testing may, depending on the circumstances, help to support the contention that, had reasonable research or testing been performed, the risk could have been foreseen. Moreover, as long as the requisites in Subsection (a), (b), or (c), or other provisions in this Chapter, are met, the plaintiff may in appropriate instances—for example, in connection with comparative fault or punitive damage claims—show that the defect resulted from reckless, willfully indifferent, or intentionally wrongful conduct of the defendant.

A separate and more difficult question arises as to whether a case should be submitted to a jury on multiple theories of recovery. Design and failure-to-warn claims may be combined in the same case because they rest on different factual allegations and distinct legal concepts. However, two or more factually identical defective-design claims or two or more factually identical failure-to-warn claims should not be submitted to the trier of fact in the same case under different doctrinal labels. Regardless of the doctrinal label attached to a particular claim, design and warning claims rest on a risk-utility assessment. To allow two or more factually identical risk-utility claims to go to a jury under different labels, whether "strict liability," "negligence," or "implied warranty of merchantability," would generate confusion and may well result in inconsistent verdicts.

In proceedings in which multiple theories are alleged, the Restatement leaves to local law the question of the procedural stage in a tort action at which plaintiff must decide under which theory to pursue the case.

A different approach may be appropriate for claims based on manufacturing defects, since the rule set forth in Subsection (a) does not require risk-utility assessment while a negligence claim does. That is, the two types of manufacturing defect claims are based on different factual predicates. Negligence rests on a showing of fault leading to product defect. Strict liability rests merely on a showing of product defect. When a plaintiff believes a good claim for the negligent creation of (or failure to discover) a manufacturing defect may be established, the plaintiff may assert such a claim in addition to a claim in strict liability under Subsection (a). The plaintiff in such a case should have the opportunity to prove fault and also to assert the right to recover based on strict liability. However, clearly it would be inconsistent for a trier of fact to find no manufacturing defect on a § 2(a) claim and yet return a verdict of liability because the defendant was negligent in having poor quality control. What must be shown under either theory is that the product in

question did, in fact, have a manufacturing defect at time of sale that contributed to causing the plaintiff's harm.

In connection with manufacturing defects, a § 2(a) tort claim and an implied warranty of merchantability claim rest on the same factual predicate—the sale by the defendant of a product that departs from the manufacturer's specifications irrespective of anyone's fault. Thus, these two claims are duplicative and may not be pursued together in the same case.

The same analysis applies to claims against a nonmanufacturing supplier. The supplier can be held liable as the seller of a defective product under § 2(a) or can be held liable under a negligence theory for failing reasonably to inspect a product or for negligently introducing a defect into the product. Since these claims are based on different factual predicates, the plaintiff may bring actions in both strict liability and negligence. Again, of course, recovery under either theory requires a finding of defect.

The plaintiff in the nonmanufacturing-supplier case should, once again, not be free to submit a case to a jury based on both the implied warranty of merchantability and strict liability theories since they rest on the same factual base—the sale by the supplier of a defective product regardless of fault. The theories are thus duplicative and do not constitute valid separate claims that may be given to the trier of fact in the same case.

In all instances set forth above in which claims are duplicative, if one or the other theory presents an advantage to the plaintiff—in connection with the statute of limitations, for example—the plaintiff may pursue the more advantageous theory. But the trier of fact may not consider both theories on the same facts.

Plaintiffs may, consistent with the foregoing principles, join claims based on product defect existing at time of sale or other distribution and claims based on theories of recovery that do not rest on a premise of product defect at time of sale. Claims based on misrepresentation, express warranty, and implied warranty of fitness for particular purpose, in particular, are not within the scope of this Chapter and thus are unaffected by it.

Finally, negligence retains its vitality as an independent theory of recovery for a wide range of product-related, harm-causing behavior not involving defects at time of sale. This Restatement includes several such topics in later Chapters, including post-sale failure to warn (see § 10); post-sale failure to recall (see § 11); and a successor's liability for its own failure to warn (see § 13). Other topics are covered in the Restatement, Second, of Torts. Thus, for example, negligent entrustment is treated in § 390. Liability for negligent service, maintenance, or repair, or negligent overpromotion of a product, is governed by the rules set forth in §§ 291 et seq.

o. Liability of nonmanufacturing sellers for defective design and defects due to inadequate instructions or warnings. Nonmanufacturing sellers such as wholesalers and retailers often are not in a good position feasibly to adopt safer product designs or better instructions or warnings. Nevertheless, once it is determined that a reasonable alternative design or reasonable instructions or warnings could have been provided at or before the time of sale by a predecessor in the chain of distribution and would have reduced plaintiff's harm, it is no defense that a nonmanufacturing seller of such a product exercised due care. Thus, strict liability is imposed on a wholesale or retail seller who neither knew nor should have known of the relevant risks, nor was in a position to have taken action to avoid them, so long as a predecessor in the chain of distribution could have acted reasonably to avoid the risks. See Comment *a*. For exceptions to the general rule regarding the liability of a nonmanufacturer seller, see § 1, Comment *e*.

p. Misuse, modification, and alteration. Product misuse, modification, and alteration are forms of post-sale conduct by product users or others that can be relevant to the determination of the issues of defect, causation, or comparative responsibility. Whether such conduct affects one or more of the issues depends on the nature of the conduct and whether the manufacturer should have adopted a reasonable alternative design or provided a reasonable warning to protect against such conduct.

Under the rule in Subsection (b), liability for defective design attaches only if the risks of harm related to foreseeable product use could have been reduced by the adoption of a reasonable alternative design. Similarly, under the rule in Subsection (c), liability for failure to instruct or warn attaches only if the risks presented by the product could have been reduced by the adoption of reasonable instructions or warnings. Foreseeable product misuse, alteration, and modification must also be considered in deciding whether an alternative design should have been adopted. The post-sale conduct of the user may be so unreasonable, unusual, and costly to avoid that a seller has no duty to design or warn against them. When a court so concludes, the product is not defective within the meaning of Subsection (b) or (c).

A product may, however, be defective as defined in Subsection (b) or (c) due to the omission of a reasonable alternative design or the omission of an adequate warning, yet the risk that eventuates due to misuse, modification, or alteration raises questions whether the extent or scope of liability under the prevailing rules governing legal causation allow for the imposition of liability. See § 15.

Moreover, a product may be found to be defective and causally responsible for plaintiff's harm but the plaintiff may have misused, altered, or modified the product in a manner that calls for the reduction of plaintiff's recovery under the rules of comparative responsibility. Thus, an automobile may be defectively designed so as to provide inadequate

protection against harm in the event of a collision, and the plaintiff's negligent modification of the automobile may have caused the collision eventuating in plaintiff's harm. See § 17.

It follows that misuse, modification, and alteration are not discrete legal issues. Rather, when relevant, they are aspects of the concepts of defect, causation, and plaintiff's fault. Jurisdictions differ on the question of who bears the burden of raising and introducing proof regarding conduct that constitutes misuse, modification, and alteration. The allocation of burdens in this regard is not addressed in this Restatement and is left to local law.

q. Causation. Under § 1, the product defect must have caused harm to the plaintiff. See §§ 17 and 18.

r. Warranty. Liability for harm caused by product defects imposed by the rules stated in this Chapter is tort liability, not liability for breach of warranty under the Uniform Commercial Code (U.C.C.). Courts may characterize claims under this Chapter as claims for breaches of the implied warranty of merchantability. But in cases involving defect-caused harm to persons or property, a well-coordinated body of law dealing with liability for such harm arising out of the sale of defective products would adopt the tort definition of product defect. See Comment *n*.

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§ 3. Circumstantial Evidence Supporting Inference of Product Defect

It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

(a) was of a kind that ordinarily occurs as a result of product defect; and

(b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

Comment:

a. History. This Section traces its historical antecedents to the law of negligence, which has long recognized that an inference of negligence may be drawn in cases where the defendant's negligence is the best explanation for the cause of an accident, even if the plaintiff cannot explain the exact nature of the defendant's conduct. See Restatement, Second, Torts § 328D. As products liability law developed, cases arose in which an inference of product defect could be drawn from the incident in which a product caused plaintiff's harm, without proof of the specific

nature of the defect. This Section sets forth the formal requisites for drawing such an inference.

b. Requirement that the harm be of a kind that ordinarily occurs as a result of product defect. The most frequent application of this Section is to cases involving manufacturing defects. When a product unit contains such a defect, and the defect affects product performance so as to cause a harmful incident, in most instances it will cause the product to malfunction in such a way that the inference of product defect is clear. From this perspective, manufacturing defects cause products to fail to perform their manifestly intended functions. Frequently, the plaintiff is able to establish specifically the nature and identity of the defect and may proceed directly under § 2(a). But when the product unit involved in the harm-causing incident is lost or destroyed in the accident, direct evidence of specific defect may not be available. Under that circumstance, this Section may offer the plaintiff the only fair opportunity to recover.

When examination of the product unit is impossible because the unit is lost or destroyed after the harm-causing incident, a somewhat different issue may be presented. Responsibility for spoliation of evidence may be relevant to the fairness of allowing the inference set forth in this Section. In any event, the issues of evidence spoliation and any sanctions that might be imposed for such conduct are beyond the scope of this Restatement Third, Torts: Products Liability.

Although the rules in this Section, for the reasons just stated, most often apply to manufacturing defects, occasionally a product design causes the product to malfunction in a manner identical to that which would ordinarily be caused by a manufacturing defect. Thus, an aircraft may inadvertently be designed in such a way that, in new condition and while flying within its intended performance parameters, the wings suddenly and unexpectedly fall off, causing harm. In theory, of course, the plaintiff in such a case would be able to show how other units in the same production line were designed, leading to a showing of a reasonable alternative design under § 2(b). As a practical matter, however, when the incident involving the aircraft is one that ordinarily occurs as a result of product defect, and evidence in the particular case establishes that the harm was not solely the result of causes other than product defect existing at time of sale, it should not be necessary for the plaintiff to incur the cost of proving whether the failure resulted from a manufacturing defect or from a defect in the design of the product. Section 3 allows the trier of fact to draw the inference that the product was defective whether due to a manufacturing defect or a design defect. Under those circumstances, the plaintiff need not specify the type of defect responsible for the product malfunction.

It is important to emphasize the difference between a general inference of defect under § 3 and claims of defect brought directly under §§ 1 and 2. Section 3 claims are limited to situations in which a product fails to perform its manifestly intended function, thus supporting the

conclusion that a defect of some kind is the most probable explanation. If that is not the case, and if no other provision of Chapter 1 allows the plaintiff to establish defect independently of the requirements in § 2 (see § 4 and Comment *e* to § 2), a plaintiff is required to establish a cause of action for defect based on proof satisfying the requirements set forth in § 2. See § 2, Comment *b*.

Illustrations:

1. John purchased a new electric blender. John used the blender approximately 10 times exclusively for making milkshakes. While he was making a milkshake, the blender suddenly shattered. A piece of glass struck John's eye, causing harm. The incident resulting in harm is of a kind that ordinarily occurs as a result of product defect.

2. Same facts as Illustration 1, except that John accidentally dropped the blender, causing the glass to shatter. The product did not fail to function in a manner supporting an inference of defect. Whether liability can be established depends on whether the plaintiff can prove a cause of action under §§ 1 and 2.

3. Mary purchased a new automobile. She drove the car 1,000 miles without incident. One day she stopped the car at a red light and leaned back to rest until the light changed. Suddenly the seat collapsed backward, causing Mary to hit the accelerator and the car to shoot out into oncoming traffic and collide with another car. Mary suffered harm in the ensuing collision. As a result of the collision, Mary's car was set afire, destroying the seat assembly. The incident resulting in the harm is of a kind that ordinarily occurs as a result of product defect. Mary need not establish whether the seat assembly contained a manufacturing defect or a design defect.

4. Same facts as in Illustration 3, except that the seat-back assembly failed when Mary, while stopped at the red light, was rear-ended by another automobile at 40 m.p.h. Mary cannot make out liability under this Section. The product did not fail to function in a manner supporting an inference of defect since the collapse of the seat is not the kind of incident that ordinarily occurs as a result of product defect. Liability must be established under the rules set forth in §§ 1 and 2.

5. While carefully driving a new automobile at legal speed on a well-maintained road, Driver felt something crack below where the steering column connects with the dashboard. The steering wheel spun to the right and the automobile turned sharply. Before Driver could stop, the automobile crashed into a wall and Driver suffered harm. Driver has brought an action against the manufacturer of the automobile. The automobile had been driven on short trips before the accident and had 300 miles on its odometer. Driver's qualified expert witness testifies that in her opinion the accident was caused

by a defect in the steering mechanism. The expert identifies four specific manufacturing and design defects that could have caused the accident, but was unable to say, on a balance of the probabilities, which of the four defects was the cause. Under this Section it is not necessary to identify the specific defect in order to draw the inference that a product defect caused the plaintiff's harm.

c. No requirement that plaintiff prove what aspect of the product was defective. The inference of defect may be drawn under this Section without proof of the specific defect. Furthermore, quite apart from the question of what type of defect was involved, the plaintiff need not explain specifically what constituent part of the product failed. For example, if an inference of defect can be appropriately drawn in connection with the catastrophic failure of an airplane, the plaintiff need not establish whether the failure is attributable to fuel-tank explosion or engine malfunction.

d. Requirement that the incident that harmed the plaintiff was not, in the particular case, solely the result of causes other than product defect existing at the time of sale. To allow the trier of fact to conclude that a product defect caused the plaintiff's harm under this Section, the plaintiff must establish by a preponderance of the evidence that the incident was not solely the result of causal factors other than defect at time of sale. The defect need not be the only cause of the incident; if the plaintiff can prove that the most likely explanation of the harm involves the causal contribution of a product defect, the fact that there may be other concurrent causes of the harm does not preclude liability under this Section. But when the harmful incident can be attributed solely to causes other than original defect, including the conduct of others, an inference of defect under this Section cannot be drawn.

Evidence may permit the inference that a defect in the product at the time of the harm-causing incident caused the product to malfunction, but not the inference that the defect existed at the time of sale or distribution. Such factors as the age of the product, possible alteration by repairers or others, and misuse by the plaintiff or third parties may have introduced the defect that causes harm.

Illustrations:

6. While driving a new automobile at high speed one night, Driver drove off the highway and crashed into a tree. Driver suffered harm. Driver cannot remember the circumstances surrounding the accident. Driver has brought an action against ABC Company, the manufacturer of the automobile. Driver presents no evidence of a specific defect. However, Driver's qualified expert presents credible testimony that a defect in the automobile must have caused the accident. ABC's qualified expert presents credible testimony that it is equally likely that, independent of any defect, Driver lost control while speeding on the highway. If the trier of fact believes the testimony of Driver's expert, then an inference of defect may be

established under this Section. If, however, ABC's expert is believed, an inference of product defect may not be drawn under this Section because Driver has failed to establish by a preponderance of the evidence that the harm did not result solely from Driver's independent loss of control at high speed.

7. Jack purchased a new ABC Electric Power Screwdriver. He inserted the bit for the appropriate screw size and turned the power button on. The bit shot out of the tool and lodged itself in Jack's arm, causing serious injury. Two weeks after purchasing the electric screwdriver, Jack believed the tool was making too much noise and brought it to the Acme Tool Repair Shop to check it out. Acme removed the mechanism that held the bit, examined it, and then reassembled it. Finding no problem, Acme returned the tool to Jack. The accident occurred the next day. On direct examination Jack's expert testifies that the accident was caused by a defect existing at time of sale. On cross-examination, however, Jack's expert admits it is equally probable that the problem with the tool was introduced by Acme. An inference that the power tool was defective at the time of sale cannot be drawn under this Section.

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§ 4. Noncompliance and Compliance with Product Safety Statutes or Regulations

In connection with liability for defective design or inadequate instructions or warnings:

(a) a product's noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation; and

(b) a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.

Comment:

a. Product safety statutes or administrative regulations. The safety statutes and administrative regulations referred to in this Section are those, promulgated by federal and state and local legislatures and agencies, intended to promote safety in the design and marketing of products. The phrase "safety statute or administrative regulation" is intended to be inclusive of all final governmental edicts and directives, issued pursuant to such statutes or regulations, that establish binding safety standards for the design and marketing of products. Because

liability for manufacturing defects under §§ 1 and 2(a) is liability without fault, the violation of, or compliance with, a safety statute or regulation is not relevant to such a claim. In connection with a claim of manufacturing defect brought under common-law negligence principles, see § 2, Comment n, the relevance of statutory or regulatory compliance and violation should be determined according to general negligence principles.

b. Requirement that the statute or regulation be applicable. For purposes of this Section, the product safety statute or administrative regulation must have been in force and applicable at the time of sale or other distribution.

c. Requirement that the statute or regulation be relevant to the particular claim of product defect. For purposes of this Section, the safety statute or administrative regulation must be such that compliance reduces the risk that caused the plaintiff's harm. Thus, when a plaintiff complains that the design of a product should have been more stable to prevent the product from tipping over, a safety statute or regulation is relevant if it addresses the issue of stability in such a way that compliance with the statute or regulation reduces the risk of the product tipping over in the manner that caused the plaintiff's harm. This Section addresses the issue of product defectiveness. For rules governing causation, see §§ 15 and 16. For rules governing affirmative defenses, see §§ 17 and 18.

d. Noncompliance with product safety statute or administrative regulation. Subsection (a) provides that noncompliance with an applicable product safety statute or administrative regulation renders the product defective in design or defective due to inadequate instructions or warnings with respect to the risks sought to be reduced by the statute or regulation. The general rule does not apply when a regulation merely suggests, but does not require, a safety feature. The general rule also does not apply when, after sale but prior to injury, the statute or regulation is repealed or otherwise rendered invalid so as to cause the product no longer to be in noncompliance. When repeal or invalidation takes place post-injury, but prior to adjudication, the court may take the repeal or invalidation into account in deciding whether noncompliance with the statute or regulation renders the product defective. Moreover, when the statute or regulation is unclear as to its meaning or purpose, or conflicts with other safety statutes or regulations with which the product must also comply, a court may take these circumstances into account in determining whether noncompliance with the statute or regulation renders the product defective. The rule in this Subsection is based on the policy judgment that designs and warnings that fail to comply with applicable safety standards established by statute or regulations are, subject to the foregoing exceptions, by definition defective.

In contrast to Subsection (a), the parallel common-law rule governing noncompliance with safety statutes or regulations in negligence actions not involving products liability claims recognizes that noncompliance with an applicable safety statute or regulation does not constitute failure to use due care when the defendant establishes a justification or excuse for the violation. For example, if noncompliance with an administrative regulation under conditions of emergency or temporary impossibility would not constitute a violation in a direct enforcement proceeding, noncompliance alone does not prove negligence. In connection with the adequacy of product designs and warnings, however, design and marketing decisions are made before distribution to users and consumers. The product seller therefore has the option of deferring sale until statutory or regulatory compliance is achieved. Consequently, justification or excuse of the sort anticipated in connection with negligence claims generally does not apply in connection with failure to comply with statutes or regulations governing product design or warnings.

e. Compliance with product safety statute or administrative regulation. An important distinction must be drawn between the subject addressed in Subsection (b) and the matter of federal preemption of state products liability law. Subsection (b) addresses the question of whether and to what extent, as a matter of state tort law, compliance with product safety statutes or administrative regulations affects liability for product defectiveness. When a court concludes that a defendant is not liable by reason of having complied with a safety design or warnings statute or regulation, it is deciding that the product in question is not defective as a matter of the law of that state. The safety statute or regulation may be a federal provision, but the decision to give it determinative effect is a state-law determination. In contrast, in federal preemption, the court decides as a matter of federal law that the relevant federal statute or regulation reflects, expressly or impliedly, the intent of Congress to displace state law, including state tort law, with the federal statute or regulation. The question of preemption is thus a question of federal law, and a determination that there is preemption nullifies otherwise operational state law. The complex set of rules and standards for resolving questions of federal preemption are beyond the scope of this Restatement. However, when federal preemption is found, the legal effect is clear. Judicial deference to federal product safety statutes or regulations occurs not because the court concludes that compliance with the statute or regulation shows the product to be nondefective; the issue of defectiveness under state law is never reached. Rather, the court defers because, when a federal statute or regulation is preemptive, the Constitution mandates federal supremacy.

Accordingly, Subsection (b) addresses the effects of compliance with a federal statute or regulation found to be nonpreemptive. It addresses the question, under state law, of the effect that compliance with product

safety statutes or regulations—federal or state—should have on the issue of product defectiveness. Subsection (b) reflects the traditional view that the standards set by most product safety statutes or regulations generally are only minimum standards. Thus, most product safety statutes or regulations establish a floor of safety below which product sellers fall only at their peril, but they leave open the question of whether a higher standard of product safety should be applied. This is the general rule, applicable in most cases.

Occasionally, after reviewing relevant circumstances, a court may properly conclude that a particular product safety standard set by statute or regulation adequately serves the objectives of tort law and therefore that the product that complies with the standard is not defective as a matter of law. Such a conclusion may be appropriate when the safety statute or regulation was promulgated recently, thus supplying currency to the standard therein established; when the specific standard addresses the very issue of product design or warning presented in the case before the court; and when the court is confident that the deliberative process by which the safety standard was established was full, fair, and thorough and reflected substantial expertise. Conversely, when the deliberative process that led to the safety standard with which the defendant's product complies was tainted by the supplying of false information to, or the withholding of necessary and valid information from, the agency that promulgated the standard or certified or approved the product, compliance with regulation is entitled to little or no weight.

f. Conduct not related to product defect. This Section deals with noncompliance and compliance with product safety statutes or regulations as they relate to the issue of product defect. Conduct involving products but not related to product defect may also be governed by statute or regulation. For example, sale of dangerous instrumentalities may be prohibited by statute or regulation, or statutes or regulations may govern such matters as post-sale warnings or recalls. When and whether liability arises when there has been noncompliance or compliance with such statutes or regulations is governed by Restatement, Second, Torts §§ 286–288C.

TOPIC 2. LIABILITY RULES APPLICABLE TO SPECIAL PRODUCTS OR PRODUCT MARKETS

§ 5. Liability of Commercial Seller or Distributor of Product Components for Harm Caused by Products Into Which Components Are Integrated

One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to liability for harm to persons or

property caused by a product into which the component is integrated if:

(a) the component is defective in itself, as defined in this Chapter, and the defect causes the harm; or

(b)(1) the seller or distributor of the component substantially participates in the integration of the component into the design of the product; and

(2) the integration of the component causes the product to be defective, as defined in this Chapter; and

(3) the defect in the product causes the harm.

Comment:

a. Rationale. Product components include raw materials, bulk products, and other constituent products sold for integration into other products. Some components, such as raw materials, valves, or switches, have no functional capabilities unless integrated into other products. Other components, such as a truck chassis or a multi-functional machine, function on their own but still may be utilized in a variety of ways by assemblers of other products.

As a general rule, component sellers should not be liable when the component itself is not defective as defined in this Chapter. If the component is not itself defective, it would be unjust and inefficient to impose liability solely on the ground that the manufacturer of the integrated product utilizes the component in a manner that renders the integrated product defective. Imposing liability would require the component seller to scrutinize another's product which the component seller has no role in developing. This would require the component seller to develop sufficient sophistication to review the decisions of the business entity that is already charged with responsibility for the integrated product.

The refusal to impose liability on sellers of nondefective components is expressed in various ways, such as the "raw material supplier defense" or the "bulk sales/sophisticated purchaser rule." However expressed, these formulations recognize that component sellers who do not participate in the integration of the component into the design of the product should not be liable merely because the integration of the component causes the product to become dangerously defective. This Section subjects component sellers to liability when the components themselves are defective or when component providers substantially participate in the integration of components into the design of the other products.

Illustration:

1. ABC Chain Co. manufactures chains for a wide range of uses in industrial equipment. XYZ Mach. Co. purchases chains from ABC for use in conveyor-belt systems and informs ABC that the

chains will be used for that purpose. In the design of a conveyor system by XYZ, part of the chain is exposed. The conveyor system as designed and manufactured by XYZ is defective in that it should include a safety guard under the rule stated in § 2(b). XYZ sells a conveyor system to LMN Co. LMN's employee, E, while working near the conveyor, is injured when her shirt sleeve becomes entangled in the unguarded chain in the conveyor. ABC is not subject to liability to E. The chain sold by ABC is not itself defective as defined in § 2, and ABC did not participate in the integration of its chain into the design of the XYZ conveyor. XYZ is subject to liability for harm to E as the seller of a defectively designed conveyor under the rules stated in §§ 1 and 2(b).

b. Liability when a product component is defective in itself. A commercial seller or other distributor of a product component is subject to liability for harm caused by a defect in the component. See § 19, Comment *b*. For example, if a cut-off switch is sold in defective condition due to loosely connected wiring, the seller of the switch is subject to liability for harm to persons or property caused by the improper wiring after the switch is integrated into another product. Similarly, if aluminum that departs from the aluminum manufacturer's specifications due to the presence of foreign particles is utilized in the manufacture of airplane engines, the seller of the defective aluminum is subject to liability for harm to persons or property caused by the defects in the aluminum. Both the switches in the first instance and the aluminum in the second are defective as defined in § 2(a).

The same rule applies when a component is defectively designed as defined in § 2(b). For example, if motorcycle headlights intended for rugged off-road use are so designed that they fail when the motorcycle is driven over bumpy roads, they are defective within the meaning of § 2(b). Since reasonable alternative designs are available that prevent such foreseeable failures from occurring, the headlight supplier is subject to liability for harm caused by the defectively designed headlight. Indeed, a defect may be inferable under § 3. However, a component not defective in itself as defined in § 2(b) or § 3 does not become defective merely because a purchaser decides to integrate the component into another product in a way that renders the design of the integrated product defective. See Comment *e*.

The same principles apply in determining a component seller's duty to supply reasonable instructions and warnings to the component buyer. The component seller is required to provide instructions and warnings regarding risks associated with the use of the component product. See §§ 1 and 2(c). However, when a sophisticated buyer integrates a component into another product, the component seller owes no duty to warn either the immediate buyer or ultimate consumers of dangers arising because the component is unsuited for the special purpose to which the buyer puts it. To impose a duty to warn in such a circumstance

would require that component sellers monitor the development of products and systems into which their components are to be integrated. See Comment *a*. Courts have not yet confronted the question of whether, in combination, factors such as the component purchaser's lack of expertise and ignorance of the risks of integrating the component into the purchaser's product, and the component supplier's knowledge of both the relevant risks and the purchaser's ignorance thereof, give rise to a duty on the part of the component supplier to warn of risks attending integration of the component into the purchaser's product. Whether the seller of a component should be subject to liability for selling its product to one who is likely to utilize it dangerously is governed by principles of negligent entrustment. See Restatement, Second, Torts § 390.

Illustrations:

2. The same facts as Illustration 1, except that one of the chains sold by ABC to XYZ contains a manufacturing defect as defined in § 2(a). XYZ installs the defective chain in the conveyor-belt system sold by XYZ to LMN. As a result of the defect, the chain breaks, causing the conveyor belt to stop abruptly. E, LMN's employee, suffers harm when the conveyor's sudden stop causes a heavy object on the conveyor to fall on E. ABC is subject to liability to E for harm caused by the sale of the defective component. XYZ is also subject to liability to E for the sale of a defective conveyor system.

3. ABC Vinyl, Inc., sells vinyl swimming-pool liners for use in above-ground swimming pools. ABC manufactures the liners without depth markers. XYZ Pools, Inc., manufactures and sells above-ground swimming pools. XYZ installs a pool with an ABC liner at the home of Roberta. Jack, while visiting Roberta, dives into the shallow portion of the pool that appears to him to be eight feet deep. In reality the water is only four feet deep. Jack hits his head on the bottom and suffers harm. If a court finds that the absence of the depth markers renders the design of the liner defective within the meaning of § 2(b), ABC is subject to liability to Jack. The fact that the liner is a component of the above-ground swimming pool and has been integrated into a specific swimming pool does not insulate ABC from liability for selling a component product that is defectively designed for all swimming-pool installations. XYZ is also subject to liability to Jack as the seller of a pool with a defectively designed liner.

4. ABC Foam Co. manufactures bulk foam with many different uses. XYZ Co. purchases bulk foam from ABC, then processes the foam and incorporates the processed foam in the manufacture of disposable dishware. ABC becomes aware that XYZ is using processed foam in the dishware. ABC and XYZ are both aware that there is a potential danger that processed foam may cause allergic skin reactions for some users. ABC is aware that XYZ

is not warning consumers of this potential problem. ABC has no duty to warn XYZ or ultimate consumers of the dangers attendant to use of the processed foam for disposable dishware. The foam sold by ABC is not defective in itself as defined in this Chapter. A supplier of a component has no duty to warn a knowledgeable buyer of risks attendant to special application of its products when integrated into another's product. ABC did not participate in the design of the disposable dishware manufactured by XYZ, and is thus not subject to liability under Subsection (b).

c. Raw materials. Product components include raw materials. See Comment *a*. Thus, when raw materials are contaminated or otherwise defective within the meaning of § 2(a), the seller of the raw materials is subject to liability for harm caused by such defects. Regarding the seller's exposure to liability for defective design, a basic raw material such as sand, gravel, or kerosene cannot be defectively designed. Inappropriate decisions regarding the use of such materials are not attributable to the supplier of the raw materials but rather to the fabricator that puts them to improper use. The manufacturer of the integrated product has a significant comparative advantage regarding selection of materials to be used. Accordingly, raw-materials sellers are not subject to liability for harm caused by defective design of the end-product. The same considerations apply to failure-to-warn claims against sellers of raw materials. To impose a duty to warn would require the seller to develop expertise regarding a multitude of different end-products and to investigate the actual use of raw materials by manufacturers over whom the supplier has no control. Courts uniformly refuse to impose such an onerous duty to warn. For a consideration of whether special circumstances may give rise to a duty on the part of raw-material sellers to warn of risks attending integration of raw materials with other components, see Comment *b*.

Illustration:

5. LMN Sand Co. sells sand in bulk. ABC Construction Co. purchases sand to use in mixing cement. LMN is aware that the improper mixture of its sand with other ingredients can cause cement to crack. ABC utilizes LMN's sand to form a cement supporting column in a building. As a result of improper mixture the cement column cracks and gives way during a mild earthquake and causes injury to the building's occupants. LMN is not liable to the injured occupants. The sand sold by LMN is not itself defective under §§ 1–4. LMN has no duty to warn ABC about improperly mixing sand for use in cement. LMN did not participate in ABC's design of the cement and is not subject to liability for harm caused by the sand as integrated into the cement.

d. Incomplete products. Product components include products that can be put to different uses depending on how they are integrated into other products. For example, the chassis of a truck can be put to a variety

of different uses. A truck chassis may ultimately be used with a cement mixer or a garbage compaction unit or in a flat-bed truck. Similarly, an engine for industrial machines may be adapted to a variety of different industrial uses. A seller ordinarily is not liable for failing to incorporate a safety feature that is peculiar to the specific adaptation for which another utilizes the incomplete product. A safety feature important for one adaptation may be wholly unnecessary or inappropriate for a different adaptation. The same considerations also militate against imposing a duty on the seller of the incomplete product to warn purchasers of the incomplete product, or end-users of the integrated product, of dangers arising from special adaptations of the incomplete product by others.

e. Substantial participation in the integration of the component into the design of another product. When the component seller is substantially involved in the integration of the component into the design of the integrated product, the component seller is subject to liability when the integration results in a defective product and the defect causes harm to the plaintiff. Substantial participation can take various forms. The manufacturer or assembler of the integrated product may invite the component seller to design a component that will perform specifically as part of the integrated product or to assist in modifying the design of the integrated product to accept the seller's component. Or the component seller may play a substantial role in deciding which component best serves the requirements of the integrated product. When the component seller substantially participates in the design of the integrated product, it is fair and reasonable to hold the component seller responsible for harm caused by the defective, integrated product. A component seller who simply designs a component to its buyer's specifications, and does not substantially participate in the integration of the component into the design of the product, is not liable within the meaning of Subsection (b). Moreover, providing mechanical or technical services or advice concerning a component part does not, by itself, constitute substantial participation that would subject the component supplier to liability. One who provides a design service alone, as distinct from combining the design function with the sale of a component, generally is liable only for negligence and is not treated as a product seller. See § 19(b).

f. Integration of the component as a cause of the harm. The mere fact that the component seller substantially participates in the integration of the component into the design of a product does not subject the seller to liability unless the integration causes the product to be defective and the resulting defect causes the plaintiff's harm. The component seller is not liable for harm caused by defects in the integrated product that are unrelated to the component. For example, a manufacturer of a component valve may substantially participate in redesigning the valve so that it can be integrated into a particular kind of tank. If the tank fails due to defective steel in the body of the tank and

the failure has nothing to do with the installation of the valve, the seller of the valve is not subject to liability under Subsection (b). The valve manufacturer is not liable under Subsection (b) even if it is sufficiently involved in the design of the tank so that it would be liable for harm caused by a failure of the valve as integrated into the tank. Similarly, if a raw-material supplier offers advice about processing the material and there is no evidence that the processing advice was a cause of the allegedly defective condition, the raw-material supplier should not be subject to liability.

Illustration:

6. ABC Chemical Co. sells plastic resins in bulk. XYZ Hot Water Heater Manufacturing Co. informs ABC that XYZ wishes to purchase resin for use in making its hot-water heaters and specifies resin that can withstand heat up to 212° Fahrenheit. ABC recommends that XYZ use a certain type of resin which, in ABC's testing under specified laboratory conditions, including thickness of one-quarter inch or more, was shown to be capable of withstanding temperatures in excess of 212° Fahrenheit. ABC explains these conditions to XYZ. ABC also provides XYZ with technical support and general processing advice. XYZ purchases the recommended resin from ABC and decides upon design and processing parameters, molds the resin into a plastic part, and combines the part with other materials and parts to produce hot-water heaters. XYZ tests its hot-water heaters for safety and durability and formulates instructions and warnings to accompany them. An XYZ hot-water heater subsequently fails because the plastic walls specified by its design, one-eighth inch thick, are too thin to withstand the stress imposed by its normal operating temperatures, resulting in injury to a homeowner. ABC is not liable to the homeowner. The resin sold by ABC was not in itself defective. ABC did not substantially participate in the design, manufacture or assembly of the hot-water heater.

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§ 6. Liability of Commercial Seller or Distributor for Harm Caused by Defective Prescription Drugs and Medical Devices

(a) A manufacturer of a prescription drug or medical device who sells or otherwise distributes a defective drug or medical device is subject to liability for harm to persons caused by the defect. A prescription drug or medical device is one that may be legally sold or otherwise distributed only pursuant to a health-care provider's prescription.

(b) For purposes of liability under Subsection (a), a prescription drug or medical device is defective if at the time of sale or other distribution the drug or medical device:

(1) contains a manufacturing defect as defined in § 2(a); or

(2) is not reasonably safe due to defective design as defined in Subsection (c); or

(3) is not reasonably safe due to inadequate instructions or warnings as defined in Subsection (d).

(c) A prescription drug or medical device is not reasonably safe due to defective design if the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable health-care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients.

(d) A prescription drug or medical device is not reasonably safe due to inadequate instructions or warnings if reasonable instructions or warnings regarding foreseeable risks of harm are not provided to:

(1) prescribing and other health-care providers who are in a position to reduce the risks of harm in accordance with the instructions or warnings; or

(2) the patient when the manufacturer knows or has reason to know that health-care providers will not be in a position to reduce the risks of harm in accordance with the instructions or warnings.

(e) A retail seller or other distributor of a prescription drug or medical device is subject to liability for harm caused by the drug or device if:

(1) at the time of sale or other distribution the drug or medical device contains a manufacturing defect as defined in § 2(a); or

(2) at or before the time of sale or other distribution of the drug or medical device the retail seller or other distributor fails to exercise reasonable care and such failure causes harm to persons.

Comment:

a. History. Subsections (b)(1) and (d)(1) state the traditional rules that drug and medical-device manufacturers are liable only when their products contain manufacturing defects or are sold without adequate instructions and warnings to prescribing and other health-care providers. Until recently, courts refused to impose liability based on

defective designs of drugs and medical devices sold only by prescription. However, consistent with recent trends in the case law, two limited exceptions from these traditional rules are generally recognized. Subsection (d)(2) sets forth situations when a prescription-drug or medical-device manufacturer is required to warn the patient directly of risks associated with consumption or use of its product. And Subsection (c) imposes liability for a drug or medical device whose risks of harm so far outweigh its therapeutic benefits that reasonable, properly informed health-care providers would not prescribe it.

b. Rationale. The obligation of a manufacturer to warn about risks attendant to the use of drugs and medical devices that may be sold only pursuant to a health-care provider's prescription traditionally has required warnings directed to health-care providers and not to patients. The rationale supporting this "learned intermediary" rule is that only health-care professionals are in a position to understand the significance of the risks involved and to assess the relative advantages and disadvantages of a given form of prescription-based therapy. The duty then devolves on the health-care provider to supply to the patient such information as is deemed appropriate under the circumstances so that the patient can make an informed choice as to therapy. Subsection (d)(1) retains the "learned intermediary" rule. However, in certain limited therapeutic relationships the physician or other health-care provider has a much-diminished role as an evaluator or decisionmaker. In these instances it may be appropriate to impose on the manufacturer the duty to warn the patient directly. See Subsection (d)(2).

The traditional refusal by courts to impose tort liability for defective designs of prescription drugs and medical devices is based on the fact that a prescription drug or medical device entails a unique set of risks and benefits. What may be harmful to one patient may be beneficial to another. Under Subsection (c) a drug is defectively designed only when it provides no net benefit to any class of patients. Courts have concluded that as long as a drug or medical device provides net benefits to some persons under some circumstances, the drug or device manufacturer should be required to instruct and warn health-care providers of the foreseeable risks and benefits. Courts have also recognized that the regulatory system governing prescription drugs is a legitimate mechanism for setting the standards for drug design. In part, this deference reflects concerns over the possible negative effects of judicially imposed liability on the cost and availability of valuable medical technology. This deference also rests on two further assumptions: first, that prescribing health-care providers, when adequately informed by drug manufacturers, are able to assure that the right drugs and medical devices reach the right patients; and second, that governmental regulatory agencies adequately review new prescription drugs and devices, keeping unreasonably dangerous designs off the market.

Nevertheless, unqualified deference to these regulatory mechanisms is considered by a growing number of courts to be unjustified. An approved prescription drug or medical device can present significant risks without corresponding advantages. At the same time, manufacturers must have ample discretion to develop useful drugs and devices without subjecting their design decisions to the ordinary test applicable to products generally under § 2(b). Accordingly, Subsection (c) imposes a more rigorous test for defect than does § 2(b), which does not apply to prescription drugs and medical devices. The requirement for establishing defective design of a prescription drug or medical device under Subsection (c) is that the drug or device have so little merit compared with its risks that reasonable health-care providers, possessing knowledge of risks that were known or reasonably should have been known, would not have prescribed the drug or device for any class of patients. Thus, a prescription drug or medical device that has usefulness to any class of patients is not defective in design even if it is harmful to other patients. Because of the special nature of prescription drugs and medical devices, the determination of whether such products are not reasonably safe is to be made under Subsections (c) and (d) rather than under §§ 2(b) and 2(c).

The rules imposing liability on a manufacturer for inadequate warning or defective design of prescription drugs and medical devices assume that the federal regulatory standard has not preempted the imposition of tort liability under state law. When such preemption is found, liability cannot attach if the manufacturer has complied with the applicable federal standard. See § 4, Comment *e*.

The doctrine of preemption based on supremacy of federal law should be distinguished from the proposition that compliance with statutory and regulatory standards satisfies the state's requirement for product safety. Subsections (c) and (d) recognize common-law causes of action for defective drug design and for failure to provide reasonable instructions or warnings, even though the manufacturer complied with governmental standards. For the rules governing compliance with governmental standards generally, see § 4(b).

c. Manufacturers' liability for manufacturing defects. Limitations on the liability for prescription drug and medical-device designs do not support treating drug and medical-device manufacturers differently from commercial sellers of other products with respect to manufacturing defects. Courts have traditionally subjected manufacturers of prescription products to liability for harm caused by manufacturing defects.

d. Manufacturers' liability for failure adequately to instruct or warn prescribing and other health-care providers. Failure to instruct or warn is the major basis of liability for manufacturers of prescription drugs and medical devices. When prescribing health-care providers are adequately informed of the relevant benefits and risks associated with

various prescription drugs and medical devices, they can reach appropriate decisions regarding which drug or device is best for specific patients. Sometimes a warning serves to inform health-care providers of unavoidable risks that inhere in the drug or medical device. By definition, such a warning would not aid the health-care provider in reducing the risk of injury to the patient by taking precautions in how the drug is administered or the medical device is used. However, warnings of unavoidable risks allow the health-care provider, and thereby the patient, to make an informed choice whether to utilize the drug or medical device. Beyond informing prescribing health-care providers, a drug or device manufacturer may have a duty under the law of negligence to use reasonable measures to supply instructions or warnings to nonprescribing health-care providers who are in positions to act on such information so as to reduce or prevent injury to patients.

e. Direct warnings to patients. Warnings and instructions with regard to drugs or medical devices that can be sold legally only pursuant to a prescription are, under the "learned intermediary" rule, directed to health-care providers. Subsection (d)(2) recognizes that direct warnings and instructions to patients are warranted for drugs that are dispensed or administered to patients without the personal intervention or evaluation of a health-care provider. An example is the administration of a vaccine in clinics where mass inoculations are performed. In many such programs, health-care providers are not in a position to evaluate the risks attendant upon use of the drug or device or to relate them to patients. When a manufacturer supplies prescription drugs for distribution to patients in this type of unsupervised environment, if a direct warning to patients is feasible and can be effective, the law requires measures to that effect.

Although the learned intermediary rule is generally accepted and a drug manufacturer fulfills its legal obligation to warn by providing adequate warnings to the health-care provider, arguments have been advanced that in two other areas courts should consider imposing tort liability on drug manufacturers that fail to provide direct warnings to consumers. In the first, governmental regulatory agencies have mandated that patients be informed of risks attendant to the use of a drug. A noted example is the FDA requirement that birth control pills be sold to patients accompanied by a patient package insert. In the second, manufacturers have advertised a prescription drug and its indicated use in the mass media. Governmental regulations require that, when drugs are so advertised, they must be accompanied by appropriate information concerning risk so as to provide balanced advertising. The question in both instances is whether adequate warnings to the appropriate health-care provider should insulate the manufacturer from tort liability.

Those who assert the need for adequate warnings directly to consumers contend that manufacturers that communicate directly with consumers should not escape liability simply because the decision to

prescribe the drug was made by the health-care provider. Proponents of the learned intermediary rule argue that, notwithstanding direct communications to the consumer, drugs cannot be dispensed unless a health-care provider makes an individualized decision that a drug is appropriate for a particular patient, and that it is for the health-care provider to decide which risks are relevant to the particular patient. The Institute leaves to developing case law whether exceptions to the learned intermediary rule in these or other situations should be recognized.

When the content of the warnings is mandated or approved by a governmental agency regulation and a court finds that compliance with such regulation federally preempts tort liability, then no liability under this Section can attach. For the rules governing compliance with governmental standards generally, see § 4(b).

f. Manufacturers' liability for defectively designed prescription drugs and medical devices. Subsection (c) reflects the judgment that, as long as a given drug or device provides net benefits for a class of patients, it should be available to them, accompanied by appropriate warnings and instructions. Learned intermediaries must generally be relied upon to see that the right drugs and devices reach the right patients. However, when a drug or device provides net benefits to no class of patients—when reasonable, informed health-care providers would not prescribe it to any class of patients—then the design of the product is defective and the manufacturer should be subject to liability for the harm caused.

A prescription drug or device manufacturer defeats a plaintiff's design claim by establishing one or more contexts in which its product would be prescribed by reasonable, informed health-care providers. That some individual providers do, in fact, prescribe defendant's product does not in itself suffice to defeat the plaintiff's claim. Evidence regarding the actual conduct of health-care providers, while relevant and admissible, is not necessarily controlling. The issue is whether, objectively viewed, reasonable providers, knowing of the foreseeable risks and benefits of the drug or medical device, would prescribe it for any class of patients. Given this very demanding objective standard, liability is likely to be imposed only under unusual circumstances. The court has the responsibility to determine when the plaintiff has introduced sufficient evidence so that reasonable persons could conclude that plaintiff has met this demanding standard.

g. Foreseeability of risks of harm in prescription drug and medical device cases. Duties concerning the design and marketing of prescription drugs and medical devices arise only with respect to risks of harm that are reasonably foreseeable at the time of sale. Imposing liability for unforeseeable risks can create inappropriate disincentives for the development of new drugs and therapeutic devices. Moreover, because actuaries cannot accurately assess unknown and unknowable risks, insuring against losses due to unknowable risks would be problematic. Drug and medical device manufacturers have the responsibility to

perform reasonable testing prior to marketing a product and to discover risks and risk-avoidance measures that such testing would reveal. See § 2, Comments *a* and *m*.

h. Liability of retail seller of prescription drugs and medical devices for defective designs and defects due to inadequate instructions or warnings. The rule governing most products imposes liability on wholesalers and retailers for selling a defectively designed product, or one without adequate instructions or warnings, even though they have exercised reasonable care in marketing the product. See § 1, Comment *e*, and § 2, Comment *o*. Courts have refused to apply this general rule to nonmanufacturing retail sellers of prescription drugs and medical devices and, instead, have adopted the rule stated in Subsection (e). That rule subjects retailers to liability only if the product contains a manufacturing defect or if the retailer fails to exercise reasonable care in connection with distribution of the drug or medical device. In so limiting the liability of intermediary parties, courts have held that they should be permitted to rely on the special expertise of manufacturers, prescribing and treating health-care providers, and governmental regulatory agencies. They have also emphasized the needs of medical patients to have ready access to prescription drugs at reasonable prices.

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§ 7. Liability of Commercial Seller or Distributor for Harm Caused by Defective Food Products

One engaged in the business of selling or otherwise distributing food products who sells or distributes a food product that is defective under § 2, § 3, or § 4 is subject to liability for harm to persons or property caused by the defect. Under § 2(a), a harm-causing ingredient of the food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient.

Comment:

a. General applicability of §§ 2, 3, and 4 to food products. Except for the special problems identified in Comment *b*, liability for harm caused by defects in commercially distributed food products are determined under the same rules generally applicable to non-food products. A food product may contain a manufacturing defect under § 2(a), as when a can of peas contains a pebble; may be defectively designed under § 2(b), as when the recipe for potato chips contains a dangerous chemical preservative; or may be sold without adequate warnings under § 2(c), as when the seller fails to inform consumers that the dye applied to the skins of oranges contains a well-known allergen. Section 3 may allow a plaintiff to reach the trier of fact when, unable to identify the specific defect, the plaintiff becomes violently ill immediately after consuming the defendant's food product and other causes are

sufficiently eliminated. And § 4 may apply when a commercially distributed food product fails to conform to applicable safety statutes or administrative regulations.

b. The special problem under § 2(a). When a plaintiff suffers harm due to the presence in food of foreign matter clearly not intended by the product seller, such as a pebble in a can of peas or the pre-sale spoilage of a jar of mayonnaise, the claim is readily treated under § 2(a), which deals with harm caused by manufacturing defects. Food product cases, however, sometimes present unique difficulties when it is unclear whether the ingredient that caused the plaintiff's harm is an unanticipated adulteration or is an inherent aspect of the product. For example, is a one-inch chicken bone in a chicken enchilada, or a fish bone in fish chowder, a manufacturing defect or, instead, an inherent aspect of the product? The analytical problem stems from the circumstance that food products in many instances do not have specific product designs that may be used as a basis for determining whether the offending product ingredient constitutes a departure from design, and is thus a manufacturing defect. Food recipes vary over time, within the same restaurant or other commercial food-preparation facility, from facility to facility, and from locale to locale.

Faced with this indeterminacy, some courts have attempted to rely on a distinction between "foreign" and "natural" characteristics of food products to determine liability. Under that distinction, liability attaches only if the alleged adulteration is foreign rather than natural to the product. Most courts have found this approach inadequate, however. Although a one-inch chicken bone may in some sense be "natural" to a chicken enchilada, depending on the context in which consumption takes place, the bone may still be unexpected by the reasonable consumer, who will not be able to avoid injury, thus rendering the product not reasonably safe. The majority view is that, in this circumstance of uncertainty, the issue of whether a food product containing a dangerous but arguably natural component is defective under § 2(a) is to be determined by reference to reasonable consumer expectations within the relevant context of consumption. A consumer expectations test in this context relies upon culturally defined, widely shared standards that food products ought to meet. Although consumer expectations are not adequate to supply a standard for defect in other contexts, assessments of what consumers have a right to expect in various commercial food preparations are sufficiently well-formed that judges and triers of fact can sensibly resolve whether liability should be imposed using this standard.

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§ 8. Liability of Commercial Seller or Distributor of Defective Used Products

One engaged in the business of selling or otherwise distributing used products who sells or distributes a defective used product is subject to liability for harm to persons or property caused by the defect if the defect:

(a) arises from the seller's failure to exercise reasonable care; or

(b) is a manufacturing defect under § 2(a) or a defect that may be inferred under § 3 and the seller's marketing of the product would cause a reasonable person in the position of the buyer to expect the used product to present no greater risk of defect than if the product were new; or

(c) is a defect under § 2 or § 3 in a used product remanufactured by the seller or a predecessor in the commercial chain of distribution of the used product; or

(d) arises from a used product's noncompliance under § 4 with a product safety statute or regulation applicable to the used product.

A used product is a product that, prior to the time of sale or other distribution referred to in this Section, is commercially sold or otherwise distributed to a buyer not in the commercial chain of distribution and used for some period of time.

Comment:

a. History. American courts have struggled with the question of whether to hold commercial sellers of used products to the same legal standards of responsibility for defects as commercial sellers of new products. Judicial responses have varied. Some courts hold used-product sellers strictly liable for harm caused by product defects existing at the time of sale. A greater number of courts hold commercial sellers of used products to lesser standards of responsibility. Liability rules applicable to used-product sellers are less stringent than those applicable to new-product sellers due to the wide variations in the type and condition of used products. For example, even in the minority of jurisdictions that generally hold commercial used-product sellers strictly liable for defects, disclaimers of liability may more readily be given effect in connection with sales of used products than in connection with sales of new products. Even in jurisdictions that generally apply more relaxed standards of responsibility for used products, factors that tend to raise a buyer's expectations regarding product quality, such as a seller's advertising a used product as "re-built" or "re-conditioned," correspondingly tend to raise the level of the sellers' responsibilities for product defects. The liability rules in this Section seek to accommodate these variations.

b. Rationale. Subsection (a) imposes liability on a commercial used-product seller for harm caused by a used product resulting from the seller's failure to exercise reasonable care. A used-product seller is properly subjected to liability, on both fairness and efficiency grounds, when its negligence causes harm. Even if a buyer does not have the right to expect a used product in obviously used condition to present the same defect-related risks as if the product were new, the buyer at least has the right to expect the used-product seller to exercise reasonable care. Moreover, exposing commercial used-product sellers to liability for harm caused by their negligence creates incentives for them to take reasonable steps to reduce risks of harm. Subsection (a) covers a wide variety of negligent conduct by the used-product seller, including conduct that introduces defects into the product and conduct that allows defects to remain when reasonable care would have eliminated them. Thus, when the requisites of Subsections (b) and (c) imposing strict liability for harm caused by product defects cannot be met, Subsection (a) will, in many instances, provide an appropriate remedy. See Comment e.

Subsections (b) and (c) subject commercial sellers of used products to liability without fault only under special circumstances. Consumers of most used products sold in obviously used condition typically do not, and should not, expect those products to perform as safely, with respect to the possibility of mechanical defects, as when those products were new. Many factors affect consumer expectations in this regard. For example, the age and condition of used products and the commensurate lower prices paid for such products alert reasonable buyers to the possibility of defects and the need to monitor the safety aspects of such products over time according to their age and condition. Given the awareness of buyers generally regarding the risks of harm presented by used products in varying stages of physical deterioration, primary responsibility for allocating these risks may, in the absence of fault on the part of the used-product seller or some special circumstance that justifies strict liability, be delegated to commercial markets for used products, in which the terms of sale vary widely depending on the apparent condition of such products at the time of sale.

When a used product is sold commercially under circumstances in which a reasonable buyer would expect the risk of defect to be substantially the same as with a new product, a different judicial response is justified. Thus, under the circumstances described in Subsection (b), many of the same rationales that support strict liability for harm caused by mechanical defects in new products support strict liability for mechanical defects in like-new used products. This section does not adopt the "consumer expectations test" as the governing standard for defining product defect. This Restatement has rejected that test as the sole test for defect in § 2 and does not adopt it in this Section. See § 2, Comment g. The question addressed in this Section is under what circumstances a plaintiff may hold the seller of a used product to the

liability standard applicable to sellers of new products. When dealing with this more limited question, Subsection (b) takes the position that, when the seller's marketing of the product would lead a reasonable consumer to expect the product to present no greater risk of defect than if the product were new, the law may treat the used-product sale as the functional equivalent of the sale of a new product.

Similarly, when a used product is remanufactured, strict liability under Subsection (c) is justified. The defects referred to in Subsection (c) include manufacturing defects, design defects, and defects based on inadequate instructions and warnings. See Comment i. Having undertaken to review and update not only the physical condition but, within limits, the design and marketing of the used product as well, the remanufacturer has taken on a role analogous to that of an original manufacturer with respect to those aspects of the product over which the remanufacturer has chosen to assert control. In that circumstance, Subsection (c) justifiably subjects used-product sellers to liability for harm caused by defects of all types in remanufactured used products.

It will be observed that, in contrast with Subsection (c), Subsection (b) imposes liability without proof of fault only for harm caused by manufacturing defects as defined in § 2(a) and defects whose existence may be inferred under § 3, even in connection with used products sold in such good condition that reasonable buyers would expect the risk of defects to be substantially the same as if the products were new. The factual difference between the circumstances described in Subsection (b) and those described in Subsection (c) is that in the latter the used-product seller (or a predecessor in the chain of distribution of the used product) has somehow introduced or chosen not to eliminate the design defect during remanufacture, whereas under Subsection (b) the design defect originates with the manufacturer in the original, new-product chain of distribution and the used-product seller is in no position to change the design.

Commercial sellers of like-new used products occupy a different position from that occupied by retailers of new products. Retailers of new products are part of the original chain of distribution and in fairness should be liable for harm caused by defects, even design defects, that exist when products are sold new. See § 1, Comment e. Retailers of new products have opportunities, as used-product sellers generally do not, to contract with those above them in the chain of distribution regarding who should ultimately bear the costs of defending design claims in court and paying successful claimants. Holding new-product retailers liable for defective designs originating at manufacture encourages them to apply pressure on manufacturers within the distributive chains, directly and indirectly, to produce safe products and to adopt reasonable designs. In contrast, sellers of like-new used products are not, except coincidentally, members of the original distributive chain. Typically they exercise little

if any control over original design choices or decisions regarding indemnity for costs of liability.

c. One engaged in the business of selling used products. The rules stated in this Section apply only to commercial sellers engaged in the business of selling used products. They do not apply to noncommercial private owners of used products, such as automobiles or electrical appliances, who sell them to others. Nor do they apply to a commercial establishment that makes an occasional sale of used equipment outside the regular course of its business. See § 1, Comment c. Noncommercial and casual used-product sellers may be liable under the general principles of negligence. See Restatement, Second, Torts § 281 et seq. But such sellers are outside the scope of this Restatement. Whether the defendant is a commercial seller or distributor within the meaning of this Section is usually a question of law to be determined by the court.

Illustrations:

1. ABC Car Rental purchases and maintains a fleet of new cars for its business of short-term car leases. At regular intervals it sells these rental cars at public auctions. In connection with these auctions, ABC is in the business of selling used products within the meaning of this Section.

2. ABC Box Co. is in the business of selling cardboard boxes. ABC owns a forklift, manufactured by SRT, that ABC uses for stacking boxes in its warehouse. ABC sells the used forklift to the XYZ Paper Supply Co. and replaces it with a new one. In connection with this sale, ABC is not in the business of selling used products within the meaning of this Section.

d. Definition of used product. To constitute a used product, a product must not only have been used for some period of time prior to the used-product sale transaction referred to in this Section, but that use must have followed its sale to a buyer not in the chain of distribution. Many products are tested, and thus in a sense are "used," within the chain of distribution prior to sale to persons outside the distributive chain. New motor vehicles, for example, are typically delivered to members of the buying public with several miles on their odometers, reflecting predistribution test driving. They are not for that reason used products under this Section. Even a product that is used by a retailer as a demonstration model prior to its first sale to the public does not thereby become a used product. After a new product has been sold or distributed, any use of the product by the buyer or other person not in the chain of distribution, for however short a period of time, transforms the product into a used product. In this connection post-sale use includes post-sale possession by the buyer or other person not in the chain of distribution occurring off the business premises of the seller.

Illustrations:

3. ABC, Inc., a retail dealer selling new and used automobiles, sells a new automobile to Sally, a customer. Sally takes delivery, drives it 300 miles, and then trades it back to ABC on the purchase of a different vehicle. ABC sells the trade-in two weeks later to Fred, another retail customer, at a discounted price. The trade-in automobile is a used product within the definition in this Section at the time of sale by ABC to Fred. (If a defect existing at the time of sale by ABC to Sally causes harm to Fred after the re-sale to him, ABC will be subject to liability to Fred under §§ 1 and 2 as the seller (to Sally) of a defective new product.)

4. ABC, Inc., a retail dealer selling new and used automobiles, offers last year's models for sale at a discounted price. The automobiles have never before been sold to the public and have only a few test miles on their odometers. They are new products at the time of sale by ABC and are not used products within the definition in this Section.

5. ABC, Inc., a retail dealer selling new and used automobiles, offers a demonstration automobile for sale at a discounted price. The demonstrator has been driven over 1,000 miles by ABC's salespersons and prospective buyers. The demonstrator has never before been sold to, or used by, anyone outside the chain of distribution. It is a new product at the time of sale by ABC and is not a used product within the definition in this Section.

6. XYZ Co. is a discount retailer that buys "seconds" and "overruns" in quantity from various manufacturers and sells them to the public at discounted prices. The products have never been used before sale by XYZ. Whether or not XYZ is considered to be a buyer in the commercial chain of distribution of the products it sells, the products have not been used for any period of time prior to sale by XYZ and therefore are not "used products" within the definition in this Section.

e. Used-product seller's liability for harm caused by seller's failure to exercise reasonable care. A commercial used-product seller who negligently introduces a defect or fails to eliminate a defect in performing such tasks as inspecting, repairing, modifying, rebuilding, redesigning, or reconditioning a used product, or a seller who negligently fails to provide adequate warnings, is subject to liability under Subsection (a) when harm to persons or property results therefrom. Liability under Subsection (a) thus focuses not on a reasonable buyer's expectations of safety but on the reasonableness of the seller's conduct and its causal relation to the defect-related harm suffered by the plaintiff.

Illustrations:

7. ABC Used Machinery Co. repairs used electric generators for commercial resale. In repairing a generator for resale, ABC negligently chooses a grade of electrical wire with inadequate heat

resistant properties given the normal uses to which the generator is put. ABC sells the generator to XYZ. Due to the inadequate wiring, the generator causes a fire, resulting in serious harm to XYZ's plant. ABC is subject to liability to XYZ for failure to exercise reasonable care in repairing the used generator.

8. LMN Co. purchases a new punch press from ABC Sales Co. After installing the punch press in its plant, LMN disengages a safety mechanism, the function of which is to shut down the press when an employee's hands get too close to the point of operation. After using the machine for five years, LMN sells it to ABC Machine Co. ABC repairs the used punch press and sells it, with the disengaged safety mechanism, to GHI, Inc. ABC negligently fails to warn GHI that the safety mechanism on the punch press is disengaged. A GHI employee working on the punch press suffers harm due to ABC's failure to warn of the disengaged safety mechanism. ABC is subject to liability for failing to exercise reasonable care with regard to its sale of the used punch press to GHI.

f. Used-product seller's liability for harm caused by manufacturing defects. Section 2(a) defines a manufacturing defect as a departure from a product's intended design. Although designated "manufacturing" defects, such mechanical defects need not originate at time of manufacture. See § 2, Comment c. If, at the time of sale or other distribution, the used product departs from its original intended design, a manufacturing defect as defined in § 2(a) exists at the time of the sale of the used product even though the defect arose during use of the product after its first commercial sale as a new product.

This Section subjects used-product sellers to liability for harm caused by manufacturing defects in three sets of circumstances. First, under Subsection (a), even if a reasonable person would expect the used product to present substantially greater risk of defect than if it were new and the product has not been remanufactured, the seller is subject to liability when the seller's negligence results in a manufacturing defect causing harm to persons or property. The seller may negligently fail to discover, repair, or warn about the defect. Second, under Subsection (b) the seller is subject to liability without fault for harm caused by a manufacturing defect when a reasonable person in the buyer's position would expect the used product to present substantially the same risk of defect as if the product were new. And third, under Subsection (c), the seller is subject to liability without fault for harm caused by a manufacturing defect in a remanufactured used product.

Illustrations:

9. XYZ, Inc., a commercial used-product seller, sells a six-month-old used clothes dryer to P. The dryer is in like-new condition. The price reflects the fact that the dryer is used. A manufacturing defect in the dryer causes a fire, harming M. If, at the time of sale by

XYZ, a reasonable person in P's position would expect the dryer to present substantially the same risk of defect as if it were new, then XYZ is subject to liability without fault to M under Subsection (b).

10. XYZ, Inc., a commercial used-product seller, sells a used clothes dryer in obviously used condition to P, under circumstances in which a reasonable person in P's position would expect the dryer to present a substantially greater risk of defect than if it were new at the time of sale. XYZ negligently repairs the dryer prior to sale, introducing a manufacturing defect. The defect subsequently causes an accident, harming M. Although XYZ is not subject to liability to M under Subsection (b), XYZ is subject to liability under Subsection (a).

11. XYZ, Inc., a commercial used-product seller, sells a used clothes dryer in obviously used condition to P. XYZ remanufactures the dryer prior to sale to P, nonnegligently introducing a manufacturing defect. The defect subsequently causes an accident, harming M. Although XYZ is not subject to liability to M under Subsection (a) or (b), XYZ is subject to liability under Subsection (c).

g. Used-product seller's liability for harm caused by defects that may be inferred under § 3. Subsections (b) and (c) impose liability on used-product sellers not only for defects as defined in §§ 2(a) and 2, respectively, but also for defects whose existence at the time of sale may be inferred under § 3. Under § 3 an inference of defect may be drawn based on circumstantial evidence.

Illustration:

12. Driver bought a used automobile from Ace Used Cars, Inc. The automobile was in like-new condition, with only 800 miles on the odometer. Shortly after buying the automobile, while driving the automobile nonnegligently on a well-maintained paved road, Driver felt something crack below where the steering column connects with the dashboard. The steering wheel spun to the right and the automobile turned sharply. Before Driver could stop, the automobile crashed into a wall and Driver suffered harm.

Driver brings an action against Ace Used Cars. Driver's qualified expert witness testifies that the accident was caused by a defect in the car's steering mechanism that existed at the time of sale by the defendant. The expert identifies four manufacturing or design defects that could have caused the accident, but is unable to say with reasonable certainty which of the four defects in fact occurred. No evidence of negligence on the part of the defendant is available. The trier of fact could find that a reasonable person in Driver's position would have expected the automobile to present substantially the same risk of defect as if it had been new at the time of sale by Ace Used Cars. The evidence is sufficient to reach the trier of fact with a strict liability claim under Subsection (b), even though it may not be

sufficient to support a determination regarding which of the four possible defects caused the accident.

h. Requirement that a reasonable person in the position of the buyer would expect the used product to present substantially the same risk of defect as if the product were new at the time of sale. Reasonable consumer expectations do not constitute the test for defectiveness under Subsection (b) but rather they determine whether or not the used product should be governed by the liability rules applicable to new products, thus imposing strict liability for harm caused by manufacturing defects under § 2(a) and by inferable defects under § 3.

The reasonable expectations test under Subsection (b) is objective, not subjective. The fact that a product has been used prior to sale for even a short period of time necessarily lowers reasonable expectations of safety to some extent. Nevertheless, under Subsection (b) reasonable expectations need only substantially approximate those associated with products in new condition. The comparison is with the actual product in new condition, not with a newer, more advanced design of the product.

The relevant circumstances determining reasonable expectations include but are not limited to: (1) the age and condition of the product unit containing the defect; (2) the price of the product relative to the prices of new and used products of a similar type; (3) the seller's affirmations, if any, that the product is rebuilt or reconditioned; (4) any statements by the seller concerning repairs undertaken with regard to the product; (5) any guarantees or warranties made by the seller with regard to the product, including any limitations accompanying such guarantees or warranties; (6) the presence or absence of contractual disclaimers of liability; and (7) the seller's disclosures of information alerting a reasonable buyer to a higher risk of defect due to prior usage of the product and its condition. The plaintiff ordinarily bears the burden of proving that the circumstances surrounding the sale would lead a reasonable person to expect the used product to present substantially the same risk of defect as if it were new at the time of sale. Whether a reasonable person would so expect may be a question of fact for the jury.

The used-product seller's liability under Subsection (b) for harm caused by a product defect may extend to a specific part of the product or to a specific time period of use. For example, the seller's marketing of the like-new used product may refer to a specific time period during which the product will present substantially the same risk of defect as if it were new. If a defect in the product at the time of sale causes harm during the specified period, then the seller is subject to liability under Subsection (b) for the harm caused by the defect whether or not the seller's marketing could be construed as an enforceable sales warranty.

When a used product contains a new component part and the component contains a manufacturing defect that causes harm, the used-product seller is subject to liability for the harm as a commercial seller of a defective new product component under §§ 1, 2(a), and 3.

Illustrations:

13. XYZ, Inc., a commercial seller of used vacuum cleaners, sells a used vacuum cleaner to P. The vacuum cleaner is three months old and is in like-new condition. A manufacturing defect in the cleaner, existing at the time of sale, causes an accident, harming P's child, C. Without regard to P's subjective expectations, XYZ is subject to liability without fault to C if the trier of fact finds that a reasonable person in P's position would expect the cleaner to present substantially the same risk of defect as if it were new at the time of sale.

14. XYZ, Inc., a commercial used-product seller, sells a used gas stove to P. The stove is five years old and has been subjected to extensive use. XYZ refurbishes the stove prior to sale and asserts to P that it is "rebuilt and in top working condition." The price includes a premium, relative to used stoves generally, reflecting the refurbishing. A manufacturing defect, existing at the time of sale of the used stove, causes an accident that harms M. Whether or not XYZ's assertion is an express warranty, XYZ is subject to liability to M under Subsection (b) if the trier of fact finds that a reasonable person in P's position would expect the refurbished stove to present substantially the same risk of defect as if it were new at the time of sale.

15. XYZ, Inc., a commercial used-product seller, sells a used snowblower to P. The blower is five years old and obviously has been subjected to extensive use. The price is discounted and XYZ asserts to P that the blower is sold "as is and with all defects." A manufacturing defect existing at the time of sale causes an accident, resulting in harm to M. Whether or not XYZ's assertion constitutes a valid disclaimer, in the absence of proof that XYZ's negligence caused the defect XYZ is not subject to liability to M. Regardless of P's subjective beliefs, no reasonable person in P's position would expect that the risk of defect is substantially the same as if the blower were new at the time of sale.

16. Same facts as Illustration 13 except that the used vacuum cleaner at the time of sale contains a new motor, installed by XYZ. Subsequently, a defect in the new motor causes an accident, harming M. XYZ, as a commercial seller of the new motor, is subject to liability without fault to M under §§ 1 and 2.

17. Same facts as Illustration 13 except that XYZ sells the used vacuum cleaner with a representation that "parts and labor are guaranteed for 90 days." A defect existing at the time of sale causes an accident 50 days after the sale, harming M. XYZ is subject to liability without fault to M if the trier of fact finds that a reasonable person in P's position would expect the vacuum to present substantially the same risk of defect during the 90-day period as if the vacuum were new at the time of sale by XYZ.

i. Remanufacture of the used product. When one undertakes to remanufacture a used product and bring it to market as a product that meets current design and production standards, it is fair to subject the seller of the remanufactured product to liability for harm caused by §§ 2 and 3 defects existing at the time of sale of the remanufactured used product. The fact that the remanufactured product is sold at a discount compared to a new product does not relieve the seller of responsibility for such defects. In part the imposition of liability for §§ 2 and 3 defects arises because of heightened consumer expectations. However, when a used product is remanufactured the plaintiff need not prove that a reasonable buyer would expect the remanufactured product to present no greater risk of defect than if the product were new, as is necessary in establishing a case under Subsection (b). The fact of remanufacture is sufficient to impose liability for § 2 defects. Even when a product is not remanufactured a plaintiff is free to establish liability under Subsections (a) and (b) by proving either that the seller failed to act reasonably with regard to the sale of the used product or that the seller's marketing of the product would cause a reasonable person to expect the used product to present no greater risk of defect than if the product were new.

Illustration:

18. ABC Motor Parts Co. sells both new and remanufactured replacement parts. ABC sold Alice a remanufactured fuel pump for her 1994 Blazer Sedan. XYZ Rebuilders, Inc. remanufactured the fuel pump and sold it to ABC. Alice paid 25 percent less for the remanufactured fuel pump than a new fuel pump would have cost. Shortly after installation of the remanufactured fuel pump Alice's car stalled while making a turn in an intersection. A collision ensued causing serious injury to Alice. Alice's expert presents credible testimony that a bracket in the fuel pump dislodged and blocked the flow of fuel and that the bracket was defectively assembled by XYZ. Both ABC and XYZ are subject to liability without fault for the harm caused by the defect.

j. Short-term product leases. A commercial lessor of new and like-new products is generally subject to the rules governing products liability. See § 20, Comment c. In contrast, when the rental units are in obviously used condition, and rented under circumstances in which a reasonable person would not expect the risk of defect to be substantially the same as if the rental units were new, liability of the lessor will depend upon a showing of fault under Subsection (a).

Illustrations:

19. XYZ, Inc., operates a commercial business leasing automobiles to customers on a short-term basis. The average age of its fleet of vehicles is six months; some leased vehicles are new or almost new. XYZ leases a 12-month-old automobile to P for three days. The odometer at the commencement of the lease shows 8,000 miles. XYZ charges P the same rate it charges for new or almost-new

automobiles of similar make and model. A defect in the vehicle at the time of commencement of the lease causes an accident, harming M. XYZ is subject to liability to M under §§ 1 and 2 for the harm caused by the defect.

20. ABC Rent-a-Used-Car, Inc., operates a commercial business leasing automobiles in obviously used condition to customers on a short-term basis. The automobiles that ABC leases are at least two years old and many are as old as four years. The odometers range from 35,000 to 75,000 miles. ABC's rates are lower than those charged for the rental of newer automobiles by the leading national car-rental chains. ABC leases a three-year-old automobile to P for one week. The automobile has 40,000 miles on the odometer. A latent manufacturing defect in the brake cylinder causes an accident, harming M. ABC is not liable as a retailer of a new product under §§ 1 and 2. Nor is ABC subject to liability to M under Subsection (b) because a reasonable person in P's position would not expect that the used automobile presents substantially the same risk of defect as if it were new at the time of the lease to P. ABC is subject to liability to P if shown to have been negligent under Subsection (a).

k. Effects of disclaimers on used-product seller's liability. A used-product seller's disclaimer of liability for harm caused by product defects may be given conclusive legal effect under applicable state law, depending on the nature of the harm caused by the defects. See, e.g., § 21, Comment f, dealing with recovery of economic loss. Whether a used-product seller's disclaimer of liability for harm to persons is legally conclusive is more problematic, but many courts give such disclaimers conclusive effect. In any event, disclaimer language is relevant in an inquiry into reasonable expectations under Subsection (b). That is, a disclaimer may diminish reasonable expectations as to the safety of a used product. This is especially likely when disclaimer language either reminds the buyer that the product is used or warns the buyer of the increased risk of defect.

l. Relationship between the rule in this Section and the liability of a used-product seller for misrepresentation or breach of express warranty. Subsection (b) imposes liability for manufacturing defects under § 2(a) and for inferable defects under § 3 when a reasonable person in the buyer's position would expect a used product to present substantially the same risk of defect as if the product were new. See Comment h. A representation about the product may contribute to such expectations even when the representation does not constitute a misrepresentation under § 9 or an express warranty. However, when the seller's representation is sufficiently explicit to constitute a misrepresentation or an express warranty about the used product, the plaintiff may be entitled to bring an action under § 9 or under Article 2 of the U.C.C.

CHAPTER 2

LIABILITY OF COMMERCIAL PRODUCT SELLERS NOT BASED ON PRODUCT DEFECTS AT TIME OF SALE

§ 9. Liability of Commercial Product Seller or Distributor for Harm Caused by Misrepresentation

One engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a fraudulent, negligent, or innocent misrepresentation of material fact concerning the product is subject to liability for harm to persons or property caused by the misrepresentation.

Comment:

a. Liability for fraudulent or negligent misrepresentation. The rules in the Restatement, Second, of Torts, governing liability for fraudulent and negligent misrepresentation, are contained in §§ 310 and 311. Case law has followed these Sections. Although these Sections do not explicitly apply to commercial product sellers, they admit of such application. Given the availability to plaintiffs of the rule under § 402B of the Restatement, Second, of Torts, subjecting product sellers to strict liability even in the absence of fraud or negligence, (see Comment b), there can be no doubt that product sellers are subject to liability for fraudulent or negligent misrepresentation. By hypothesis, given the rule stated in § 402B, a plaintiff who proves that the misrepresentation that caused harm was made fraudulently or negligently should have a remedy.

b. Liability for innocent misrepresentation. The rules governing liability for innocent product misrepresentation are stated in the Restatement, Second, of Torts § 402B. Case law has followed that Section. Section 402B contains two caveats. The first caveat leaves open the question whether a seller should be liable under § 402B for an innocent misrepresentation that is made to an individual and not to the public at large. This question remains open. Case law on the subject of liability for innocent misrepresentation has dealt exclusively with public misrepresentations. The second caveat to § 402B leaves open the question whether a seller should be liable for an innocent misrepresentation that causes harm to the person or property of one who is not a consumer of the product. Case law has not resolved the issue of whether an innocent misrepresentation may, in the absence of a product defect, be a basis of liability to a non-consumer who suffers harm as a result of reliance by an intermediary.

c. The elements of materiality, causation, and contributory fault. It is important to note that § 402B, in Comments g and j, incorporates by

reference §§ 537–548A of the Restatement, Second, of Torts. These Sections define what constitutes a material misrepresentation, see § 538; what is a material fact, see §§ 538–543; the requirement that the misrepresentation be a cause in fact of the harm, see § 546; the requirement that the misrepresentation be a legal cause of the harm, see § 548A; and the role of contributory fault and its relation to justifiable reliance, see § 545A.

d. No requirement of product defect. This Section does not require the plaintiff to show that the product was defective at the time of sale or distribution within the meaning of other Sections of this Restatement Third of Torts: Products Liability.

e. Relationship between the rule stated in this Section and express warranty. The rule stated in this Section provides a remedy in tort in many cases in which a remedy for breach of express warranty or implied warranty of fitness for particular purpose is also available to the plaintiff. Breach of these warranties provides an independent basis of liability under the Uniform Commercial Code and may be combined in the same case with a claim for misrepresentation.

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§ 10. Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Warn

(a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning.

(b) A reasonable person in the seller's position would provide a warning after the time of sale if:

(1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and

(2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

(3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing a warning.

Comment:

a. Rationale. Judicial recognition of the seller's duty to warn of a product-related risk after the time of sale, whether or not the product is defective at the time of original sale within the meaning of other Sections of this Restatement, is relatively new. Nonetheless, a growing body of decisional and statutory law imposes such a duty. Courts recognize that warnings about risks discovered after sale are sometimes necessary to prevent significant harm to persons and property. Nevertheless, an unbounded post-sale duty to warn would impose unacceptable burdens on product sellers. The costs of identifying and communicating with product users years after sale are often daunting. Furthermore, as product designs are developed and improved over time, many risks are reduced or avoided by subsequent design changes. If every post-sale improvement in a product design were to give rise to a duty to warn users of the risks of continuing to use the existing design, the burden on product sellers would be unacceptably great.

As with all rules that raise the question whether a duty exists, courts must make the threshold decisions that, in particular cases, triers of fact could reasonably find that product sellers can practically and effectively discharge such an obligation and that the risks of harm are sufficiently great to justify what is typically a substantial post-sale undertaking. In deciding whether a claim based on breach of a post-sale duty to warn should reach the trier of fact, the court must determine whether the requirements in Subsection (b)(1) through (4) are supported by proof. The legal standard is whether a reasonable person would provide a post-sale warning. In light of the serious potential for overburdening sellers in this regard, the court should carefully examine the circumstances for and against imposing a duty to provide a post-sale warning in a particular case.

b. When a reasonable person in the seller's position would provide a warning. The standard governing the liability of the seller is objective: whether a reasonable person in the seller's position would provide a warning. This is the standard traditionally applied in determining negligence. See Restatement, Second, Torts § 283, Comment *c*. In applying the reasonableness standard to members of the chain of distribution it is possible that one party's conduct may be reasonable and another's unreasonable. For example, a manufacturer may discover information under circumstances satisfying Subsection (b)(1) through (4) and thus be required to provide a post-sale warning. In contrast, a retailer is generally not in a position to know about the risk discovered by the manufacturer after sale and thus is not subject to liability because it neither knows nor should know of the risk. Once the retailer is made aware of the risk, however, whether the retailer is subject to liability for failing to issue a post-sale warning depends on whether a reasonable person in the retailer's position would warn under the criteria set forth in Subsection (b)(1) through (4).

c. Requirement that seller or other distributor knows or should know of the product-related risk. A duty to warn after the time of sale cannot arise unless the product seller or other distributor knows or in the exercise of reasonable care should know of the product-related risk that causes plaintiff's harm. The seller may have known or should have known of the risk at the time of sale, in which case failure to warn will cause the product to be defective under § 2(c). But even if the product is not defective at the time of sale because no reasonable seller would have known of the risk under § 2(c), knowledge of the risk may come after sale and may give rise to a duty to warn at that time.

As a practical matter, most post-sale duties to warn arise when new information is brought to the attention of the seller, after the time of sale, concerning risks accompanying the product's use or consumption. When risks are not actually brought to the attention of sellers, the burden of constantly monitoring product performance in the field is usually too burdensome to support a post-sale duty to warn. However, when reasonable grounds exist for the seller to suspect that a hitherto unknown risk exists, especially when the risk involved is great, the duty of reasonable care may require investigation. With regard to one class of products, prescription drugs and devices, courts traditionally impose a continuing duty of reasonable care to test and monitor after sale to discover product-related risks.

Illustration:

1. ABC manufactures and sells Model 1220 power drills used exclusively in heavy industry. Three years after the Model 1220 is first put on the market, ABC learns that when the drill is used continuously for more than four hours it overheats, causing it to fracture. ABC learns of the overheating problem when the Model 1220 is first used on a new metal alloy that was not previously available, and thus not in use, at the time of first distribution. The new alloy causes the drill to heat well beyond temperatures caused by any other metal for which the Model 1220 has ever been used. No reasonable person could have foreseen the development of the new alloy when any of the drills were sold. Because the risk of overheating was not foreseeable at the time of sale of many of the Model 1220s, those units are not defective within the meaning of § 2. Whether ABC is subject to liability for failing to issue a post-sale warning regarding the risks of overheating is determined based on the factors set forth in Subsection (b)(1) through (4).

d. Requirement that the risk of harm be substantial. For a post-sale duty to arise under this Section, the risk of harm must be at least as great as the level of risk that would require a warning under § 2(c). Because post-sale warnings are invariably costly to provide, and post-sale increases in knowledge of risks are to some extent inevitable, no duty arises after the time of sale to issue warnings regarding product-related accidents that occur infrequently and are not likely to cause substantial

harm. If post-sale acquisition of knowledge of adverse outcomes that are both infrequent and insubstantial were to trigger a post-sale duty to warn, sellers would face costly and potentially crushing burdens.

e. Requirement that those to whom a warning might be provided be identifiable. The problem of identifying those to whom product warnings might be provided is especially relevant in the post-sale context. When products are originally sold or distributed, most often the seller accompanies the product, together with its packaging, with whatever warnings are appropriate. When knowledge of product-related risk is available to the seller only after sale, it may be difficult for the seller to determine who, in the general population of product users and consumers, is in a position to respond to warnings effectively. In some instances, customer records may identify the population to whom warnings should be provided. Individual names and addresses are not necessarily required. Records may indicate classes of product users, or geographically limited markets. But when no such records are available, the seller's inability to identify those for whom warnings would be useful may properly prevent a post-sale duty to warn from arising. See Comment *g*.

Illustration:

2. ABC has manufactured and distributed vacuum cleaners commercially to millions of consumers over the course of many years. Only scanty and incomplete sales records have been kept by retailers, and it is practically impossible for ABC to identify who among the consuming public owns and operates its vacuums. Five years after the first commercial distribution of Model 14, ABC discovers a risk when the Model 14 is used to vacuum dust from a chemical carpet cleaner newly introduced to the market. No reasonable person in ABC's position would have foreseen the risk previously, and thus the Model 14 was not defective at time of original sale. The difficulty of ABC's identifying users of its Model 14 vacuum, together with the frequency and severity of the risk, must be weighed by the court in determining whether ABC owes a post-sale duty to warn of the newly discovered risk.

f. The reasonableness of assuming that those to whom a warning might be provided are unaware of the risk. To justify the cost of providing a post-sale warning, it must reasonably appear that those to whom a warning might be provided are unaware of the risk. See § 2, Comment *j*. Similarly, even if knowledge of the risk reasonably becomes available to the seller only after the original sale, if users and consumers are at that time generally aware of the risk a post-sale warning is not required.

g. The seller's ability to communicate the warning effectively to those who are in a position to act to prevent harm. For a post-sale duty to warn to arise, the seller must reasonably be able to communicate the warning to those identified as appropriate recipients. When original customer sales records indicate which individuals are probably using and

consuming the product in question, direct communication of a warning may be feasible. When direct communication is not feasible, it may be necessary to utilize the public media to disseminate information regarding risks of substantial harm. As the group to whom warnings might be provided increases in size, costs of communicating warnings may increase and their effectiveness may decrease.

h. Requirement that those to whom a post-sale warning might be provided be able to act effectively to reduce the risk. To justify the potentially high cost of providing a post-sale warning, those to whom such warnings are provided must be in a position to reduce or prevent product-caused harm. Such recipients of warnings need not be original purchasers of the product, so long as they are able to reduce risk effectively.

i. Requirement that the risk of harm be sufficiently great to justify providing a post-sale warning. Compared with the costs of providing warnings attendant upon the original sale of a product, the costs of providing post-sale warnings are typically greater. In the post-sale context, identifying those who should receive a warning and communicating the warning to them can require large expenditures. Courts recognize these burdens and hold that a post-sale warning is required only when the risk of harm is sufficiently great to justify undertaking a post-sale warning program. Subsection (b)(4) requires that, even for a substantial risk, a seller owes a duty to warn after the time of sale only if the risk of harm is sufficiently great to justify the cost of providing a post-sale warning. The test defining unreasonable conduct is that which governs negligence generally. See Restatement, Second, Torts § 291.

j. Distinguishing post-sale failures to warn from defects existing at the time of sale. When a product is defective at the time of sale liability can be established without reference to a post-sale duty to warn. A seller who discovers after sale that its product was defective at the time of sale within the meaning of this Restatement cannot generally absolve itself of liability by issuing a post-sale warning. As long as the original defect is causally related to the harm suffered by the plaintiff, a prima facie case under this Restatement can be established notwithstanding reasonable post-sale efforts to warn. Of course, even when a product is defective at the time of sale a seller may have an independent obligation to issue a post-sale warning based on the rule stated in this Section. Thus, a plaintiff may seek recovery based on both a time-of-sale defect and a post-sale failure to warn.

Illustrations:

3. ABC manufactures and sells Model 1220 power drills used exclusively in heavy industry. ABC sells a Model 1220 drill to XYZ Industries. Six months after the sale to XYZ, ABC learns that when the Model 1220 drill is used continuously for more than four hours it overheats, causing the drill to fracture. ABC should have discovered

this problem through reasonable testing before the drill was put on the market. Had ABC done so, it could have adopted a reasonable alternative design that would have avoided the problem. Model 1220 is thus defective within the meaning of § 2(b). After ABC discovers the overheating problem, it sends warning letters to all owners of the Model 1220, including XYZ, that the machine should not be used for more than four hours continuously and that after prolonged use the machine should be turned off for 30 minutes to cool. The post-sale warning states that failure to do so could cause harm. XYZ posts the warning in its plant. Several months thereafter, XYZ's employee, E, is working on the machine during a rush job and the Model 1220 is allowed to run continuously for more than four hours. The machine overheats and the drill shatters, causing harm to E. Notwithstanding ABC's post-sale efforts to warn, ABC is subject to liability for the harm to E caused by the defectively designed Model 1220 under §§ 1 and 2. Whether E's recovery should be reduced because of contributory negligence or comparative fault is governed by § 17. Whether E should be denied recovery due to the absence of proximate causation is governed by § 15.

4. Same facts as Illustration 3 except that ABC fails to issue a post-sale warning after it discovers the overheating problem. E may bring an action based on a § 2 defect and may also assert the failure of ABC to provide a post-sale warning of the overheating problem. Whether it is reasonable also to subject ABC to liability for failure to issue a post-sale warning is determined by applying the factors set forth in Subsection (b)(1) through (4).

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§ 11. Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Recall Product

One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to recall a product after the time of sale or distribution if:

(a)(1) a governmental directive issued pursuant to a statute or administrative regulation specifically requires the seller or distributor to recall the product; or

(2) the seller or distributor, in the absence of a recall requirement under Subsection (a)(1), undertakes to recall the product; and

(b) the seller or distributor fails to act as a reasonable person in recalling the product.

Comment:

a. Rationale. Duties to recall products impose significant burdens on manufacturers. Many product lines are periodically redesigned so that they become safer over time. If every improvement in product safety were to trigger a common-law duty to recall, manufacturers would face incalculable costs every time they sought to make their product lines better and safer. Moreover, even when a product is defective within the meaning of § 2, § 3, or § 4, an involuntary duty to recall should be imposed on the seller only by a governmental directive issued pursuant to statute or regulation. Issues relating to product recalls are best evaluated by governmental agencies capable of gathering adequate data regarding the ramifications of such undertakings. The duty to recall or repair should be distinguished from a post-sale duty to warn about product hazards discovered after sale. See §§ 10 and 13.

Illustration:

1. MNO Corp. has manufactured and distributed washing machines for five years. MNO develops an improved model that includes a safety device that reduces the risk of harm to users. The washing machines sold previously conformed to the best technology available at time of sale and were not defective when sold. MNO is under no common-law obligation to recall previously-distributed machines in order to retrofit them with the new safety device.

b. Failure to recall when recall is specifically required by a governmental directive issued pursuant to statute or other governmental regulation. When a product recall is specifically required by a governmental directive issued pursuant to a statute or regulation, failure reasonably to comply with the relevant directive subjects the seller or other distributor to liability for harm caused by such failure. For the product seller or other distributor to be subject to liability under Subsection (a)(1), the directive must specifically require recall. It is not sufficient that an agency has the power to direct product recalls with regard to the product in question if the agency has failed to issue a specific recall directive, nor will it suffice that a general duty to recall is imposed by statute or regulation and the plaintiff alleges that the defendant breached that duty by failing to recall in the absence of a specific directive to do so. When a directive issued pursuant to a statute or regulation specifically requires product recall, the violation by the seller of that requirement constitutes actionable negligence. See § 4, Comment *f*.

To give rise to the duty to recall under this Section, the governmental directive must require the defendant to recall the product during the time period in which the plaintiff claims the defendant breached the duty to recall. For example, if the regulatory scheme calls for a stay of the recall directive pending appeal, no duty to recall arises under this Section until the appeal is decided in a way that makes the recall directive binding on the defendant.

Illustrations:

2. The same facts as Illustration 1, except that a federal agency directs MNO to recall the machines distributed by MNO. Thereafter, MNO unreasonably fails to notify machine owners, whom it can reasonably identify, about the recall. MNO is subject to liability for harm caused by its noncompliance with the governmental directive to recall the machines.

3. The same facts as Illustration 1, except that the agency issues no directive to MNO regarding the washing machines. A plaintiff argues that MNO owed a general tort duty under the statute to recall the washing machine, which the plaintiff claims was defectively designed as defined in § 2(b) and caused the claimant's harm. MNO is not subject to liability under Subsection (a)(1).

c. When seller or other distributor voluntarily undertakes to recall. Some courts have held that, when a seller, under no statutory or regulatory obligation to undertake a recall, volunteers to do so, the seller is subject to liability for failing to act reasonably to recall the product. The rationale for this rule lies partly in the general rule that one who undertakes a rescue, and thus induces other would-be rescuers to forbear, must act reasonably in following through. In the context of products liability, courts appear to assume that voluntary recalls are typically undertaken in the anticipation that, if the seller does not recall voluntarily, it will be directed to do so by a governmental regulator. Having presumably forestalled the regulatory recall directive, the seller should be under a common-law duty to follow through on its commitment to recall. In some instances voluntary recalls are subject to regulation by governmental agencies. Whether product sellers are subject to, or protected from, liability for harm caused by noncompliance or compliance with the terms of such regulations is governed by Restatement, Second, of Torts §§ 286–288C. See § 4, Comment *f*.

Illustration:

4. The same facts as Illustration 1, except that MNO voluntarily announces that it will recall and retrofit the washing machines it distributed earlier, and it thereafter unreasonably fails to notify owners whom it can reasonably identify about the recall. MNO is subject to liability under Subsection (a)(2) for harm caused by its failure to act reasonably in undertaking to recall the machines.

d. Distinguishing liability for post-sale failure to recall from liability for the sale or other distribution of defective products. When a product is defective at the time of sale and the defect causes harm to persons or property, the seller is subject to liability whether or not the seller attempts to eliminate the defect by post-sale recall. The fact that one who owns or possesses a product that was defective at time of sale does not respond to a recall notice does not necessarily eliminate the causal connection between the original defect and the plaintiff's harm.

See § 15. It may be foreseeable that product owners will fail to respond to recall notices. In a case involving harm caused by an original defect at the time of sale, the plaintiff's failure to act on a recall notice may be taken into account under the rules stated in § 17 governing comparative responsibility. In appropriate cases a plaintiff may seek recovery based on both a claim of original defect and a claim of post-sale failure to recall.

Illustrations:

5. XYZ Motor Co. manufactures and sells the Buster Sedan. XYZ learned that the Buster tends to oversteer dangerously. XYZ should have discovered the problem before the Buster Sedan was put on the market, when it could have adopted a reasonable alternative design. The Buster Sedan was thus defectively designed within the meaning of § 2(b). The National Highway Traffic Safety Administration directed XYZ to recall the Buster to correct the oversteering problem. Sonia Rand, who had purchased a Buster Sedan, received a recall notice. Sonia did not respond to the notice. Six months later, while driving on the highway, Sonia lost control of her car. A trier of fact could find that the oversteering in Sonia's Buster contributed to her loss of control. XYZ is subject to liability under §§ 1 and 2(b) for the injury caused by the defectively designed Buster Sedan. In her action based on the design defect, Sonia's failure to bring her car in for repair is relevant to the issue of legal causation under § 15 and the issue of comparative responsibility under § 17.

6. Same facts as Illustration 5, except that XYZ failed to undertake the recall directed by the National Highway Traffic Safety Administration. Sonia suffers injury after the time a recall notice should have been issued. XYZ is subject to liability under this Section for failure to recall. XYZ is also subject to liability under § 2(b) based on defective design. Whether XYZ is subject to liability for post-sale failure to warn is governed by the rules stated in § 10.

7. Same facts as Illustration 5, except that the National Highway Traffic Safety Administration refused, after considering the problem, to direct a recall. XYZ is subject to liability to Sonia based on a § 2(b) design defect. XYZ is not subject to liability under this Section for failure to recall. Whether XYZ is subject to liability for post-sale failure to warn is governed by the rules stated in § 10.

e. Causal relationship between failure to recall and plaintiff's harm. For a seller to be subject to liability for post-sale failure to recall, the plaintiff must establish not only that the seller unreasonably failed to recall the product under this Section, but also that the defect that was the subject of recall was a legal cause of the plaintiff's harm. See § 15.

CHAPTER 3

LIABILITY OF SUCCESSORS AND APPARENT MANUFACTURERS

§ 12. Liability of Successor for Harm Caused by Defective Products Sold Commercially by Predecessor

A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor if the acquisition:

(a) is accompanied by an agreement for the successor to assume such liability; or

(b) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor; or

(c) constitutes a consolidation or merger with the predecessor; or

(d) results in the successor becoming a continuation of the predecessor.

Comment:

a. History. The rule that a corporation or other business entity is not, in the absence of the circumstances described in Subsections (a) through (d), subject to liability for harm caused by defective products sold by a corporation from which it purchases productive assets derives from both products liability and corporate law principles. When the alleged successor purchases the assets piecemeal with little or no further continuity of operations between the two corporations or other business entities, the nonliability of the alleged successor derives primarily from the fact that the successor is not within the basic liability rule in § 1 of this Restatement: "one . . . *who sells or distributes* a defective product is subject to liability for harm . . . caused by the defective product." (Emphasis added.) Thus, when one corporation commercially sells products, some of which are defective, and later transfers its productive assets to another corporation that uses those assets to manufacture products of its own, the purchaser of the assets is not liable for harm caused by a defective product sold earlier by the transferor because the transferee did not "sell or distribute" the defective product that caused the harm. When the alleged successor receives value in the form of the transferor's goodwill and continues to manufacture products of the same sort as manufactured earlier by the predecessor, and thus to some extent constitutes a continuation of the predecessor, the general rule of nonliability derives primarily from the law governing corporations,

which favors the free alienability of corporate assets and limits shareholders' exposures to liability in order to facilitate the formation and investment of capital.

When the transferor goes out of business upon, or shortly after, a transfer of productive assets, the rights of plaintiffs injured by defective products sold earlier by the transferor may be adversely affected. For tort plaintiffs who have existing judgments outstanding against the predecessor at the time of transfer and dissolution, the law governing corporations and other business entities provides, within limits, legal protection. Creditors, including tort creditors, who hold existing judgments against a corporation that is in the process of transferring its assets and going out of business may satisfy those claims out of the proceeds from the transfer of assets. Moreover, if the proceeds from the transfer of assets are distributed to shareholders of the transferor corporation in violation of applicable state corporation law or fraudulent transfer law, existing creditors of the corporation may pursue the proceeds in the hands of the transferor's shareholders. These rules, in some states expressed in statutes, are designed to protect, within the limits of practicality, creditors who are identifiable at the time of the transfer of the predecessor's assets to the successor corporation and the transferor's dissolution. The same principles have been applied to the transfer of assets of proprietorships, partnerships, and other business entities.

Tort claimants who, as a result of defective products sold by a predecessor corporation, seek recovery only after transfer of assets to a successor corporation often face difficulties in attempting to bring their claims within the foregoing legal rules. Their claims typically accrue after the predecessor corporation has lawfully distributed to its shareholders the proceeds from the transfer of assets and has ceased to exist. Under these circumstances, tort claimants who were not existing creditors at the time of the transfer of assets ordinarily have no recourse against the predecessor's shareholders. Unless they can pursue their claims against the successor corporation, or can reach other funds provided by existing insurance or by a statute, their only practical remedy lies with retailers and wholesalers in the predecessor's distributive chain, who may not be available as a practical matter. Statutes and judicial precedents governing the rights of creditors after a corporate assets transfer and dissolution generally do not address this problem of post-transfer claims accrual.

Few precedents recognize tort claims against the successor corporation for harm caused by defective products sold by the predecessor unless the transaction by which productive assets are acquired meets criteria established by one of several traditional exceptions. These exceptions apply generally to creditors whose claims accrue after dissolution of the predecessor, and are not limited to products liability claimants. They fall into two basic categories: those in which some

conduct of the successor, in addition to acquiring the predecessor's assets, justifies holding the successor responsible (the successor either contractually agrees to be liable or knowingly participates in a fraudulent asset transfer); and those in which the successor itself can be said to have sold or distributed the defective products because the successor constitutes the same juridical entity as the predecessor, perhaps in somewhat different form (the successor merges with, or constitutes a "mere continuation" of, the predecessor). Under this Section, a products liability claimant has a recognized claim against a successor for harm caused by defective products distributed by the predecessor in these circumstances.

A minority of jurisdictions impose liability on a successor corporation based on a broader concept of continuation of the business enterprise, even when there is no continuity of shareholders, officers, or directors. Some courts hold that the continuation of a predecessor's product line by the successor is sufficient to support imposition of successor liability for harm caused by defects in products sold before the assets transfer.

b. Rationale. Limiting the liability of successor corporations to the circumstances described in this Section is supported by fairness and efficiency considerations. An alleged successor that purchases the predecessor's productive assets piecemeal, other than as part of a going concern, cannot, by that fact alone, be said to have either manufactured or sold defective products distributed by the predecessor before the transfer of assets. In the absence of circumstances in which the successor could be said to constitute a continuation of the predecessor, or somehow to have prejudiced subsequent tort plaintiffs by its own pre-acquisition conduct, imposing liability on a business entity that did not make or distribute the defective products that caused harm could be justified only because it increases the amount of money available post-acquisition out of which to satisfy plaintiffs' claims. But that alone cannot be justification for successor liability. Thus, imposing liability on the piecemeal purchase of productive assets would, for no compelling reason, impede the free alienability of corporate assets, thereby discouraging shareholder investment of capital and increasing social costs.

Imposing liability on successor corporations constitutes acceptable public policy when the successor either agrees to be liable or is implicated in the transfer of assets in a way that, without such liability, would unfairly deprive future products liability plaintiffs of the remedies that would otherwise have been available against the predecessor. Subsections (a) through (d) describe the types of corporate asset transfers that have been determined to justify imposing liability on the successor. Subsection (a) recognizes that contractual promises by the successor to pay subsequent tort claims, for which promises the successor has presumably been compensated, should be honored. Subsection (b) provides that when a business entity makes a fraudulent transfer in which the transferee is implicated, successor liability is appropriate for

the same reason that liability would be imposed in favor of other creditors. Thus, a predecessor may arrange an asset transfer at an artificially deflated price, accompanied by an agreement by the successor to compensate either the predecessor, its owners, or its managers in ways that escape easy detection; or a successor may knowingly participate in an asset transfer coupled with a liquidating dividend by the predecessor to its shareholders for the purpose of leaving tort plaintiffs without remedy. If those transfers are fraudulent under applicable state law, imposing tort liability on the transferee for having knowingly participated in such transfers is justified.

Subsections (c) and (d) deal with successors that, in a real sense, did produce and distribute the product that caused the harm, though in a somewhat different organizational form. Subsection (c) deals with the transferor corporation that merges by law or in fact into the transferee, typically with no substantial change in corporate management or ownership. Subsection (d) concerns the transfer of corporate assets in the context of a transaction involving only a change in organizational form. In both these situations, liability for harm caused by defective products distributed previously should be imposed on the business entity that emerges from the transaction. In substance, if not in form, the post-transfer entity distributed the defective products and should be held responsible for them. If mere changes in form were allowed to control substance, corporations intending to continue operations could periodically wash themselves clean of potential liability at practically zero cost, in sham transactions, and thereby unreasonably undermine incentives for producers and distributors to invest in product safety and unfairly deny tort plaintiffs adequate remedies when defective products later cause harm.

A small minority of courts have fashioned successor liability rules more advantageous to products liability claimants than the rules stated in this Section. Those minority rules, in effect, extend the "change in form only" exception just described to include circumstances in which the successor continues a product line previously distributed by the predecessor. The minority position is based on the belief that a successor who purchases productive assets should not be allowed to benefit from receiving the goodwill and reputation of the predecessor's business without the burden of responding in tort to claims for harm caused by products sold by the predecessor prior to transfer. An argument advanced to support this minority view is that holding successors liable reduces the price that predecessors receive for transferring assets, thereby helping to strengthen incentives for the managers to invest in care before the transfer of the business.

This reasoning has proven unpersuasive to a substantial majority of courts that have considered the issue. Extending successor liability beyond the exceptions set forth in Subsections (a) through (d) would, in the judgment of most courts, be unfair and socially wasteful. Post-

transfer plaintiffs harmed by pre-transfer defects have a right to expect that a transfer of assets will not be allowed to prejudice financially their chances of satisfying a judgment; they have no legitimate claim that the transfer should increase those chances over what they would have been if no transfer had occurred. In the likely event that the successor is financially stronger than the predecessor, imposing a broader liability for pre-transfer product defects would unjustifiably increase the funds available to those injured by such defects compared with what would have been available to them if no transfer had taken place.

As courts have recognized, it would be difficult, and often impossible, to implement and administer a liability rule that attempted to limit post-transfer plaintiffs' rights to an aggregate amount equal to the net value of the predecessor before transfer. Tort judgments are imposed independently of one another, in various jurisdictions; no central authority exists to assure that, in the aggregate, tort judgments do not exceed a predetermined total amount. Thus, the expanded successor liability rules in a minority of states, not limited to time-of-transfer net value, replace one risk of injustice—that the assets transfer may unfairly reduce plaintiffs' recoveries in cases that do not satisfy the traditional exceptions (reflected in Subsections (a) through (d))—with another, possibly greater, injustice: that the transfer may give tort plaintiffs a windfall at the expense of companies who engage in asset transfers and, in turn, at the expense of the consuming public.

Moreover, a majority of courts have concluded that the substantial social costs of a more expansive liability rule would be incurred without actually benefiting very many tort plaintiffs. In most instances, the magnitude of future liability for products distributed pre-transfer is difficult, if not impossible, to assess. As a majority of courts have recognized, the result of imposing successor liability as a general rule would be to depress the prices for transferred assets to the point that piecemeal disposition of assets, which clearly would not subject the buyers to liability, would be a preferable alternative to sale of the assets as part of a going concern. In that event, the products liability claimant harmed by a pre-transfer product defect would still run the risk of ending up with an uncollectible judgment. The benefits to society of preserving the predecessor's assets as a going concern would be sacrificed, with no commensurate benefits to tort claimants.

And even if a more expansive successor liability rule did not invariably lead to piecemeal asset transfers, such a liability rule would depress the prices received for going-concern transfers to an extent that would threaten to undermine the objectives of the law governing corporations. One of the purposes served by the corporate structure is to provide limitation and certainty of risk to shareholders in order to encourage capital formation. Thus, the shareholders' initial risk is limited to the value of their shares of stock and they are able to withdraw from an investment by sale of the stock without incurring future

potential liability. A more expansive successor liability rule might threaten shareholders' investments by significantly restraining corporate assets transfers, thereby tending to frustrate corporation law's objective of encouraging shareholder investment.

Some critics of the majority rule argue that, when the successor continues to manufacture the same products as the predecessor, often under the same trademark, consumers have legitimate expectations that the successor will stand behind the predecessor's products. Disappointing these expectations is unfair, according to the critics, quite apart from the effects of successor liability upon the formation of capital. But this argument overlooks the reality that the predecessor's products that cause harm in these cases were distributed prior to the assets transfer, when there could be no reliance by consumers on the financial viability of the successor. One cannot logically rely on post-transfer expectations regarding the successor to justify the imposition of liability on the successor for pre-transfer distributions by the predecessor.

c. Nonliability in the absence of special circumstances. In the absence of the circumstances described in Subsections (a) through (d), a successor company that buys productive assets from another company is not liable for harm caused by a defective product sold or otherwise distributed by the predecessor prior to the successor's acquisition of assets. When the assets are purchased piecemeal, the alleged successor did not "sell or distribute" the product under the liability rule stated in § 1; and attempts to establish continuation of the corporate entity are recognized only under the terms set forth in this Section. The successor is liable under §§ 1–4 for harm caused by defective products it sells after acquisition. In the absence of the circumstances described in this Section, however, the successor is not liable for defective products sold by another prior to that time.

d. Agreement for successor to assume liability. When the successor agrees to assume liabilities for defective products sold by its predecessor, liability is imposed under Subsection (a) in accordance with the terms of the agreement. As a general matter, contract law governs the application of this exception. Courts have interpreted general statements that the successor agrees to assume the liabilities of the predecessor to include products liability claims even though the agreement makes no specific mention of products liability. However, assumption of products liability is not implied by the successor's assumption of specific duties with regard to product service or replacement.

e. Fraudulent transfer in order to avoid debts or liabilities. Subsection (b) incorporates by reference the relevant state law governing fraudulent conveyances and transfers. In contexts other than successor products liability, fraudulent transfers can be set aside on behalf of existing creditors of the transferor. In this context, fraudulent transfers provide a basis for holding successors liable to post-transfer tort plaintiffs. The fact that general creditors are pursuing remedies against

the transferee does not prevent tort plaintiffs from pursuing remedies under Subsection (b). What constitutes a fraudulent conveyance or transfer is determined by reference to applicable state law.

f. Consolidation or merger. When statutory consolidation or merger of two corporations takes place, products liability devolves on the successor corporation under Subsection (c). A more difficult question is whether, absent statutory merger, a de facto merger has taken place. Local law governing de facto mergers is determinative. Whether a de facto merger under Subsection (c) has occurred generally depends on whether: (1) there is a continuity of management, employees, location, and assets; (2) the successor corporation acquires the assets of the predecessor with shares of its own stock so that shareholders of the transferor corporation become shareholders of the transferee corporation; (3) the predecessor corporation ceases its ordinary business operations immediately or shortly after the transfer of assets; and (4) the successor assumes those liabilities and obligations of the predecessor necessary for the uninterrupted continuation of the normal operations of the predecessor.

g. Continuation of the predecessor. The exception recognized in Subsection (d), referred to by many courts as the "mere continuation" exception, applies when there has been a formal redesignation of the predecessor corporate entity but little or no change in underlying substance. The most important indicia of continuation, in addition to the continuation of the predecessor's business activities, are common identities of officers, directors, and shareholders in the predecessor and successor corporations. A minority of jurisdictions recognize a broader exception, referred to as the "continuity of enterprise" exception, that imposes liability on the successor for continuing the business activities of the predecessor even when the corporate form of the successor is different from the predecessor. This Section does not follow that minority position.

h. Necessity for the predecessor to transfer all of its assets and go out of business. Almost all of the reported decisions applying the bases of successor liability stated in this Section involve predecessors that transfer all of their assets to successors and then dissolve or otherwise cease operations. Indeed, the predecessor's termination is the circumstance that, as a practical matter, most often gives rise to the need for a post-transfer tort plaintiff to look to the successor for recovery. The exceptions set forth in Subsections (c) and (d), merger and continuation, most frequently have significance when the predecessor has transferred all of its assets to the successor and, at least formally, has ceased to exist. But there is no reason that the exceptions set forth in Subsections (c) and (d) might not arise in connection with the transfer of a division of a large company, leaving the company in existence after the transfer. And the exceptions in Subsections (a) and (b) could arise in connection with

transfers involving less than all of the predecessor's assets where the predecessor continues in existence after the transfer.

i. Relationship between the rule in this Section and the successor's independent duty to warn. This Section deals with a successor's liability for harm caused by the predecessor's defective products and is not premised on post-transfer wrongdoing by the successor itself. For the rules governing the liability of a successor for its own post-transfer failure to warn its predecessor's customers, see § 13.

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§ 13. Liability of Successor for Harm Caused by Successor's Own Post-Sale Failure to Warn

(a) A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity, whether or not liable under the rule stated in § 12, is subject to liability for harm to persons or property caused by the successor's failure to warn of a risk created by a product sold or distributed by the predecessor if:

(1) the successor undertakes or agrees to provide services for maintenance or repair of the product or enters into a similar relationship with purchasers of the predecessor's products giving rise to actual or potential economic advantage to the successor, and

(2) a reasonable person in the position of the successor would provide a warning.

(b) A reasonable person in the position of the successor would provide a warning if:

(1) the successor knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and

(2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

(3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing a warning.

Comment:

a. Rationale. Corporations that acquire assets from other corporations are liable for harm caused by defective products sold by predecessors only in limited circumstances. See § 12. This Section subjects a successor to liability for its own failure to warn after acquiring

the predecessor's assets when certain conditions are satisfied and when a reasonable person in the successor's position would provide a warning. Liability under this Section is similar to liability under § 10, in which a seller is liable for harm caused by breach of a post-sale duty to warn even if the product was not defective at the time of original sale. Unlike product sellers in § 10, the successor governed by this Section did not manufacture or sell the defective product. However, by virtue of succeeding to the predecessor's interests, the successor is often in a good position to learn of problems arising from use of the predecessor's product and to prevent harm to persons or property. When the relationship between the successor and pre-transfer purchasers of the predecessor's products gives rise to actual or potential economic benefit to the successor, it is both fair and efficient to require the successor to act reasonably to prevent such harm.

b. Relationship between the successor and the predecessor's customers. Absent some additional circumstance besides having become a successor, the successor remains a pure volunteer upon whom the law usually imposes no duty to act or to warn. Many courts have recognized four elements as being significant in determining the existence of a duty to warn: (1) succession to a predecessor's service contracts; (2) coverage of the defective product under a service contract made directly with the successor; (3) actual service of the defective product by the successor; and (4) the successor's knowledge of the existence of defects and the identities of the predecessor's customers who own the defective product. However, these factors are not exhaustive and the inquiry should be whether the successor's relationships with the predecessor's customers give rise to actual or potential economic advantage.

In most instances, in the absence of service contracts governing the predecessor's products or actual service of the defective product by the successor, it will be difficult to establish that the successor's relationships with the predecessor's customers give rise to actual or potential economic benefit to the successor. Furthermore, in the absence of service contracts, it may be difficult to establish under Subsection (b)(1) through (4) that a reasonable person in the position of the successor would provide a warning. Thus, when the successor has established no systematic relationships with the predecessor's customers through service contracts, usually the successor has no practical method of identifying those customers and communicating effectively with them. The successor who has no continuing contacts with a predecessor's customers may also be unable to discover risks that should be addressed through warnings. Similarly, when a successor has discontinued both the sale of a predecessor's product line and the provision of services to the predecessor's customers, it may not be in a position reasonably to discover risks about the discontinued line or to determine the persons to whom a warning should be addressed.

Notwithstanding the importance of service contracts in the application of this Section, a contract is not the only method of establishing a relationship with a predecessor's customers. For example, a successor may sell or offer to sell spare parts to the predecessor's customers for machinery sold by the predecessor when the successor knows or should know the machinery is defective. Such conduct should be considered by courts in deciding whether sufficient actual or potential economic advantage has accrued to the successor to warrant the imposition of a duty to warn the predecessor's customers.

c. Factors in determining whether a reasonable successor would provide a warning. Whether a reasonable person in the successor's position would provide a warning is governed by the same requirements that determine whether a reasonable seller should provide a post-sale warning under § 10. Subsection (b)(1) through (4) are identical to the requirements set forth in Subsection (b)(1) through (4) of § 10 and are explained in the Comments to § 10.

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§ 14. Selling or Distributing as One's Own a Product Manufactured by Another

One engaged in the business of selling or otherwise distributing products who sells or distributes as its own a product manufactured by another is subject to the same liability as though the seller or distributor were the product's manufacturer.

Comment:

a. History. The rule stated in this Section derives from § 400 of the Restatement, Second, of Torts, promulgated in 1965. Section 400 incorporates by reference §§ 394–398, setting forth the rules governing the liability of manufacturers of chattels. These rules establish a regime of fault-based manufacturers' liability and treat product manufacturers differently than other actors, including nonmanufacturer product sellers. After inclusion of § 402A in the Restatement, Second, imposing strict liability on all commercial sellers of defective products for harm caused by product defects, it was questionable whether § 400 remained relevant in the context of products liability. Once § 402A imposed strict liability on all product sellers it made little, if any, difference whether the seller of a defective product was a retailer or a manufacturer. Compare Comment *b*.

b. Relevance of this Section when all commercial product sellers are held to the same standards of liability under §§ 1–4. To the extent that nonmanufacturers in the chain of distribution are held to the same standards as manufacturers, the rule stated in this Section is of little practical significance. However, many jurisdictions by statute treat

nonmanufacturers more leniently. See § 1, Comment *e*. To the extent that a statute specifies responsibilities, the statutory terms control. But to the extent that a statute does not, the rule in this Section states the common-law rule.

c. Representing oneself as the manufacturer or one for whom the product has been specially manufactured. When a commercial seller sells a product manufactured by another under its own trademark or logo, the seller is liable as though it were the manufacturer of the product. This rule applies even if the seller discloses that the product was produced by an identified manufacturer specifically for the seller. In this circumstance, the seller is presumed to cause the product to be used or consumed, in part at least, in reliance on the seller. The seller's reputation is an implied assurance of the quality of the product, and the seller should be estopped from denying that it stands behind that assurance.

d. Liability of trademark licensors. The rule stated in this Section does not, by its terms, apply to the owner of a trademark who licenses a manufacturer to place the licensor's trademark or logo on the manufacturer's product and distribute it as though manufactured by the licensor. In such a case, even if purchasers of the product might assume that the trademark owner was the manufacturer, the licensor does not "sell or distribute as its own a product manufactured by another." Thus, the manufacturer may be liable under §§ 1–4, but the licensor, who does not sell or otherwise distribute products, is not liable under this Section of this Restatement.

Trademark licensors are liable for harm caused by defective products distributed under the licensor's trademark or logo when they participate substantially in the design, manufacture, or distribution of the licensee's products. In these circumstances they are treated as sellers of the products bearing their trademarks.

CHAPTER 4

PROVISIONS OF GENERAL APPLICABILITY

TOPIC 1. CAUSATION

§ 15. General Rule Governing Causal Connection Between Product Defect and Harm

Whether a product defect caused harm to persons or property is determined by the prevailing rules and principles governing causation in tort.

Comment:

a. Requirement of causal connection between defect and harm. Sections 1, 5, 6, 7, and 8 require that the defect of which the plaintiff complains cause harm to person or property. The rules that govern causation in tort law generally are, subject to § 16, also applicable in products liability cases.

b. Misuse, alteration, and modification. When the plaintiff establishes product defect under the rules stated in Chapter 1, a question can arise whether the misuse, alteration, or modification of the product by the user or a third party contributed to the plaintiff's harm in such a way as to absolve the defendant from liability, in whole or in part. Such a question is to be resolved under the prevailing rules and principles governing causation or the prevailing rules and principles governing comparative responsibility, as the case may be. See § 17.

Illustrations:

1. XYZ Co. manufactures and sells automobiles. Sam purchased a new XYZ Model 300 and drove it around town for several days. Unknown to Sam, the lug nuts that hold the right front wheel to the axle were too large, allowing them to loosen and present a serious risk of eventual failure. On Sam's fifth day of ownership, a large truck rear-ended the XYZ automobile while Sam was driving it. Both Sam and the automobile suffer harm. XYZ Co. is not liable to Sam. Although the automobile was defective when Sam purchased it, and although the automobile was a cause of Sam's injuries, the defect was not a substantial factor in causing the injuries, which would have occurred even if the defect had not been present.

2. XYZ Co. manufactures and sells automobiles. Sam purchased a new XYZ Model 300 and drove it around town for several days. On one trip Sam felt the right front wheel wobbling. Upon examination Sam discovered that the five lug nuts holding the wheel to the axle were too large, causing them to loosen. Had Sam not stopped when he did, the wheel would have fallen off. Sam removed the five over-sized lug nuts, borrowed two correct-sized nuts from the right rear wheel, and reattached the right front wheel with them. Sam did nothing more about the wheels for more than a month, whereupon he loaned the automobile to a friend, saying nothing about the wheels. The friend inadvertently drove into a large pothole, causing the two nuts on the right front wheel to break. The wheel came off and both the automobile and Sam's friend suffered harm. Had five proper-sized lug nuts been on the wheel instead of just two, they would not have broken and the accident would not have occurred. XYZ Co. is not liable to Sam or Sam's friend. Although the XYZ automobile was defective when sold, and although the defect was a necessary condition to the occurrence of the accident, Sam's modification and subsequent failure to effect adequate repair

were sufficiently unforeseeable that the defect was not a substantial factor in causing the friend's injury.

c. Causation and proportional liability. In certain cases involving generic toxic substances, the plaintiffs may be unable to identify which among a number of manufacturers produced the particular product that caused a particular plaintiff's harm. In this context, especially with respect to the drug diethylstilbestrol (DES), some courts have relieved the plaintiff of responsibility to identify the causal producer, and allow recovery instead against each producer named by the plaintiff in proportion to each defendant's market share. Other courts have refused to effect such a basic change in traditional rules of causation.

In deciding whether to adopt a rule of proportional liability, courts have considered the following factors: (1) the generic nature of the product; (2) the long latency period of the harm; (3) the inability of plaintiffs to discover which defendant's product caused plaintiff's harm, even after exhaustive discovery; (4) the clarity of the causal connection between the defective product and the harm suffered by plaintiffs; (5) the absence of other medical or environmental factors that could have caused or materially contributed to the harm; and (6) the availability of sufficient "market share" data to support a reasonable apportionment of liability. The Institute leaves to developing law the question of whether, given the appropriate factors, a rule of proportional liability should be adopted.

However, if a court does adopt some form of proportional liability, the liability of each defendant is properly limited to the individual defendant's share of the market. The rules of joint and several liability are incompatible with a market-share approach to causation. Unlike the case of concurrent tortfeasors, in which several parties contribute to a single plaintiff's entire harm, it is not established in the market-share context that all the defendants contributed to the plaintiff's injury. Instead, each defendant should pay for harm in proportion to the risk that it caused in the market at large. Joint and several liability would impose liability on each defendant for the entirety of the harm based on its presence in the market with other defendants. In the absence of some concerted conduct among the defendants, such liability is inappropriate.

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§ 16. Increased Harm Due to Product Defect

(a) When a product is defective at the time of commercial sale or other distribution and the defect is a substantial factor in increasing the plaintiff's harm beyond that which would have resulted from other causes, the product seller is subject to liability for the increased harm.

(b) If proof supports a determination of the harm that would have resulted from other causes in the absence of the

product defect, the product seller's liability is limited to the increased harm attributable solely to the product defect.

(c) If proof does not support a determination under Subsection (b) of the harm that would have resulted in the absence of the product defect, the product seller is liable for all of the plaintiff's harm attributable to the defect and other causes.

(d) A seller of a defective product that is held liable for part of the harm suffered by the plaintiff under Subsection (b), or all of the harm suffered by the plaintiff under Subsection (c), is jointly and severally liable or severally liable with other parties who bear legal responsibility for causing the harm, determined by applicable rules of joint and several liability.

Comment:

a. Liability for increased harm. This Section deals with the problem of increased harm, often referred to as the issue of "enhancement" of harm. Liability for increased harm arises most frequently in automobile crashworthiness cases, but can also arise in connection with other products. Typically, the plaintiff is involved in an automobile accident caused by conduct or circumstances other than a product defect. The plaintiff would have suffered some injury as a result of the accident even in the absence of the claimed product defect. However, the plaintiff contends that the injuries were aggravated by the vehicle's failure reasonably to protect occupants in the event of an accident.

In the early era of product design litigation, controversy arose over whether a manufacturer owed any obligation to design its product so that injuries would be reasonably minimized in the event of an accident. That controversy is now settled. Although accidents are not intended uses of products, they are generally foreseeable. A manufacturer has a duty to design and manufacture its product so as reasonably to reduce the foreseeable harm that may occur in an accident brought about by causes other than a product defect. See Comment *b*. Since the product seller is responsible only for the increased harm, and not for the harm that would have occurred even in the absence of the product defect, basic principles of causation limit the damages to those resulting from the increased harm caused by the defect. The plaintiff must establish that the defect was a substantial factor in increasing the harm beyond that which would have resulted from other causes. Once the plaintiff establishes such increased harm, Subsection (b) or (c) applies. If proof supports a determination of what harm would have occurred without a defect, then liability is limited to the increased harm. If proof does not support such a determination, then the product seller is liable for all of the plaintiff's harm from both the defect and other causes.

Illustrations:

1. Bob negligently lost control of his car and collided with Ann's car, causing Ann to suffer harm from being thrown against her car's steering wheel. Ann was driving a car manufactured by XYZ Motor Co. In addition to suing Bob for his negligence, Ann sues XYZ. Expert testimony establishes that a reasonable alternative design of the steering mechanism was available that would have cushioned the impact between Ann and the steering column and that its omission rendered the car not reasonably safe. Further expert testimony describes the extent to which the omission of the alternative design increased the harm. Defendant XYZ is liable for harm that the trier of fact concludes the plaintiff suffered beyond the harm that would have been suffered had the car been equipped with the reasonable alternative design.

2. While Arthur was driving a snowmobile manufactured by ABC Co., the snowmobile hit a snow-covered rock. On impact, Arthur fell off the snowmobile and his face struck a brake bracket on the side of the snowmobile. Two sharp metal protrusions on the bracket caused serious facial injury. Competent testimony establishes that the brake bracket could have been covered by a safety guard that would have prevented such serious injury and that omission of the guard rendered the product not reasonably safe. Competent testimony also indicates the extent to which absence of the guard increased Arthur's harm. ABC is subject to liability for the harm that the trier of fact finds would have been prevented by a safety guard.

b. Establishing defect in increased-harm cases. To establish liability for increased harm, the plaintiff must prove that a product defect caused the harm under the rules stated in §§ 1–4. When the plaintiff alleges that a manufacturing defect caused increased harm, the plaintiff must establish a defect as set forth in § 2(a). When the plaintiff alleges that a design defect or a defect due to inadequate instructions or warnings caused increased harm, the plaintiff must establish that a reasonable alternative design could have been adopted, or that reasonable instructions or warnings could have been provided, as set forth in §§ 2(b) and 2(c).

In connection with a design defect claim in the context of increased harm, the plaintiff must establish that a reasonable alternative design would have reduced the plaintiff's harm. The factors enumerated in § 2, Comment *f*, for determining the reasonableness of an alternative design and the reasonable safety of the product are fully applicable to establishing defect in an increased-harm case. Furthermore, the alternative to the product design must increase the overall safety of the product. It is not sufficient that the alternative design would have reduced or prevented the harm the plaintiff suffered if the alternative would introduce into the product other dangers of equal or greater magnitude.

Proof of defect does not, of itself, establish a case of increased harm. The plaintiff must also establish that the defect was a substantial factor in increasing the plaintiff's harm beyond the harm that would have occurred from other causes. Subsection (c) provides that, when proof does not support a determination of increased harm, the product seller is liable for all harm suffered by the victim. However, the rule stated in Subsection (c) does not take effect until the plaintiff establishes under Subsection (a), by competent testimony, that the plaintiff's harm was increased as a result of the product defect.

Illustrations:

3. George was a passenger in a van manufactured by the XYZ Motor Co. The van was driven by a co-worker, Alice, who was proceeding non-negligently along a highway at 50 mph. To avoid a dog that unexpectedly ran across the highway, Alice swerved and lost control of the van, which struck an abutment. The force and angle of the collision caused the van to fly in the air and travel 75 feet before coming to rest upside down. During or after the initial collision, the roof panel separated from the van. George was thrown through the roof area and landed 50 feet from the van. Competent testimony by George's expert establishes that the welds meant to hold the roof to the body of the van were defective and did not meet the XYZ design standards. George's expert evidence also supports a determination that, had the roof been properly welded, it would not have come off as a result of the collision, that George would have remained in the van, and that the harm he suffered as a result of being thrown from the van was more serious than it would have been if the roof had kept George inside the van. Expert testimony also supports a determination of the extent to which George would have been harmed if he had stayed in the van, and thus the extent to which George's harm was increased by the failure of the roof to remain attached to the van. XYZ is liable for George's harm above that which the trier of fact determines George would have suffered in the absence of the defective welds.

4. Alice was operating a tractor manufactured by XYZ Farm Equipment. The tractor was designed for use on hills and sharp inclines. The tractor struck a large rock protruding from the ground, causing the tractor to roll over down a slope. Alice was thrown from the tractor and pinned beneath it. Alice's expert testifies that, had the tractor been designed with a rollover protection system, Alice would not have been thrown from the tractor and that the omission of the rollover protection system rendered the product not reasonably safe. This testimony supports a finding of defective design. Expert testimony also describes the extent to which Alice's harm was increased by the omission of the rollover protection system. Defendant XYZ is subject to liability for Alice's harm beyond

that which the trier of fact finds she would have suffered had the tractor been equipped with the rollover protection system.

5. Richard suffered harm as a result of an automobile accident that occurred when he lost control of his car on a rain-soaked highway. The car slid off the highway and collided sideways with a steel pole. As a result of the force of the collision, the pole ripped through the body of the car and crushed Richard between the front seat and the area of the roof just above the windshield. Richard brings suit against the XYZ Motor Co., the manufacturer of the car, alleging that the car was defective in design in that it did not have a continuous steel frame extending through the door panels. Richard's experts assert that, had the vehicle been so designed, it would have bounced off the pole, preventing penetration by the pole into the passenger space. XYZ's experts assert that a continuous steel frame would also reduce front-to-back deformation of the body of the vehicle in a head-on crash. Deformation is desirable in head-on crashes because it absorbs the impact of the crash and decreases risk of harm to the occupants of the vehicle. Richard's experts admit on cross-examination that, for head-on automobile accidents, the alternative design offered by Richard would decrease safety. Even if the design alternative offered by Richard would have reduced his harm, if the trier of fact finds that Richard's proposed alternative would have decreased the overall safety of the vehicle, it should return a verdict for XYZ.

c. Determination of what harm would have resulted in the absence of the product defect. The task of determining what harm would have resulted had the product not been defective under Subsection (b) is often difficult. Outright guesswork is not permitted, but neither should anything approaching certainty be required. When an expert offers a rational explanation derived from a causal analysis, the testimony should, subject to the normal discretion of the trial court, be admitted for consideration by the trier of fact.

d. Extent of liability for increased harm when proof does not support determination of what harm would have resulted in the absence of the product defect. Subsection (c) provides that when the plaintiff has proved defect-caused increased harm, the product seller is subject to liability for all harm suffered by the plaintiff if proof does not support a determination of what harm would have resulted if the product had not been defective. The defendant, a wrongdoer who in fact has caused harm to the plaintiff, should not escape liability because the nature of the harm makes such a determination impossible. Compare § 433B(2) of the Restatement, Second, of Torts.

Illustration:

6. The same facts as Illustration 3, in that George proves that the defect was a substantial factor in increasing the harm beyond that which he would have suffered if the roof had kept him inside

the van, but George is unable to quantify the extent of the increased harm. Neither party introduces proof that supports the apportionment of liability. XYZ is liable for all of George's harm.

e. Joint and several liability for increased harm. When the plaintiff proves defect-caused increased harm, and the seller of the defective product is held liable for part of the harm suffered by the plaintiff under Subsection (b) or all of the harm suffered by the plaintiff under Subsection (c), liability of the seller and other tortfeasors is joint and several. In a case under Subsection (b), the manufacturer is jointly and severally liable only for the increased harm; in a case under Subsection (c), for the entire harm. Joint and several liability is imposed because there is no practical method of apportioning responsibility that would reflect the separate causal contributions of those tortfeasors who caused the increased harm. The general rules governing joint and several liability determine the liability of the parties to the injured plaintiff. In those jurisdictions that retain the common-law rule, all parties bear full responsibility for the entirety of the harm. In many jurisdictions, the common-law rules of joint and several liability have undergone significant legislative modification limiting liability to the percentage of fault allocated to each party.

Illustrations:

7. Same facts as Illustration 6, except that Alice's negligent driving caused her to lose control of her van. The XYZ Motor Co. is liable under Subsection (c) for all of George's harm. The case is governed by the law of State A, which follows the common-law rule of joint and several liability. George may recover all of his damages from either Alice or XYZ.

8. Same facts as Illustration 7. The XYZ Motor Co. is liable under Subsection (c) for all of George's harm. The case is governed by the law of State B, whose statute limits the liability of joint tortfeasors to the percentage of responsibility allocated to each party. The trier of fact allocates 40 percent of the responsibility to Alice and 60 percent of the responsibility to XYZ. XYZ's liability is limited to 60 percent of the total damages.

9. Same facts as Illustration 7. The XYZ Motor Co. is liable under Subsection (c) for all of George's harm. The case is governed by the law of State C, whose statute retains the common-law rule of joint and several liability for economic loss but limits the liability of joint tortfeasors for noneconomic loss to the percentage of responsibility allocated to each party. The trier of fact has allocated 40 percent of the responsibility to Alice and 60 percent to XYZ. George may recover all of his economic loss damages from either Alice or XYZ. His recovery from XYZ for noneconomic damages is limited to 60 percent.

f. Plaintiff's fault in cases of increased harm. Section 17 sets forth the general rules governing plaintiff's fault in products liability litigation. It provides that plaintiff's fault is relevant in apportioning liability between the plaintiff and the product seller. The seriousness of the plaintiff's fault and the nature of the product defect are relevant in apportioning the appropriate percentages of responsibility between the plaintiff and the product seller. See § 17, Comment *d*. Accordingly, the contributory fault of the plaintiff in causing an accident that results in defect-related increased harm is relevant in apportioning responsibility between or among the parties, according to applicable apportionment law. In apportioning responsibility in such cases, it may be important that requiring a product to be designed reasonably to prevent increased harm aims to protect persons in circumstances in which they are unable to protect themselves.

TOPIC 2. AFFIRMATIVE DEFENSES

§ 17. Apportionment of Responsibility Between or Among Plaintiff, Sellers and Distributors of Defective Products, and Others

(a) A plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care.

(b) The manner and extent of the reduction under Subsection (a) and the apportionment of plaintiff's recovery among multiple defendants are governed by generally applicable rules apportioning responsibility.

Comment:

a. History. The rule stated in this Section recognizes that the fault of the plaintiff is relevant in assessing liability for product-caused harm. Section 402A of the Restatement, Second, of Torts, recognizing strict liability for harm caused by defective products, was adopted in 1964 when the overwhelming majority rule treated contributory negligence as a total bar to recovery. Understandably, the Institute was reluctant to bar a plaintiff's products liability claim in tort based on conduct that was not egregious. Thus, § 402A, Comment *n*, altered the general tort defenses by narrowing the applicability of contributory negligence and emphasizing assumption of risk as the primary defense. Since then, comparative fault has swept the country. Only a tiny minority of states retain contributory fault as a total bar.

A strong majority of jurisdictions apply the comparative responsibility doctrine to products liability actions. Courts today do not

limit the relevance of plaintiff's fault as did the Restatement, Second, of Torts to conduct characterized as voluntary assumption of the risk. See Comment *d*.

Certain forms of consumer behavior—product misuse and product alteration or modification—have been the subject of much confusion and misunderstanding. Early decisions treated product misuse, alteration, and modification, whether by the plaintiff or a third party, as a total bar to recovery against a product seller. Today misuse, alteration, and modification relate to one of three issues in a products liability action. In some cases, misuse, alteration, and modification are important in determining whether the product is defective. In others, they are relevant to the issue of legal cause. Finally, when the plaintiff misuses, alters, or modifies the product, such conduct may constitute contributory fault and reduce the plaintiff's recovery under the rules of comparative responsibility. See Comment *c*.

b. Conduct of the plaintiff. The applicable rules of apportionment of responsibility vary among jurisdictions. Some states have adopted "pure" comparative fault, which allocates responsibility to each actor purely in proportion to the actor's percentage of total fault. Others follow some variant of "modified" comparative fault, in which actors' responsibilities are adjusted according to predetermined thresholds of responsibility. For example, in many modified jurisdictions the plaintiff is totally barred if found more than 50 percent at fault. The apportionment of responsibility principles as they have developed in each jurisdiction should be applied to products liability cases. With respect to whether special exceptions should be made in products liability cases for certain categories of plaintiff conduct, see Comment *d*.

c. Misuse, alteration, and modification. Product misuse, alteration, and modification, whether by a third party or the plaintiff, are not discrete doctrines within products liability law. Instead such conduct is relevant to the determination of the issues of defect, causation, and comparative responsibility. See § 2, Comment *p*.

Jurisdictions differ on the question of who bears the burden of proof regarding conduct that constitutes misuse, modification, and alteration. The allocation of burdens in this regard is not addressed in this Restatement and is left to local law.

d. Particular forms or categories of plaintiff's conduct. Some courts accord different treatment to special categories of plaintiff conduct. For example, some decisions hold that when the plaintiff's negligence is the failure to discover a product defect, reduction of damages on the basis of apportionment of responsibility is improper, reasoning that a consumer has a right to expect a defect-free product and should not be burdened with a duty to inspect for defects. Other decisions hold that apportionment of responsibility is improper when the product lacked a safety feature that would protect against the risk that resulted in the injury in question, reasoning that the defendant's responsibility should

not be diminished when the plaintiff engages in the very conduct that the product design should have prevented. On the other hand, some decisions hold that a plaintiff's assumption of the risk is a complete defense to a products liability action, not merely a basis for apportionment of responsibility. Product misuse, alteration, and modification have been treated by some courts as an absolute bar to recovery and by others as a form of plaintiff fault that should be compared with that of other parties to reduce recovery. The majority position is that all forms of plaintiff's failure to conform to applicable standards of care are to be considered for the purpose of apportioning responsibility between the plaintiff and the product seller or distributor.

Before the court will allow any apportionment of responsibility, the defendant must introduce sufficient evidence to support a finding of fault on the part of the plaintiff. Thus, for example, when the defendant claims that the plaintiff failed to discover a defect, there must be evidence that the plaintiff's conduct in failing to discover a defect did, in fact, fail to meet a standard of reasonable care. In general, a plaintiff has no reason to expect that a new product contains a defect and would have little reason to be on guard to discover it. Or when a plaintiff is injured due to inattention to a danger that should have been eliminated by a safety feature, there must be evidence supporting the conclusion that the plaintiff's momentary inattention or inadvertence in a workplace setting constitutes failure to exercise reasonable care. In the absence of such evidence courts refuse to submit the plaintiff's conduct to the trier of fact for apportionment based on the principles of comparative responsibility. When evidence of plaintiff fault is established, how much responsibility to attribute to a plaintiff will vary with the circumstances. The seriousness of the plaintiff's fault and the nature of the product defect are relevant in apportioning the appropriate percentages of responsibility between the plaintiff and the product seller.

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§ 18. Disclaimers, Limitations, Waivers, and Other Contractual Exculpations as Defenses to Products Liability Claims for Harm to Persons

Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or reduce otherwise valid products liability claims against sellers or other distributors of new products for harm to persons.

Comment:

a. Effects of contract defenses on products liability tort claims for harm to persons. A commercial seller or other distributor of a new product is not permitted to avoid liability for harm to persons through limiting

terms in a contract governing the sale of a product. It is presumed that the ordinary product user or consumer lacks sufficient information and bargaining power to execute a fair contractual limitation of rights to recover. For a limited exception to this general rule, see Comment *d*. The rule in this Section applies only to "sellers or other distributors of new products." For rules governing commercial sellers of used products, including whether they may rely on disclaimers, waivers, and other contractual defenses, see § 8. Nothing in this Section is intended to constrain parties within the commercial chain of distribution from contracting inter se for indemnity agreements or save-harmless clauses.

b. Distinguishing disclaimers from warnings. This Section invalidates disclaimers and contractual exculpations of liability by sellers of new products when they are interjected to bar or limit claims by plaintiffs for harm to persons. Disclaimers should be distinguished from warnings. Warnings convey information to the buyer about avoiding risk in using the product. In some cases warnings inform the consumer of risks that cannot be avoided. Both types of warnings provide consumers with valuable information concerning the risks attendant to using the product. A product sold with reasonable instructions or warnings may be nondefective. See § 2, Comments *i, j, k,* and *l*. Disclaimers attempt contractually to avoid liability for defective products. For the reasons set forth in Comment *a*, courts refuse to enforce disclaimers that purport to deny recovery for harm to persons caused by new products that were defective at the time of sale.

c. Effects of disclaimers on claims for harm to property or for economic loss. For the effect of disclaimers on tort claims for defect-caused harm to property or for economic loss, see § 21, Comment *f*.

d. Waiver of rights in contractual settings in which product purchasers possess both adequate knowledge and sufficient economic power. The rule in this Section applies to cases in which commercial product sellers attempt unfairly to disclaim or otherwise limit their liability to the majority of users and consumers who are presumed to lack information and bargaining power adequate to protect their interests. This Section does not address whether consumers, especially when represented by informed and economically powerful consumer groups or intermediaries, with full information and sufficient bargaining power, may contract with product sellers to accept curtailment of liability in exchange for concomitant benefits, or whether such consumers might be allowed to agree to substitute alternative dispute resolution mechanisms in place of traditional adjudication. When such contracts are accompanied by alternative nontort remedies that serve as an adequate quid pro quo for reducing or eliminating rights to recover in tort, arguments may support giving effect to such agreements. Such contractual arrangements raise policy questions different from those raised by this Section and require careful consideration by the courts.

TOPIC 3. DEFINITIONS

§ 19. Definition of "Product"

For purposes of this Restatement:

(a) A product is tangible personal property distributed commercially for use or consumption. Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in this Restatement.

(b) Services, even when provided commercially, are not products.

(c) Human blood and human tissue, even when provided commercially, are not subject to the rules of this Restatement.

Comment:

a. History. The question of whether something distributed in commerce is a product for purposes of tort liability is important in this Restatement, but relatively less so than it was in the period from the early 1960s to the early 1980s. Before 1960, American courts had not yet recognized strict liability in tort for harm caused by defective products, particularly if there was no privity of contract between plaintiff and defendant. Thus, prior to that time, plaintiffs claiming in tort against product sellers were required to prove causal negligence; if they could prove negligence they could usually recover in tort whether or not a product was involved. Once the era of strict products liability in tort arrived in the early 1960s, liability turned primarily on whether what the defendant distributed was, or was not, a product. Most of the focus during this period was on liability for harm caused by manufacturing defects, in connection with which strict liability had a distinctive character. See § 2(a).

By the early 1980s, the emphasis of products liability litigation had shifted from manufacturing defects to defective designs and defects due to inadequate instructions and warnings. Thereafter, design and warning cases came to dominate. Given that design and warning cases turn on essentially risk-utility evaluations, see § 2, Comment *d*, the practical importance of whether something is, or is not, a product has diminished somewhat. Nevertheless, that issue remains important in the modern era to the extent that the concept of strict liability retains functional meaning. See § 1, Comment *a*. Statutes enacted to reform products liability law, many of which impose nontraditional conditions and limitations on product-related liability, tend to enhance the importance of classifying something as a product.

Apart from statutes that define "product" for purposes of determining products liability, in every instance it is for the court to determine as a matter of law whether something is, or is not, a product.

b. Tangible personal property: in general. For purposes of this Restatement, most but not necessarily all products are tangible personal property. In certain situations, however, intangible personal property (see Comment *d*) and real property (see Comment *e*) may be products. Component parts are products, whether sold or distributed separately or assembled with other component parts. An assemblage of component parts is also, itself, a product. Raw materials are products, whether manufactured, such as sheet metal; processed, such as lumber; or gathered and sold or distributed in raw condition, such as unwashed gravel and farm produce. For treatment of the special problems presented when plaintiffs join sellers of component parts and raw materials in actions against those who subsequently combined those materials to create defective products, see § 10.

Courts are divided regarding whether living animals, such as pets or livestock, should be considered to be products for the purpose of determining a commercial seller's liability in tort. Frequently, as when diseased livestock are sold and subsequently must be destroyed, the claim to recover for their value involves a claim for harm to the product itself and thus represents a claim for pure economic loss not permitted by this Restatement. See § 21. But when a living animal is sold commercially in a diseased condition and causes harm to other property or to persons, the animal constitutes a product for purposes of this Restatement.

c. Tangible personal property: human blood and human tissue. Although human blood and human tissue meet the formal requisites of Subsection (a), they are specifically excluded from the coverage of this Restatement. Almost all the litigation regarding such products has dealt with contamination of human blood and blood-related products by the hepatitis virus or the HIV virus. Absent a special rule dealing with human blood and tissue, such contamination presumably would be subject to the rules of §§ 1 and 2(a). Those Sections impose strict liability when a product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product. However, legislation in almost all jurisdictions limits the liability of sellers of human blood and human tissue to the failure to exercise reasonable care, often by providing that human blood and human tissue are not "products" or that their provision is a "service." Where legislation has not addressed the problem, courts have concluded that strict liability is inappropriate for harm caused by such product contamination.

What constitutes reasonable care for those engaged in providing professional services is defined in § 299A of the Restatement, Second, of Torts.

d. Intangible personal property. Two basic types of intangible personal property are involved. The first consists of information in media such as books, maps, and navigational charts. Plaintiffs allege that the information delivered was false and misleading, causing harm when actors relied on it. They seek to recover against publishers in strict liability in tort based on product defect, rather than on negligence or some form of misrepresentation. Although a tangible medium such as a book, itself clearly a product, delivers the information, the plaintiff's grievance in such cases is with the information, not with the tangible medium. Most courts, expressing concern that imposing strict liability for the dissemination of false and defective information would significantly impinge on free speech have, appropriately, refused to impose strict products liability in these cases. One area in which some courts have imposed strict products liability involves false information contained in maps and navigational charts. In that context the falsity of the factual information is unambiguous and more akin to a classic product defect. However, the better view is that false information in such documents constitutes a misrepresentation that the user may properly rely upon.

The second major category of intangible, harm-causing products involves the transmission of intangible forces such as electricity and X rays. With respect to transmission of electricity, a majority of courts have held that electricity becomes a product only when it passes through the customer's meter and enters the customer's premises. Until then, the system of high-voltage transmission provides, not a product, but a service; before passing the meter and entering the plaintiff's premises, so it is said, the electricity has not entered the stream of commerce. Some courts employ this analysis to conclude that, while electricity is a "product" prior to delivery, it has not yet been "sold or otherwise distributed." Whether or not these rationales are cogent, the distinction drawn between pre-and post-delivery is reasonable. Plaintiffs in the post-delivery cases typically complain of unexpected drops or surges in voltage, resulting in personal injury or property damage. Those claims seem better governed by principles of strict liability for physical deviations from intended design. Plaintiffs in the pre-delivery, high-voltage cases complain of the inherent dangers that unavoidably accompany the transmission of high-voltage electricity. Courts have refused to impose strict liability on electric utilities for high voltage-related accidents either on a strict products liability basis or under the abnormally dangerous activities doctrine set out in § 520 of the Restatement, Second, of Torts. This Restatement does not alter that approach.

The cases involving harm caused by X-rays and radiation treatments rest not on assertions that the X-rays themselves were defective, but rather on assertions that they were improperly administered by medical technicians. Courts have refused to impose liability in the absence of a

showing by plaintiff either that the X-rays or other forms of radiation treatment were defective or that the medical technicians acted negligently. These cases may also reflect courts' traditional refusal to impose strict liability on providers of medical care.

e. Real property. Traditionally, courts have been reluctant to impose products liability on sellers of improved real property in that such property does not constitute goods or personalty. A housing contractor, building and selling one house at a time, does not fit the pattern of a mass producer of manufactured products, nor is such a builder perceived to be more capable than are purchasers of controlling or insuring against risks presented by weather conditions or earth movements. More recently, courts have treated sellers of improved real property as product sellers in a number of contexts. When a building contractor sells a building that contains a variety of appliances or other manufactured equipment, the builder, together with the equipment manufacturer and other distributors, are held as product sellers with respect to such equipment notwithstanding the fact that the built-in equipment may have become, for other legal purposes, attachments to and thus part of the underlying real property. Moreover, the builder may be treated as a product seller even with respect to the building itself when the building has been prefabricated—and thus manufactured—and later assembled on-or off-site. Finally, courts impose strict liability for defects in construction when dwellings are built, even if on-site, on a major scale, as in a large housing project.

f. The distinction between services and products. Services, even when provided commercially, are not products for purposes of this Restatement. Thus, apart from the sale of a product incidental to the service, one who agrees for a monetary fee to mow the lawn of another is the provider of a service even if the provider is a large firm engaged commercially in lawn care. Moreover, it is irrelevant that the service provided relates directly to products commercially distributed. For example, one who contracts to inspect, repair, and maintain machinery owned and operated by another is the provider of a product-related service rather than the provider of a product. If a product repairer replaces a worn-out component part with a new part, the replacement constitutes a sale of the part; but the repair itself constitutes a service. For consideration of commercial transactions combining elements of both sale and service, see § 20(c).

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§ 20. Definition of "One Who Sells or Otherwise Distributes"

For purposes of this Restatement:

(a) One sells a product when, in a commercial context, one transfers ownership thereto either for use or consumption or for resale leading to ultimate use or

consumption. Commercial product sellers include, but are not limited to, manufacturers, wholesalers, and retailers.

(b) One otherwise distributes a product when, in a commercial transaction other than a sale, one provides the product to another either for use or consumption or as a preliminary step leading to ultimate use or consumption. Commercial nonsale product distributors include, but are not limited to, lessors, bailors, and those who provide products to others as a means of promoting either the use or consumption of such products or some other commercial activity.

(c) One also sells or otherwise distributes a product when, in a commercial transaction, one provides a combination of products and services and either the transaction taken as a whole, or the product component thereof, satisfies the criteria in Subsection (a) or (b).

Comment:

a. History. Until the mid-1960s, the only transactions that gave rise to what today is known as "products liability" were commercial product sales, as defined in Subsection (a). In large part this limitation reflects the origins of liability without fault in the law of warranty, which has traditionally focused on sales transactions. During the formative years in the development of strict products liability, courts extended liability to some nonsale transactions, but always by assimilating such transactions to sales. Section 402A of the Restatement, Second, of Torts, approved in 1964, limited itself to "one who *sells* a product in a defective condition. . . ." (Emphasis added). After the promulgation of § 402A, courts began to extend strict liability for harm caused by product defects to some nonsale commercial transactions involving the distribution of products. Rather than stretching to call these transactions "sales," courts simply declared that the same policy objectives that supported strict liability in the sales context supported strict liability in other contexts. The first significant extension involved commercial product lessors. Although title does not pass in lease transactions, courts have reasoned that the same policy objectives that are served by holding commercial product sellers strictly liable also apply to commercial product lessors. Over time, courts have extended strict products liability to a wide range of nonsale, nonlease transactions.

b. Product sales and giveaways. Sales occur at all levels in the distributive chain including manufacturer sellers, wholesale sellers, and retail sellers. Food served in a restaurant is sold to the customer, as are products given away free of separate charge in the context of a commercial sales promotion. Thus, businesses are liable for defects in free samples or defects in products given away for other promotional purposes. Even if the final transaction through which a defective product reaches the plaintiff is not a commercial sales transaction, with the result

that products liability is not imposed on the final transferor—as when one buys a soft drink at a store and then gives it to a friend—a plaintiff may recover in tort for resulting harm against all commercial sellers who sold the product in a defective condition.

c. Commercial product leases. A commercial lessor of new and like-new products is generally subject to the rules governing new product sellers. When an individual rents a new or an almost-new used product on a short-term basis, with the lessee having no opportunity to inspect the product or adequately to assess its condition, and the product unit is drawn from a pool of rental units that includes new and almost-new used units with no attempt by the leasing agent to distinguish among units on the basis of age and condition, the lessor is subject to liability as if it were the retail seller of a new product. When the rental units are in obviously used condition, liability of the lessor depends on the rules stated in § 8.

d. Sales-service combinations. When the same person provides both products and services in a commercial transaction, whether a product has been sold may be difficult to determine. When the product and service components are kept separate by the parties to the transaction, as when a lawn-care firm bills separately for fertilizer applied to a customer's lawn or when a machinery repairer replaces a component part and bills separately for it, the firm will be held to be the seller of the product. This is especially true when the parties to the transaction explicitly characterize the property aspect as a sale.

When the parties do not clearly separate the product and service components, courts differ in their treatment of these so-called "sale-service hybrid transactions." These transactions tend to fall into two categories. In the first, the product component is consumed in the course of providing the service, as when a hair dye is used in treating a customer's hair in a salon. Even when the service provider does not charge the customer separately for the dye, the transaction ordinarily is treated as a sale of the material that is consumed in providing the service. When the product component in the sale-service transaction is not consumed or permanently transferred to the customer—as when defective scissors are used in the hair salon—the transaction ordinarily is treated as one not involving a sale of the product to the customer. But while the salon is not a seller, all commercial sellers in the chain of distribution of the scissors, from the manufacturer through the retailer who sold them to the salon, are clearly sellers of the scissors and are subject to liability to the salon customer under the rules of this Restatement. It should be noted that, in a strong majority of jurisdictions, hospitals are held not to be sellers of products they supply in connection with the provision of medical care, regardless of the circumstances.

e. Other means of commercial distribution: finance leases. A finance lessor, as distinct from a commercial lessor under Comment *c*, is

not subject to the rule of this Section in the absence of active participation in the underlying commercial product distribution.

f. Other means of commercial distribution: product bailments. Bailments typically involve short-term transfers of possession. Several categories of cases are fairly clear. When the defendant is in the business of selling the same type of product as is the subject of the bailment, the seller/bailor is subject to strict liability for harm caused by defects. Thus, an automobile dealer who allows a prospective customer to test-drive a demonstrator will be treated the same as a seller of the demonstrator car. Even when sale of a product is not contemplated, the commercial bailor is subject to strict liability if a charge is imposed as a condition of the bailment. Thus, a laundromat is subject to strict liability for a defective clothes dryer, and a roller rink that rents skates is treated similarly. When products are made available as a convenience to customers who are on the defendant's premises primarily for different, although related purposes, and no separate charge is made, strict liability is not imposed. Thus, bowling alleys that supply bowling balls for customer use and markets that supply shopping carts are not subject to strict products liability for harm caused by defects in those items. Similarly, doctors who use medical devices while treating patients are not considered distributors of those products.

g. Other means of commercial distribution: product distribution facilitators. Persons assisting or providing services to product distributors, while indirectly facilitating the commercial distribution of products, are not subject to liability under the rules of this Restatement. Thus, commercial firms engaged in advertising products are outside the rules of this Restatement, as are firms engaged exclusively in the financing of product sale or lease transactions. Sales personnel and commercial auctioneers are also outside the rules of this Restatement.

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§ 21. Definition of "Harm to Persons or Property": Recovery for Economic Loss

For purposes of this Restatement, harm to persons or property includes economic loss if caused by harm to:

(a) the plaintiff's person; or

(b) the person of another when harm to the other interferes with an interest of the plaintiff protected by tort law; or

(c) the plaintiff's property other than the defective product itself.

Comment:

a. Rationale. This Section limits the kinds of harm for which recovery is available under this Restatement. Two major constraints on

tort recovery give content to this Section. First, products liability law lies at the boundary between tort and contract. Some categories of loss, including those often referred to as "pure economic loss," are more appropriately assigned to contract law and the remedies set forth in Articles 2 and 2A of the Uniform Commercial Code. When the Code governs a claim, its provisions regarding such issues as statutes of limitation, privity, notice of claim, and disclaimer ordinarily govern the litigation. Second, some forms of economic loss have traditionally been excluded from the realm of tort law even when the plaintiff has no contractual remedy for a claim.

b. Economic loss resulting from harm to plaintiff's person. Loss of earnings and reductions in earning capacity are common forms of economic loss resulting from harm to the plaintiff's person and are included in Subsection (a). Other forms of economic loss resulting from harm to the plaintiff's person are recoverable if they are within the general principles of legal cause. See Restatement, Second, Torts §§ 430–461.

c. When harm to another interferes with an interest of the plaintiff protected by tort law. When tort law recognizes the right of a plaintiff to recover for economic loss arising from harm to another's person, that right is included within the rules of this Restatement Third, Torts: Products Liability. Thus, for example, actions under local common law and statutes for loss of consortium or wrongful death on behalf of next of kin, although not direct harms to the plaintiff's person, are included in Subsection (b). Other examples of such rights may be recognized under local law, but the categories included in Subsection (b) have traditionally been limited in number.

d. Harm to the defective product itself. When a product defect results in harm to the product itself, the law governing commercial transactions sets forth a comprehensive scheme governing the rights of the buyer and seller. Harm to the product itself takes two forms. A product defect may render the product ineffective so that repair or replacement is necessary. Such a defect may also result in consequential loss to the buyer. For example, a machine that becomes inoperative may cause the assembly line in which it is being used to break down and may lead to a wide range of consequential economic losses to the business that owns the machine. These losses are not recoverable in tort under the rules of this Restatement. A somewhat more difficult question is presented when the defect in the product renders it unreasonably dangerous, but the product does not cause harm to persons or property. In these situations the danger either (1) never eventuates in harm because the product defect is discovered before it causes harm, or (2) eventuates in harm to the product itself but not in harm to persons or other property. A plausible argument can be made that products that are dangerous, rather than merely ineffectual, should be governed by the rules governing products liability law. However, a majority of courts have

concluded that the remedies provided under the Uniform Commercial Code—repair and replacement costs and, in appropriate circumstances, consequential economic loss—are sufficient. Thus, the rules of this Restatement do not apply in such situations.

A second category of economic loss excluded from the coverage of this Restatement includes losses suffered by a plaintiff but not as a direct result of harm to the plaintiff's person or property. For example, a defective product may destroy a commercial business establishment, whose employees patronize a particular restaurant, resulting in economic loss to the restaurant. The loss suffered by the restaurant generally is not recoverable in tort and in any event is not cognizable under products liability law.

e. Harm to the plaintiff's property other than the defective product itself. A defective product that causes harm to property other than the defective product itself is governed by the rules of this Restatement. What constitutes harm to other property rather than harm to the product itself may be difficult to determine. A product that nondangerously fails to function due to a product defect has clearly caused harm only to itself. A product that fails to function and causes harm to surrounding property has clearly caused harm to other property. However, when a component part of a machine or a system destroys the rest of the machine or system, the characterization process becomes more difficult. When the product or system is deemed to be an integrated whole, courts treat such damage as harm to the product itself. When so characterized, the damage is excluded from the coverage of this Restatement. A contrary holding would require a finding of property damage in virtually every case in which a product harms itself and would prevent contractual rules from serving their legitimate function in governing commercial transactions.

The characterization of a claim as harm to other property may trigger liability not only for the harm to physical property but also for incidental economic loss. The extent to which incidental economic loss is recoverable in tort is governed by general principles of legal cause. See Restatement, Second, Torts §§ 430–461.

One category of claims stands apart. In the case of asbestos contamination in buildings, most courts have taken the position that the contamination constitutes harm to the building as other property. The serious health threat caused by asbestos contamination has led the courts to this conclusion. Thus, actions seeking recovery for the costs of asbestos removal have been held to be within the purview of products liability law rather than commercial law.

f. Harm to other property: disclaimers and limitations of remedies. Although recovery for harm to property other than the defective product itself is governed by this Restatement, the Institute leaves to developing case law the questions of whether and under what circumstances contracting parties may disclaim or limit remedies for harm to other property. Of course, such contractual limitations would be effective only

between the parties themselves. When a defective product causes harm to property owned by third persons, the contractual arrangements between the contracting parties should not shield the seller from liability to the third party. However, contractual limitations on tort liability for harm to property, when fairly bargained for, may provide an effective way for the contracting parties efficiently to allocate risks of such harm between themselves.

UNIFORM COMMERCIAL CODE

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Jurisdiction	Laws	Effective Date	Statutory Citation
Alabama	1965, Act No. 549	1–1–1967	Code 1975, §§ 7–1–101 to 7–11–108
Alaska	1962, c. 114	1–1–1963	AS §§ 45.01 to 45.09, 45.12, 45.14
Arizona	1967, c. 3	1–1–1968	A.R.S. §§ 47–1101 to 47–11107
Arkansas	1961, Act No. 185	1–1–1962	Code 1987, §§ 4–1–101 to 4–10–104
California	Stats.1963, c. 819	1–1–1965	West's Ann.Cal.Com.Code, §§ 1101 to 15104
Colorado	1965, c. 330	7–1–1966	C.R.S. §§ 4–1–101 to 4–11–102
Connecticut	1959, No. 133	10–1–1961	C.G.S.A. §§ 42a–1–101 to 42a–10–109
Delaware	1966, c. 349	7–1–1967	6 Del.C. §§ 1–101 to 11–109
Dist. of Columbia	P.L. 88–243	1–1–1965	D.C.Code 1981, §§ 28:1–101 to 28:11–108
Florida	1965, c. 65–254	1–1–1967	West's F.S.A. §§ 670.101 to 670.507; 671.101 to 680.532
Georgia	1962, Act 713	1–1–1964	O.C.G.A. §§ 11–1–101 to 11–11–104
Hawaii	1965, No. 208	1–1–1967	HRS §§ 490:1–101 to 490:11–108
Idaho	1967, c. 161	1–1–1968	I.C. §§ 28–1–101 to 28–10–104; 28–12–101 to 28–12–532
Illinois	1961, p. 2101	7–2–1962	S.H.A. 810 ILCS 5/1–101 to 5/12–102
Indiana	1963, c. 317	7–1–1964	West's A.I.C. 26–1–1–101 to 26–1–10–104
Iowa	1965, (61 G.A.) c. 413	7–4–1966	I.C.A. §§ 554.1101 to 554.13532
Kansas	1965, c. 564	1–1–1966	K.S.A. 84–1–101 to 84–10–102
Kentucky	1958, c. 77	7–1–1960	KRS 355.1–101 to 355.11–108
Louisiana	1974, No. 92	1–1–1975	LSA-R.S. 10:1–101 to 10:5–117
Maine	1963, c. 362	12–31–1964	11 M.R.S.A. §§ 1–101 to 10–108

* For the versions of the UCC adopted in each state, see Uniform Commercial Code (U.L.A.) at 1–2 (1989 and Supp.2004). Eds.

Jurisdiction	Laws	Effective Date	Statutory Citation
Maryland	1963, c. 538	2–1–1964	Code, Commercial Law, §§ 1–101 to 10–112
Massachusetts	1957, c. 765	10–1–1958	M.G.L.A. c. 106, §§ 1–101 to 9–507
Michigan	1962, P.A. 174	1–1–1964	M.C.L.A. §§ 440.1101 to 440.11102
Minnesota	1965, c. 811	7–1–1966	M.S.A. §§ 336.1–101 to 336.11–108
Mississippi	1966, c. 316	3–31–1968	Code 1972, §§ 75–1–101 to 75–11–108
Missouri	1963, p. 503	7–1–1965	V.A.M.S. §§ 400.1–101 to 400.11–107
Montana	1963, c. 264	1–2–1965	MCA 30–1–101 to 30–9–511
Nebraska	1963, c. 544	9–2–1965	Neb.U.C.C. §§ 1–101 to 10–104
Nevada	1965, c. 353	3–1–1967	N.R.S. 104.1101 to 104.9507; 104A.010 to 104A.2531
New Hampshire	1959, c. 247	7–1–1961	RSA 382–A:1–101 to 382–A:9–507
New Jersey	1961, c. 120	1–1–1963	N.J.S.A. 12A:1–101 to 12A:11–108
New Mexico	1961, c. 96	1–1–1962	NMSA 1978, §§ 55–1–101 to 55–12–108
New York	1962, c. 553	9–27–1964	McKinney's Uniform Commercial Code, §§ 1–101 to 13–105
North Carolina	1965, c. 700	7–1–1967	G.S. §§ 25–1–101 to 25–11–108
North Dakota	1965, c. 296	7–1–1966	NDCC 41–01–02 to 41–09–53
Ohio	1961, p. 13	7–1–1962	R.C. §§ 1301.01 to 1310.78
Oklahoma	1961, p. 70	1–1–1963	12A Okl.St.Ann. §§ 1–101 to 11–107
Oregon	1961, c. 726	9–1–1963	ORS 71.1010 to 79.6010
Pennsylvania	1953, P.L. 3	7–1–1954	13 Pa.C.S.A. §§ 1101 to 9507
Rhode Island	1960, c. 147	1–2–1962	Gen.Laws 1956, §§ 6A–1–101 to 6A–9–507
South Carolina	1966, c. 1065	1–1–1968	Code 1976, §§ 36–1–101 to 36–11–108
South Dakota	1966, c. 150	7–1–1967	SDCL 57A–1–101 to 57A–11–108

Jurisdiction	Laws	Effective Date	Statutory Citation
Tennessee	1963, c. 81	7–1–1964	West's Tenn.Code §§ 47–1–101 to 47–9–607
Texas	1965, c. 721	7–1–1966	V.T.C.A., Bus. & C. §§ 1.101 to 11.108
Utah	1965, c. 154	1–1–1966	U.C.A.1953, 70A–1–101 to 70A–11–108
Vermont	1966, No. 29	1–1–1967	9A V.S.A. §§ 1–101 to 9–607
Virgin Islands	1965, No. 1299	7–1–1965	11A V.I.C. §§ 1–101 to 9–507
Virginia	1964, c. 219	1–1–1966	Code 1950, §§ 8.1–101 to 8.11–108
Washington	1965, Ex.Sess., c. 157	7–1–1967	West's RCWA 62A.1–101 to 62A.11–109
West Virginia	1963, c. 193	7–1–1964	Code, 46–1–101 to 46–11–108
Wisconsin	1963, c. 158	7–1–1965	W.S.A. 401.101 to 411.901
Wyoming	1961, c. 219	1–2–1962	W.S.1977, §§ 34.1–1–101 to 34.1–10–104

ARTICLE 1

GENERAL PROVISIONS

PART 1
SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE ACT

§ 1–101. Short Title

This Act shall be known and may be cited as Uniform Commercial Code.

* * *

§ 1–102. Purposes; Rules of Construction; Variation by Agreement

(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

(3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

(4) The presence in certain provisions of this Act of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).

(5) In this Act unless the context otherwise requires

(a) words in the singular number include the plural, and in the plural include the singular;

(b) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

* * *

§ 1–103. Supplementary General Principles of Law Applicable

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

* * *

§ 1–104. Construction Against Implicit Repeal

This Act being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

* * *

§ 1–105. Territorial Application of the Act; Parties' Power to Choose Applicable Law

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

* * *

Official Comment

Prior Uniform Statutory Provision: None.

Purposes:

1. Subsection (1) states affirmatively the right of the parties to a multi-state transaction or a transaction involving foreign trade to choose their own law. That right is subject to the firm rules stated in the five sections listed in subsection (2), and is limited to jurisdictions to which the transaction bears a "reasonable relation." In general, the test of "reasonable relation" is similar to that laid down by the Supreme Court in Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 47 S.Ct. 626, 71 L.Ed. 1123 (1927). Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs. But an agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen.

2. Where there is no agreement as to the governing law, the Act is applicable to any transaction having an "appropriate" relation to any state which enacts it. Of course, the Act applies to any transaction which takes place in its entirety in a state which has enacted the Act. But the mere fact that suit is brought in a state does not make it appropriate to apply the substantive law of that state. Cases where a relation to the enacting state is not "appropriate" include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the Code.

3. Where a transaction has significant contacts with a state which has enacted the Act and also with other jurisdictions, the question what relation is "appropriate" is left to judicial decision. In deciding that question, the court is not strictly bound by precedents established in other contexts. Thus a conflict-of-laws decision refusing to apply a purely local statute or rule of law to a particular multi-state transaction may not be valid precedent for refusal to apply the Code in an analogous situation. Application of the Code in such circumstances may be justified by its comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries. Compare Global Commerce Corp. v. Clark-Babbitt Industries, Inc., 239 F.2d 716, 719 (2d Cir.1956). In particular, where a transaction is governed in large part by the Code, application of another law to some detail of performance because of an accident of geography may violate the commercial understanding of the parties.

4. The Act does not attempt to prescribe choice-of-law rules for states which do not enact it, but this section does not prevent application of the Act in a court of such a state. Common-law choice of law often rests on policies of giving effect to agreements and of uniformity of result regardless of where

suit is brought. To the extent that such policies prevail, the relevant considerations are similar in such a court to those outlined above.

* * *

§ 1–106. Remedies to Be Liberally Administered

(1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

(2) Any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect.

Official Comment

Prior Uniform Statutory Provision: Subsection (1)—none; Subsection (2)—Section 72, Uniform Sales Act.

Changes: Reworded.

Purposes of Changes and New Matter: Subsection (1) is intended to effect three things:

1. First, to negate the unduly narrow or technical interpretation of some remedial provisions of prior legislation by providing that the remedies in this Act are to be liberally administered to the end stated in the section. Second, to make it clear that compensatory damages are limited to compensation. They do not include consequential or special damages, or penal damages; and the Act elsewhere makes it clear that damages must be minimized. Cf. Sections 1–203, 2–706(1), and 2–712(2). The third purpose of subsection (1) is to reject any doctrine that damages must be calculable with mathematical accuracy. Compensatory damages are often at best approximate: they have to be proved with whatever definiteness and accuracy the facts permit, but no more. Cf. Section 2–204(3).

2. Under subsection (2) any right or obligation described in this Act is enforceable by court action, even though no remedy may be expressly provided, unless a particular provision specifies a different and limited effect. Whether specific performance or other equitable relief is available is determined not by this section but by specific provisions and by supplementary principles. Cf. Sections 1–103, 2–716.

3. "Consequential" or "special" damages and "penal" damages are not defined in terms in the Code, but are used in the sense given them by the leading cases on the subject.

§ 1–107. Waiver or Renunciation of Claim or Right After Breach

Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

Official Comment

Prior Uniform Statutory Provision: Compare Section 1, Uniform Written Obligations Act; Sections 119(3), 120(2) and 122, Uniform Negotiable Instruments Law.

Purposes:

This section makes consideration unnecessary to the effective renunciation or waiver of rights or claims arising out of an alleged breach of a commercial contract where such renunciation is in writing and signed and delivered by the aggrieved party. Its provisions, however, must be read in conjunction with the section imposing an obligation of good faith. (Section 1–203). There may, of course, also be an oral renunciation or waiver sustained by consideration but subject to Statute of Frauds provisions and to the section of Article 2 on Sales dealing with the modification of signed writings (Section 2–209). As is made express in the latter section this Act fully recognizes the effectiveness of waiver and estoppel.

* * *

PART 2
GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

§ 1–201. General Definitions

Subject to additional definitions contained in the subsequent Articles of this Act which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Act:

(1) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined.

(2) "Aggrieved party" means a party entitled to resort to a remedy.

(3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1–205 and 2–208). Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts (Section 1–103). (Compare "Contract".)

* * *

(10) "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.

(11) "Contract" means the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law. (Compare "Agreement".)

* * *

(13) "Defendant" includes a person in the position of defendant in a cross-action or counterclaim.

* * *

(16) "Fault" means wrongful act, omission or breach.

* * *

(19) "Good faith" means honesty in fact in the conduct or transaction concerned.

* * *

(25) A person has "notice" of a fact when

(a) he has actual knowledge of it; or

(b) he has received a notice or notification of it; or

(c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this Act.

(26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when

(a) it comes to his attention; or

(b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

(27) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the

transaction and that the transaction would be materially affected by the information.

(28) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(29) "Party", as distinct from "third party", means a person who has engaged in a transaction or made an agreement within this Act.

(30) "Person" includes an individual or an organization (See Section 1–102).

(31) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non-existence.

(32) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property.

(33) "Purchaser" means a person who takes by purchase.

(34) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(35) "Representative" includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.

(36) "Rights" includes remedies.

* * *

Official Comment

* * *

10. "Conspicuous". New. This is intended to indicate some of the methods of making a term attention-calling. But the test is whether attention can reasonably be expected to be called to it.

* * *

19. "Good faith". See Section 76(2), Uniform Sales Act; Section 58(2), Uniform Warehouse Receipts Act; Section 53(2), Uniform Bills of Lading Act; Section 22(2), Uniform Stock Transfer Act. "Good faith", whenever it is used in the Code, means at least what is here stated. In certain Articles, by specific provision, additional requirements are made applicable. See, e.g., Secs. 2–103(1)(b), 7–404. To illustrate, in the Article on Sales, Section 2–103, good faith is expressly defined as including in the case of a merchant observance of reasonable commercial standards of fair dealing in the trade, so that throughout that Article wherever a merchant appears in the case an inquiry into his observance of such standards is necessary to determine his good faith.

* * *

25. "Notice". New. Compare N.I.L. Sec. 56. Under the definition a person has notice when he has received a notification of the fact in question. But by the last sentence the act leaves open the time and circumstances under which notice or notification may cease to be effective. Therefore such cases as Graham v. White-Phillips Co., 296 U.S. 27, 56 S.Ct. 21, 80 L.Ed. 20 (1935), are not overruled.

26. "Notifies". New. This is the word used when the essential fact is the proper dispatch of the notice, not its receipt. Compare "Send". When the essential fact is the other party's receipt of the notice, that is stated. The second sentence states when a notification is received.

27. New. This makes clear that reason to know, knowledge, or a notification, although "received" for instance by a clerk in Department A of an organization, is effective for a transaction conducted in Department B only from the time when it was or should have been communicated to the individual conducting that transaction.

28. "Organization". This is the definition of every type of entity or association, excluding an individual, acting as such. Definitions of "person" were included in Section 191, Uniform Negotiable Instruments Law; Section 76, Uniform Sales Act; Section 58, Uniform Warehouse Receipts Act; Section 53, Uniform Bills of Lading Act; Section 22, Uniform Stock Transfer Act; Section 1, Uniform Trust Receipts Act. The definition of "organization" given here includes a number of entities or associations not specifically mentioned in prior definition of "person", namely, government, governmental subdivision or agency, business trust, trust and estate.

* * *

§ 1–203. Obligation of Good Faith

Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

Official Comment

Prior Uniform Statutory Provision: None.

Purposes:

This section sets forth a basic principle running throughout this Act. The principle involved is that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties. * * *

It is to be noted that under the Sales Article definition of good faith (Section 2–103), contracts made by a merchant have incorporated in them the explicit standard not only of honesty in fact (Section 1–201), but also of observance by the merchant of reasonable commercial standards of fair dealing in the trade.

* * *

§ 1–204. Time; Reasonable Time; "Seasonably"

(1) Whenever this Act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.

(2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.

(3) An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

Official Comment

Prior Uniform Statutory Provision: None.

Purposes:

1. Subsection (1) recognizes that nothing is stronger evidence of a reasonable time than the fixing of such time by a fair agreement between the parties. However, provision is made for disregarding a clause which whether by inadvertence or overreaching fixes a time so unreasonable that it amounts to eliminating all remedy under the contract. The parties are not required to fix the most reasonable time but may fix any time which is not obviously unfair as judged by the time of contracting.

2. Under the section, the agreement which fixes the time need not be part of the main agreement, but may occur separately. Notice also that under the definition of "agreement" (Section 1–201) the circumstances of the transaction, including course of dealing or usages of trade or course of performance may be material. On the question what is a reasonable time these matters will often be important.

* * *

§ 1–205. Course of Dealing and Usage of Trade

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable

express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

Official Comment

Prior Uniform Statutory Provision: No such general provision but see Sections 9(1), 15(5), 18(2), and 71, Uniform Sales Act.

Purposes: This section makes it clear that:

1. This Act rejects both the "lay-dictionary" and the "conveyancer's" reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.

2. Course of dealing under subsection (1) is restricted, literally, to a sequence of conduct between the parties previous to the agreement. However, the provisions of the Act on course of performance make it clear that a sequence of conduct after or under the agreement may have equivalent meaning. (Section 2–208.)

3. "Course of dealing" may enter the agreement either by explicit provisions of the agreement or by tacit recognition.

4. This Act deals with "usage of trade" as a factor in reaching the commercial meaning of the agreement which the parties have made. The language used is to be interpreted as meaning what it may fairly be expected to mean to parties involved in the particular commercial transaction in a given locality or in a given vocation or trade. By adopting in this context the term "usage of trade" this Act expresses its intent to reject those cases which see evidence of "custom" as representing an effort to displace or negate "established rules of law." A distinction is to be drawn between mandatory rules of law such as the Statute of Frauds provisions of Article 2 on Sales whose very office is to control and restrict the actions of the parties, and which cannot be abrogated by agreement, or by a usage of trade, and those rules of law (such as those in Part 3 of Article 2 on Sales) which fill in points which the parties have not considered and in fact agreed upon. The latter rules hold "unless otherwise agreed" but yield to the contrary agreement of the parties. Part of the agreement of the parties to which such rules yield is to be sought for in the usages of trade which furnish the background and give particular meaning to the language used, and are the framework of common understanding controlling any general rules of law which hold only when there is no such understanding.

5. A usage of trade under subsection (2) must have the "regularity of observance" specified. The ancient English tests for "custom" are abandoned in this connection. Therefore, it is not required that a usage of trade be "ancient or immemorial," "universal" or the like. Under the requirement of subsection (2) full recognition is thus available for new usages and for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree. There is room also for proper recognition of usage agreed upon by merchants in trade codes.

6. The policy of this Act controlling explicit unconscionable contracts and clauses (Sections 1–203, 2–302) applies to implicit clauses which rest on usage of trade and carries forward the policy underlying the ancient requirement that a custom or usage must be "reasonable." However, the emphasis is shifted. The very fact of commercial acceptance makes out a prima facie case that the usage is reasonable, and the burden is no longer on the usage to establish itself as being reasonable. But the anciently established policing of usage by the courts is continued to the extent necessary to cope with the situation arising if an unconscionable or dishonest practice should become standard.

7. Subsection (3), giving the prescribed effect to usages of which the parties "are or should be aware", reinforces the provision of subsection (2) requiring not universality but only the described "regularity of observance" of the practice or method. This subsection also reinforces the point of subsection (2) that such usages may be either general to trade or particular to a special branch of trade.

8. Although the terms in which this Act defines "agreement" include the elements of course of dealing and usage of trade, the fact that express reference is made in some sections to those elements is not to be construed as carrying a contrary intent or implication elsewhere. Compare Section 1–102(4).

9. In cases of a well-established line of usage varying from the general rules of this Act where the precise amount of the variation has not been worked out into a single standard, the party relying on the usage is entitled, in any event, to the minimum variation demonstrated. The whole is not to be disregarded because no particular line of detail has been established. In case a dominant pattern has been fairly evidenced, the party relying on the usage is entitled under this section to go to the trier of fact on the question of whether such dominant pattern has been incorporated into the agreement.

10. Subsection (6) is intended to insure that this Act's liberal recognition of the needs of commerce in regard to usage of trade shall not be made into an instrument of abuse.

* * *

ARTICLE 2

SALES

PART 1
SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER

§ 2–101. Short Title

This Article shall be known and may be cited as Uniform Commercial Code—Sales.

Official Comment

This Article is a complete revision and modernization of the Uniform Sales Act which was promulgated by the National Conference of Commissioners on Uniform State Laws in 1906 and has been adopted in 34 states and Alaska, the District of Columbia and Hawaii.

The coverage of the present Article is much more extensive than that of the old Sales Act and extends to the various bodies of case law which have been developed both outside of and under the latter.

The arrangement of the present Article is in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.

* * *

§ 2–103. Definitions and Index of Definitions

(1) In this Article unless the context otherwise requires

(a) "Buyer" means a person who buys or contracts to buy goods.

(b) "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

(c) "Receipt" of goods means taking physical possession of them.

(d) "Seller" means a person who sells or contracts to sell goods.

* * *

§ 2–104. Definitions: "Merchant"; "Between Merchants"; "Financing Agency"

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of

an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

* * *

(3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

Official Comment

Prior Uniform Statutory Provision: None. But see Sections 15(2), (5), 16(c), 45(2) and 71, Uniform Sales Act, and Sections 35 and 37, Uniform Bills of Lading Act for examples of the policy expressly provided for in this Article.

Purposes:

1. This Article assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer. It thus adopts a policy of expressly stating rules applicable "between merchants" and "as against a merchant", wherever they are needed instead of making them depend upon the circumstances of each case as in the statutes cited above. This section lays the foundation of this policy by defining those who are to be regarded as professionals or "merchants" and by stating when a transaction is deemed to be "between merchants".

2. The term "merchant" as defined here roots in the "law merchant" concept of a professional in business. The professional status under the definition may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both and which kind of specialized knowledge may be sufficient to establish the merchant status is indicated by the nature of the provisions.

The special provisions as to merchants appear only in this Article and they are of three kinds. Sections 2–201(2), 2–205, 2–207 and 2–209 dealing with the statute of frauds, firm offers, confirmatory memoranda and modification rest on normal business practices which are or ought to be typical of and familiar to any person in business. For purposes of these sections almost every person in business would, therefore, be deemed to be a "merchant" under the language "who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . ." since the practices involved in the transaction are non-specialized business practices such as answering mail. In this type of provision, banks or even universities, for example, well may be "merchants." But even these sections only apply to a merchant in his mercantile capacity; a lawyer or bank president buying fishing tackle for his own use is not a merchant.

On the other hand, in Section 2–314 on the warranty of merchantability, such warranty is implied only "if the seller is a merchant with respect to goods of that kind." Obviously this qualification restricts the implied warranty to a much smaller group than everyone who is engaged in business and requires a professional status as to particular kinds of goods. The exception in Section 2–402(2) for retention of possession by a merchant-seller

falls in the same class; as does Section 2–403(2) on entrusting of possession to a merchant "who deals in goods of that kind".

A third group of sections includes 2–103(1)(b), which provides that in the case of a merchant "good faith" includes observance of reasonable commercial standards of fair dealing in the trade; 2–327(1)(c), 2–603 and 2–605, dealing with responsibilities of merchant buyers to follow seller's instructions, etc.; 2–509 on risk of loss, and 2–609 on adequate assurance of performance. This group of sections applies to persons who are merchants under either the "practices" or the "goods" aspect of the definition of merchant.

3. The "or to whom such knowledge or skill may be attributed by his employment of an agent or broker . . ." clause of the definition of merchant means that even persons such as universities, for example, can come within the definition of merchant if they have regular purchasing departments or business personnel who are familiar with business practices and who are equipped to take any action required.

* * *

§ 2–105. Definitions: Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial Unit"

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2–107).

* * *

Official Comment

Prior Uniform Statutory Provision: Subsections (1), (2), (3) and (4)—Sections 5, 6 and 76, Uniform Sales Act; Subsections (5) and (6)—none.

Changes: Rewritten.

Purposes of Changes and New Matter:

1. Subsection (1) on "goods": The phraseology of the prior uniform statutory provision has been changed so that:

The definition of goods is based on the concept of movability and the term "chattels personal" is not used. It is not intended to deal with things which are not fairly identifiable as movables before the contract is performed.

Growing crops are included within the definition of goods since they are frequently intended for sale. The concept of "industrial" growing crops has been abandoned, for under modern practices fruit, perennial hay, nursery stock and the like must be brought within the scope of this Article. The young of animals are also included expressly in this definition since they, too, are frequently intended for sale and may be contracted for before birth. The period of gestation of domestic animals is such that the provisions of the

section on identification can apply as in the case of crops to be planted. The reason of this definition also leads to the inclusion of a wool crop or the like as "goods" subject to identification under this Article.

The exclusion of "money in which the price is to be paid" from the definition of goods does not mean that foreign currency which is included in the definition of money may not be the subject matter of a sales transaction. Goods is intended to cover the sale of money when money is being treated as a commodity but not to include it when money is the medium of payment.

As to contracts to sell timber, minerals, or structures to be removed from the land Section 2–107(1)(Goods to be severed from Realty: recording) controls.

The use of the word "fixtures" is avoided in view of the diversity of definitions of that term. This Article in including within its scope "things attached to realty" adds the further test that they must be capable of severance without material harm thereto. As between the parties any identified things which fall within that definition become "goods" upon the making of the contract for sale.

* * *

§ 2–106. Definitions: "Contract"; "Agreement"; "Contract for Sale"; "Sale"; "Present Sale"; "Conforming" to Contract; "Termination"; "Cancellation"

(1) In this Article unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (Section 2–401). A "present sale" means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.

(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

Official Comment

Prior Uniform Statutory Provision: Subsection (1)—Section 1(1) and (2), Uniform Sales Act; Subsection (2)—none, but subsection generally continues policy of Sections 11, 44 and 69, Uniform Sales Act; Subsections (3) and (4)—none.

Changes: Completely rewritten.

Purposes of Changes and New Matter:

1. Subsection (1): "Contract for sale" is used as a general concept throughout this Article, but the rights of the parties do not vary according to whether the transaction is a present sale or a contract to sell unless the Article expressly so provides.

2. Subsection (2): It is in general intended to continue the policy of requiring exact performance by the seller of his obligations as a condition to his right to require acceptance. However, the seller is in part safeguarded against surprise as a result of sudden technicality on the buyer's part by the provisions of Section 2–508 on seller's cure of improper tender or delivery. Moreover usage of trade frequently permits commercial leeways in performance and the language of the agreement itself must be read in the light of such custom or usage and also, prior course of dealing, and in a long term contract, the course of performance.

3. Subsections (3) and (4): These subsections are intended to make clear the distinction carried forward throughout this Article between termination and cancellation.

* * *

PART 2
FORM, FORMATION AND READJUSTMENT OF CONTRACT

§ 2–201. Formal Requirements; Statute of Frauds

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are

for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2–606).

Official Comment

Prior Uniform Statutory Provision: Section 4, Uniform Sales Act (which was based on Section 17 of the Statute of 29 Charles II).

Changes: Completely rephrased; restricted to sale of goods. See also Sections 1–206, 8–319 and 9–203.

Purposes of Changes: The changed phraseology of this section is intended to make it clear that:

1. The required writing need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad. It need not indicate which party is the buyer and which the seller. The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted.

Special emphasis must be placed on the permissibility of omitting the price term in view of the insistence of some courts on the express inclusion of this term even where the parties have contracted on the basis of a published price list. In many valid contracts for sale the parties do not mention the price in express terms, the buyer being bound to pay and the seller to accept a reasonable price which the trier of the fact may well be trusted to determine. Again, frequently the price is not mentioned since the parties have based their agreement on a price list or catalogue known to both of them and this list serves as an efficient safeguard against perjury. Finally, "market" prices and valuations that are current in the vicinity constitute a similar check. Thus if the price is not stated in the memorandum it can normally be supplied without danger of fraud. Of course if the "price" consists of goods rather than money the quantity of goods must be stated.

Only three definite and invariable requirements as to the memorandum are made by this subsection. First, it must evidence a contract for the sale of goods; second, it must be "signed", a word which includes any authentication which identifies the party to be charged; and third, it must specify a quantity.

2. "Partial performance" as a substitute for the required memorandum can validate the contract only for the goods which have been accepted or for which payment has been made and accepted.

Receipt and acceptance either of goods or of the price constitutes an unambiguous overt admission by both parties that a contract actually exists. If the court can make a just apportionment, therefore, the agreed price of any goods actually delivered can be recovered without a writing or, if the price has been paid, the seller can be forced to deliver an apportionable part of the goods. The overt actions of the parties make admissible evidence of the other terms of the contract necessary to a just apportionment. This is true even though the actions of the parties are not in themselves inconsistent with a different transaction such as a consignment for resale or a mere loan of money.

Part performance by the buyer requires the delivery of something by him that is accepted by the seller as such performance. Thus, part payment may be made by money or check, accepted by the seller. If the agreed price consists of goods or services, then they must also have been delivered and accepted.

3. Between merchants, failure to answer a written confirmation of a contract within ten days of receipt is tantamount to a writing under subsection (2) and is sufficient against both parties under subsection (1). The only effect, however, is to take away from the party who fails to answer the defense of the Statute of Frauds; the burden of persuading the trier of fact that a contract was in fact made orally prior to the written confirmation is unaffected. Compare the effect of a failure to reply under Section 2–207.

4. Failure to satisfy the requirements of this section does not render the contract void for all purposes, but merely prevents it from being judicially enforced in favor of a party to the contract. For example, a buyer who takes possession of goods as provided in an oral contract which the seller has not meanwhile repudiated, is not a trespasser. Nor would the Statute of Frauds provisions of this section be a defense to a third person who wrongfully induces a party to refuse to perform an oral contract, even though the injured party cannot maintain an action for damages against the party so refusing to perform.

5. The requirement of "signing" is discussed in the comment to Section 1–201.

6. It is not necessary that the writing be delivered to anybody. It need not be signed or authenticated by both parties but it is, of course, not sufficient against one who has not signed it. Prior to a dispute no one can determine which party's signing of the memorandum may be necessary but from the time of contracting each party should be aware that to him it is signing by the other which is important.

7. If the making of a contract is admitted in court, either in a written pleading, by stipulation or by oral statement before the court, no additional writing is necessary for protection against fraud. Under this section it is no longer possible to admit the contract in court and still treat the Statute as a defense. However, the contract is not thus conclusively established. The admission so made by a party is itself evidential against him of the truth of the facts so admitted and of nothing more; as against the other party, it is not evidential at all.

* * *

§ 2–202. Final Written Expression: Parol or Extrinsic Evidence

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(a) by course of dealing or usage of trade (Section 1–205) or by course of performance (Section 2–208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Official Comment

Prior Uniform Statutory Provision: None.

Purposes:

1. This section definitely rejects:

(a) Any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon;

(b) The premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used; and

(c) The requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) is an original determination by the court that the language used is ambiguous.

2. Paragraph (a) makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used. Similarly, the course of actual performance by the parties is considered the best indication of what they intended the writing to mean.

3. Under paragraph (b) consistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all the terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.

* * *

§ 2–204. Formation in General

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

* * *

§ 2–206. Offer and Acceptance in Formation of Contract

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

* * *

§ 2–207. Additional Terms in Acceptance or Confirmation

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

* * *

§ 2–208. Course of Performance or Practical Construction

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Section 1–205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

Official Comment

Prior Uniform Statutory Provision: No such general provision but concept of this section recognized by terms such as "course of dealing", "the circumstances of the case," "the conduct of the parties," etc., in Uniform Sales Act.

Purposes:

1. The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was. This section thus rounds out the set of factors which determines the meaning of the "agreement" and therefore also of the "unless otherwise agreed" qualification to various provisions of this Article.

2. Under this section a course of performance is always relevant to determine the meaning of the agreement. Express mention of course of performance elsewhere in this Article carries no contrary implication when there is a failure to refer to it in other sections.

3. Where it is difficult to determine whether a particular act merely sheds light on the meaning of the agreement or represents a waiver of a term of the agreement, the preference is in favor of "waiver" whenever such construction, plus the application of the provisions on the reinstatement of rights waived (see Section 2–209), is needed to preserve the flexible character of commercial contracts and to prevent surprise or other hardship.

4. A single occasion of conduct does not fall within the language of this section but other sections such as the ones on silence after acceptance and failure to specify particular defects can affect the parties' rights on a single occasion (see Sections 2–605 and 2–607).

* * *

§ 2–209. Modification, Rescission and Waiver

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this Article (Section 2–201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Official Comment

Prior Uniform Statutory Provision: Subsection (1)—Compare Section 1, Uniform Written Obligations Act; Subsections (2) to (5)—none.

Purposes of Changes and New Matter:

1. This section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments.

2. Subsection (1) provides that an agreement modifying a sales contract needs no consideration to be binding.

However, modifications made thereunder must meet the test of good faith imposed by this Act. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a "modification" without legitimate commercial reason is ineffective as a violation of the duty of good faith. Nor can a mere technical consideration support a modification made in bad faith.

The test of "good faith" between merchants or as against merchants includes "observance of reasonable commercial standards of fair dealing in the trade" (Section 2–103), and may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under Sections 2–615 and 2–616.

3. Subsections (2) and (3) are intended to protect against false allegations of oral modifications. "Modification or rescission" includes abandonment or other change by mutual consent, contrary to the decision in Green v. Doniger, 300 N.Y. 238, 90 N.E.2d 56 (1949); it does not include unilateral "termination" or "cancellation" as defined in Section 2–106.

The Statute of Frauds provisions of this Article are expressly applied to modifications by subsection (3). Under those provisions the "delivery and acceptance" test is limited to the goods which have been accepted, that is, to the past. "Modification" for the future cannot therefore be conjured up by oral testimony if the price involved is $500.00 or more since such modification must be shown at least by an authenticated memo. And since a memo is limited in its effect to the quantity of goods set forth in it there is safeguard against oral evidence.

Subsection (2) permits the parties in effect to make their own Statute of Frauds as regards any future modification of the contract by giving effect to a clause in a signed agreement which expressly requires any modification to be by signed writing. But note that if a consumer is to be held to such a clause on a form supplied by a merchant it must be separately signed.

4. Subsection (4) is intended, despite the provisions of subsections (2) and (3), to prevent contractual provisions excluding modification except by a signed writing from limiting in other respects the legal effect of the parties' actual later conduct. The effect of such conduct as a waiver is further regulated in subsection (5).

* * *

PART 3
GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

§ 2–301. General Obligations of Parties

The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.

Official Comment

Prior Uniform Statutory Provision: Sections 11 and 41, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: This section uses the term "obligation" in contrast to the term "duty" in order to provide for the "condition" aspects of delivery and payment insofar as they are not modified by other sections of this Article such as those on cure of tender. It thus replaces not only the general provisions of the Uniform Sales Act on the parties' duties, but also the general provisions of that Act on the effect of conditions. In order to determine what is "in accordance with the contract" under this Article usage of trade, course of dealing and performance, and the general background of circumstances must be given due consideration in conjunction with the lay meaning of the words used to define the scope of the conditions and duties.

* * *

§ 2–302. Unconscionable Contract or Clause

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Official Comment

Prior Uniform Statutory Provision: None.

Purposes:

1. This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise (Cf. Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir.1948)) and not of disturbance of allocation of risks because of superior bargaining power. The underlying basis of this section is illustrated by the results in cases such as the following:

Kansas City Wholesale Grocery Co. v. Weber Packing Corporation, 93 Utah 414, 73 P.2d 1272 (1937), where a clause limiting time for complaints was held inapplicable to latent defects in a shipment of catsup which could be discovered only by microscopic analysis; Hardy v. General Motors Acceptance Corporation, 38 Ga.App. 463, 144 S.E. 327 (1928), holding that a disclaimer of warranty clause applied only to express warranties, thus letting in a fair implied warranty; Andrews Bros. v. Singer & Co. (1934 CA) 1 K.B. 17, holding that where a car with substantial mileage was delivered instead of a "new" car, a disclaimer of warranties, including those "implied," left unaffected an "express obligation" on the description, even though the Sale of Goods Act called such an implied warranty; New Prague Flouring Mill Co. v. Spears, 194 Iowa 417, 189 N.W. 815 (1922), holding that a clause permitting the seller, upon the buyer's failure to supply shipping instructions, to cancel, ship, or allow delivery date to be indefinitely

postponed 30 days at a time by the inaction, does not indefinitely postpone the date of measuring damages for the buyer's breach, to the seller's advantage; and Kansas Flour Mills Co. v. Dirks, 100 Kan. 376, 164 P. 273 (1917), where under a similar clause in a rising market the court permitted the buyer to measure his damages for non-delivery at the end of only one 30 day postponement; Green v. Arcos, Ltd. (1931 CA) 47 T.L.R. 336, where a blanket clause prohibiting rejection of shipments by the buyer was restricted to apply to shipments where discrepancies represented merely mercantile variations; Meyer v. Packard Cleveland Motor Co., 106 Ohio St. 328, 140 N.E. 118 (1922), in which the court held that a "waiver" of all agreements not specified did not preclude implied warranty of fitness of a rebuilt dump truck for ordinary use as a dump truck; F.C. Austin Co. v. J.H. Tillman Co., 104 Or. 541, 209 P. 131 (1922), where a clause limiting the buyer's remedy to return was held to be applicable only if the seller had delivered a machine needed for a construction job which reasonably met the contract description; Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790, 59 A.L.R. 1164 (1927), refusing to allow warranty of fitness for purpose imposed by law to be negated by clause excluding all warranties "made" by the seller; Robert A. Munroe & Co. v. Meyer (1930) 2 K.B. 312, holding that the warranty of description overrides a clause reading "with all faults and defects" where adulterated meat not up to the contract description was delivered.

2. Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results.

3. The present section is addressed to the court, and the decision is to be made by it. The commercial evidence referred to in subsection (2) is for the court's consideration, not the jury's. Only the agreement which results from the court's action on these matters is to be submitted to the general triers of the facts.

* * *

§ 2–303. Allocation or Division of Risks

Where this Article allocates a risk or a burden as between the parties "unless otherwise agreed", the agreement may not only shift the allocation but may also divide the risk or burden.

Official Comment

Prior Uniform Statutory Provision: None.

Purposes:

1. This section is intended to make it clear that the parties may modify or allocate "unless otherwise agreed" risks or burdens imposed by this Article as they desire, always subject, of course, to the provisions on unconscionability.

Compare Section 1–102(4).

2. The risk or burden may be divided by the express terms of the agreement or by the attending circumstances, since under the definition of

"agreement" in this Act the circumstances surrounding the transaction as well as the express language used by the parties enter into the meaning and substance of the agreement.

* * *

§ 2–313. Express Warranties by Affirmation, Promise, Description, Sample

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Official Comment

Prior Uniform Statutory Provision: Sections 12, 14 and 16, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To consolidate and systematize basic principles with the result that:

1. "Express" warranties rest on "dickered" aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms. "Implied" warranties rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated.

This section reverts to the older case law insofar as the warranties of description and sample are designated "express" rather than "implied".

2. Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their

contents. The provisions of Section 2–318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

3. The present section deals with affirmations of fact by the seller, descriptions of the goods or exhibitions of samples, exactly as any other part of a negotiation which ends in a contract is dealt with. No specific intention to make a warranty is necessary if any of these factors is made part of the basis of the bargain. In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. The issue normally is one of fact.

4. In view of the principle that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse except in unusual circumstances to recognize a material deletion of the seller's obligation. Thus, a contract is normally a contract for a sale of something describable and described. A clause generally disclaiming "all warranties, express or implied" cannot reduce the seller's obligation with respect to such description and therefore cannot be given literal effect under Section 2–316.

This is not intended to mean that the parties, if they consciously desire, cannot make their own bargain as they wish. But in determining what they have agreed upon good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation.

5. Paragraph (1)(b) makes specific some of the principles set forth above when a description of the goods is given by the seller.

A description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform with them. Past deliveries may set the description of quality, either expressly or impliedly by course of dealing. Of course, all descriptions by merchants must be read against the applicable trade usages with the general rules as to merchantability resolving any doubts.

6. The basic situation as to statements affecting the true essence of the bargain is no different when a sample or model is involved in the transaction. This section includes both a "sample" actually drawn from the bulk of goods which is the subject matter of the sale, and a "model" which is offered for inspection when the subject matter is not at hand and which has not been drawn from the bulk of the goods.

Although the underlying principles are unchanged, the facts are often ambiguous when something is shown as illustrative, rather than as a straight sample. In general, the presumption is that any sample or model just as any affirmation of fact is intended to become a basis of the bargain.

But there is no escape from the question of fact. When the seller exhibits a sample purporting to be drawn from an existing bulk, good faith of course requires that the sample be fairly drawn. But in mercantile experience the mere exhibition of a "sample" does not of itself show whether it is merely intended to "suggest" or to "be" the character of the subject-matter of the contract. The question is whether the seller has so acted with reference to the sample as to make him responsible that the whole shall have at least the values shown by it. The circumstances aid in answering this question. If the sample has been drawn from an existing bulk, it must be regarded as describing values of the goods contracted for unless it is accompanied by an unmistakable denial of such responsibility. If, on the other hand, a model of merchandise not on hand is offered, the mercantile presumption that it has become a literal description of the subject matter is not so strong, and particularly so if modification on the buyer's initiative impairs any feature of the model.

7. The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (Section 2–209).

8. Concerning affirmations of value or a seller's opinion or commendation under subsection (2), the basic question remains the same: What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain? As indicated above, all of the statements of the seller do so unless good reason is shown to the contrary. The provisions of subsection (2) are included, however, since common experience discloses that some statements or predictions cannot fairly be viewed as entering into the bargain. Even as to false statements of value, however, the possibility is left open that a remedy may be provided by the law relating to fraud or misrepresentation.

* * *

§ 2–314. Implied Warranty: Merchantability; Usage of Trade

(1) Unless excluded or modified (Section 2–316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2–316) other implied warranties may arise from course of dealing or usage of trade.

Official Comment

Prior Uniform Statutory Provision: Section 15(2), Uniform Sales Act.

Changes: Completely rewritten.

Purposes of Changes: This section, drawn in view of the steadily developing case law on the subject, is intended to make it clear that:

1. The seller's obligation applies to present sales as well as to contracts to sell subject to the effects of any examination of specific goods. (Subsection (2) of Section 2–316). Also, the warranty of merchantability applies to sales for use as well as to sales for resale.

2. The question when the warranty is imposed turns basically on the meaning of the terms of the agreement as recognized in the trade. Goods delivered under an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement. The responsibility imposed rests on any merchant-seller, and the absence of the words "grower or manufacturer or not" which appeared in Section 15(2) of the Uniform Sales Act does not restrict the applicability of this section.

3. A specific designation of goods by the buyer does not exclude the seller's obligation that they be fit for the general purposes appropriate to such goods. A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description. A person making an isolated sale of goods is not a "merchant" within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply. His knowledge of any defects not apparent on inspection would, however, without need for express agreement and in keeping with the underlying reason of the present section and the provisions on good faith, impose an obligation that known material but hidden defects be fully disclosed.

4. Although a seller may not be a "merchant" as to the goods in question, if he states generally that they are "guaranteed" the provisions of this section may furnish a guide to the content of the resulting express warranty. This has particular significance in the case of second-hand sales, and has further significance in limiting the effect of fine-print disclaimer clauses where their effect would be inconsistent with large-print assertions of "guarantee".

5. The second sentence of subsection (1) covers the warranty with respect to food and drink. Serving food or drink for value is a sale, whether to be consumed on the premises or elsewhere. Cases to the contrary are rejected. The principal warranty is that stated in subsections (1) and (2)(c) of this section.

6. Subsection (2) does not purport to exhaust the meaning of "merchantable" nor to negate any of its attributes not specifically mentioned in the text of the statute, but arising by usage of trade or through case law. The language used is "must be at least such as . . . ," and the intention is to leave open other possible attributes of merchantability.

7. Paragraphs (a) and (b) of subsection (2) are to be read together. Both refer, as indicated above, to the standards of that line of the trade which fits the transaction and the seller's business. "Fair average" is a term directly appropriate to agricultural bulk products and means goods centering around the middle belt of quality, not the least or the worst that can be understood in the particular trade by the designation, but such as can pass "without objection." Of course a fair percentage of the least is permissible but the goods are not "fair average" if they are all of the least or worst quality possible under the description. In cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation under the present section.

8. Fitness for the ordinary purposes for which goods of the type are used is a fundamental concept of the present section and is covered in paragraph (c). As stated above, merchantability is also a part of the obligation owing to the purchaser for use. Correspondingly, protection, under this aspect of the warranty, of the person buying for resale to the ultimate consumer is equally necessary, and merchantable goods must therefore be "honestly" resalable in the normal course of business because they are what they purport to be.

9. Paragraph (d) on evenness of kind, quality and quantity follows case law. But precautionary language has been added as a reminder of the frequent usages of trade which permit substantial variations both with and without an allowance or an obligation to replace the varying units.

10. Paragraph (e) applies only where the nature of the goods and of the transaction require a certain type of container, package or label. Paragraph (f) applies, on the other hand, wherever there is a label or container on which representations are made, even though the original contract, either by express terms or usage of trade, may not have required either the labelling or the representation. This follows from the general obligation of good faith which requires that a buyer should not be placed in the position of reselling or using goods delivered under false representations appearing on the package or container. No problem of extra consideration arises in this connection since, under this Article, an obligation is imposed by the original contract not to deliver mislabeled articles, and the obligation is imposed where mercantile good faith so requires and without reference to the doctrine of consideration.

11. Exclusion or modification of the warranty of merchantability, or of any part of it, is dealt with in the section to which the text of the present section makes explicit precautionary references. That section must be read with particular reference to its subsection (4) on limitation of remedies. The warranty of merchantability, wherever it is normal, is so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution.

12. Subsection (3) is to make explicit that usage of trade and course of dealing can create warranties and that they are implied rather than express warranties and thus subject to exclusion or modification under Section 2–316. A typical instance would be the obligation to provide pedigree papers to evidence conformity of the animal to the contract in the case of a pedigreed dog or blooded bull.

13. In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense. Equally, evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the warranty was in fact broken. Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury.

* * *

§ 2–315. Implied Warranty: Fitness for Particular Purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Official Comment

Prior Uniform Statutory Provision: Section 15(1), (4), (5), Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes:

1. Whether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting. Under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists. The buyer, of course, must actually be relying on the seller.

2. A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is

peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.

A contract may of course include both a warranty of merchantability and one of fitness for a particular purpose.

The provisions of this Article on the cumulation and conflict of express and implied warranties must be considered on the question of inconsistency between or among warranties. In such a case any question of fact as to which warranty was intended by the parties to apply must be resolved in favor of the warranty of fitness for particular purpose as against all other warranties except where the buyer has taken upon himself the responsibility of furnishing the technical specifications.

3. In connection with the warranty of fitness for a particular purpose the provisions of this Article on the allocation or division of risks are particularly applicable in any transaction in which the purpose for which the goods are to be used combines requirements both as to the quality of the goods themselves and compliance with certain laws or regulations. How the risks are divided is a question of fact to be determined, where not expressly contained in the agreement, from the circumstances of contracting, usage of trade, course of performance and the like, matters which may constitute the "otherwise agreement" of the parties by which they may divide the risk or burden.

4. The absence from this section of the language used in the Uniform Sales Act in referring to the seller, "whether he be the grower or manufacturer or not," is not intended to impose any requirement that the seller be a grower or manufacturer. Although normally the warranty will arise only where the seller is a merchant with the appropriate "skill or judgment," it can arise as to non-merchants where this is justified by the particular circumstances.

5. The elimination of the "patent or other trade name" exception constitutes the major extension of the warranty of fitness which has been made by the cases and continued in this Article. Under the present section the existence of a patent or other trade name and the designation of the article by that name, or indeed in any other definite manner, is only one of the facts to be considered on the question of whether the buyer actually relied on the seller, but it is not of itself decisive of the issue. If the buyer himself is insisting on a particular brand he is not relying on the seller's skill and judgment and so no warranty results. But the mere fact that the article purchased has a particular patent or trade name is not sufficient to indicate nonreliance if the article has been recommended by the seller as adequate for the buyer's purposes.

6. The specific reference forward in the present section to the following section on exclusion or modification of warranties is to call attention to the possibility of eliminating the warranty in any given case.

However it must be noted that under the following section the warranty of fitness for a particular purpose must be excluded or modified by a conspicuous writing.

* * *

§ 2–316. Exclusion or Modification of Warranties

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2–202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2–718 and 2–719).

Official Comment

Prior Uniform Statutory Provision: None. See sections 15 and 71, Uniform Sales Act.

Purposes:

1. This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude "all warranties, express or implied." It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied

warranties only by conspicuous language or other circumstances which protect the buyer from surprise.

2. The seller is protected under this Article against false allegations of oral warranties by its provisions on parol and extrinsic evidence and against unauthorized representations by the customary "lack of authority" clauses. This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under subsection (4) the question of limitation of remedy is governed by the sections referred to rather than by this section.

3. Disclaimer of the implied warranty of merchantability is permitted under subsection (2), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous.

4. Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous.

5. Subsection (2) presupposes that the implied warranty in question exists unless excluded or modified. Whether or not language of disclaimer satisfies the requirements of this section, such language may be relevant under other sections to the question whether the warranty was ever in fact created. Thus, unless the provisions of this Article on parol and extrinsic evidence prevent, oral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had "reason to know" under the section on implied warranty of fitness for a particular purpose.

6. The exceptions to the general rule set forth in paragraphs (a), (b) and (c) of subsection (3) are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded.

7. Paragraph (a) of subsection (3) deals with general terms such as "as is," "as they stand," "with all faults," and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved. The terms covered by paragraph (a) are in fact merely a particularization of paragraph (c) which provides for exclusion or modification of implied warranties by usage of trade.

8. Under paragraph (b) of subsection (3) warranties may be excluded or modified by the circumstances where the buyer examines the goods or a sample or model of them before entering into the contract. "Examination" as used in this paragraph is not synonymous with inspection before acceptance or at any other time after the contract has been made. It goes rather to the nature of the responsibility assumed by the seller at the time of the making of the contract. Of course if the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather than

proximately from a breach of warranty. See Sections 2–314 and 2–715 and comments thereto.

In order to bring the transaction within the scope of "refused to examine" in paragraph (b), it is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully. The seller by the demand puts the buyer on notice that he is assuming the risk of defects which the examination ought to reveal. The language "refused to examine" in this paragraph is intended to make clear the necessity for such demand.

Application of the doctrine of "caveat emptor" in all cases where the buyer examines the goods regardless of statements made by the seller is, however, rejected by this Article. Thus, if the offer of examination is accompanied by words as to their merchantability or specific attributes and the buyer indicates clearly that he is relying on those words rather than on his examination, they give rise to an "express" warranty. In such cases the question is one of fact as to whether a warranty of merchantability has been expressly incorporated in the agreement. Disclaimer of such an express warranty is governed by subsection (1) of the present section.

The particular buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination. A failure to notice defects which are obvious cannot excuse the buyer. However, an examination under circumstances which do not permit chemical or other testing of the goods would not exclude defects which could be ascertained only by such testing. Nor can latent defects be excluded by a simple examination. A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe, while a nonprofessional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe.

9. The situation in which the buyer gives precise and complete specifications to the seller is not explicitly covered in this section, but this is a frequent circumstance by which the implied warranties may be excluded. The warranty of fitness for a particular purpose would not normally arise since in such a situation there is usually no reliance on the seller by the buyer. The warranty of merchantability in such a transaction, however, must be considered in connection with the next section on the cumulation and conflict of warranties. Under paragraph (c) of that section in case of such an inconsistency the implied warranty of merchantability is displaced by the express warranty that the goods will comply with the specifications. Thus, where the buyer gives detailed specifications as to the goods, neither of the implied warranties as to quality will normally apply to the transaction unless consistent with the specifications.

* * *

§ 2–317. Cumulation and Conflict of Warranties Express or Implied

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is

unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

Official Comment

Prior Uniform Statutory Provision: On cumulation of warranties see Sections 14, 15, and 16, Uniform Sales Act.

Changes: Completely rewritten into one section.

Purposes of Changes:

1. The present section rests on the basic policy of this Article that no warranty is created except by some conduct (either affirmative action or failure to disclose) on the part of the seller. Therefore, all warranties are made cumulative unless this construction of the contract is impossible or unreasonable.

This Article thus follows the general policy of the Uniform Sales Act except that in case of the sale of an article by its patent or trade name the elimination of the warranty of fitness depends solely on whether the buyer has relied on the seller's skill and judgment; the use of the patent or trade name is but one factor in making this determination.

2. The rules of this section are designed to aid in determining the intention of the parties as to which of inconsistent warranties which have arisen from the circumstances of their transaction shall prevail. These rules of intention are to be applied only where factors making for an equitable estoppel of the seller do not exist and where he has in perfect good faith made warranties which later turn out to be inconsistent. To the extent that the seller has led the buyer to believe that all of the warranties can be performed, he is estopped from setting up any essential inconsistency as a defense.

3. The rules in subsections (a), (b) and (c) are designed to ascertain the intention of the parties by reference to the factor which probably claimed the attention of the parties in the first instance. These rules are not absolute but may be changed by evidence showing that the conditions which existed at the time of contracting make the construction called for by the section inconsistent or unreasonable.

* * *

§ 2–318. Third Party Beneficiaries of Warranties Express or Implied

Note: *If this Act is introduced in the Congress of the United States this section should be omitted. (States to select one alternative.)*

Alternative A

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends. As amended 1966.

Official Comment

Purposes:

1. The last sentence of this section does not mean that a seller is precluded from excluding or disclaiming a warranty which might otherwise arise in connection with the sale provided such exclusion or modification is permitted by Section 2–316. Nor does that sentence preclude the seller from limiting the remedies of his own buyer and of any beneficiaries, in any manner provided in Sections 2–718 or 2–719. To the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section. What this last sentence forbids is exclusion of liability by the seller to the persons to whom the warranties which he has made to his buyer would extend under this section.

2. The purpose of this section is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to "privity." It seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence. It rests primarily upon the merchant-seller's warranty under this Article that the goods sold are merchantable and fit for the ordinary purposes for which such goods are used rather than the warranty of fitness for a particular purpose. Implicit in the section is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him [As amended in 1966].

3. The first alternative expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this,

the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain. The second alternative is designed for states where the case law has already developed further and for those that desire to expand the class of beneficiaries. The third alternative goes further, following the trend of modern decisions as indicated by Restatement of Torts 2d § 402 A (Tentative Draft No. 10, 1965) in extending the rule beyond injuries to the person [As amended in 1966].

* * *

PART 5
PERFORMANCE

* * *

§ 2–503. Manner of Seller's Tender of Delivery

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this Article, and in particular

(a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

(2) Where the case is within the next section respecting shipment tender requires that the seller comply with its provisions.

(3) Where the seller is required to deliver at a particular destination tender requires that he comply with subsection (1) and also in any appropriate case tender documents as described in subsections (4) and (5) of this section.

(4) Where goods are in the possession of a bailee and are to be delivered without being moved

(a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but

(b) tender to the buyer of a non-negotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

(5) Where the contract requires the seller to deliver documents

(a) he must tender all such documents in correct form, except as provided in this Article with respect to bills of lading in a set (subsection (2) of Section 2–323); and

(b) tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes non-acceptance or rejection.

* * *

§ 2–507. Effect of Seller's Tender; Delivery on Condition

(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

* * *

§ 2–508. Cure by Seller of Improper Tender or Delivery; Replacement

(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

Official Comment

Prior Uniform Statutory Provision: None.

Purposes:

1. Subsection (1) permits a seller who has made a non-conforming tender in any case to make a conforming delivery within the contract time upon seasonable notification to the buyer. It applies even where the seller has taken back the non-conforming goods and refunded the purchase price. He may still make a good tender within the contract period. The closer, however, it is to the contract date, the greater is the necessity for extreme promptness on the seller's part in notifying of his intention to cure, if such notification is to be "seasonable" under this subsection.

The rule of this subsection, moreover, is qualified by its underlying reasons. Thus if, after contracting for June delivery, a buyer later makes known to the seller his need for shipment early in the month and the seller ships accordingly, the "contract time" has been cut down by the supervening

modification and the time for cure of tender must be referred to this modified time term.

2. Subsection (2) seeks to avoid injustice to the seller by reason of a surprise rejection by the buyer. However, the seller is not protected unless he had "reasonable grounds to believe" that the tender would be acceptable. Such reasonable grounds can lie in prior course of dealing, course of performance or usage of trade as well as in the particular circumstances surrounding the making of the contract. The seller is charged with commercial knowledge of any factors in a particular sales situation which require him to comply strictly with his obligations under the contract as, for example, strict conformity of documents in an overseas shipment or the sale of precision parts or chemicals for use in manufacture. Further, if the buyer gives notice either implicitly, as by a prior course of dealing involving rigorous inspections, or expressly, as by the deliberate inclusion of a "no replacement" clause in the contract, the seller is to be held to rigid compliance. If the clause appears in a "form" contract evidence that it is out of line with trade usage or the prior course of dealing and was not called to the seller's attention may be sufficient to show that the seller had reasonable grounds to believe that the tender would be acceptable.

3. The words "a further reasonable time to substitute a conforming tender" are intended as words of limitation to protect the buyer. What is a "reasonable time" depends upon the attending circumstances. Compare Section 2–511 on the comparable case of a seller's surprise demand for legal tender.

4. Existing trade usages permitting variations without rejection but with price allowance enter into the agreement itself as contractual limitations of remedy and are not covered by this section.

* * *

§ 2–515. Preserving Evidence of Goods in Dispute

In furtherance of the adjustment of any claim or dispute

(a) either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including such of them as may be in the possession or control of the other; and

(b) the parties may agree to a third party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment.

Official Comment

Prior Uniform Statutory Provision: None.

Purposes:

1. To meet certain serious problems which arise when there is a dispute as to the quality of the goods and thereby perhaps to aid the parties in reaching a settlement, and to further the use of devices which will promote

certainty as to the condition of the goods, or at least aid in preserving evidence of their condition.

2. Under paragraph (a), to afford either party an opportunity for preserving evidence, whether or not agreement has been reached, and thereby to reduce uncertainty in any litigation and, in turn perhaps, to promote agreement.

Paragraph (a) does not conflict with the provisions on the seller's right to resell rejected goods or the buyer's similar right. Apparent conflict between these provisions which will be suggested in certain circumstances is to be resolved by requiring prompt action by the parties. Nor does paragraph (a) impair the effect of a term for payment before inspection. Short of such defects as amount to fraud or substantial failure of consideration, non-conformity is neither an excuse nor a defense to an action for non-acceptance of documents. Normally, therefore, until the buyer has made payment, inspected and rejected the goods, there is no occasion or use for the rights under paragraph (a).

3. Under paragraph (b), to provide for third party inspection upon the agreement of the parties, thereby opening the door to amicable adjustments based upon the findings of such third parties.

The use of the phrase "conformity or condition" makes it clear that the parties' agreement may range from a complete settlement of all aspects of the dispute by a third party to the use of a third party merely to determine and record the condition of the goods so that they can be resold or used to reduce the stake in controversy. "Conformity", at one end of the scale of possible issues, includes the whole question of interpretation of the agreement and its legal effect, the state of the goods in regard to quality and condition, whether any defects are due to factors which operate at the risk of the buyer, and the degree of non-conformity where that may be material. "Condition", at the other end of the scale, includes nothing but the degree of damage or deterioration which the goods show. Paragraph (b) is intended to reach any point in the gamut which the parties may agree upon.

The principle of the section on reservation of rights reinforces this paragraph in simplifying such adjustments as the parties wish to make in partial settlement while reserving their rights as to any further points. Paragraph (b) also suggests the use of arbitration, where desired, of any points left open, but nothing in this section is intended to repeal or amend any statute governing arbitration. Where any question arises as to the extent of the parties' agreement under the paragraph, the presumption should be that it was meant to extend only to the relation between the contract description and the goods as delivered, since that is what a craftsman in the trade would normally be expected to report upon. Finally, a written and authenticated report of inspection or tests by a third party, whether or not sampling has been practicable, is entitled to be admitted as evidence under this Act, for it is a third party document.

* * *

PART 6
BREACH, REPUDIATION AND EXCUSE

§ 2–601. Buyer's Rights on Improper Delivery

Subject to the provisions of this Article on breach in installment contracts (Section 2–612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2–718 and 2–719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

(a) reject the whole; or

(b) accept the whole; or

(c) accept any commercial unit or units and reject the rest.

Official Comment

Prior Uniform Statutory Provision: No one general equivalent provision but numerous provisions, dealing with situations of non-conformity where buyer may accept or reject, including Sections 11, 44 and 69(1), Uniform Sales Act.

Changes: Partial acceptance in good faith is recognized and the buyer's remedies on the contract for breach of warranty and the like, where the buyer has returned the goods after transfer of title, are no longer barred.

Purposes of Changes: To make it clear that:

1. A buyer accepting a nonconforming tender is not penalized by the loss of any remedy otherwise open to him. This policy extends to cover and regulate the acceptance of a part of any lot improperly tendered in any case where the price can reasonably be apportioned. Partial acceptance is permitted whether the part of the goods accepted conforms or not. The only limitation on partial acceptance is that good faith and commercial reasonableness must be used to avoid undue impairment of the value of the remaining portion of the goods. This is the reason for the insistence on the "commercial unit" in paragraph (c). In this respect, the test is not only what unit has been the basis of contract, but whether the partial acceptance produces so materially adverse an effect on the remainder as to constitute bad faith.

2. Acceptance made with the knowledge of the other party is final. An original refusal to accept may be withdrawn by a later acceptance if the seller has indicated that he is holding the tender open. However, if the buyer attempts to accept, either in whole or in part, after his original rejection has caused the seller to arrange for other disposition of the goods, the buyer must answer for any ensuing damage since the next section provides that any exercise of ownership after rejection is wrongful as against the seller. Further, he is liable even though the seller may choose to treat his action as acceptance rather than conversion, since the damage flows from the misleading notice. Such arrangements for resale or other disposition of the goods by the seller must be viewed as within the normal contemplation of a buyer who has given notice of rejection. However, the buyer's attempts in

good faith to dispose of defective goods where the seller has failed to give instructions within a reasonable time are not to be regarded as an acceptance.

* * *

§ 2–602. Manner and Effect of Rightful Rejection

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two following sections on rejected goods (Sections 2–603 and 2–604),

(a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this Article (subsection (3) of Section 2–711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) the buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this Article on Seller's remedies in general (Section 2–703).

Official Comment

Prior Uniform Statutory Provision: Section 50, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To make it clear that:

1. A tender or delivery of goods made pursuant to a contract of sale, even though wholly non-conforming, requires affirmative action by the buyer to avoid acceptance. Under subsection (1), therefore, the buyer is given a reasonable time to notify the seller of his rejection, but without such seasonable notification his rejection is ineffective. The sections of this Article dealing with inspection of goods must be read in connection with the buyer's reasonable time for action under this subsection. Contract provisions limiting the time for rejection fall within the rule of the section on "Time" and are effective if the time set gives the buyer a reasonable time for discovery of defects. What constitutes a due "notifying" of rejection by the buyer to the seller is defined in Section 1–201.

2. Subsection (2) lays down the normal duties of the buyer upon rejection, which flow from the relationship of the parties. Beyond his duty to hold the goods with reasonable care for the buyer's [seller's] disposition, this section continues the policy of prior uniform legislation in generally relieving the buyer from any duties with respect to them, except when the

circumstances impose the limited obligation of salvage upon him under the next section.

3. The present section applies only to rightful rejection by the buyer. If the seller has made a tender which in all respects conforms to the contract, the buyer has a positive duty to accept and his failure to do so constitutes a "wrongful rejection" which gives the seller immediate remedies for breach. Subsection (3) is included here to emphasize the sharp distinction between the rejection of an improper tender and the non-acceptance which is a breach by the buyer.

4. The provisions of this section are to be appropriately limited or modified when a negotiation is in process.

* * *

§ 2–605. Waiver of Buyer's Objections by Failure to Particularize

(1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach

(a) where the seller could have cured it if stated seasonably; or

(b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents.

* * *

§ 2–606. What Constitutes Acceptance of Goods

(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or

(b) fails to make an effective rejection (subsection (1) of Section 2–602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

Official Comment

Prior Uniform Statutory Provision: Section 48, Uniform Sales Act.

Changes: Rewritten, the qualification in paragraph (c) and subsection (2) being new; otherwise the general policy of the prior legislation is continued.

Purposes of Changes and New Matter: To make it clear that:

1. Under this Article "acceptance" as applied to goods means that the buyer, pursuant to the contract, takes particular goods which have been appropriated to the contract as his own, whether or not he is obligated to do so, and whether he does so by words, action, or silence when it is time to speak. If the goods conform to the contract, acceptance amounts only to the performance by the buyer of one part of his legal obligations.

2. Under this Article acceptance of goods is always acceptance of identified goods which have been appropriated to the contract or are appropriated by the contract. There is no provision for "acceptance of title" apart from acceptance in general, since acceptance of title is not material under this Article to the detailed rights and duties of the parties. (See Section 2–401). The refinements of the older law between acceptance of goods and of title become unnecessary in view of the provisions of the sections on effect and revocation of acceptance, on effects of identification and on risk of loss, and those sections which free the seller's and buyer's remedies from the complications and confusions caused by the question of whether title has or has not passed to the buyer before breach.

3. Under paragraph (a), payment made after tender is always one circumstance tending to signify acceptance of the goods but in itself it can never be more than one circumstance and is not conclusive. Also, a conditional communication of acceptance always remains subject to its expressed conditions.

4. Under paragraph (c), any action taken by the buyer, which is inconsistent with his claim that he has rejected the goods, constitutes an acceptance. However, the provisions of paragraph (c) are subject to the sections dealing with rejection by the buyer which permit the buyer to take certain actions with respect to the goods pursuant to his options and duties imposed by those sections, without effecting an acceptance of the goods. The second clause of paragraph (c) modifies some of the prior case law and makes it clear that "acceptance" in law based on the wrongful act of the acceptor is acceptance only as against the wrongdoer and then only at the option of the party wronged.

In the same manner in which a buyer can bind himself, despite his insistence that he is rejecting or has rejected the goods, by an act inconsistent with the seller's ownership under paragraph (c), he can obligate himself by a communication of acceptance despite a prior rejection under paragraph (a). However, the sections on buyer's rights on improper delivery and on the effect of rightful rejection, make it clear that after he once rejects a tender, paragraph (a) does not operate in favor of the buyer unless the seller has re-tendered the goods or has taken affirmative action indicating that he is holding the tender open. See also Comment 2 to Section 2–601.

5. Subsection (2) supplements the policy of the section on buyer's rights on improper delivery, recognizing the validity of a partial acceptance but insisting that the buyer exercise this right only as to whole commercial units.

* * *

§ 2–607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

(b) if the claim is one for infringement or the like (subsection (3) of Section 2–312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted.

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

(b) if the claim is one for infringement or the like (subsection (3) of Section 2–312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

(6) The provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of Section 2–312).

Official Comment

Prior Uniform Statutory Provision: Subsection (1)—Section 41, Uniform Sales Act; Subsections (2) and (3)—Sections 49 and 69, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To continue the prior basic policies with respect to acceptance of goods while making a number of minor though material changes in the interest of simplicity and commercial convenience so that:

1. Under subsection (1), once the buyer accepts a tender the seller acquires a right to its price on the contract terms. In cases of partial acceptance, the price of any part accepted is, if possible, to be reasonably apportioned, using the type of apportionment familiar to the courts in quantum valebat cases, to be determined in terms of "the contract rate," which is the rate determined from the bargain in fact (the agreement) after the rules and policies of this Article have been brought to bear.

2. Under subsection (2) acceptance of goods precludes their subsequent rejection. Any return of the goods thereafter must be by way of revocation of acceptance under the next section. Revocation is unavailable for a non-conformity known to the buyer at the time of acceptance, except where the buyer has accepted on the reasonable assumption that the non-conformity would be seasonably cured.

3. All other remedies of the buyer remain unimpaired under subsection (2). This is intended to include the buyer's full rights with respect to future installments despite his acceptance of any earlier non-conforming installment.

4. The time of notification is to be determined by applying commercial standards to a merchant buyer. "A reasonable time" for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2–605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

5. Under this Article various beneficiaries are given rights for injuries sustained by them because of the seller's breach of warranty. Such a beneficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance. However, the reason of this section does extend to requiring the beneficiary to notify the seller

that an injury has occurred. What is said above, with regard to the extended time for reasonable notification from the lay consumer after the injury is also applicable here; but even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.

6. Subsection (4) unambiguously places the burden of proof to establish breach on the buyer after acceptance. However, this rule becomes one purely of procedure when the tender accepted was non-conforming and the buyer has given the seller notice of breach under subsection (3). For subsection (2) makes it clear that acceptance leaves unimpaired the buyer's right to be made whole, and that right can be exercised by the buyer not only by way of cross-claim for damages, but also by way of recoupment in diminution or extinction of the price.

7. Subsections (3)(b) and (5)(b) give a warrantor against infringement an opportunity to defend or compromise third-party claims or be relieved of his liability. Subsection (5)(a) codifies for all warranties the practice of voucher to defend. Compare Section 3–803. Subsection (6) makes these provisions applicable to the buyer's liability for infringement under Section 2–312.

8. All of the provisions of the present section are subject to any explicit reservation of rights.

* * *

§ 2–608. Revocation of Acceptance in Whole or in Part

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

Official Comment

Prior Uniform Statutory Provision: Section 69(1)(d), (3), (4) and (5), Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To make it clear that:

1. Although the prior basic policy is continued, the buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach. Both are now available to him. The non-alternative character of the two remedies is stressed by the terms used in the present section. The section no longer speaks of "rescission," a term capable of ambiguous application either to transfer of title to the goods or to the contract of sale and susceptible also of confusion with cancellation for cause of an executed or executory portion of the contract. The remedy under this section is instead referred to simply as "revocation of acceptance" of goods tendered under a contract for sale and involves no suggestion of "election" of any sort.

2. Revocation of acceptance is possible only where the non-conformity substantially impairs the value of the goods to the buyer. For this purpose the test is not what the seller had reason to know at the time of contracting; the question is whether the non-conformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances.

3. "Assurances" by the seller under paragraph (b) of subsection (1) can rest as well in the circumstances or in the contract as in explicit language used at the time of delivery. The reason for recognizing such assurances is that they induce the buyer to delay discovery. These are the only assurances involved in paragraph (b). Explicit assurances may be made either in good faith or bad faith. In either case any remedy accorded by this Article is available to the buyer under the section on remedies for fraud.

4. Subsection (2) requires notification of revocation of acceptance within a reasonable time after discovery of the grounds for such revocation. Since this remedy will be generally resorted to only after attempts at adjustment have failed, the reasonable time period should extend in most cases beyond the time in which notification of breach must be given, beyond the time for discovery of non-conformity after acceptance and beyond the time for rejection after tender. The parties may by their agreement limit the time for notification under this section, but the same sanctions and considerations apply to such agreements as are discussed in the comment on manner and effect of rightful rejection.

5. The content of the notice under subsection (2) is to be determined in this case as in others by considerations of good faith, prevention of surprise, and reasonable adjustment. More will generally be necessary than the mere notification of breach required under the preceding section. On the other hand the requirements of the section on waiver of buyer's objections do not apply here. The fact that quick notification of trouble is desirable affords good ground for being slow to bind a buyer by his first statement. Following the general policy of this Article, the requirements of the content of notification are less stringent in the case of a non-merchant buyer.

6. Under subsection (2) the prior policy is continued of seeking substantial justice in regard to the condition of goods restored to the seller. Thus the buyer may not revoke his acceptance if the goods have materially deteriorated except by reason of their own defects. Worthless goods, however,

need not be offered back and minor defects in the articles reoffered are to be disregarded.

7. The policy of the section allowing partial acceptance is carried over into the present section and the buyer may revoke his acceptance, in appropriate cases, as to the entire lot or any commercial unit thereof.

* * *

PART 7
REMEDIES

* * *

§ 2–711. Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2–612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for non-delivery as provided in this Article (Section 2–713).

(2) Where the seller fails to deliver or repudiates the buyer may also

(a) if the goods have been identified recover them as provided in this Article (Section 2–502); or

(b) in a proper case obtain specific performance or replevy the goods as provided in this Article (Section 2–716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2–706).

Official Comment

Prior Uniform Statutory Provision: No comparable index section; Subsection (3)—Section 69(5), Uniform Sales Act.

Changes: The prior uniform statutory provision is generally continued and expanded in Subsection (3).

Purposes of Changes and New Matter:

1. To index in this section the buyer's remedies, subsection (1) covering those remedies permitting the recovery of money damages, and subsection (2) covering those which permit reaching the goods themselves. The remedies listed here are those available to a buyer who has not accepted

the goods or who has justifiably revoked his acceptance. The remedies available to a buyer with regard to goods finally accepted appear in the section dealing with breach in regard to accepted goods. The buyer's right to proceed as to all goods when the breach is as to only some of the goods is determined by the section on breach in installment contracts and by the section on partial acceptance.

Despite the seller's breach, proper retender of delivery under the section on cure of improper tender or replacement can effectively preclude the buyer's remedies under this section, except for any delay involved.

2. To make it clear in subsection (3) that the buyer may hold and resell rejected goods if he has paid a part of the price or incurred expenses of the type specified. "Paid" as used here includes acceptance of a draft or other time negotiable instrument or the signing of a negotiable note. His freedom of resale is coextensive with that of a seller under this Article except that the buyer may not keep any profit resulting from the resale and is limited to retaining only the amount of the price paid and the costs involved in the inspection and handling of the goods. The buyer's security interest in the goods is intended to be limited to the items listed in subsection (3), and the buyer is not permitted to retain such funds as he might believe adequate for his damages. The buyer's right to cover, or to have damages for non-delivery, is not impaired by his exercise of his right of resale.

3. It should also be noted that this Act requires its remedies to be liberally administered and provides that any right or obligation which it declares is enforceable by action unless a different effect is specifically prescribed (Section 1–106).

* * *

§ 2–714. Buyer's Damages for Breach in Regard to Accepted Goods

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2–607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

Official Comment

Prior Uniform Statutory Provision: Section 69(6) and (7), Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes:

1. This section deals with the remedies available to the buyer after the goods have been accepted and the time for revocation of acceptance has gone by. In general this section adopts the rule of the prior uniform statutory provision for measuring damages where there has been a breach of warranty as to goods accepted, but goes further to lay down an explicit provision as to the time and place for determining the loss.

The section on deduction of damages from price provides an additional remedy for a buyer who still owes part of the purchase price, and frequently the two remedies will be available concurrently. The buyer's failure to notify of his claim under the section on effects of acceptance, however, operates to bar his remedies under either that section or the present section.

2. The "non-conformity" referred to in subsection (1) includes not only breaches of warranties but also any failure of the seller to perform according to his obligations under the contract. In the case of such non-conformity, the buyer is permitted to recover for his loss "in any manner which is reasonable."

3. Subsection (2) describes the usual, standard and reasonable method of ascertaining damages in the case of breach of warranty but it is not intended as an exclusive measure. It departs from the measure of damages for non-delivery in utilizing the place of acceptance rather than the place of tender. In some cases the two may coincide, as where the buyer signifies his acceptance upon the tender. If, however, the non-conformity is such as would justify revocation of acceptance, the time and place of acceptance under this section is determined as of the buyer's decision not to revoke.

4. The incidental and consequential damages referred to in subsection (3), which will usually accompany an action brought under this section, are discussed in detail in the comment on the next section.

* * *

§ 2–715. Buyer's Incidental and Consequential Damages

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

Official Comment

Prior Uniform Statutory Provisions: Subsection (2)(b)—Sections 69(7) and 70, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes and New Matter:

1. Subsection (1) is intended to provide reimbursement for the buyer who incurs reasonable expenses in connection with the handling of rightfully rejected goods or goods whose acceptance may be justifiably revoked, or in connection with effecting cover where the breach of the contract lies in non-conformity or non-delivery of the goods. The incidental damages listed are not intended to be exhaustive but are merely illustrative of the typical kinds of incidental damage.

2. Subsection (2) operates to allow the buyer, in an appropriate case, any consequential damages which are the result of the seller's breach. The "tacit agreement" test for the recovery of consequential damages is rejected. Although the older rule at common law which made the seller liable for all consequential damages of which he had "reason to know" in advance is followed, the liberality of that rule is modified by refusing to permit recovery unless the buyer could not reasonably have prevented the loss by cover or otherwise. Subparagraph (2) carries forward the provisions of the prior uniform statutory provision as to consequential damages resulting from breach of warranty, but modifies the rule by requiring first that the buyer attempt to minimize his damages in good faith, either by cover or otherwise.

3. In the absence of excuse under the section on merchant's excuse by failure of presupposed conditions, the seller is liable for consequential damages in all cases where he had reason to know of the buyer's general or particular requirements at the time of contracting. It is not necessary that there be a conscious acceptance of an insurer's liability on the seller's part, nor is his obligation for consequential damages limited to cases in which he fails to use due effort in good faith.

Particular needs of the buyer must generally be made known to the seller while general needs must rarely be made known to charge the seller with knowledge.

Any seller who does not wish to take the risk of consequential damages has available the section on contractual limitation of remedy.

4. The burden of proving the extent of loss incurred by way of consequential damage is on the buyer, but the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances.

5. Subsection (2)(b) states the usual rule as to breach of warranty, allowing recovery for injuries "proximately" resulting from the breach. Where the injury involved follows the use of goods without discovery of the defect causing the damage, the question of "proximate" cause turns on whether it was reasonable for the buyer to use the goods without such inspection as would have revealed the defects. If it was not reasonable for

him to do so, or if he did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty.

6. In the case of sale of wares to one in the business of reselling them, resale is one of the requirements of which the seller has reason to know within the meaning of subsection (2)(a).

* * *

§ 2–716. Buyer's Right to Specific Performance or Replevin

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

Official Comment

Prior Uniform Statutory Provision: Section 68, Uniform Sales Act.

Changes: Rephrased.

Purposes of Changes: To make it clear that:

1. The present section continues in general prior policy as to specific performance and injunction against breach. However, without intending to impair in any way the exercise of the court's sound discretion in the matter, this Article seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale.

2. In view of this Article's emphasis on the commercial feasibility of replacement, a new concept of what are "unique" goods is introduced under this section. Specific performance is no longer limited to goods which are already specific or ascertained at the time of contracting. The test of uniqueness under this section must be made in terms of the total situation which characterizes the contract. Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation, as contrasted with contracts for the sale of heirlooms or priceless works of art which were usually involved in the older cases. However, uniqueness is not the sole basis of the remedy under this section for the relief may also be granted "in other proper circumstances" and inability to cover is strong evidence of "other proper circumstances".

3. The legal remedy of replevin is given the buyer in cases in which cover is reasonably unavailable and goods have been identified to the contract. This is in addition to the buyer's right to recover identified goods on the seller's insolvency (Section 2–502).

4. This section is intended to give the buyer rights to the goods comparable to the seller's rights to the price.

5. If a negotiable document of title is outstanding, the buyer's right of replevin relates of course to the document not directly to the goods. See Article 7, especially Section 7–602.

* * *

§ 2–717. Deduction of Damages from the Price

The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

Official Comment

Prior Uniform Statutory Provision: See Section 69(1)(a), Uniform Sales Act.

Purposes:

1. This section permits the buyer to deduct from the price damages resulting from any breach by the seller and does not limit the relief to cases of breach of warranty as did the prior uniform statutory provision. To bring this provision into application the breach involved must be of the same contract under which the price in question is claimed to have been earned.

2. The buyer, however, must give notice of his intention to withhold all or part of the price if he wishes to avoid a default within the meaning of the section on insecurity and right to assurances. In conformity with the general policies of this Article, no formality of notice is required and any language which reasonably indicates the buyer's reason for holding up his payment is sufficient.

* * *

§ 2–718. Liquidation or Limitation of Damages; Deposits

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this Article other than subsection (1), and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this Article on resale by an aggrieved seller (Section 2–706).

Official Comment

Prior Uniform Statutory Provision: None.

Purposes:

1. Under subsection (1) liquidated damage clauses are allowed where the amount involved is reasonable in the light of the circumstances of the case. The subsection sets forth explicitly the elements to be considered in determining the reasonableness of a liquidated damage clause. A term fixing unreasonably large liquidated damages is expressly made void as a penalty. An unreasonably small amount would be subject to similar criticism and might be stricken under the section on unconscionable contracts or clauses.

2. Subsection (2) refuses to recognize a forfeiture unless the amount of the payment so forfeited represents a reasonable liquidation of damages as determined under subsection (1). A special exception is made in the case of small amounts (20% of the price or $500, whichever is smaller) deposited as security. No distinction is made between cases in which the payment is to be applied on the price and those in which it is intended as security for performance. Subsection (2) is applicable to any deposit or down or part payment. In the case of a deposit or turn in of goods resold before the breach, the amount actually received on the resale is to be viewed as the deposit rather than the amount allowed the buyer for the trade in. However, if the seller knows of the breach prior to the resale of the goods turned in, he must make reasonable efforts to realize their true value, and this is assured by requiring him to comply with the conditions laid down in the section on resale by an aggrieved seller.

* * *

§ 2–719. Contractual Modification or Limitation of Remedy

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Official Comment

Prior Uniform Statutory Provision: None.

Purposes:

1. Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect.

However, it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. Similarly, under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.

2. Subsection (1)(b) creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. If the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed.

3. Subsection (3) recognizes the validity of clauses limiting or excluding consequential damages but makes it clear that they may not operate in an unconscionable manner. Actually such terms are merely an allocation of unknown or undeterminable risks. The seller in all cases is free to disclaim warranties in the manner provided in Section 2–316.

* * *

§ 2–720. Effect of "Cancellation" or "Rescission" on Claims for Antecedent Breach

Unless the contrary intention clearly appears, expressions of "cancellation" or "rescission" of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.

Official Comment

Prior Uniform Statutory Provision: None.

Purpose: This section is designed to safeguard a person holding a right of action from any unintentional loss of rights by the ill-advised use of such terms as "cancellation", "rescission", or the like. Once a party's rights have accrued they are not to be lightly impaired by concessions made in business decency and without intention to forego them. Therefore, unless the cancellation of a contract expressly declares that it is "without reservation of rights", or the like, it cannot be considered to be a renunciation under this section.

* * *

§ 2–721. Remedies for Fraud

Remedies for material misrepresentation or fraud include all remedies available under this Article for non-fraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

Official Comment

Prior Uniform Statutory Provision: None.

Purposes: To correct the situation by which remedies for fraud have been more circumscribed than the more modern and mercantile remedies for breach of warranty. Thus the remedies for fraud are extended by this section to coincide in scope with those for non-fraudulent breach. This section thus makes it clear that neither rescission of the contract for fraud nor rejection of the goods bars other remedies unless the circumstances of the case make the remedies incompatible.

* * *

§ 2–725. Statute of Limitations in Contracts for Sale

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from

voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.

Official Comment

Prior Uniform Statutory Provision: None.

Purposes: To introduce a uniform statute of limitations for sales contracts, thus eliminating the jurisdictional variations and providing needed relief for concerns doing business on a nationwide scale whose contracts have heretofore been governed by several different periods of limitation depending upon the state in which the transaction occurred. This Article takes sales contracts out of the general laws limiting the time for commencing contractual actions and selects a four year period as the most appropriate to modern business practice. This is within the normal commercial record keeping period.

Subsection (1) permits the parties to reduce the period of limitation. The minimum period is set at one year. The parties may not, however, extend the statutory period.

Subsection (2), providing that the cause of action accrues when the breach occurs, states an exception where the warranty extends to future performance.

Subsection (3) states the saving provision included in many state statutes and permits an additional short period for bringing new actions, where suits begun within the four year period have been terminated so as to leave a remedy still available for the same breach.

Subsection (4) makes it clear that this Article does not purport to alter or modify in any respect the law on tolling of the statute of limitations as it now prevails in the various jurisdictions.

* * *

STATE REFORM STATUTES

ALABAMA CODE

(1979, 2011, 2015)

§ 6–5–500. Intent of Legislature; legislative findings.

It is the intent of the Legislature that a comprehensive system consisting of the time for commencement of actions, for discoverability of actions based upon insidious disease and the repose of actions shall be instituted in this state. The Legislature finds that in order to assure the rights of all persons, and to provide for the fair, orderly and efficient administration of product liability actions in the courts of this state, a complete and unified approach to the time in which product liability actions may be brought and maintained is required. The Legislature finds that product liability actions and litigation have increased substantially, and the cost of such litigation has risen in recent years. The Legislature further finds that these increases are having an impact upon consumer prices, and upon the availability, cost and use of product liability insurance, thus, affecting the availability of compensation for injured consumers. Therefore, it is the intent of the Legislature to provide a comprehensive time framework for the commencement and maintenance of all product liability actions brought in this state.

§ 6–5–501. Definitions.

The following definitions are applicable in this division:

(1) ORIGINAL SELLER. Any person, firm, corporation, association, partnership, or other legal or business entity, which in the course of business or as an incident to business, sells or otherwise distributes a manufactured product (a) prior to or (b) at the time the manufactured product is first put to use by any person or business entity who did not acquire the manufactured product for either resale or other distribution in its unused condition or for incorporation as a component part in a manufactured product which is to be sold or otherwise distributed in its unused condition.

(2) PRODUCT LIABILITY ACTION. Any action brought by a natural person for personal injury, death, or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, or labeling of a manufactured product when such action is based upon (a) negligence, (b) innocent or negligent misrepresentation, (c) the manufacturer's liability doctrine, (d) the Alabama extended manufacturer's liability doctrine, as it exists or is hereafter construed or modified, (e) breach of any implied warranty, or (f) breach of any oral

express warranty and no other. A product liability action does not include an action for contribution or indemnity.

a. No product liability action may be asserted or may be provided a claim for relief against any distributor, wholesaler, dealer, retailer, or seller of a product, or against an individual or business entity using a product in the production or delivery of its products or services (collectively referred to as the distributor) unless any of the following apply:

1. The distributor is also the manufacturer or assembler of the final product and such act is causally related to the product's defective condition.

2. The distributor exercised substantial control over the design, testing, manufacture, packaging, or labeling of the product and such act is causally related to the product's condition.

3. The distributor altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought.

4. It is the intent of this subsection to protect distributors who are merely conduits of a product. This subsection is not intended to protect distributors from independent acts unrelated to the product design or manufacture, such as independent acts of negligence, wantonness, warranty violations, or fraud.

b. Notwithstanding paragraph a., if a claimant is unable, despite a good faith exercise of due diligence, to identify the manufacturer of an allegedly defective and unreasonably dangerous product, a product liability action may be brought against a distributor, wholesaler, dealer, retailer, or seller of a product, or against the individual or business entity using a product in the production or delivery of its products or services. The claimant shall provide an affidavit certifying that the claimant, or the attorney therefor, has in good faith exercised due diligence and has been unable to identify the manufacturer of the product in question.

c. In a product liability action brought pursuant to paragraph b., against a distributor, wholesaler, dealer, retailer, or seller of a product, or against the individual or business entity using a product in the production or delivery of its products or services, the party, upon answering or otherwise pleading, may file an affidavit certifying the correct identity of the manufacturer of the product that allegedly caused the claimant's injury. Once the claimant has received an affidavit, the claimant shall exercise due diligence to file an action and obtain jurisdiction over the manufacturer. Once the claimant has commenced an action against the manufacturer, and the manufacturer has or is required to have answered or otherwise pleaded, the claimant shall voluntarily dismiss all claims against any distributor, wholesaler, dealer, retailer, or seller of the product in question, or against the individual or business entity using a product in the production or delivery of its

products or services, unless the claimant can identify prima facie evidence that the requirements of paragraph a. for maintaining a product liability action against such a party are satisfied.

(3) The definitions used herein are to be used for purposes of this division and are not to be construed to expand or limit the status of the common or statutory law except as expressly modified by the provisions of this division.

§ 6–5–502. Limitation periods for product liability actions.

(a) All product liability actions against an original seller must be commenced within the following time limits and not otherwise:

(1) Except as specifically provided in subsections (b), (c), and (e) of this section, within one year of the time the personal injury, death, or property damage occurs; and

(2) Except as specifically provided in subsections (b), (c), and (e) of this section, each element of a product liability action shall be deemed to accrue at the time the personal injury, death, or property damage occurs;

(b) Where the personal injury, including personal injury resulting in death, or property damage (i) either is latent or by its nature is not discoverable in the exercise of reasonable diligence at the time of its occurrence, and (ii) is the result of ingestion of or exposure to some toxic or harmful or injury-producing substance, element or particle, including radiation, over a period of time as opposed to resulting from a sudden and fortuitous trauma, then, in that event, the product liability action claiming damages for such personal injury, or property damage must be commenced within one year from the date such personal injury or property damage is or in the exercise of reasonable diligence should have been discovered by the plaintiff or the plaintiff's decedent, and in such cases each of the elements of the product liability action shall be deemed to accrue at the time the personal injury is or in the exercise of reasonable diligence should have been discovered by the plaintiff or the plaintiff's decedent; and

(c) Notwithstanding the provisions of subsections (a) and (b) of this section, a product liability action against an original seller must be brought within 10 years after the manufactured product is first put to use by any person or business entity who did not acquire the manufactured product for either resale or other distribution in its unused condition or for incorporation as a component part in a manufactured product which is to be sold or otherwise distributed in its unused condition.*

(d) The original seller may by express written agreement only waive or extend the period of time provided for in subsection (c) of this section; and

* Held unconstitutional in *Lankford v. Sullivan, Long & Hagerty*, 416 So.2d 996, 1004 (Ala. 1982).

(e)(1) Notwithstanding the provisions of subsection (c) of this section, if a plaintiff or plaintiff's decedent is entitled to maintain a product liability action because of the failure of an original seller to alter, repair, recall, inspect, or issue warnings or instructions about the manufactured product, or otherwise to take any action or precautions with regard to the safety of the manufactured product for the benefit of users or consumers after the manufactured product was sold or otherwise distributed by an original seller, and, if any federal or state governmental agency shall impose a requirement so to alter, repair, recall, inspect, or issue warnings or instructions about the manufactured product or otherwise to take any actions or precautions with regard to the safety of the manufactured product for the benefit of users or consumers after the manufactured product was sold or otherwise distributed by an original seller, then, if these two events have occurred, a product liability action for damages on account of such failure for personal injury, death, or property damage must be commenced within one year of the time the personal injury, death, or property damage resulting from such failure occurs;

(2) In product liability actions predicated upon the failure to act and the governmental action, set forth in subdivision (1) of this subsection, where the personal injury, including personal injury resulting in death, or property damage (I) either is latent or by its nature is not discoverable in the exercise of reasonable diligence at the time of its occurrence, and (ii) is the result of the ingestion of or exposure to some toxic or harmful or injury-producing substance, element, or particle, including radiation, over a period of time as opposed to resulting from a sudden and fortuitous trauma, then in that event, the product liability action claiming damages for such personal injury or property damage must be commenced within one year from the date such personal injury or property damage is or in the exercise of reasonable diligence should have been discovered by the plaintiff or the plaintiff's decedent and in such cases each of the elements of the product liability action shall be deemed to accrue at the time the personal injury or property damage is or in the exercise of reasonable diligence should have been discovered by the plaintiff or plaintiff's decedent; and

(3) Notwithstanding the provisions of subdivisions (1) and (2) of this subsection, a product liability action against an original seller must be brought within 10 years after the date of the imposition of such requirement by such governmental agency.

§ 6–5–503. Applicability of division; not retroactive.

This division and each section thereof shall apply only to product liability actions, wherein each element accrues after the effective date of this division, and no provision of this division shall have retroactive application.

§ 6–5–520. Intent of Legislature; legislative findings; collateral source rule modified.

The Legislature finds that product liability litigation has increased substantially and the cost of such litigation has risen in recent years. The Legislature further finds that these increases have an impact upon the price and availability of products. It is the belief of the Legislature that there are special reasons for modifying the collateral source rule in this state as it applies to product liability actions. The Legislature finds that the recovery by plaintiffs of medical and hospital expenses as damages where plaintiffs are reimbursed for the same medical and hospital expenses from other sources contributes to the increase in the cost of product liability litigation. It is the intent of the Legislature that plaintiffs be compensated fully for any medical or hospital expenses incurred as a result of injuries sustained from a breach of product liability laws, but that plaintiffs not receive compensation more than once for the same medical and hospital expenses.

§ 6–5–521. "Product liability action" defined.

(a) A "product liability action" means any action brought by a natural person for personal injury, death, or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, or labeling of a manufactured product when such action is based upon (1) negligence, (2) innocent or negligent misrepresentation, (3) the manufacturer's liability doctrine, (4) the Alabama extended manufacturer's liability doctrine as it exists or is hereafter construed or modified, (5) breach of any implied warranty, or (6) breach of any oral express warranty and no other. A product liability action does not include an action for contribution or indemnity.

(b) No product liability action may be asserted or may be provided a claim for relief against any distributor, wholesaler, dealer, retailer, or seller of a product, or against an individual or business entity using a product in the production or delivery of its products or services (collectively referred to as the distributor) unless any of the following apply:

(1) The distributor is also the manufacturer or assembler of the final product and such act is causally related to the product's defective condition.

(2) The distributor exercised substantial control over the design, testing, manufacture, packaging, or labeling of the product and such act is causally related to the product's condition.

(3) The distributor altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought.

(4) It is the intent of this subsection to protect distributors who are merely conduits of a product. This subsection is not intended to protect

distributors from independent acts unrelated to the product design or manufacture, such as independent acts of negligence, wantonness, warranty violations, or fraud.

(c) Notwithstanding subsection (b), if a claimant is unable, despite a good faith exercise of due diligence, to identify the manufacturer of an allegedly defective and unreasonably dangerous product, a product liability action may be brought against a distributor, wholesaler, dealer, retailer, or seller of a product, or against the individual or business entity using a product in the production or delivery of its products or services. The claimant shall provide an affidavit certifying that the claimant, or the attorney therefor, has in good faith exercised due diligence and has been unable to identify the manufacturer of the product in question.

(d) In a product liability action brought pursuant to subsection (c), against a distributor, wholesaler, dealer, retailer, or seller of a product, or against the individual or business entity using a product in the production or delivery of its products or services, the party, upon answering or otherwise pleading, may file an affidavit certifying the correct identity of the manufacturer of the product that allegedly caused the claimant's injury. Once the claimant has received an affidavit, the claimant shall exercise due diligence to file an action and obtain jurisdiction over the manufacturer. Once the claimant has commenced an action against the manufacturer, and the manufacturer has or is required to have answered or otherwise pleaded, the claimant shall voluntarily dismiss all claims against any distributor, wholesaler, dealer, retailer, or seller of the product in question, or against the individual or business entity using a product in the production or delivery of its products or services, unless the claimant can identify prima facie evidence that the requirements of subsection (b) for maintaining a product liability action against such a party are satisfied.

(e) The definition used herein is to be used for purposes of this division and is not to be construed to expand or limit the status of the common or statutory law except as expressly modified by the provisions of this division.

§ 6–5–522. Evidence of medical expense reimbursement mitigates damages; cost of obtaining reimbursement recoverable.

In all product liability actions where damages for any medical or hospital expenses are claimed and are legally recoverable for personal injury or death, evidence that the plaintiff's medical or hospital expenses have been or will be paid or reimbursed (1) by medical or hospital insurance, or (2) pursuant to the medical and hospital payment provisions of law governing workmen's compensation, shall be admissible as competent evidence in mitigation of such medical or hospital expense damages. In such actions upon admission of evidence respecting reimbursement or payment of medical or hospital expenses, the plaintiff shall be entitled to introduce evidence of the cost of obtaining

reimbursement or payment of medical or hospital expenses. Such portion of the costs of obtaining reimbursement or payment of medical or hospital expenses as the trier of fact finds is reasonably related to the reimbursement or payment received or to be received by the plaintiff shall be a recoverable item of such damages for medical or hospital expenses.

§ 6–5–523. Reimbursement for medical expenses discoverable.

In all product liability actions information respecting reimbursement or payment obtained or which may be obtained by the plaintiff for medical or hospital expenses shall be subject to discovery.

§ 6–5–524. Evidence of reimbursement inadmissible if recipient must repay.

Upon proof by the plaintiff to the court that the plaintiff is obligated to repay the medical or hospital expenses which have been or will be paid or reimbursed, no evidence relating to such reimbursement or payment not otherwise admissible shall be admissible as a result of this division.

§ 6–5–525. Prior rights not affected.

This division shall not affect any rights which have accrued prior to July 30, 1979.

§ 6–5–530. Liability for damages.

(a) In any civil action for personal injury, death, or property damage caused by a product, regardless of the type of claims alleged or the theory of liability asserted, the plaintiff must prove, among other elements, that the defendant designed, manufactured, sold, or leased the particular product the use of which is alleged to have caused the injury on which the claim is based, and not a similar or equivalent product. Designers, manufacturers, sellers, or lessors of products not identified as having been used, ingested, or encountered by an allegedly injured party may not be held liable for any alleged injury. A person, firm, corporation, association, partnership, or other legal or business entity whose design is copied or otherwise used by a manufacturer without the designer's express authorization is not subject to liability for personal injury, death, or property damage caused by the manufacturer's product, even if use of the design is foreseeable.

(b) This act is not intended in any way to alter or affect any other principle of law, including those that apply under the Alabama Medical Liability Act, Section 6–5–540 et seq., Code of Alabama 1975; those that apply to successor entities, distributors, component manufacturers, or manufacturers who use component parts in assembling products for sale as complete units; or those that apply to the operation of a contract, including a licensing agreement.

ARIZONA REVISED STATUTES ANNOTATED

(1978, 1989, 1995, 2004, 2009, 2012)

§ 12–551. Product liability.

A product liability action as defined in § 12–681 shall be commenced and prosecuted within the period prescribed in § 12–542, except that no product liability action may be commenced and prosecuted if the cause of action accrues more than twelve years after the product was first sold for use or consumption, unless the cause of action is based upon the negligence of the manufacturer or seller or a breach of an express warranty provided by the manufacturer or seller.

§ 12–681. Definitions.

In this article, unless the context otherwise requires:

1. "Defective and unreasonably dangerous" does not include a food product that is otherwise fit for human consumption and nourishment.

2. "Food product" means any product that is grown, prepared, provided, served or sold and that is primarily intended for human consumption and nourishment.

3. "Manufacturer" means a person or entity that designs, assembles, fabricates, produces, constructs or otherwise prepares a product or component part of a product before its sale to a user or consumer, including a seller owned in whole or significant part by the manufacturer or a seller owning the manufacturer in whole or significant part.

4. "Product" means the individual product or any component part of the product that is the subject of a product liability action.

5. "Product liability action" means any action brought against a manufacturer or seller of a product for damages for bodily injury, death or property damage caused by or resulting from the manufacture, construction, design, formula, installation, preparation, assembly, testing, packaging, labeling, sale, use or consumption of any product, the failure to warn or protect against a danger or hazard in the use or misuse of the product or the failure to provide proper instructions for the use or consumption of any product.

6. "Product safety analysis or review" means any investigation, inquiry, review, evaluation or other means by which a person or entity seeks to determine, calculate, predict, estimate, evaluate or report the safety or health effects of the use of any of its products, systems, services or processes. Product safety analysis or review includes an analysis or review by a component manufacturer of the safety and health effects of component parts in end products. A product safety analysis or review may be conducted by employees of the person or entity or by consultants engaged specifically to perform the analysis or review.

7. "Reasonable remedial measures" means actions taken as a result of a product safety analysis or review and intended to improve the safety of products, systems, services or processes or to lessen the likelihood of a safety-related accident. These actions include:

(a) Modifications to the product, system, service or process.

(b) Changes in quality assurance procedures or policies.

(c) Modifications made to the design or method of manufacturing, to manufacturing equipment or to the testing of the product, system, service or process.

(d) Changes or additions to training programs or safety education programs.

(e) Personnel or human resources measures related to the product, system, service or process.

(f) The use or modification of warnings, notices or changes to owner manuals and related materials.

(g) The recall of products.

8. "Reasonably foreseeable alteration, modification, use or consumption" means an alteration, modification, use or consumption of the product that would be expected of an ordinary and prudent purchaser, user or consumer and that an ordinary and prudent manufacturer should have anticipated.

9. "Seller" means a person or entity, including a wholesaler, distributor, retailer or lessor, that is engaged in the business of leasing any product or selling any product for resale, use or consumption.

10. "State of the art" means the technical, mechanical and scientific knowledge of manufacturing, designing, testing or labeling the same or similar products that was in existence and reasonably feasible for use at the time of manufacture.

§ 12–682. Limitation.

The previously existing common law of products liability is modified only to the extent specifically stated in this article and § 12–551.

§ 12–683. Affirmative defenses.

In any product liability action, a defendant shall not be liable if the defendant proves that any of the following apply:

1. The defect in the product is alleged to result from inadequate design or fabrication, and if the plans or designs for the product or the methods and techniques of manufacturing, inspecting, testing and labeling the product conformed with the state of the art at the time the product was first sold by the defendant.

2. The proximate cause of the incident giving rise to the action was an alteration or modification of the product that was not reasonably

foreseeable, made by a person other than the defendant and subsequent to the time the product was first sold by the defendant.

3. The proximate cause of the incident giving rise to the action was a use or consumption of the product that was for a purpose, in a manner or in an activity other than that which was reasonably foreseeable or was contrary to any express and adequate instructions or warnings appearing on or attached to the product or on its original container or wrapping, if the intended consumer knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings.

4. The proximate cause of the incident or incidents giving rise to the action was the repeated consumption of a food product that is not defective and unreasonably dangerous if consumed in reasonable quantities.

§ 12–684. Indemnification—Tender of defense—Execution.

A. In any product liability action where the manufacturer refuses to accept a tender of defense from the seller, the manufacturer shall indemnify the seller for any judgment rendered against the seller and shall also reimburse the seller for reasonable attorneys' fees and costs incurred by the seller in defending such action, unless either paragraph 1 or 2 applies:

1. The seller had knowledge of the defect in the product.

2. The seller altered, modified or installed the product, and such alteration, modification or installation was a substantial cause of the incident giving rise to the action, was not authorized or requested by the manufacturer and was not performed in compliance with the directions or specifications of the manufacturer.

B. If a judgment is rendered in favor of the plaintiff and a seller is granted indemnity against a manufacturer, the plaintiff shall first attempt to satisfy the judgment by levying execution upon the manufacturer in this state or in the state where the manufacturer's principal place of business is located and by making demand upon any liability insurance carrier of the manufacturer whose identity is known to plaintiff before attempting to collect the judgment from the seller or the seller's liability insurance carrier. The return of a writ of execution partially or wholly unsatisfied or the failure of the manufacturer's insurance carrier to pay the judgment upon demand shall be deemed full compliance with the plaintiff's obligation to attempt to collect from the manufacturer.

C. In any product liability action the manufacturer of the product shall be indemnified by the seller of the product for any judgment rendered against the manufacturer and shall also reimburse the manufacturer for reasonable attorneys' fees and costs incurred in defending such action, if the seller provided the plans or specifications for the manufacturer or preparation of the product and such plans or specifications were a substantial cause of the product's alleged defect and

if the product was manufactured in compliance with and according to the plans or specifications of the seller. If a judgment is rendered in favor of the plaintiff and a manufacturer is granted indemnity against a seller, the plaintiff shall first attempt to satisfy the judgment by levying execution upon the seller in this state or in the state where the seller's principal place of business is located and by making demand upon any liability insurance carrier of the seller whose identity is known to plaintiff before attempting to collect the judgment from the manufacturer or manufacturer's liability insurance carrier. The return of a writ of execution partially or wholly unsatisfied or the failure of the seller's insurance carrier to pay the judgment upon demand shall be deemed full compliance with the plaintiff's obligation to attempt to collect from the seller. The provisions of this subsection shall not apply if the manufacturer had knowledge or with the exercise of reasonable and diligent care should have had knowledge of the defect in the product.

§ 12–685. Contents of complaint—Amount of recovery.

In any product liability action no dollar amount or figure shall be included in the complaint. The complaint shall pray for such damages as are reasonable in the premises. The complaint shall include a statement reciting that the jurisdictional amount established for filing the action is satisfied.

§ 12–686. Inadmissible evidence—State of the art—Modification.

In any product liability action, the following shall not be admissible as direct evidence of a defect:

1. Evidence of advancements or changes in the state of the art subsequent to the time the product was first sold by the defendant.

2. Evidence of any change made in the warnings, design or methods of manufacturing or testing the product or any similar product subsequent to the time the product was first sold by the defendant.

§ 12–687. Reasonable remedial measures; cause of action; punitive damages.

If a person or entity conducts a product safety analysis or review and, as a result, takes reasonable remedial measures, the following shall apply to a product liability action brought against the person or entity:

1. The plaintiff may not use the product safety analysis or review or the reasonable remedial measures to prove negligence, that the product was defective or unreasonably dangerous, or other culpable conduct in a product liability action. However, the plaintiff may use the product safety analysis or review or reasonable remedial measures for other purposes, such as proving feasibility of precautionary measures, impeachment or to controvert any position taken by a defendant in litigation which is inconsistent with the contents of the product safety analysis or review or reasonable remedial measures.

2. This subsection does not prevent a plaintiff in a product liability action from proving negligence, that the product was defective or unreasonably dangerous, or other culpable conduct by other independent evidence or sources, even if such evidence or sources are mentioned or included in the product safety analysis or review or reasonable remedial measures.

3. The plaintiff may not use the product safety analysis or review or the reasonable remedial measures to prove conduct that would subject the person or entity that caused the product safety analysis or review to be performed to punitive or exemplary damages, unless the plaintiff establishes that the analysis or review, or the reasonable remedial measures, were undertaken in bad faith or solely for the purpose of affecting the litigation instituted by the plaintiff.

4. The existence and contents of a product safety analysis or review and any resulting reasonable remedial measures are discoverable and subject to disclosure in a product liability action unless otherwise privileged. However, a portion of a product safety analysis or review may be designated and maintained as confidential and protected from public disclosure pursuant to applicable rules of civil procedures if the portion involves trade secrets as defined in section 44–401, proprietary material or competitively sensitive information. Any dispute as to confidentiality shall be determined by a court following an in camera review of the portion of the analysis or review in question.

§ 12–688. Duty to warn; food products.

There is no duty to warn a purchaser, user or consumer or any other person, regardless of age, that the consumption of a food product that is not defective and unreasonably dangerous may cause health problems if consumed excessively.

§ 12–689. Exemption from punitive or exemplary damages; application; definitions.

A. A manufacturer, service provider or seller is not liable for exemplary or punitive damages if any of the following applies:

1. The product alleged to have caused the harm was designed, manufactured, packaged, labeled, sold or represented in relevant and material respects according to the terms of an approval, conditional approval, clearance, license or similar determination of a government agency.

2. The product, activity or service complied with all statutes of this State or the United States or standards, rules, regulations, orders or other actions of a government agency pursuant to statutory authority that are relevant and material to the event or risk allegedly causing the harm and the product, activity or service complied at the time the product left the control of the manufacturer or seller.

3. The act or transaction forming the basis of the claim involves terms of service, contract provisions, representations or other practices authorized by, or in compliance with, the rules, regulations, standards or orders of, or a statute administered by, a government agency.

B. This section does not apply if the claimant establishes that the manufacturer, service provider or seller, at any time before the activity or event that allegedly caused the harm, did any of the following:

1. Sold the product, activity or service after the effective date of a final order of a government agency to remove the product from the market, to withdraw its approval of the product, activity or service or to substantially alter its terms of approval of the product, activity or service in a manner that would have avoided the claimant's alleged injury. For the purposes of this paragraph and paragraph 4 of this subsection, a product, activity or service is sold when it is delivered or provided to the end user, even if payment is not made until later.

2. Intentionally, and in violation of applicable regulations as determined by final action of the government agency, withheld from or misrepresented to the government agency information material to the approval or maintaining of approval of the product, activity or service, and the information is relevant to the harm that the claimant allegedly suffered.

3. Made an illegal payment to an official or employee of a government agency for the purpose of securing or maintaining approval of the product, activity or service.

4. After the product was sold or the service was provided, a government agency found that the manufacturer, service provider or seller knowingly violated applicable regulations requiring the reporting to that government agency of risks of harm and the unreported information was material and relevant to the harm that the claimant allegedly suffered.

C. This section shall not be construed to do any of the following:

1. Expand the authority of any state agency or state agent to adopt or promulgate standards or regulations where no such authority previously existed.

2. Reduce the scope of any limitation on liability based on compliance with the rules or regulations of a government agency applicable to a specific act, transaction, person or industry.

3. Affect the liability of a service provider based on rates filed with and reviewed or approved by a government agency.

D. For the purposes of this section:

1. "Activity" means an action, pattern of operation or practice that is regulated, approved, licensed or otherwise required by a government agency.

2. "Government agency" means this State or the United States or any agency of this state or the United States or any entity vested with the authority of this State or the United States to issue rules, regulations, orders or standards concerning the design, manufacture, packaging, labeling or advertising of a product or activity or the provision of a service.

3. "Manufacturer" means any person who is engaged in a business to produce, create, make or construct any product or component part of a product and who does either of the following:

(a) Designs, manufactures or formulates the product or component part of the product.

(b) Engages another person to design, manufacture or formulate the product or component part of the product.

4. "Product" means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts and produced for introduction into trade or commerce.

5. "Seller" means a person who in the course of a business conducted for that purpose does either of the following:

(a) Sells, distributes, rents, leases, prepares, blends, packages, labels or otherwise is involved in placing a product, activity or service in the stream of commerce.

(b) Installs, repairs, refurbishes, reconditions or maintains a product.

6. "Service" means all actions that are engaged in for other persons for a consideration, which actions involve predominantly the performance of a service as distinguished from manufacture or sale of a product and that are regulated, approved or licensed by a government agency.

§ 12–701. Drugs—Exemplary or punitive damages—Definition.

A. The manufacturer or seller of a drug is not liable for exemplary or punitive damages if the drug alleged to cause the harm either:

1. was manufactured and labeled in relevant and material respects in accordance with the terms of an approval or license issued by the federal Food and Drug Administration under the Food, Drug and Cosmetic Act (21 United States Code Section 301, et seq.) or the Public Health Service Act (42 United States Code Section 201, et seq.) or

2. is generally recognized as safe and effective pursuant to conditions established by the federal food and drug administration and applicable regulations, including packaging and labeling regulations.

B. Subsection A does not apply if the plaintiff proves, by clear and convincing evidence, that the defendant, either before or after making the drug available for public use, knowingly, in violation of applicable

federal food and drug administration regulations, withheld from or misrepresented to the administration information known to be material and relevant to the harm which the plaintiff allegedly suffered.

C. In this section, "drug" means the same as provided in Section 201(g)(1) of the federal food, drug and cosmetic act (21 United States Code Section 321(g)(1)).

[Subsection B held preempted, Kobar ex rel Kobar v. Novartis Corp., 378 F.Supp.2d 1166 (D.Ariz. Jun 03, 2005).]

ARKANSAS CODE ANNOTATED

(1973, 1979, 1987, 2007, 2016)

§ 16–116–101. Liability of supplier.

(a) A supplier of a product is subject to liability in damages for harm to a person or to property if:

(1) The supplier is engaged in the business of manufacturing, assembling, selling, leasing, or otherwise distributing the product;

(2) The product was supplied by him or her in a defective condition that rendered it unreasonably dangerous; and

(3) The defective condition was a proximate cause of the harm to a person or to property.

(b) The provisions of subsection (a) of this section apply although the claiming party has not obtained the product from or entered into any contractual relation with the supplier.

(c)(1) Any licensee under § 17–42–103(7)(A) who is only providing brokerage and sales services under his or her license shall not be considered a supplier under this section.

(2)(A) Except as provided in subdivisions (c)(2)(B) and (C) of this section, real estate and improvements located on real estate shall not be considered a product under this section.

(B) Any tangible object or good produced that is affixed to, installed on, or incorporated into real estate or any improvement on real estate shall be considered a product under this section.

(C) If environmental contaminants exist or have occurred in an improvement on real estate, the improvement on real estate shall be considered a product under this section.

§ 16–116–202. Definitions.

As used in this subchapter:

(1) "Anticipated life" means the period over which the product may reasonably be expected to be useful to the user as determined by the trier of facts;

(2) "Defective condition" means a condition of a product that renders it unsafe for reasonably foreseeable use and consumption;

(3) "Manufacturer" means the designer, fabricator, producer, compounder, processor, or assembler of any product or its component parts;

(4) "Product" means any tangible object or goods produced, excluding real estate and improvements located thereon. Provided, any tangible object or good produced that is affixed to, installed on, or incorporated into real estate or any improvement thereon shall constitute a product under this subchapter. Provided further, an improvement on

real estate shall constitute a product in the event that environmental contaminants exist or have occurred in the improvement;

(5) "Product liability action" includes all actions brought for or on account of personal injury, death, or property damage caused by or resulting from, the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging, or labeling of any product;

(6)(A) "Supplier" means any individual or entity engaged in the business of selling a product, whether the sale is for resale, or for use or consumption.

(B) "Supplier" includes a retailer, wholesaler, or distributor and also includes a lessor or bailor engaged in the business of leasing or bailment of a product; and

(C) "Supplier" shall not include any licensee, as the term is defined in § 17–42–103(10), who is providing only brokerage and sales services under a license.

(7)(A) "Unreasonably dangerous" means that a product is dangerous to an extent beyond that which would be contemplated by the ordinary and reasonable buyer, consumer, or user who acquires or uses the product, assuming the ordinary knowledge of the community or of similar buyers, users, or consumers as to its characteristics, propensities, risks, dangers, and proper and improper uses, as well as any special knowledge, training, or experience possessed by the particular buyer, user, or consumer or which he or she was required to possess.

(B) However, as to a minor, "unreasonably dangerous" means that a product is dangerous to an extent beyond that which would be contemplated by an ordinary and reasonably careful minor considering his or her age and intelligence.

§ 16–116–203. Three year commencement requirement.

All product liability actions shall be commenced within three (3) years after the date on which the death, injury, or damage complained of occurs.

§ 16–116–204. Certain knowledge considered evidence.

(a)(1) In determining the liability of the manufacturer, the state of scientific and technological knowledge available to the manufacturer or supplier at the time the product was placed on the market, rather than at the time of the injury, may be considered as evidence.

(2) Consideration may also be given to the customary designs, methods, standards, and techniques of manufacturing, inspecting, and testing by other manufacturers or sellers of similar products.

(b) The provisions of this section shall not apply to an action based on express warranty or misrepresentation regarding the product.

§ 16–116–205. Compliance with statute or administrative regulation—Evidence that product not in unreasonably dangerous condition.

(a) Compliance by a manufacturer or supplier with any federal or state statute or administrative regulation existing at the time a product was manufactured and prescribing standards of design, inspection, testing, manufacture, labeling, warning, or instructions for use of a product shall be considered as evidence that the product is not in an unreasonably dangerous condition in regard to matters covered by these standards.

(b) Supplying of a product after its anticipated life may be considered as a defense by the manufacturer as between the manufacturer and supplier if the product is supplied after the expiration date placed on the product by the manufacturer as required by law.

(c) Use of a product beyond its anticipated life by a consumer where the consumer knew or should have known the anticipated life of the product may be considered as evidence of fault on the part of the consumer.

§ 16–116–206. Unreasonably dangerous by alteration.

If a product is not unreasonably dangerous at the time it leaves the control of the manufacturer or supplier but was made unreasonably dangerous by subsequent unforeseeable alteration, change, improper maintenance, or abnormal use, such conduct may be considered as evidence of fault on the part of the user.

§ 16–116–207. Supplier's action for indemnity.

A supplier of a defective product who was not the manufacturer shall have a cause of action for indemnity from the manufacturer of a defective product arising from the supplying of the defective product.

CALIFORNIA CIVIL CODE

(1987, 1997, 1998)

§ 1714.45. Products liability; consumer products known by consumers to be inherently unsafe.

(a) In a products liability action, a manufacturer or seller shall not be liable if both of the following apply:

(1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community.

(2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, and butter, as identified in Comment *i* to Section 402A of the *Restatement (Second) of Torts.*

(b) This section does not exempt the manufacture or sale of tobacco products by tobacco manufacturers and their successors in interest from product liability actions, but does exempt the sale or distribution of tobacco products by any other person, including, but not limited to, retailers or distributors.

(c) For purposes of this section, the term "product liability action" means any action for injury or death caused by a product, except that the term does not include an action based on a manufacturing defect or breach of an express warranty.

(d) This section is intended to be declarative of and does not alter or amend existing California law, including *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, and shall apply to all product liability actions pending on, or commenced after, January 1, 1988.

(e) This section does not apply to, and never applied to, an action brought by a public entity to recover the value of benefits provided to individuals injured by a tobacco-related illness caused by the tortious conduct of a tobacco company or its successor in interest, including, but not limited to, an action brought pursuant to Section 14124.71 of the Welfare and Institutions Code. In the action brought by a public entity, the fact that the injured individual's claim against the defendant may be barred by a prior version of this section shall not be a defense. This subdivision does not constitute a change in, but is declaratory of, existing law relating to tobacco products.

(f) It is the intention of the Legislature in enacting the amendments to subdivisions (a) and (b) of this section adopted at the 1997–98 Regular Session to declare that there exists no statutory bar to tobacco-related personal injury, wrongful death, or other tort claims against tobacco manufacturers and their successors in interest by California smokers or others who have suffered or incurred injuries, damages, or costs arising from the promotion, marketing, sale, or consumption of tobacco products. It is also the intention of the

Legislature to clarify that such claims which were or are brought shall be determined on their merits, without the imposition of any claim of statutory bar or categorical defense.

(g) This section shall not be construed to grant immunity to a tobacco industry research organization.

COLORADO REVISED STATUTES

(1977, 1981, 1986–87, 2003–04, 2007, 2019)

§ 13–21–102.5. Limitations on damages for noneconomic loss or injury.

(1) The general assembly finds, determines, and declares that awards in civil actions for noneconomic losses or injuries often unduly burden the economic, commercial, and personal welfare of persons in this state; therefore, for the protection of the public peace, health, and welfare, the general assembly enacts this section placing monetary limitations on such damages for noneconomic losses or injuries.

(2) As used in this section:

(a) "Derivative noneconomic loss or injury" means nonpecuniary harm or emotional stress to persons other than the person suffering the direct or primary loss or injury.

(b) "Noneconomic loss or injury" means nonpecuniary harm for which damages are recoverable by the person suffering the direct or primary loss or injury, including pain and suffering, inconvenience, emotional stress, and impairment of the quality of life. "Noneconomic loss or injury" includes a damage recovery for nonpecuniary harm for actions brought under section 13–21–201 or 13–21–202.

(3)(a) In any civil action other than medical malpractice actions in which damages for noneconomic loss or injury may be awarded, the total of such damages shall not exceed the sum of two hundred fifty thousand dollars, unless the court finds justification by clear and convincing evidence therefor. In no case shall the amount of noneconomic loss or injury damages exceed five hundred thousand dollars. The damages for noneconomic loss or injury in a medical malpractice action shall not exceed the limitations on noneconomic loss or injury specified in section 13–64–302.

(b) In any civil action, no damages for derivative noneconomic loss or injury may be awarded unless the court finds justification by clear and convincing evidence therefor. In no case shall the amount of such damages exceed two hundred fifty thousand dollars.

(c)(I) The limitations on damages set forth in subsections (3)(a) and (3)(b) of this section must be adjusted for inflation as of January 1, 1998, January 1, 2008, January 1, 2020, and each January 1 every two years thereafter. The adjustments made on January 1, 1998, January 1, 2008, January 1, 2020, and each January 1 every two years thereafter must be based on the cumulative annual adjustment for inflation for each year since the effective date of the damages limitations in subsections (3)(a) and (3)(b) of this section. The adjustments made pursuant to this subsection (3)(c)(I) must be rounded upward or downward to the nearest ten-dollar increment.

(II) As used in this paragraph (c), "inflation" means the annual percentage change in the United States department of labor, bureau of labor statistics, consumer price index for Denver-Boulder, all items, all urban consumers, or its successor index.

(III) The secretary of state shall certify the adjusted limitation on damages within fourteen days after the appropriate information is available, and:

(A) The adjusted limitation on damages is applicable to all claims for relief that accrue on or after January 1, 1998, and before January 1, 2008; and

(B) The adjusted limitation on damages as of January 1, 2008, is applicable to all claims for relief that accrue on and after January 1, 2008, and before January 1, 2020; and

(C) The adjusted limitation on damages as of January 1, 2020, and each January 1 every two years thereafter is applicable to all claims for relief that accrue on and after the specified January 1 and before the January 1 two years thereafter.

(IV) Nothing in this subsection (3) shall change the limitations on damages set forth in section 13–64–302, or the limitation on damages set forth in section 33–44–113, C.R.S.

(4) The limitations specified in subsection (3) of this section shall not be disclosed to a jury in any such action, but shall be imposed by the court before judgment.

(5) Nothing in this section shall be construed to limit the recovery of compensatory damages for physical impairment or disfigurement.

(6)(a)(I) In any claim for breach of contract, damages for noneconomic loss or injury or for derivative noneconomic loss or injury are recoverable only if:

(A) The recovery for such damages is specifically authorized in the contract that is the subject of the claim; or

(B) In any first-party claim brought against an insurer for breach of an insurance contract, the plaintiff demonstrates by clear and convincing evidence that the defendant committed willful and wanton breach of contract.

(II) For purposes of this paragraph (a), "willful and wanton breach of contract" means that:

(A) The defendant intended to breach the contract;

(B) The defendant breached the contract without any reasonable justification; and

(C) The contract clearly indicated that damages for noneconomic loss or injury or for derivative noneconomic damages or loss were within the contemplation or expectation of the parties.

(b) Except for the breach of contract damages that are permitted pursuant to sub-subparagraph (B) of subparagraph (I) of paragraph (a) of this subsection (6), nothing in this subsection (6) shall be construed to prohibit one or more parties from waiving the recovery of damages for noneconomic loss or injury or for derivative noneconomic loss or injury on a breach of contract claim so long as the waiver is explicit and in writing.

(c) The limitations on damages set forth in subsection (3) of this section shall apply in any civil action to the aggregate sum of any noneconomic damages awarded under this section for breach of contract including but not limited to bad faith breach of contract.

(d) In any civil action in which an award of damages for noneconomic loss or injury or for derivative noneconomic loss or injury is made on a breach of contract claim, the court shall state such award in the judgment separately from any other damages award.

(e) Except as otherwise provided in paragraph (c) of this subsection (6), nothing in this subsection (6) shall be construed to govern the recovery of noneconomic damages on a tort claim for bad faith breach of contract.

§ 13–21–401. Definitions.

As used in this part 4, unless the context otherwise requires:

(1) "Manufacturer" means a person or entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product prior to the sale of the product to a user or consumer. The term includes any seller who has actual knowledge of a defect in a product or a seller of a product who creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process or who alters or modifies a product in any significant manner after the product comes into his possession and before it is sold to the ultimate user or consumer. The term also includes any seller of a product who is owned in whole or significant part by the manufacturer or who owns, in whole or significant part, the manufacturer. A seller not otherwise a manufacturer shall not be deemed to be a manufacturer merely because he places or has placed a private label on a product if he did not otherwise specify how the product shall be produced or control, in some significant manner, the manufacturing process of the product and the seller discloses who the actual manufacturer is.

(2) "Product liability action" means any action brought against a manufacturer or seller of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formula, installation, preparation, assembly, testing, packaging, labeling, or sale of any

product, or the failure to warn or protect against a danger or hazard in the use, misuse, or unintended use of any product, or the failure to provide proper instructions for the use of any product.

(3) "Seller" means any individual or entity, including a manufacturer, wholesaler, distributor, or retailer, who is engaged in the business of selling or leasing any product for resale, use, or consumption.

§ 13–21–402. Innocent seller.

(1) No product liability action shall be commenced or maintained against any seller of a product unless said seller is also the manufacturer of said product or the manufacturer of the part thereof giving rise to the product liability action. Nothing in this part 4 shall be construed to limit any other action from being brought against any seller of a product.

(2) If jurisdiction cannot be obtained over a particular manufacturer of a product or a part of a product alleged to be defective, then that manufacturer's principal distributor or seller over whom jurisdiction can be obtained shall be deemed, for the purposes of this section, the manufacturer of the product.

§ 13–21–402.5. Product misuse.

A product liability action may not be commenced or maintained against a manufacturer or seller of a product that caused injury, death, or property damage if, at the time the injury, death, or property damage occurred, the product was used in a manner or for a purpose other than that which was intended and which could not reasonably have been expected, and such misuse of the product was a cause of the injury, death, or property damage.

§ 13–21–403. Presumptions.

(1) In any product liability action, it shall be rebuttably presumed that the product which caused the injury, death, or property damage was not defective and that the manufacturer or seller thereof was not negligent if the product:

(a) Prior to sale by the manufacturer, conformed to the state of the art, as distinguished from industry standards, applicable to such product in existence at the time of sale; or

(b) Complied with, at the time of sale by the manufacturer, any applicable code, standard, or regulation adopted or promulgated by the United States or by this state, or by any agency of the United States or of this state.

(2) In like manner, noncompliance with a government code, standard, or regulation existing and in effect at the time of sale of the product by the manufacturer which contributed to the claim or injury shall create a rebuttable presumption that the product was defective or negligently manufactured.

(3) Ten years after a product is first sold for use or consumption, it shall be rebuttably presumed that the product was not defective and that the manufacturer or seller thereof was not negligent and that all warnings and instructions were proper and adequate.

(4) In a product liability action in which the court determines by a preponderance of the evidence that the necessary facts giving rise to a presumption have been established, the court shall instruct the jury concerning the presumption.

§ 13–21–404. Inadmissible evidence.

In any product liability action, evidence of any scientific advancements in technical or other knowledge or techniques, or in design theory or philosophy, or in manufacturing or testing knowledge, techniques, or processes, or in labeling, warnings of risks or hazards, or instructions for the use of such product, where such advancements were discovered subsequent to the time the product in issue was sold by the manufacturer, shall not be admissible for any purpose other than to show a duty to warn.

§ 13–80–106. Limitation of actions against manufacturers or sellers of products.

(1) Notwithstanding any other statutory provisions to the contrary, all actions except those governed by section 4–2–725, C.R.S., brought against a manufacturer or seller of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formula, installation, preparation, assembly, testing, packaging, labeling, or sale of any product, or the failure to warn or protect against a danger or hazard in the use, misuse, or unintended use of any product, or the failure to provide proper instructions for the use of any product shall be brought within two years after the claim for relief arises and not thereafter.

(2) If any person entitled to bring any action mentioned in this section is under the age of eighteen years, mentally incompetent, imprisoned, or absent from the United States at the time the cause of action accrues and is without spouse or natural or legal guardian, such person may bring said action within the time limit specified in this section after the disability is removed. If such person has a legal representative, such person's representative shall bring the action within the period of limitation imposed by this section.

§ 13–80–107. Limitation of actions against manufacturers, sellers, or lessors of new manufacturing equipment.

(1)(a) Notwithstanding any statutory provision to the contrary, all actions for or on account of personal injury, death, or property damage brought against a person or entity on account of the design, assembly, fabrication, production, or construction of new manufacturing

equipment, or any component part thereof, or involving the sale or lease of such equipment shall be brought within the time provided in section 13–80–102 and not thereafter.

(b) Except as provided in paragraph (c) of this subsection (1), no such action shall be brought on a claim arising more than seven years after such equipment was first used for its intended purpose by someone not engaged in the business of manufacturing, selling, or leasing such equipment, except when the claim arises from injury due to hidden defects or prolonged exposure to hazardous material.

(c) The time limitation specified in paragraph (b) of this subsection (1) shall not apply if the manufacturer, seller, or lessor intentionally misrepresented or fraudulently concealed any material fact concerning said equipment which is a proximate cause of the injury, death, or property damage.

(2) As used in this section, "manufacturing equipment" means equipment used in the operation or process of producing a new product, article, substance, or commodity for the purposes of commercial sale and different from and having a distinctive name, character, or use from the raw or prepared materials used in the operation or process.

(3) The provisions of subsection (1) of this section shall not apply to a claim against a manufacturer, seller, or lessor, who, in an express written warranty, warranted manufacturing equipment to be free of defects in design, manufacture, or materials for a period of time greater than that set forth in paragraph (b) of subsection (1) of this section, if the injury complained of occurred and the claim for relief arose during the period of the express written warranty.

(4) The provisions of subsection (1) of this section shall not be applicable to indemnity actions brought by a manufacturer, seller, or lessor of manufacturing equipment or any other product against any other person who is or may be liable to said manufacturer, seller, or lessor for all or a portion of any judgment rendered against said manufacturer, seller, or lessor.

CONNECTICUT GENERAL STATUTES

(1982–99, 2005, 2011, 2017)

§ 52–572*l*. Strict tort liability, contributory negligence and comparative negligence not bar to recovery.

In causes of action based on strict tort liability, contributory negligence or comparative negligence shall not be a bar to recovery. The provisions of this section shall apply to all actions pending on or brought after June 7, 1977, claiming strict tort liability notwithstanding the date on which the cause of action accrued. Nothing in this section shall be construed as barring the defense of misuse of the product or the defense of knowingly using the product in a defective condition in an action based on strict tort liability.

§ 52–572m. Product liability actions—Definitions.

As used in this section and sections 52–240a, 52–240b, 52–572n to 52–572q, inclusive, and 52–577a:

(a) "Product seller" means any person or entity, including a manufacturer, wholesaler, distributor or retailer who is engaged in the business of selling such products whether the sale is for resale or for use or consumption. The term "product seller" also includes lessors or bailors of products who are engaged in the business of leasing or bailment of products.

(b) "Product liability claim" includes all claims or actions brought for personal injury, death or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging or labeling of any product. "Product liability claim" shall include, but is not limited to, all actions based on the following theories: strict liability in tort; negligence; breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation or nondisclosure, whether negligent or innocent.

(c) "Claimant" means a person asserting a product liability claim for damages incurred by the claimant or one for whom the claimant is acting in a representative capacity.

(d) "Harm" includes damage to property, including the product itself, and personal injuries including wrongful death. As between commercial parties, "harm" does not include commercial loss.

(e) "Manufacturer" includes product sellers who design, assemble, fabricate, construct, process, package or otherwise prepare a product or component part of a product prior to its sale to a user or consumer. It includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.

§ 52–572n. Product liability claims.

(a) A product liability claim as provided in sections 52–240a, 52–240b, 52–572m to 52–572q, inclusive, and 52–577a may be asserted and shall be in lieu of all other claims against product sellers, including actions of negligence, strict liability and warranty, for harm caused by a product.

(b) A claim may be asserted successfully under said sections notwithstanding the claimant did not buy the product from or enter into any contractual relationship with the product seller.

(c) As between commercial parties, commercial loss caused by a product is not harm and may not be recovered by a commercial claimant in a product liability claim. An action for commercial loss caused by a product may be brought only under, and shall be governed by, title 42a, the Uniform Commercial Code.

§ 52–572*o*. Comparative responsibility—Award of damages—Action for contribution.

(a) In any claim under sections 52–240a, 52–240b, 52–572m to 52–572q, inclusive, or 52–577a, the comparative responsibility of, or attributed to, the claimant, shall not bar recovery but shall diminish the award of compensatory damages proportionately, according to the measure of responsibility attributed to the claimant.

(b) In any claim involving comparative responsibility, the court may instruct the jury to give answers to special interrogatories, or if there is no jury, the court may make its own findings, indicating (1) the amount of damages each claimant would receive if comparative responsibility were disregarded, and (2) the percentage of responsibility allocated to each party, including the claimant, as compared with the combined responsibility of all parties to the action. For this purpose, the court may decide that it is appropriate to treat two or more persons as a single party.

(c) In determining the percentage of responsibility, the trier of fact shall consider, on a comparative basis, both the nature and quality of the conduct of the party.

(d) The court shall determine the award for each claimant according to these findings and shall enter judgment against parties liable on the basis of the common law joint and several liability of joint tortfeasors. The judgment shall also specify the proportionate amount of damages allocated against each party liable, according to the percentage of responsibility established for such party.

(e) If a judgment has been rendered, any action for contribution must be brought within one year after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution either must have (1) discharged by payment the common liability within the period of the statute of limitations applicable to the

right of action of the claimant against him and commenced the action for contribution within one year after payment, or (2) agreed while action was pending to discharge the common liability and, within one year after the agreement, have paid the liability and brought an action for contribution.

§ 52–572p. Limitation of liability of product seller.

(a) A product seller shall not be liable for harm that would not have occurred but for the fact that his product was altered or modified by a third party unless: (1) The alteration or modification was in accordance with the instructions or specifications of the product seller; (2) the alteration or modification was made with the consent of the product seller; or (3) the alteration or modification was the result of conduct that reasonably should have been anticipated by the product seller.

(b) For the purposes of this section, alteration or modification includes changes in the design, formula, function or use of the product from that originally designed, tested or intended by the product seller.

§ 52–572q. Liability of product seller due to lack of adequate warnings or instructions.

(a) A product seller may be subject to liability for harm caused to a claimant who proves by a fair preponderance of the evidence that the product was defective in that adequate warnings or instructions were not provided.

(b) In determining whether instructions or warnings were required and, if required, whether they were adequate the trier of fact may consider: (1) The likelihood that the product would cause the harm suffered by the claimant; (2) the ability of the product seller to anticipate at the time of manufacture that the expected product user would be aware of the product risk, and the nature of the potential harm; and (3) the technological feasibility and cost of warnings and instructions.

(c) In claims based on this section, the claimant shall prove by a fair preponderance of the evidence that if adequate warnings or instructions had been provided, the claimant would not have suffered the harm.

(d) A product seller may not be considered to have provided adequate warnings or instructions unless they were devised to communicate with the person best able to take or recommend precautions against the potential harm.

§ 52–577a. Limitation of action based on product liability claim.

(a) No product liability claim, as defined in section 52–572m, shall be brought but within three years from the date when the injury, death or property damage is first sustained or discovered or in the exercise of reasonable care should have been discovered, except that, subject to the provisions of subsections (c), (d) and (e) of this section, no such action may

be brought against any party nor may any party be impleaded pursuant to subsection (b) of this section later than ten years from the date that the party last parted with possession or control of the product.

(b) In any such action, a product seller may implead any third party who is or may be liable for all or part of the claimant's claim, if such third party defendant is served with the third party complaint within one year from the date the cause of action brought under subsection (a) of this section is returned to court.

(c) The ten-year limitation provided for in subsection (a) of this section shall not apply to any product liability claim brought by a claimant who can prove that the harm occurred during the useful safe life of the product. In determining whether a product's useful safe life has expired, the trier of fact may consider among other factors: (1) The effect on the product of wear and tear or deterioration from natural causes; (2) the effect of climatic and other local conditions in which the product was used; (3) the policy of the user and similar users as to repairs, renewals and replacements; (4) representations, instructions and warnings made by the product seller about the useful safe life of the product; and (5) any modification or alteration of the product by a user or third party.

(d) The ten-year limitation provided for in subsection (a) of this section shall be extended pursuant to the terms of any express written warranty that the product can be used for a period longer than ten years, and shall not preclude any action against a product seller who intentionally misrepresents a product or fraudulently conceals information about it, provided the misrepresentation or fraudulent concealment was the proximate cause of harm of the claimant.

(e) The ten-year limitation provided for in subsection (a) of this section shall not apply to any product liability claim, whenever brought, involving injury, death or property damage caused by contact with or exposure to asbestos, except that (1) no such action for personal injury or death may be brought by the claimant later than eighty years from the date that the claimant last had contact with or exposure to asbestos, and (2) no such action for damage to property may be brought by the claimant later than thirty years from the date of last contact with or exposure to asbestos.

(f) The definitions contained in section 52–572m shall apply to this section.

(g) The provisions of this section shall apply to all product liability claims brought on or after October 1, 1979.

(1979)

§ 52–240a. Award of attorney's fees in product liability action.

If the court determines that the claim or defense is frivolous, the court may award reasonable attorney's fees to the prevailing party in a products liability action.

§ 52–240b. Punitive damages in product liability actions.

Punitive damages may be awarded if the claimant proves that the harm suffered was the result of the product seller's reckless disregard for the safety of product users, consumers or others who were injured by the product. If the trier of fact determines that punitive damages should be awarded, the court shall determine that amount of damages not to exceed an amount equal to twice the damages awarded to the plaintiff.

(1991, concerning AIDS vaccine)

§ 19a–591. Definitions.

As used in sections 19a–591 to 19a–591c, inclusive:

(1) "AIDS vaccine" means a vaccine which has been developed by a manufacturer, is being tested and administered at a research institution for purposes of determining whether it provides immunity to acquired immune deficiency syndrome or is of therapeutic benefit to persons or fetuses infected with the acquired immune deficiency syndrome virus, and for which an investigational new drug application is on file with the federal Food and Drug Administration and is in effect.

(2) "Manufacturer" means any person who is domiciled or has his principal place of business in this state and has developed an AIDS vaccine.

(3) "Research institution" means a hospital which is accredited by the Joint Commission on the Accreditation of Healthcare Organizations, or a recognized medical school which operates, or is affiliated with, or is operated by an accredited hospital.

(4) "Research subject" means a person who is administered an AIDS vaccine, or a fetus of a person administered an AIDS vaccine, or a child born to a person administered an AIDS vaccine.

(5) "Researcher" means a person employed by or affiliated with a manufacturer or a research institution, who participates in the development or testing or administration of an AIDS vaccine, or who is involved in the diagnosis and treatment of a research subject.

§ 19a–591a. Administration of AIDS vaccine.

A manufacturer, research institution or researcher shall, prior to the administration of an AIDS vaccine to a person, provide a written explanation of the immunity provisions of section 19a–591b to such person and obtain such person's informed consent. A parent or legal guardian of a child may give informed consent for such child. A copy of

the informed consent shall be maintained with such person's medical records.

§ 19a–591b. Immunity from liability for civil damages for personal injury to research subject. Exceptions.

A manufacturer, research institution or researcher shall not be liable to a research subject for civil damages for personal injury resulting from the administration of any AIDS vaccine to such research subject, unless such injury was caused by the gross negligence or reckless, wilful or wanton misconduct of such manufacturer, research institution or researcher or such manufacturer, research institution or researcher has failed to comply with the provisions of section 19a–591a. The immunity provided by this section shall not apply to a manufacturer, research institution or researcher who intentionally provided false information in connection with an investigational new drug application.

§ 19a–591c. Research subjects.

No person shall be denied the opportunity to be a research subject because of the inability to pay for medical treatment.

DELAWARE CODE ANNOTATED

(1987, 1995)

§ 7001. Sealed container defense in product liability.

(a) In this section, the following words have the meanings indicated:

(1) a. "Manufacturer" means a designer, assembler, fabricator, constructor, compounder, producer or processor of any product or its component parts.

b. "Manufacturer" includes an entity not otherwise a manufacturer that imports a product or otherwise holds itself out as a manufacturer.

(2) "Product" means any tangible article, including attachments, accessories and component parts and accompanying labels, warnings, instructions and packaging.

(3) "Sealed container" means a box, container, package, wrapping, encasement or housing of any nature that covers a product so that it would be unreasonable to expect a seller to detect or discover the existence of a dangerous or defective condition in the product. A product shall be deemed to be in a sealed container if the product, by its nature and design, is encased or sold in any other manner making it unreasonable to expect a seller to detect or discover the existence of a dangerous or defective condition.

(4) a. "Seller" means a wholesaler, distributor, retailer or other individual or entity other than a manufacturer that is regularly engaged in the selling of a product whether the sale is for resale by the purchaser or is for use or consumption by the ultimate consumer.

b. "Seller" includes a lessor or bailor regularly engaged in the business of the lease or bailment of the product.

(5) "Similar product" means another article of the same design produced by the same manufacturer.

(b) It shall be a defense to an action against a seller of a product for property damage or personal injury allegedly caused by the defective design or manufacture of a product if the seller establishes that:

(1) The product was acquired and then sold or leased by the seller in a sealed container and in unaltered form;

(2) The seller had no knowledge of the defect;

(3) In the performance of the duties the seller performed or while the product was in the seller's possession could not have discovered the defect while exercising reasonable care;

(4) The seller did not manufacturer, produce, design or designate the specifications for the product, which conduct was the proximate and substantial cause of the claimant's injury;

(5) The seller did not alter, modify, assemble or mishandle the product while in the seller's possession in a manner which was the proximate and substantial cause of the claimant's injury; and

(6) The seller had not received notice of the defect from purchasers of similar products.

(c) The defense provided in subsection (b) of this section is not available if:

(1) The claimant is unable to identify the manufacturer through reasonable effort;

(2) The manufacturer is insolvent, immune from suit or not subject to suit in Delaware; or

(3) The seller made any express warranties, the breach of which were the proximate and substantial cause of the claimant's injury.

(d)(1) Except in an action based on an expressed indemnity agreement, if the seller shows by unrebutted facts that he/she had satisfied subsection (b) of this section and that subsection (c) of this section does not apply, summary judgment shall be entered in his/her favor as to the original or third party actions.

(2) Notwithstanding the granting of a motion for summary judgment pursuant to paragraph (1) of this subsection, the seller will thereafter continue to be treated as though he/she were still a party for all purposes of discovery including the uses thereof.

(3) On a subsequent showing of the occurrence of any condition described in subsection (c) of this section, or that 1 or more of the conditions of subsection (b) of this section did not exist, during the pending litigation, the actions dismissed by summary judgment pursuant to subsection (d)(1) of this section shall be reinstated and are not barred by the passage of time.

FLORIDA STATUTES ANNOTATED

(1999)

§ 768.1256. Government rules defense.

(1) In a product liability action brought against a manufacturer or seller for harm allegedly caused by a product, there is a rebuttable presumption that the product is not defective or unreasonably dangerous and the manufacturer or seller is not liable if, at the time the specific unit of the product was sold or delivered to the initial purchaser or user, the aspect of the product that allegedly caused the harm:

(a) Complied with federal or state codes, statutes, rules, regulations, or standards relevant to the event causing the death or injury;

(b) The codes, statutes, rules, regulations, or standards are designed to prevent the type of harm that allegedly occurred; and

(c) Compliance with the codes, statutes, rules, regulations, or standards is required as a condition for selling or distributing the product.

(2) In a product liability action as described in subsection (1), there is a rebuttable presumption that the product is defective or unreasonably dangerous and the manufacturer or seller is liable if the manufacturer or seller did not comply with the federal or state codes, statutes, rules, regulations, or standards which:

(a) Were relevant to the event causing the death or injury;

(b) Are designed to prevent the type of harm that allegedly occurred; and

(c) Require compliance as a condition for selling or distributing the product.

(3) This section does not apply to an action brought for harm allegedly caused by a drug that is ordered off the market or seized by the Federal Food and Drug Administration.

§ 768.1257. State-of-the-art defense for products liability.

In an action based upon defective design, brought against the manufacturer of a product, the finder of fact shall consider the state of the art of scientific and technical knowledge and other circumstances that existed at the time of manufacture, not at the time of loss or injury.

§ 90.407. Subsequent remedial measures.

Evidence of measures taken after an injury or harm caused by an event, which measures if taken before the event would have made injury or harm less likely to occur, is not admissible to prove negligence, the existence of a product defect, or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving

ownership, control, or the feasibility of precautionary measures, if controverted, or impeachment.

GEORGIA CODE ANNOTATED

(1968, 1978, 1987, 2009)

§ 51–1–11. Privity to support action.

(a) Except as otherwise provided in this Code section, no privity is necessary to support a tort action; but, if the tort results from the violation of a duty which is itself the consequence of a contract, the right of action is confined to the parties and those in privity to that contract, except in cases where the party would have a right of action for the injury done independently of the contract and except as provided in Code Section 11–2–318.

(b)(1) The manufacturer of any personal property sold as new property directly or through a dealer or any other person shall be liable in tort, irrespective of privity, to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained.

(2) No action shall be commenced pursuant to this subsection with respect to an injury after ten years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury.

(3) A manufacturer may not exclude or limit the operation of this subsection.

(c) The limitation of paragraph (2) of subsection (b) of this Code section regarding bringing an action within ten years from the date of the first sale for use or consumption of personal property shall also apply to the commencement of an action claiming negligence of a manufacturer as the basis of liability, except an action seeking to recover from a manufacturer for injuries or damages arising out of the negligence of such manufacturer in manufacturing products which cause a disease or birth defect, or arising out of conduct which manifests a willful, reckless, or wanton disregard for life or property. Nothing contained in this subsection shall relieve a manufacturer from the duty to warn of a danger arising from use of a product once that danger becomes known to the manufacturer.

(d) Irrespective of privity, a manufacturer shall not be held liable for the manufacture of a product alleged to be defective based on theories of market share or enterprise, or other theories of industry-wide liability.

(e) Irrespective of privity, a manufacturer of a product alleged to be defective shall not be held liable for a public nuisance based on theories of market share or enterprise, or other theories of industry-wide liability.

§ 51–1–11.1. Liability of product seller as manufacturer in product liability action based on doctrine of strict liability in tort.

(a) As used in this Code section, the term "product seller" means a person who, in the course of a business conducted for the purpose leases or sells and distributes; installs; prepares; blends; packages; labels; markets; or assembles pursuant to a manufacturer's plan, intention, design, specifications, or formulation; or repairs; maintains; or otherwise is involved in placing a product in the stream of commerce. This definition does not include a manufacturer which, because of certain activities, may additionally be included within all or a portion of the definition of a product seller.

(b) For purposes of a product liability action based in whole or in part on the doctrine of strict liability in tort, a product seller is not a manufacturer as provided in Code Section 51–1–11 and is not liable as such.

(c) Nothing contained in this Code section shall be construed to grant a cause of action in strict liability in tort or any other legal theory or to affect the right of any person to seek and obtain indemnity or contribution.

(d) This Code section shall apply to all causes of action accruing on or after July 1, 1987.

IDAHO CODE ANNOTATED

(1980, 1986, 2005)

§ 6–1401. Scope.

The previous existing applicable law of this state on product liability is modified only to the extent set forth in this act.

§ 6–1402. Definitions.

(1) "Product seller" means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. The term also includes a party who is in the business of leasing or bailing such products. The term "product seller" does not include:

(a) A provider of professional services who utilizes or sells products within the legally authorized scope of its professional practice. A nonprofessional provider of services is not included unless the sale or use of a product is the principal part of the transaction, and the essence of the relationship between the seller and purchaser is not the furnishing of judgment, skill, or services;

(b) A commercial seller of used products who resells a product after use by a consumer or other product user, provided the used product is in essentially the same condition as when it was acquired for resale; and

(c) A finance lessor who is not otherwise a product seller. A "finance lessor" is one who acts in a financial capacity, who is not a manufacturer, wholesaler, distributor, or retailer, and who leases a product without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor.

(2) "Manufacturer" includes a product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer. It includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer. A product seller acting primarily as a wholesaler, distributor, or retailer of a product may be a "manufacturer" but only to the extent that it designs, produces, makes, fabricates, constructs, or remanufactures the product before its sale.

(3) "Product" means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce. Human tissue and organs, including human blood and its components, are excluded from this term. The "relevant product" under this chapter is that product, or its component part or parts, which gave rise to the product liability claim.

(4) "Claimant" means a person or entity asserting a product liability claim, including a wrongful death action, and, if the claim is asserted through or on behalf of an estate, the term includes claimant's decedent. "Claimant" includes any person or entity that suffers harm.

(5) "Reasonably anticipated conduct" means the conduct which would be expected of an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances.

§ 6–1403. Length of time product sellers are subject to liability.

(1) Useful safe life.

(a) Except as provided in subsection (1)(b) hereof, a product seller shall not be subject to liability to a claimant for harm under this chapter if the product seller proves by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired.

"Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner. For the purposes of this chapter, "time of delivery" means the time of delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold.

(b) A product seller may be subject to liability for harm caused by a product used beyond its useful safe life to the extent that the product seller has expressly warranted the product for a longer period.

(2) Statute of repose.

(a) Generally. In claims that involve harm caused more than ten (10) years after time of delivery, a presumption arises that the harm was caused after the useful safe life had expired. This presumption may only be rebutted by clear and convincing evidence.

(b) Limitations on statute of repose.

1. If a product seller expressly warrants that its product can be utilized safely for a period longer than ten (10) years, the period of repose, after which the presumption created in subsection (2)(a) hereof arises, shall be extended according to that warranty or promise.

2. The ten (10) year period of repose established in subsection (2)(a) hereof does not apply if the product seller intentionally misrepresents facts about its product, or fraudulently conceals information about it, and that conduct was a substantial cause of the claimant's harm.

3. Nothing contained in subsection (2) of this section shall affect the right of any person found liable under this chapter to seek and obtain contribution or indemnity from any other person who is responsible for harm under this chapter.

4. The ten (10) year period of repose established in subsection (2)(a) hereof shall not apply if the harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than ten (10) years after the time of delivery, or if the harm, caused within ten (10) years after the time of delivery, did not manifest itself until after that time.

(3) Statute of limitation. No claim under this chapter may be brought more than two (2) years from the time the cause of action accrued as defined in section 5–219, Idaho Code.

§ 6–1404. Comparative responsibility.

Comparative responsibility shall not bar recovery in an action by any person or his legal representative to recover damages for product liability resulting in death or injury to person or property, if such responsibility was not as great as the responsibility of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of responsibility attributable to the person recovering.

§ 6–1405. Conduct affecting comparative responsibility.

(1) Failure to discover a defective condition.

(a) Claimant's failure to inspect. A claimant is not required to have inspected the product for a defective condition. Failure to have done so does not render the claimant responsible for the harm caused or reduce the claimant's damages.

(b) Claimant's failure to observe an obvious defective condition. When the product seller proves by a preponderance of the evidence that the claimant, while using the product, was injured by a defective condition that would have been obvious to an ordinary reasonably prudent person, the claimant's damages shall be subject to reduction.

(c) A nonclaimant's failure to inspect for defects or to observe an obvious defective condition. A nonclaimant's failure to inspect for a defective condition or to observe a defective condition that would have been obvious to an ordinary reasonably prudent person, shall not reduce claimant's damages.

(2) Use of a product with a known defective condition.

(a) By a claimant. When the product seller proves, by a preponderance of the evidence, that the claimant knew about the product's defective condition, and voluntarily used the product or voluntarily assumed the risk of harm from the product, the claimant's damages shall be subject to reduction to the extent that the claimant did not act as an ordinary reasonably prudent person under the circumstances.

(b) By a nonclaimant product user. If the product seller proves by a preponderance of the evidence that a product user, other than the

claimant, knew about a product's defective condition, but voluntarily and unreasonably used or stored the product and thereby proximately caused claimant's harm, the claimant's damages shall be subject to apportionment.

(3) Misuse of a product.

(a) "Misuse" occurs when the product user does not act in a manner that would be expected of an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances.

(b) When the product seller proves, by a preponderance of the evidence, that product misuse by a claimant, or by a party other than the claimant or the product seller has proximately caused the claimant's harm, the claimant's damages shall be subject to reduction or apportionment to the extent that the misuse was a proximate cause of the harm.

(4) Alteration or modification of a product.

(a) "Alteration or modification" occurs when a person or entity other than the product seller changes the design, construction, or formula of the product, or changes or removes warnings or instructions that accompanied or were displayed on the product. "Alteration or modification" of a product includes the failure to observe routine care and maintenance, but does not include ordinary wear and tear.

(b) When the product seller proves, by a preponderance of the evidence, that an alteration or modification of the product by the claimant, or by a party other than the claimant or the product seller has proximately caused the claimant's harm, the claimant's damages shall be subject to reduction or apportionment to the extent that the alteration or modification was a proximate cause of the harm.

This subsection shall not be applicable if:

1. The alteration or modification was in accord with the product seller's instructions or specifications;

2. The alteration or modification was made with the express or implied consent of the product seller; or

3. The alteration or modification was reasonably anticipated conduct, and the product was defective because of the product seller's failure to provide adequate warnings or instructions with respect to the alteration or modification.

§ 6–1406. Relevance of industry custom, safety or performance standards, and technological feasibility.

(1) Evidence of changes in (a) a product's design, (b) warnings or instructions concerning the product, (c) technological feasibility, (d) "state of the art," or (e) the custom of the product seller's industry or business, occurring after the product was manufactured and delivered to its first purchaser or lessee who was not engaged in the business of either

selling such products or using them as component parts of another product to be sold, is not admissible for the purpose of proving that the product was defective in design or that a warning or instruction should have accompanied the product at the time of manufacture. The provisions of this section shall not relieve the product seller of any duty to warn of known defects discovered after the product was designed and manufactured.

(2) If the court finds outside the presence of a jury that the probative value of such evidence substantially outweighs its prejudicial effect and that there is no other proof available, this evidence may be admitted for other relevant purposes, including but not limited to proving ownership or control, or impeachment.

(3) For purposes of this section, "custom" refers to the practices followed by an ordinary product seller in the product seller's industry or business.

(4) For purposes of this section, "technological feasibility" means the technological, mechanical and scientific knowledge relating to product safety that was reasonably feasible for use, in light of economic practicality, at the time of manufacture.

§ 6–1407. Individual rights and responsibilities of product sellers other than manufacturers.

(1) In the absence of express warranties to the contrary, product sellers other than manufacturers shall not be subject to liability in circumstances where they do not have a reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, reveal the existence of the defective condition which is in issue; or where the product seller acquires the product in a sealed package or container and sells the product in the same sealed package or container. The liability limitation of this subsection shall not apply if:

(a) The product seller had knowledge or reason to know of the defect in the product;

(b) The product seller altered, modified, or installed the product, and such alteration, modification or installation was a substantial proximate cause of the incident giving rise to the action, was not authorized or requested by the manufacturer and was not performed in compliance with the directions or specifications of the manufacturer;

(c) The product seller provided the plans or specifications for the manufacture or preparation of the product and such plans or specifications were a substantial cause of the product's alleged defect;

(d) The product seller is a wholly-owned subsidiary of the manufacturer, the manufacturer is a wholly-owned subsidiary of the product seller;

(e) The product seller sold the product after the expiration date placed on the product or its package by the manufacturer.

(2) In an action where the liability limitation of subsection (1) applies, any manufacturer who refuses to accept a tender of defense from the product seller, shall indemnify the product seller for reasonable attorney's fees and costs incurred by the product seller in defending such action.

(3) In any product liability action, the manufacturer of the product shall be indemnified by the product seller of the product for any judgment rendered against the manufacturer and shall also be reimbursed for reasonable attorney's fees and costs incurred in defending such action:

(a) If the product seller provided the plans or specifications for the manufacture or preparation of the product;

(b) If such plans or specifications were a substantial cause of the product's alleged defect; and

(c) If the product was manufactured in compliance with and according to the plans or specifications of the seller.

The provisions of this subsection shall not apply if the manufacturer had knowledge or with the exercise of reasonable and diligent care should have had knowledge of the defect in the product.

(4) A product seller, other than a manufacturer, is also subject to the liability of manufacturer if:

(a) The manufacturer is not subject to service of process under the laws of the claimant's domicile; or

(b) The manufacturer has been judicially declared insolvent in that the manufacturer is unable to pay its debts as they become due in the ordinary course of business; or

(c) The court outside the presence of a jury determines that it is highly probable that the claimant would be unable to enforce a judgment against the product manufacturer.

§ 6–1408. Contents of complaint—Amount of recovery.

In any product liability action no dollar amount or figure shall be included in the complaint. The complaint shall pray for such damages as are reasonable in the premises. The complaint shall include a statement reciting that the jurisdictional amount established for filing the action is satisfied.

§ 6–1409. Short title.

This act shall be known and may be cited as the "Idaho Product Liability Reform Act."

§ 6–1410. Products liability—Defectiveness of firearms or ammunition.

(1) In a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.

(2) For purposes of this section:

(a) The potential of a firearm or ammunition to cause serious injury, damage, or death when discharged does not make the product defective in design;

(b) Injuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product;

(3) The provisions of this section shall not affect a products liability cause of action based upon the improper selection of design alternatives.

INDIANA CODE ANNOTATED

(1978, 1983, 1995, 1998, 1999, 2018)

§ 34–6–2–29. "Consumer."

"Consumer," for purposes of IC 34–20, means:

(1) a purchaser;

(2) any individual who uses or consumes the product;

(3) any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question; or

(4) any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.

§ 34–6–2–45. "Fault."

(a) "Fault", for purposes of IC 34–20, means an act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term includes the following:

(1) Unreasonable failure to avoid an injury or to mitigate damages.

(2) A finding under IC 34–20–2 (or IC 33–1–1.5–3 before its repeal) that a person is subject to liability for physical harm caused by a product, notwithstanding the lack of negligence or willful, wanton, or reckless conduct by the manufacturer or seller.

(b) "Fault", for purposes of IC 34–51–2 and IC 34–51–6, includes any act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages.

§ 34–6–2–77. "Manufacturer."

(a) "Manufacturer", for purposes of IC 34–20, means a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer. "Manufacturer" includes a seller who:

(1) has actual knowledge of a defect in a product;

(2) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process;

(3) alters or modifies the product in any significant manner after the product comes into the seller's possession and before it is sold to the ultimate user or consumer;

(4) is owned in whole or significant part by the manufacturer; or

(5) owns in whole or significant part the manufacturer.

(b) A seller who discloses the name of the actual manufacturer of a product is not a manufacturer under this section merely because the seller places or has placed a private label on a product.

§ 34–6–2–105. "Physical harm."

(a) "Physical harm", for purposes of IC 34–20, means bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property.

(b) The term does not include gradually evolving damage to property or economic losses from such damage.

§ 34–6–2–114. "Product."

(a) "Product", for purposes of IC 34–20, means any item or good that is personalty at the time it is conveyed by the seller to another party.

(b) The term does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.

§ 34–6–2–115. "Product Liability Action."

"Product liability action," for purposes of IC 34–20, means an action that is brought:

(1) against a manufacturer or seller of a product; and

(2) for or on account of physical harm; regardless of the substantive legal theory or theories upon which the action is brought.

§ 34–6–2–136. "Seller."

"Seller", for purposes of IC 34–20, means a person engaged in the business of selling or leasing a product for resale, use, or consumption.

§ 34–6–2–146. "Unreasonably dangerous."

"Unreasonably dangerous", for purposes of IC 34–20, refers to any situation in which the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases the product with the ordinary knowledge about the product's characteristics common to the community of consumers.

§ 34–6–2–147. "User."

"User", for purposes of IC 34–20, has the same meaning as the term "consumer", which is set forth in section 29 of this chapter.

§ 34–20–1–1. Application of Article.

This article governs all actions that are:

(1) brought by a user or consumer;

(2) against a manufacturer or seller; and

(3) for physical harm caused by a product;

regardless of the substantive legal theory or theories upon which the action is brought.

§ 34–20–1–2. Remedies cumulative.

This article shall not be construed to limit any other action from being brought against a seller of a product.

§ 34–20–1–3. Severability.

If a provision of this article or its application to a person or circumstance is held invalid, the invalidity does not affect other provisions or applications, and to this end the provisions of this article are severable.

§ 34–20–1–4. Effective date.

This article does not apply to a cause of action that accrues before June 1, 1978.

§ 34–20–2–1. Grounds.

Except as provided in section 3 of this chapter, a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property is subject to liability for physical harm caused by that product to the user or consumer or to the user's or consumer's property if:

(1) that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition;

(2) the seller is engaged in the business of selling the product; and

(3) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.

§ 34–20–2–2. Exercise of reasonable care; privacy.

The rule stated in section 1 of this chapter applies although:

(1) the seller has exercised all reasonable care in the manufacture and preparation of the product; and

(2) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

However, in an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.

§ 34–20–2–3. Strict liability of manufacturer.

A product liability action based on the doctrine of strict liability in tort may not be commenced or maintained against a seller of a product

that is alleged to contain or possess a defective condition unreasonably dangerous to the user or consumer unless the seller is a manufacturer of the product or of the part of the product alleged to be defective.

§ 34–20–2–4. Principal distributor, seller deemed manufacturer.

If a court is unable to hold jurisdiction over a particular manufacturer of a product or part of a product alleged to be defective, then that manufacturer's principal distributor or seller over whom a court may hold jurisdiction shall be considered, for the purposes of this chapter, the manufacturer of the product.

§ 34–20–3–1. Statute of limitations. Negligence and strict liability in tort actions.

(a) This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34–11–6–1, this section applies in any product liability action in which the theory of liability is negligence or strict liability in tort.

(b) Except as provided in section 2 of this chapter, a product liability action must be commenced:

(1) within two (2) years after the cause of action accrues; or

(2) within ten (10) years after the delivery of the product to the initial user or consumer.

However, if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

§ 34–20–3–2. Asbestos-related actions.

(a) A product liability action that is based on:

(1) property damage resulting from asbestos; or

(2) personal injury, disability, disease, or death resulting from exposure to asbestos;

must be commenced within two (2) years after the cause of action accrues. The subsequent development of an additional asbestos related disease or injury is a new injury and is a separate cause of action.

(b) A product liability action for personal injury, disability, disease, or death resulting from exposure to asbestos accrues on the date when the injured person knows that the person has an asbestos related disease or injury.

(c) A product liability action for property damage accrues on the date when the injured person knows that the property damage has resulted from asbestos.

(d) This section applies only to product liability actions against:

(1) persons who mined and sold commercial asbestos; and

(2) funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims.

(e) For the purposes of IC 1–1–1–8, if any part of this section is held invalid, the entire section is void.

(f) Except for the cause of action expressly recognized in this section, this section does not otherwise modify the limitation of action or repose period contained in section 1 of this chapter.

[Held unconstitutional, Myers v. Crouse-Hinds Div. of Cooper Industries, Inc., 53 N.E.3d 1160, 1167 (Ind. 2016).]

§ 34–20–4–1. Products which are considered defective.

A product is in a defective condition under this article if, at the time it is conveyed by the seller to another party, it is in a condition:

(1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and

(2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.

§ 34–20–4–2. Failure to provide adequate instructions or warnings.

A product is defective under this article if the seller fails to:

(1) properly package or label the product to give reasonable warnings of danger about the product; or

(2) give reasonably complete instructions on proper use of the product; when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.

§ 34–20–4–3. Products made safe for reasonably expectable handling and consumption not deemed defective.

A product is not defective under this article if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under this article.

§ 34–20–4–4. Products incapable of being made safe not deemed defective.

A product is not defective under this article if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.

§ 34–20–5–1. Rebuttable presumption.

In a product liability action, there is a rebuttable presumption that the product that caused the physical harm was not defective and that the manufacturer or seller of the product was not negligent if, before the sale by the manufacturer, the product:

(1) was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged, and labeled; or

(2) complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by an agency of the United States or Indiana.

§ 34–20–6–1. Applicability of defenses.

The defenses in this chapter are defenses to an action brought under this article (or IC 33–1–1.5 before its repeal).

§ 34–20–6–2. Burden of proof.

The burden of proof of any defense raised in an action under this article (or IC 33–1–1.5 before its repeal) is on the party raising the defense.

§ 34–20–6–3. Use of product with knowledge of defect or danger.

It is a defense to an action under this article (or IC 33–1–1.5 before its repeal) that the user or consumer bringing the action:

(1) knew of the defect;

(2) was aware of the danger in the product; and

(3) nevertheless proceeded to make use of the product and was injured.

§ 34–20–6–4. Misuse of product.

It is a defense to an action under this article (or IC 33–1–1.5 before its repeal) that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.

§ 34–20–6–5. Modification or alteration of product.

It is a defense to an action under this article (or IC 33–1–1.5 before its repeal) that a cause of the physical harm is a modification or alteration of the product made by any person after the product's delivery to the initial user or consumer if the modification or alteration is the proximate cause of physical harm where the modification or alteration is not reasonably expectable to the seller.

§ 34–20–7–1. Assessment of liability.

In a product liability action where liability is assessed against more than one (1) defendant, a defendant is not liable for more than the amount of fault, as determined under IC 34–20–8, directly attributable to that defendant. A defendant in a product liability action may not be held jointly liable for damages attributable to the fault of another defendant.

§ 34–20–8–1. Assessment of percentage of fault.

(a) In a product liability action, the fault of the person suffering the physical harm, as well as the fault of all others who caused or contributed to cause the harm, shall be compared by the trier of fact in accordance with IC 34–51–2–7, IC 34–51–2–8, or IC 34–51–2–9.

(b) In assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm.

§ 34–20–9–1. Indemnification from person actually at fault for defect.

This article does not affect the right of any person who is found liable to seek and obtain indemnity from any other person whose actual fault caused a product to be defective.

IOWA CODE ANNOTATED

(1986, 2002–04, 2007–08, 2013, 2017, 2019)

§ 613.18. Limitation on products liability of nonmanufacturers.

1. A person who is not the assembler, designer, or manufacturer, and who wholesales, retails, distributes, or otherwise sells a product is:

a. Immune from any suit based upon strict liability in tort or breach of implied warranty of merchantability which arises solely from an alleged defect in the original design or manufacture of the product.

b. Not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability for the product upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent.

2. A person who is a retailer of a product and who assembles a product, such assembly having no causal relationship to the injury from which the claim arises, is not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability which arises from an alleged defect in the original design or manufacture of the product upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent.

3. An action brought pursuant to this section, where the claimant certifies that the manufacturer of the product is not yet identifiable, tolls the statute of limitations against such manufacturer until such time as discovery in the case has identified the manufacturer.

§ 614.1. Period.

Actions may be brought within the times limited as follows, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

1.–2. [Not reproduced]

2A. With respect to products

a. Those founded on the death of a person or injuries to the person or property brought against the manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of a product based upon an alleged defect in the design, inspection, testing, manufacturing, formulation, marketing, packaging, warning, labeling of the product, or any other alleged defect or failure of whatever nature or kind, based on the theories of strict liability in tort, negligence, or breach of an implied warranty shall not be commenced more than fifteen years after the product was first purchased, leased, bailed, or installed for use or consumption unless expressly warranted for a longer period of time by the manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of the product. This subsection shall not affect the time during which a person found liable may seek and obtain

contribution or indemnity from another person whose actual fault caused a product to be defective. This subsection shall not apply if the manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of the product intentionally misrepresents facts about the product or fraudulently conceals information about the product and that conduct was a substantial cause of the claimant's harm.

b. (1) The fifteen-year limitation in paragraph "a" shall not apply to the time period in which to discover a disease that is latent and caused by exposure to a harmful material, in which event the cause of action shall be deemed to have accrued when the disease and such disease's cause have been made known to the person or at the point the person should have been aware of the disease and such disease's cause. This subsection shall not apply to cases governed by subsection 11 of this section.

(2) As used in this paragraph, "harmful material" means silicone gel breast implants, which were implanted prior to July 12, 1992; and chemical substances commonly known as asbestos, dioxins, tobacco, or polychlorinated biphenyls, whether alone or as part of any product; or any substance which is determined to present an unreasonable risk of injury to health or the environment by the United States environmental protection agency pursuant to the federal Toxic Substance Control Act, 15 U.S.C. § 2601 et seq., or by this state, if that risk is regulated by the United States environmental protection agency or this state.

3. [Not reproduced]

4. Unwritten contracts—injuries to property—fraud—other actions. Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years, except as provided by subsections 8 and 10.

5.–10. [Not reproduced]

11. Improvements to real property.

a. In addition to limitations contained elsewhere in this section, an action arising out of the unsafe or defective condition of an improvement to real property based on tort and implied warranty and for contribution and indemnity, and founded on injury to property, real or personal, or injury to the person or wrongful death, shall not be brought more than the number of years specified below after the date on which occurred the act or omission of the defendant alleged in the action to have been the cause of the injury or death:

(1) Not reproduced.

(2) For an action arising from or related to residential construction, as defined in section 572.1, ten years.

(3) For an action arising from or related to any other kind of improvement to real property, eight years.

b. Notwithstanding paragraph "a", an action arising from or related to the intentional misconduct or fraudulent concealment of an unsafe or defective condition of an improvement to real property shall not be brought more than fifteen years after the date on which occurred the act or omission of the defendant alleged in the action to have been the cause of the injury or death.

c. If the unsafe or defective condition is discovered within one year prior to the expiration of the applicable period of repose, the period of repose shall be extended one year.

d. This subsection does not bar an action against a person solely in the person's capacity as an owner, occupant, or operator of an improvement to real property.

12.–14. [Not reproduced]

§ 668.12. Liability for products—defenses.

1. In any action brought pursuant to this chapter against an assembler, designer, supplier of specifications, distributor, manufacturer, or seller for damages arising from an alleged defect in the design, testing, manufacturing, formulation, packaging, warning, or labeling of a product, a percentage of fault shall not be assigned to such persons if they plead and prove that the product conformed to the state of the art in existence at the time the product was designed, tested, manufactured, formulated, packaged, provided with a warning, or labeled.

2. Nothing contained in subsection 1 shall diminish the duty of an assembler, designer, supplier of specifications, distributor, manufacturer or seller to warn concerning subsequently acquired knowledge of a defect or dangerous condition that would render the product unreasonably dangerous for its foreseeable use or diminish the liability for failure to so warn.

3. An assembler, designer, supplier of specifications, distributor, manufacturer, or seller shall not be subject to liability for failure to warn regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users. When reasonable minds may differ as to whether the risk or risk-avoidance measure was obvious or generally known, the issues shall be decided by the trier of fact.

4. In any action brought pursuant to this chapter against an assembler, designer, supplier of specifications, distributor, manufacturer, or seller for damages arising from an alleged defect in packaging, warning, or labeling of a product, a product bearing or accompanied by a reasonable and visible warning or instruction that is reasonably safe for use if the warning or instruction is followed shall not

be deemed defective or unreasonably dangerous on the basis of failure to warn or instruct. When reasonable minds may differ as to whether the warning or instruction is reasonable and visible, the issues shall be decided by the trier of fact.

KANSAS REVISED STATUTES ANNOTATED

(1981–92, 2012)

§ 60–3301. Short title.

The act shall be known and may be cited as the "Kansas Product Liability Act."

§ 60–3302. Definitions.

(a) "Product seller" means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor or retailer of the relevant product, but does not include a health care provider, as defined in subsection (f) of K.S.A. 40–3401 and amendments thereto, who utilizes a product in the course of rendering professional services.

(b) "Manufacturer" includes a product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer. It includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer, or that is owned in whole or in part by the manufacturer.

(c) "Product liability claim" includes any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product. It includes, but is not limited to, any action based on strict liability in tort, negligence, breach of express or implied warranty, breach of, or failure to discharge a duty to warn or instruct, whether negligent or innocent, misrepresentation, concealment or nondisclosure, whether negligent or innocent, or under any other substantive legal theory.

(d) "Harm" includes: 1. damage to property; 2. personal physical injuries, illness and death; 3. mental anguish or emotional harm attendant to such personal physical injuries, illness or death. The term "harm" does not include direct or consequential economic loss.

§ 60–3303. Useful safe life, ten-year period of repose, evidence; latent disease exception; reviving certain causes of action.

(a)(1) Except as provided in paragraph 2 of this subsection, a product seller shall not be subject to liability in a product liability claim if the product seller proves by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired. "Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner. For the purposes of this section, "time of delivery" means the time of delivery of a product to its first

purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold.

Examples of evidence that is especially probative in determining whether a product's useful safe life had expired include:

(A) The amount of wear and tear to which the product had been subject;

(B) the effect of deterioration from natural causes, and from climate and other conditions under which the product was used or stored;

(C) the normal practices of the user, similar users and the product seller with respect to the circumstances, frequency and purposes of the product's use, and with respect to repairs, renewals and replacements;

(D) any representations, instructions or warnings made by the product seller concerning proper maintenance, storage and use of the product or the expected useful safe life of the product; and

(E) any modification or alteration of the product by a user or third party.

(2) A product seller may be subject to liability for harm caused by a product used beyond its useful safe life to the extent that the product seller has expressly warranted the product for a longer period.

(b)(1) In claims that involve harm caused more than 10 years after time of delivery, a presumption arises that the harm was caused after the useful safe life had expired. This presumption may only be rebutted by clear and convincing evidence.

(2)(A) If a product seller expressly warrants that its product can be utilized safely for a period longer than 10 years, the period of repose, after which the presumption created in paragraph 1. of this subsection arises, shall be extended according to that warranty or promise.

(B) The ten-year period of repose established in paragraph 1. of this subsection does not apply if the product seller intentionally misrepresents facts about its product, or fraudulently conceals information about it, and that conduct was a substantial cause of the claimant's harm.

(C) Nothing contained in this subsection shall affect the right of any person liable under a product liability claim to seek and obtain indemnity from any other person who is responsible for the harm which gave rise to the product liability claim.

(D) The ten-year period of repose established in paragraph 1. of this subsection shall not apply if the harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by a reasonably prudent person until more than 10 years after the time of delivery, or if

the harm caused within 10 years after the time of delivery did not manifest itself until after that time.

(c) Except as provided in subsections (d) and (e), nothing contained in subsections (a) and (b) above shall modify the application of K.S.A. 60–513, and amendments thereto.

(d)(1) In a product liability claim against the product seller, the ten-year limitation, as defined in K.S.A. 60–513, and amendments thereto, shall not apply to the time to discover a disease which is latent caused by exposure to a harmful material, in which event the action shall be deemed to have accrued when the disease and such disease's cause have been made known to the person or at the point the person should have been aware of the disease and such disease's cause.

(2) The term "harmful material" means silicone gel breast implants, which were implanted prior to July 1, 1992; any chemical substances commonly known as asbestos, dioxins, or polychlorinated biphenyls, whether alone or as part of any product, or any substance which is determined to present an unreasonable risk of injury to health or the environment by the United States Environmental Protection Agency pursuant to the Federal Toxic Substances Control Act, 15 U.S.C. § 2601 et seq., or the state of Kansas, and because of such risk is regulated by the state or the Environmental Protection Agency.

(e) Upon the effective date of this act through July 1, 1991, the provisions of this subsection shall revive such causes of action for latent diseases caused by exposure to a harmful material for: (1) Any person whose cause of action had accrued, as defined in subsection (d) on or after March 3, 1987; or (2) any person who had an action pending in any court on March 3, 1989, and because of the judicial interpretation of the ten-year limitation contained in subsection (b) of K.S.A. 60–513, and amendments thereto, as applied to latent disease caused by exposure to a harmful material the: (A) action was dismissed; (B) dismissal of the action was affirmed; or (C) action was subject to dismissal. The intent of this subsection is to revive causes of action for latent diseases caused by exposure to a harmful material which were barred by interpretation of K.S.A. 60–513, and amendments thereto, in effect prior to this enactment.

§ 60–3304. Legislative regulatory standards or administrative regulatory safety standards or mandatory government contract specifications—Defenses.

(a) When the injury-causing aspect of the product was, at the time of manufacture, in compliance with legislative regulatory standards or administrative regulatory safety standards relating to design or performance, the product shall be deemed not defective by reason of design or performance, or, if the standard addressed warnings or instructions, the product shall be deemed not defective by reason of warnings or instructions, unless the claimant proves by a preponderance

of the evidence that a reasonably prudent product seller could and would have taken additional precautions.

(b) When the injury-causing aspect of the product was not, at the time of manufacture, in compliance with legislative regulatory standards or administrative regulatory safety standards relating to design, performance, warnings or instructions, the product shall be deemed defective unless the product seller proves by a preponderance of the evidence that its failure to comply was a reasonably prudent course of conduct under the circumstances.

(c) When the injury-causing aspect of the product was, at the time of manufacture, in compliance with a mandatory government contract specification relating to design, this shall be an absolute defense and the product shall be deemed not defective for that reason, or, if the specification related to warnings or instructions, then the product shall be deemed not defective for that reason.

(d) When the injury-causing aspect of the product was not, at the time of manufacture, in compliance with a mandatory government contract specification relating to design, the product shall be deemed defective for that reason, or if the specification related to warnings or instructions, the product shall be deemed defective for that reason.

§ 60–3305. Manufacturer's or seller's duty to warn or protect against danger, when.

In any product liability claim any duty on the part of the manufacturer or seller of the product to warn or protect against a danger or hazard which could or did arise in the use or misuse of such product, and any duty to have properly instructed in the use of such product shall not extend: (a) To warnings, protecting against or instructing with regard to those safeguards, precautions and actions which a reasonable user or consumer of the product, with the training, experience, education and any special knowledge the user or consumer did, should or was required to possess, could and should have taken for such user or consumer or others, under all the facts and circumstances;

(b) to situations where the safeguards, precautions and actions would or should have been taken by a reasonable user or consumer of the product similarly situated exercising reasonable care, caution and procedure; or

(c) to warnings, protecting against or instructing with regard to dangers, hazards or risks which are patent, open or obvious and which should have been realized by a reasonable user or consumer of the product.

§ 60–3306. Seller not subject to liability, when.

(a) A product seller shall not be subject to liability in a product liability claim arising from an alleged defect in a product, if the product seller establishes that:

(1) Such seller had no knowledge of the defect;

(2) such seller in the performance of any duties the seller performed, or was required to perform, could not have discovered the defect while exercising reasonable care;

(3) such seller was not a manufacturer of the defective product or product component;

(4) the manufacturer of the defective product or product component is subject to service of process either under the laws of the state of Kansas or the domicile of the person making the product liability claim; and

(5) any judgment against the manufacturer obtained by the person making the product liability claim would be reasonably certain of being satisfied.

(b) A product seller that is a retail seller of used products shall not be subject to liability in a product liability claim arising from an alleged defect in a used product sold by the retail seller, if the retail seller establishes that:

(1) Such seller is exempt from federal income taxation pursuant to section 501(c)(3) of the internal revenue code of 1986;

(2) the product liability claim is for strict liability in tort; or

(3)(A) Such seller resold the product after the product was used by a consumer or other product user;

(B) the product was sold in substantially the same condition as it was when it was acquired for resale;

(C) the manufacturer of the defective product or product component is subject to service of process either under the laws of the state of Kansas or the domicile of the person making the product liability claim; and

(D) any judgment against the manufacturer obtained by the person making the product liability claim would be reasonably certain of being satisfied.

§ 60–3307. Inadmissible evidence.

(a) In a product liability claim, the following evidence shall not be admissible for any purpose:

(1) Evidence of any advancements or changes in technical or other knowledge or techniques, in design theory or philosophy, in manufacturing or testing knowledge, techniques or processes in labeling, warning of risks or hazards, instructions for the use of such product, if such advancements or changes have been made, learned or placed into common use subsequent to the time the product in issue was designed, formulated, tested, manufactured or sold by the manufacturer; and

(2) evidence of any changes made in the designing, planning, formulating, testing, preparing, manufacturing, packaging, warnings, labeling or instructing for use of, or with regard to, the product in issue, or any similar product, which changes were made subsequent to the time

the product in issue was designed, formulated, tested, manufactured or sold by the manufacturer.

(b) This section does not require the exclusion of evidence of a subsequent measure if offered to impeach a witness for the manufacturer or seller of a product who has expressly denied the feasibility of such a measure.

KENTUCKY (REVISED) STATUTES ANNOTATED

(1979)

§ 411.300. Definitions.

(1) As used in KRS 411.310 to 411.340, a "product liability action" shall include any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, advertising, packaging or labeling of any product.

(2) As used in KRS 411.310 to 411.340, a "plaintiff" shall mean a person asserting a claim and, if said claim is asserted on behalf of an estate, "plaintiff" shall include plaintiff's decedent.

§ 411.310. Presumptions in product liability actions.

(1) In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the subject product was not defective if the injury, death or property damage occurred either more than five (5) years after the date of sale to the first consumer or more than eight (8) years after the date of manufacture.

(2) In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured.

§ 411.320. Circumstances under which defendant is liable.

(1) In any product liability action, a manufacturer shall be liable only for the personal injury, death or property damage that would have occurred if the product had been used in its original, unaltered and unmodified condition. For the purpose of this section, product alteration or modification shall include failure to observe routine care and maintenance, but shall not include ordinary wear and tear. This section shall apply to alterations or modifications made by any person or entity, except those made in accordance with specifications or instructions furnished by the manufacturer.

(2) In any product liability action, if the plaintiff performed an unauthorized alteration or an unauthorized modification, and such alteration or modification was a substantial cause of the occurrence that caused injury or damage to the plaintiff, the defendant shall not be liable whether or not said defendant was at fault or the product was defective.

(3) In any product liability action, if the plaintiff failed to exercise ordinary care in the circumstances in his use of the product, and such failure was a substantial cause of the occurrence that caused injury or

damage to the plaintiff, the defendant shall not be liable whether or not said defendant was at fault or the product was defective.

§ 411.340. When wholesaler, distributor, or retailer to be held liable.

In any product liability action, if the manufacturer is identified and subject to the jurisdiction of the court, a wholesaler, distributor, or retailer who distributes or sells a product, upon his showing by a preponderance of the evidence that said product was sold by him in its original manufactured condition or package, or in the same condition such product was in when received by said wholesaler, distributor or retailer, shall not be liable to the plaintiff for damages arising solely from the distribution or sale of such product, unless such wholesaler, distributor or retailer, breached an express warranty or knew or should have known at the time of distribution or sale of such product that the product was in a defective condition, unreasonably dangerous to the user or consumer.

§ 411.350. Short title.

KRS 411.300 to 411.340 shall be known as the "Product Liability Act of Kentucky."

LOUISIANA REVISED STATUTES ANNOTATED

(1988)

§ 9:2800.51. Short title.

This Chapter shall be known and may be cited as the "Louisiana Products Liability Act."

§ 9:2800.52. Scope of this chapter.

This Chapter establishes the exclusive theories of liability for manufacturers for damage caused by their products. A claimant may not recover from a manufacturer for damage caused by a product on the basis of any theory of liability that is not set forth in this Chapter. Conduct or circumstances that result in liability under this Chapter are "fault" within the meaning of Civil Code Article 2315. This Chapter does not apply to the rights of an employee or his personal representatives, dependents or relations against a manufacturer who is the employee's employer or against any principal or any officer, director, stockholder, partner or employee of such manufacturer or principal as limited by R.S. 23:1032, or to the rights of a claimant against the following, unless they assume the status of a manufacturer as defined in R.S. 9:2800.53(1):

(1) Providers of professional services, even if the service results in a product.

(2) Providers of nonprofessional services where the essence of the service is the furnishing of judgment or skill, even if the service results in a product.

(3) Producers of natural fruits and other raw products in their natural state that are derived from animals, fowl, aquatic life or invertebrates, including but not limited to milk, eggs, honey and wool.

(4) Farmers and other producers of agricultural plants in their natural state.

(5) Ranchers and other producers of animals, fowl, aquatic life or invertebrates in their natural state.

(6) Harvesters and other producers of fish, crawfish, oysters, crabs, mollusks or other aquatic animals in their natural state.

[Limited on preemption grounds by Parra v. Coloplast Corp., 2017 WL 24794, *3 (E.D. La. 2017).]

§ 9:2800.53. Definitions.

The following terms have the following meanings for the purpose of this Chapter:

(1) "Manufacturer" means a person or entity who is in the business of manufacturing a product for placement into trade or commerce. "Manufacturing a product" means producing, making, fabricating, constructing, designing, remanufacturing, reconditioning or refurbishing a product. "Manufacturer" also means:

(a) A person or entity who labels a product as his own or who otherwise holds himself out to be the manufacturer of the product.

(b) A seller of a product who exercises control over or influences a characteristic of the design, construction or quality of the product that causes damage.

(c) A manufacturer of a product who incorporates into the product a component or part manufactured by another manufacturer.

(d) A seller of a product of an alien manufacturer if the seller is in the business of importing or distributing the product for resale and the seller is the alter ego of the alien manufacturer. The court shall take into consideration the following in determining whether the seller is the alien manufacturer's alter ego: whether the seller is affiliated with the alien manufacturer by way of common ownership or control; whether the seller assumes or administers product warranty obligations of the alien manufacturer; whether the seller prepares or modifies the product for distribution; or any other relevant evidence. A "product of an alien manufacturer" is a product that is manufactured outside the United States by a manufacturer who is a citizen of another country or who is organized under the laws of another country.

(2) "Seller" means a person or entity who is not a manufacturer and who is in the business of conveying title to or possession of a product to another person or entity in exchange for anything of value.

(3) "Product" means a corporeal movable that is manufactured for placement into trade or commerce, including a product that forms a component part of or that is subsequently incorporated into another product or an immovable. "Product" does not mean human blood, blood components, human organs, human tissue or approved animal tissue to the extent such are governed by R.S. 9:2797.

(4) "Claimant" means a person or entity who asserts a claim under this Chapter against the manufacturer of a product or his insurer for damage caused by the product.

(5) "Damage" means all damage caused by a product, including survival and wrongful death damages, for which Civil Code Articles 2315, 2315.1 and 2315.2 allow recovery. "Damage" includes damage to the product itself and economic loss arising from a deficiency in or loss of use of the product only to the extent that Section 3 of Chapter 6 of Title VII of Book III of the Civil Code, entitled "Of the Vices of the Thing Sold," does not allow recovery for such damage or economic loss. Attorneys' fees are not recoverable under this Chapter.

(6) "Express warranty" means a representation, statement of alleged fact or promise about a product or its nature, material or workmanship that represents, affirms or promises that the product or its nature, material or workmanship possesses specified characteristics or qualities or will meet a specified level of performance. "Express

warranty" does not mean a general opinion about or general praise of a product. A sample or model of a product is an express warranty.

(7) "Reasonably anticipated use" means a use or handling of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances.

(8) "Reasonably anticipated alteration or modification" means a change in a product that the product's manufacturer should reasonably expect to be made by an ordinary person in the same or similar circumstances, and also means a change arising from ordinary wear and tear. "Reasonably anticipated alteration or modification" does not mean the following:

(a) Alteration, modification or removal of an otherwise adequate warning provided about a product.

(b) The failure of a person or entity, other than the manufacturer of a product, reasonably to provide to the product user or handler an adequate warning that the manufacturer provided about the product, when the manufacturer has satisfied his obligation to use reasonable care to provide the adequate warning by providing it to such person or entity rather than to the product user or handler.

(c) Changes to or in a product or its operation because the product does not receive reasonable care and maintenance.

(9) "Adequate warning" means a warning or instruction that would lead an ordinary reasonable user or handler of a product to contemplate the danger in using or handling the product and either to decline to use or handle the product or, if possible, to use or handle the product in such a manner as to avoid the damage for which the claim is made.

§ 9:2800.54. Manufacturer responsibility and burden of proof.

A. The manufacturer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arose from a reasonably anticipated use of the product by the claimant or another person or entity.

B. A product is unreasonably dangerous if and only if:

(1) The product is unreasonably dangerous in construction or composition as provided in R.S. 9:2800.55;

(2) The product is unreasonably dangerous in design as provided in R.S. 9:2800.56;

(3) The product is unreasonably dangerous because an adequate warning about the product has not been provided as provided in R.S. 9:2800.57; or

(4) The product is unreasonably dangerous because it does not conform to an express warranty of the manufacturer about the product as provided in R.S. 9:2800.58.

C. The characteristic of the product that renders it unreasonably dangerous under R.S. 9:2800.55 must exist at the time the product left the control of its manufacturer. The characteristic of the product that renders it unreasonably dangerous under R.S. 9:2800.56 or 9:2800.57 must exist at the time the product left the control of its manufacturer or result from a reasonably anticipated alteration or modification of the product.

D. The claimant has the burden of proving the elements of Subsections A, B and C of this Section.

§ 9:2800.55. Unreasonably dangerous in construction or composition.

A product is unreasonably dangerous in construction or composition if, at the time the product left its manufacturer's control, the product deviated in a material way from the manufacturer's specifications or performance standards for the product or from otherwise identical products manufactured by the same manufacturer.

§ 9:2800.56. Unreasonably dangerous in design.

A product is unreasonably dangerous in design if, at the time the product left its manufacturer's control:

(1) There existed an alternative design for the product that was capable of preventing the claimant's damage; and

(2) The likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on the utility of the product. An adequate warning about a product shall be considered in evaluating the likelihood of damage when the manufacturer has used reasonable care to provide the adequate warning to users and handlers of the product.

§ 9:2800.57. Unreasonably dangerous because of inadequate warning.

A. A product is unreasonably dangerous because an adequate warning about the product has not been provided if, at the time the product left its manufacturer's control, the product possessed a characteristic that may cause damage and the manufacturer failed to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.

B. A manufacturer is not required to provide an adequate warning about his product when:

(1) The product is not dangerous to an extent beyond that which would be contemplated by the ordinary user or handler of the product, with the ordinary knowledge common to the community as to the product's characteristics; or

(2) The user or handler of the product already knows or reasonably should be expected to know of the characteristic of the product that may cause damage and the danger of such characteristic.

C. A manufacturer of a product who, after the product has left his control, acquires knowledge of a characteristic of the product that may cause damage and the danger of such characteristic, or who would have acquired such knowledge had he acted as a reasonably prudent manufacturer, is liable for damage caused by his subsequent failure to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.

§ 9:2800.58. Unreasonably dangerous because of nonconformity to express warranty.

A product is unreasonably dangerous when it does not conform to an express warranty made at any time by the manufacturer about the product if the express warranty has induced the claimant or another person or entity to use the product and the claimant's damage was proximately caused because the express warranty was untrue.

§ 9:2800.59. Manufacturer knowledge, design feasibility and burden of proof.

A. Notwithstanding R.S. 9:2800.56, a manufacturer of a product shall not be liable for damage proximately caused by a characteristic of the product's design if the manufacturer proves that, at the time the product left his control:

(1) He did not know and, in light of then-existing reasonably available scientific and technological knowledge, could not have known of the design characteristic that caused the damage or the danger of such characteristic; or

(2) He did not know and, in light of then-existing reasonably available scientific and technological knowledge, could not have known of the alternative design identified by the claimant under R.S. 9:2800.56(1); or

(3) The alternative design identified by the claimant under R.S. 9:2800.56(1) was not feasible, in light of then-existing reasonably available scientific and technological knowledge or then-existing economic practicality.

B. Notwithstanding R.S. 9:2800.57(A) or (B), a manufacturer of a product shall not be liable for damage proximately caused by a characteristic of the product if the manufacturer proves that, at the time the product left his control, he did not know and, in light of then-existing reasonably available scientific and technological knowledge, could not

have known of the characteristic that caused the damage or the danger of such characteristic.

MAINE REVISED STATUTES ANNOTATED

(1973)

Title 14, § 221. Defective or unreasonably dangerous goods.

One who sells any goods or products in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods, or to his property, if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without significant change in the condition in which it is sold. This section applies although the seller has exercised all possible care in the preparation and sale of his product and the user or consumer has not bought the product from or entered into any contractual relation with the seller.

MICHIGAN COMPILED LAWS ANNOTATED

(1995, 2013, 2016)

§ 600.2945. Definitions.

As used in this section and sections 1629, 2945 to 2949a, and 5805:

(a) "Alteration" means a material change in a product after the product leaves the control of the manufacturer or seller. Alteration includes a change in the product's design, packaging, or labeling; a change to or removal of a safety feature, warning, or instruction; deterioration or damage caused by failure to observe routine care and maintenance or failure to observe an installation, preparation, or storage procedure; or a change resulting from repair, renovation, reconditioning, recycling, or reclamation of the product.

(b) "Drug" means that term as defined in section 201 of the federal food, drug, and cosmetic act, chapter 675, 52.1040, 21 U.S.C. 321. However, drug does not include a medical appliance or device.

(c) "Economic loss" means objectively verifiable pecuniary damages arising from medical expenses or medical care, rehabilitation services, custodial care, loss of wages, loss of future earnings, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, or other objectively verifiable monetary losses.

(d) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether injury results.

(e) "Misuse" means use of a product in a materially different manner than the product's intended use. Misuse includes uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances.

(f) "Noneconomic loss" means any type of pain, suffering, inconvenience, physical impairment, mental anguish, emotional distress, loss of society and companionship, loss of consortium injury to reputation, humiliation, or other nonpecuniary damages.

(g) "Product" includes any and all component parts to a product.

(h) "Product liability action" means an action based on a legal or equitable, theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product.

(i) "Production" means manufacture, construction, design, formulation, development of standards, preparation, processing,

assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling.

(j) "Sophisticated user" means a person or entity that, by virtue of training, experience, a profession, or legal obligations, is or is generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect. An employee who does not have actual knowledge of the product's potential hazard or adverse effect that caused the injury is not a sophisticated user.

§ 600.2946. Product liability actions; admissibility of evidence; liability, burden of proof; presumption; drugs.

(1) It shall be admissible as evidence in a product liability action that the production of the product was in accordance with the generally recognized and prevailing nongovernmental standards in existence at the time the specific unit of the product was sold or delivered by the defendant to the initial purchaser or user.

(2) In a product liability action brought against a manufacturer or seller for harm allegedly caused by a production defect, the manufacturer or seller is not liable unless the plaintiff establishes that the product was not reasonably safe at the time the specific unit of the product left the control of the manufacturer or seller and that, according to generally accepted production practices at the time the specific unit of the product left the control of the manufacturer or seller, a practical and technically feasible alternative production practice was available that would have prevented the harm without significantly impairing the usefulness or desirability of the product to users and without creating equal or greater risk of harm to others. An alternative production practice is practical and feasible only if the technical, medical, or scientific knowledge relating to production of the product, at the time the specific unit of the product left the control of the manufacturer or seller, was developed, available and capable of use in the production of the product and was economically feasible for use by the manufacturer. Technical, medical, or scientific knowledge is not economically feasible for use by the manufacturer if use of that knowledge in production of the product would significantly compromise the product's usefulness or desirability.

(3) With regard to the production of a product that is the subject of a product liability action, evidence of a philosophy, theory, knowledge, technique, or procedure that is learned, placed in use, or discontinued after the event resulting in the death of the person or injury to the person or property, which if learned, placed in use, or discontinued before the event would have made the event less likely to occur, is admissible only for the purpose of providing the feasibility of precautions, if controverted, or for impeachment.

(4) In a product liability action brought against a manufacturer or seller for harm allegedly caused by a product, there is a rebuttable presumption that the manufacturer or seller is not liable if; at the time

the specific unit of the product was sold or delivered to the initial purchaser or user, the aspect of the product that allegedly caused the harm was in compliance with standards relevant to the event causing the death or injury set forth in a federal or state statute or was approved by, or was in compliance with regulations or standards relevant to the event causing the death or injury promulgated by, a federal or state agency responsible for reviewing the safety of the product. Noncompliance with a standard relevant to the event causing the death or injury set forth in a federal or state statute or lack of approval by, or noncompliance with regulations or standards relevant to the event causing the death or injury promulgated by, a federal or state agency does not raise a presumption of negligence on the part of a manufacturer or seller. Evidence of compliance or noncompliance with a regulation or standard not relevant to the event causing the death or injury is not admissible.

§ 600.2946a. Product liability actions; noneconomic damages, limitations; application of limitations; itemization and calculation of damages.

(1) In an action for product liability, the total amount of damages for noneconomic loss shall not exceed $280,000.00, unless the defect in the product caused either the person's death or permanent loss of a vital bodily function, in which case the total amount of damages for noneconomic loss shall not exceed $500,000.00. On the effective date of the amendatory act that added this section, the state treasurer shall adjust the limitations set forth in this subsection so that the limitations are equal to the limitations provided in section 1483. After that date, the state treasurer shall adjust the limitations set forth in this subsection at the end of each calendar year so that they continue to be equal to the limitations provided in section 1483.

(2) In awarding damages in a product liability action, the trier of fact shall itemize damages into economic and noneconomic losses. Neither the court nor counsel for a party shall inform the jury of the limitations under subsection (1). The court shall adjust an award of noneconomic loss to conform to the limitations under subsection (1).

(3) The limitation on damages under subsection (1) for death or permanent loss of a vital bodily function does not apply to a defendant if the trier of fact determines by a preponderance of the evidence that the death or loss was the result of the defendant's gross negligence, or if the court finds that the matters stated in section 2949a are true.

(4) If damages for economic loss cannot readily be ascertained by the trier of fact, then the trier fact shall calculate damages for economic loss based on an amount that is equal to the state average median family income as reported in the immediately preceding federal decennial census and adjusted by the state treasurer in the same manner as provided in subsection (1).

§ 600.2947. Product liability actions; alterations, misuse, awareness of risk; warnings; inherently harmful characteristics; liability of sellers other than manufacturers.

(1) A manufacturer or seller is not liable in a product liability action for harm caused by an alteration of the product unless the alteration was reasonably foreseeable. Whether there was an alteration of a product and whether an alteration was reasonably foreseeable are legal issues to be resolved by the court.

(2) A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court.

(3) A manufacturer or seller is not liable in a product liability action if the purchaser or user of the product was aware that use of the product created an unreasonable risk of personal injury and voluntarily exposed himself or herself to that risk and the risk that he or she exposed himself or herself to was the proximate cause of the injury. This subsection does not relieve a manufacturer or seller from a duty to use reasonable care in a product's production.

(4) Except to the extent a state or federal statute or regulation requires a manufacturer to warn, a manufacturer or seller is not liable in a product liability action for failure to provide an adequate warning if the product is provided for use by a sophisticated user.

(5) A manufacturer or seller is not liable in a product liability action if the alleged harm was caused by an inherent characteristic of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability, and that is recognized by a person with the ordinary knowledge common to the community.

(6) In a product liability action, a seller other than a manufacturer is not liable for harm allegedly caused by the product unless either of the following is true:

(a) The seller failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person's injuries.

(b) The seller made an express warranty as to the product, the product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person's harm.

§ 600.2948. Product liability actions; written warnings; failure to warn of material risks; burden of proof; duty of care.

(1) Evidence is admissible in a product liability action that, before the death of the person or injury to the person or damage to property, pamphlets, booklets, labels, or other written warnings were provided that gave notice to foreseeable users of the material risk of injury, death, or damage connected with the foreseeable use of the product or provided

instructions as to the foreseeable uses, applications, or limitations of the product that the defendant knew or should have known.

(2) A defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action.

(3) In a product liability action brought against a manufacturer or seller for harm allegedly caused by a failure to provide adequate warnings or instructions, a manufacturer or seller is not liable unless the plaintiff proves that the manufacturer knew or should have known about the risk of harm based on the scientific, technical, or medical information reasonably available at the time the specific unit of the product left the control of the manufacturer.

(4) This section does not limit a manufacturer's or seller's duty to use reasonable care in relation to a product after the product has left the manufacturer's or seller's control.

§ 600.2949a. Product liability actions; defendant's actual knowledge; willful disregard of defects.

In a product liability action, if the court determines that at the time of manufacture or distribution the defendant had actual knowledge that the product was defective and that there was a substantial likelihood that the defect would cause the injury that is the basis of the action, and the defendant willfully disregarded that knowledge in the manufacture or distribution of the product, then sections 2946(4), 2946a, 2947(1) to (4), and 2948(2) do not apply.

§ 600.2949b. Vehicle manufacturers; products liability.

(1) The manufacturer of a vehicle is not liable and must be dismissed from any action for alleged damages resulting from any of the following unless the defect from which the damages resulted was present in the vehicle when it was manufactured:

(a) The conversion or attempted conversion of the vehicle into an automated motor vehicle by another person.

(b) The installation of equipment in the vehicle by another person to convert it into an automated motor vehicle.

(c) The modification by another person of equipment that was installed by the manufacturer in an automated motor vehicle specifically for using the vehicle in automatic mode.

(2) A subcomponent system producer recognized as described in section 244 of the Michigan vehicle code, 1949 PA 300, MCL 257.244, is not liable in a product liability action for damages resulting from the modification of equipment installed by the subcomponent system producer to convert a vehicle to an automated motor vehicle unless the

defect from which the damages resulted was present in the equipment when it was installed by the subcomponent system producer.

(3) A motor vehicle mechanic or a motor vehicle repair facility that repairs an automated motor vehicle according to specifications from the manufacturer of the automated motor vehicle is not liable in a product liability action for damages resulting from the repairs.

(4) Sections 2945 to 2949a do not apply in a product liability action to the extent that they are inconsistent with this section.

(5) As used in this section:

(a) "Automated motor vehicle" means that term as defined in section 2b of the Michigan vehicle code, 1949 PA 300, MCL 257.2b.

(b) "Automatic mode" means that term as defined in section 2b of the Michigan vehicle code, 1949 PA 300, MCL 257.2b.

(c) "Motor vehicle mechanic" means that term as defined in section 2 of the motor vehicle service and repair act, 1974 PA 300, MCL 257.1302.

(d) "Motor vehicle repair facility" means that term as defined in section 2 of the motor vehicle service and repair act, 1974 PA 300, MCL 257.1302.

(e) "Vehicle" means that term as defined in section 79 of the Michigan vehicle code, 1949 PA 300, MCL 257.79.

MINNESOTA STATUTES ANNOTATED

(1980)

§ 544.41. Product liability; limit on liability of nonmanufacturers.

Subd. 1. Product liability; requirements. In any product liability action based in whole or in part on strict liability in tort commenced or maintained against a defendant other than the manufacturer, that party shall upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage. The commencement of a product liability action based in whole or part on strict liability in tort against a certifying defendant shall toll the applicable statute of limitation relative to the defendant for purposes of asserting a strict liability in tort cause of action.

Subd. 2. Certifying defendant; dismissal of strict liability. Once the plaintiff has filed a complaint against a manufacturer and the manufacturer has or is required to have answered or otherwise pleaded, the court shall order the dismissal of a strict liability in tort claim against the certifying defendant, provided the certifying defendant is not within the categories set forth in subdivision 3. Due diligence shall be exercised by the certifying defendant in providing the plaintiff with the correct identity of the manufacturer and due diligence shall be exercised by the plaintiff in filing a law suit and obtaining jurisdiction over the manufacturer.

The plaintiff may at any time subsequent to dismissal move to vacate the order of dismissal and reinstate the certifying defendant, provided plaintiff can show one of the following:

(a) that the applicable statute of limitation bars the assertion of a strict liability in tort cause of action against the manufacturer of the product allegedly causing the injury, death or damage;

(b) that the identity of the manufacturer given to the plaintiff by the certifying defendant was incorrect. Once the correct identity of the manufacturer has been given by the certifying defendant the court shall again dismiss the certifying defendant;

(c) that the manufacturer no longer exists, cannot be subject to the jurisdiction of the courts of this state, or, despite due diligence, the manufacturer is not amenable to service of process;

(d) that the manufacturer is unable to satisfy any judgment as determined by the court; or

(e) that the court determines that the manufacturer would be unable to satisfy a reasonable settlement or other agreement with plaintiff.

Subd. 3. Dismissal order prohibited. A court shall not enter a dismissal order relative to any certifying defendant even though full compliance with subdivision 1 has been made where the plaintiff can show one of the following:

(a) that the defendant has exercised some significant control over the design or manufacture of the product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury, death or damage;

(b) that the defendant had actual knowledge of the defect in the product which caused the injury, death or damage; or

(c) that the defendant created the defect in the product which caused the injury, death or damage.

Subd. 4. Limiting constructing laws. Nothing contained in subdivisions 1 to 3 shall be construed to create a cause of action in strict liability in tort or based on other legal theory, or to affect the right of any person to seek and obtain indemnity or contribution.

MISSISSIPPI CODE ANNOTATED

(1993, 2003, 2004, 2014)

§ 11–1–63. Product liability suits.

Subject to the provisions of Section 11–1–64, in any action for damages caused by a product, including, but not limited to, any action based on a theory of strict liability in tort, negligence or breach of implied warranty, except for commercial damage to the product itself:

(a) The manufacturer, designer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer, designer or seller:

(i) 1. The product was defective because it deviated in a material way from the manufacturer's or designer's specifications or from otherwise identical units manufactured to the same manufacturing specifications, or

2. The product was defective because it failed to contain adequate warnings or instructions, or

3. The product was designed in a defective manner, or

4. The product breached an express warranty or failed to conform to other express factual representations upon which the claimant justifiably relied in electing to use the product; and

(ii) The defective condition rendered the product unreasonably dangerous to the user or consumer; and

(iii) The defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought.

(b) A product is not defective in design or formulation if the harm for which the claimant seeks to recover compensatory damages was caused by an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and which is recognized by the ordinary person with the ordinary knowledge common to the community.

(c)(i) In any action alleging that a product is defective because it failed to contain adequate warnings or instructions pursuant to paragraph (a)(i)2 of this section, the manufacturer, designer or seller shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer, designer or seller, the manufacturer, designer or seller knew or in light of reasonably available knowledge should have known about the danger that caused the damage for which recovery is sought and that the ordinary user or consumer would not realize its dangerous condition.

(ii) An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates sufficient information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to an ordinary consumer who purchases the product; or in the case of a prescription drug, medical device or other product that is intended to be used only under the supervision of a physician or other licensed professional person, taking into account the characteristics of, and the ordinary knowledge common to, a physician or other licensed professional who prescribes the drug, device or other product.

(d) In any action alleging that a product is defective pursuant to paragraph (a) of this section, the manufacturer, designer or seller shall not be liable if the claimant (i) had knowledge of a condition of the product that was inconsistent with his safety; (ii) appreciated the danger in the condition; and (iii) deliberately and voluntarily chose to expose himself to the danger in such a manner to register assent on the continuance of the dangerous condition.

(e) In any action alleging that a product is defective pursuant to paragraph (a)(i)2 of this section, the manufacturer, designer or seller shall not be liable if the danger posed by the product is known or is open and obvious to the user or consumer of the product, or should have been known or open and obvious to the user or consumer of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons who ordinarily use or consume the product.

(f) In any action alleging that a product is defective because of its design pursuant to paragraph (a)(i)3 of this section, the manufacturer, designer or product seller shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer, designer or seller:

(i) The manufacturer or seller knew, or in light of reasonably available knowledge or in the exercise of reasonable care should have known, about the danger that caused the damage for which recovery is sought; and

(ii) The product failed to function as expected and there existed a feasible design alternative that would have to a reasonable probability prevented the harm. A feasible design alternative is a design that would have to a reasonable probability prevented the harm without impairing the utility, usefulness, practicality or desirability of the product to users or consumers.

(g)(i) The manufacturer of a product who is found liable for a defective product pursuant to paragraph (a) shall indemnify a product seller or designer for the costs of litigation, any reasonable expenses, reasonable attorney's fees and any damages awarded by the trier of fact unless the seller or designer exercised substantial control over that

aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller or designer altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller or designer had actual knowledge of the defective condition of the product at the time he supplied same; or the seller or designer made an express factual representation about the aspect of the product which caused the harm for which recovery of damages is sought.

(ii) Subparagraph (i) shall not apply unless the seller or designer has given prompt notice of the suit to the manufacturer within ninety (90) days of the service of the complaint against the seller.

(h) In any action alleging that a product is defective pursuant to paragraph (a) of this section, the seller or designer of a product other than the manufacturer shall not be liable unless the seller or designer exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; or the seller or designer altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; or the seller or designer had actual or constructive knowledge of the defective condition of the product at the time he supplied the product. It is the intent of this section to immunize innocent sellers who are not actively negligent, but instead are mere conduits of a product.

(i) Nothing in this section shall be construed to eliminate any common law defense to an action for damages caused by a product.

SECTION 2. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

SECTION 3. This act shall take effect and be in force from and after July 1, 2014.

§ 11–1–64. Sellers in stream of commerce; dismissal of products liability claim; application; procedure.

[Repealed by 2004 H.B. 13, §§ 6, 7].

§ 11–1–65. Punitive damages.

(1) In any action in which punitive damages are sought:

(a) Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.

(b) In any action in which the claimant seeks an award of punitive damages, the trier of fact shall first determine whether compensatory

damages are to be awarded and in what amount, before addressing any issues related to punitive damages.

(c) If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing before the same trier of fact to determine whether punitive damages may be considered.

(d) The court shall determine whether the issue of punitive damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount.

(e) In all cases involving an award of punitive damages, the fact finder, in determining the amount of punitive damages, shall consider, to the extent relevant, the following: the defendant's financial condition and net worth; the nature and reprehensibility of the defendant's wrongdoing, for example, the impact of the defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff; the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; and any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages. The trier of fact shall be instructed that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole.

(f)(i) Before entering judgment for an award of punitive damages the trial court shall ascertain that the award is reasonable in its amount and rationally related to the purpose to punish what occurred giving rise to the award and to deter its repetition by the defendant and others.

(ii) In determining whether the award is excessive, the court shall take into consideration the following factors:

1. Whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred;

2. The degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;

3. The financial condition and net worth of the defendant; and

4. In mitigation, the imposition of criminal sanctions on the defendant for its conduct and the existence of other civil awards against the defendant for the same conduct.

(2) The seller of a product other than the manufacturer shall not be liable for punitive damages unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or

labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller had actual knowledge of the defective condition of the product at the time he supplied same.

(3)(a) In any civil action where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed the following:

(i) Twenty Million Dollars ($20,000,000.00) for a defendant with a net worth of more than One Billion Dollars ($1,000,000,000.00);

(ii) Fifteen Million Dollars ($15,000,000.00) for a defendant with a net worth of more than Seven Hundred Fifty Million Dollars ($750,000,000.00) but not more than One Billion Dollars ($1,000,000,000.00);

(iii) Five Million Dollars ($5,000,000.00) for a defendant with a net worth of more than Five Hundred Million Dollars ($500,000,000.00) but not more than Seven Hundred Fifty Million Dollars ($750,000,000.00);

(iv) Three Million Seven Hundred Fifty Thousand Dollars ($3,750,000.00) for a defendant with a net worth of more than One Hundred Million Dollars ($100,000,000.00) but not more than Five Hundred Million Dollars ($500,000,000.00);

(v) Two Million Five Hundred Dollars ($2,500,000.00) for a defendant with a net worth of more than Fifty Million Dollars ($50,000,000.00) but not more than One Hundred Million Dollars ($100,000,000.00); or

(vi) Two percent (2%) of the defendant's net worth for a defendant with a net worth of Fifty Million Dollars ($50,000,000.00) or less.

(b) For the purposes of determining the defendant's net worth in paragraph (a), the amount of the net worth shall be determined in accordance with Generally Accepted Accounting Principles.

(c) The limitation on the amount of punitive damages imposed by this subsection (3) shall not be disclosed to the trier of fact, but shall be applied by the court to any punitive damages verdict.

(d) The limitation on the amount of punitive damages imposed by this subsection (3) shall not apply to actions brought for damages or an injury resulting from an act or failure to act by the defendant:

(i) If the defendant was convicted of a felony under the laws of this state or under federal law which caused the damages or injury; or

(ii) While the defendant was under the influence of alcohol or under the influence of drugs other than lawfully prescribed drugs administered in accordance with a prescription.

(4) Nothing in this section shall be construed as creating a right to an award of punitive damages or to limit the duty of the court, or the

appellate courts, to scrutinize all punitive damage awards, ensure that all punitive damage awards comply with applicable procedural, evidentiary and constitutional requirements, and to order remittitur where appropriate.

MISSOURI REVISED STATUTES

(1987, 2019)

§ 537.760. Products liability claim defined. As used in sections 33 to 36 of this act, the term "products liability claim" means a claim or portion of a claim in which the plaintiff seeks relief in the form of damages on a theory that the defendant is strictly liable for such damages because:

(1) The defendant, wherever situated in the chain of commerce, transferred a product in the course of his business; and

(2) The product was used in a manner reasonably anticipated; and

(3) Either or both of the following:

(a) The product was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use, and the plaintiff was damaged as a direct result of such defective condition as existed when the product was sold; or

(b) The product was then unreasonably dangerous when put to a reasonably anticipated use without knowledge of its characteristics, and the plaintiff was damaged as a direct result of the product being sold without an adequate warning.

§ 537.762. Motion to dismiss, defendant whose only liability is as seller in stream of commerce.

1. A defendant whose liability is based solely on his status as a seller in the stream of commerce may be dismissed from a products liability claim as provided in this section.

2. This section shall apply to any products liability claim in which another defendant, including the manufacturer, is properly before the court and from whom total recovery may be had for plaintiff's claim.

3. A defendant may move for dismissal under this section within the time for filing an answer or other responsive pleading unless permitted by the court at a later time for good cause shown. The motion shall be accompanied by an affidavit which shall be made under oath and shall state that the defendant is aware of no facts or circumstances upon which a verdict might be reached against him, other than his status as a seller in the stream of commerce.

4. The parties shall have sixty days in which to conduct discovery on the issues raised in the motion and affidavit. The court for good cause shown, may extend the time for discovery, and may enter a protective order pursuant to the rules of civil procedure regarding the scope of discovery on other issues.

5. Any party may move for a hearing on a motion to dismiss under this section. If the requirements of subsections 2 and 3 of this section are met, and no party comes forward at such a hearing with evidence of facts which would render the defendant seeking dismissal under this section

liable on some basis other than his status as a seller in the stream of commerce, the court shall dismiss without prejudice the claim as to that defendant.

6. An order of dismissal under this section shall be interlocutory until final disposition of plaintiff's claim by settlement or judgment and may be set aside for good cause shown at any time prior to such disposition.

§ 537.764. State of the art, defined—affirmative defense in cases of strict liability for failure to warn.

1. As used in this section, "state of the art" means that the dangerous nature of the product was not known and could not reasonably be discovered at the time the product was placed into the stream of commerce.

2. The state of the art shall be a complete defense and relevant evidence only in an action based upon strict liability for failure to warn of the dangerous condition of a product. This defense shall be pleaded as an affirmative defense and the party asserting it shall have the burden of proof.

3. Nothing in this section shall be construed as limiting the rights of an injured party to maintain an action for negligence whenever such a cause of action would otherwise exist.

4. This section shall not be construed to permit or prohibit evidence of feasibility in products liability claims.

§ 537.765. Contributory fault as complete bar to plaintiff's recovery abolished.

1. Contributory fault, as a complete bar to plaintiff's recovery in a products liability claim, is abolished. The doctrine of pure comparative fault shall apply to products liability claims as provided in this section.

2. Defendant may plead and prove the fault of the plaintiff as an affirmative defense. Any fault chargeable to the plaintiff shall diminish proportionately the amount awarded as compensatory damages but shall not bar recovery.

3. For purposes of this section, "fault" is limited to:

(1) The failure to use the product as reasonably anticipated by the manufacturer;

(2) Use of the product for a purpose not intended by the manufacturer;

(3) Use of the product with knowledge of a danger involved in such use with reasonable appreciation of the consequences and the voluntary and unreasonable exposure to said danger;

(4) Unreasonable failure to appreciate the danger involved in use of the product or the consequences thereof and the unreasonable exposure to said danger;

(5) The failure to undertake the precautions a reasonably careful user of the product would take to protect himself against dangers which he would reasonably appreciate under the same or similar circumstances; or

(6) The failure to mitigate damages.

MONTANA CODE ANNOTATED

(1987, 1997, 2009, 2015, 2021)

§ 27–1–719. Liability of seller of product for physical harm to user or consumer.

(1) As used in this section, "seller" means a manufacturer, wholesaler, or retailer.

(2) A person who sells a product in a defective condition that is unreasonably dangerous to a user or consumer or to the property of a user or consumer is liable for physical harm caused by the product to the ultimate user or consumer or to the user's or consumer's property if:

(a) the seller is engaged in the business of selling such a product; and

(b) the product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(3) The provisions of subsection (2) apply even if:

(a) the seller exercised all possible care in the preparation and sale of the product; and

(b) the user or consumer did not buy the product from or enter into any contractual relation with the seller.

(4) (a) Subsection (2) does not apply to product liability claims brought for damages caused in part by covid-19 as defined in [Laws 2021, ch. 2, § 1], which are governed by [Laws 2021, ch. 2, § 2].

(b) Subsection (2)(b) does not apply to a claim for relief based upon improper product design.

(5) Except as provided in this subsection, contributory negligence is not a defense to the liability of a seller, based on strict liability in tort, for personal injury or property damage caused by a defectively manufactured or defectively designed product. A seller named as a defendant in an action based on strict liability in tort for damages to a person or property caused by a defectively designed or defectively manufactured product may assert the following affirmative defenses against the user or consumer, the legal representative of the user or consumer, or any person claiming damages by reason of injury to the user or consumer:

(a) The user or consumer of the product discovered the defect or the defect was open and obvious and the user or consumer unreasonably made use of the product and was injured by it.

(b) The product was unreasonably misused by the user or consumer and the misuse caused or contributed to the injury.

(6) The affirmative defenses referred to in subsection (5) mitigate or bar recovery and must be applied in accordance with the principles of comparative fault set forth in 27–1–702 and 27–1–705.

§ 27–1–720. Liability—Defect in design of firearms or ammunition.

(1) In a products liability action, no firearm, ammunition component that was manufactured in Montana, or ammunition may be considered defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.

(2) For purposes of this section:

(a) the potential of a firearm or ammunition to cause serious injury, damage, or death when discharged does not make the product defective in design; and

(b) injuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death but are proximately caused by the actual discharge of the product.

(3) The provisions of this section do not affect a products liability cause of action based upon the improper selection of design alternatives.

NEBRASKA REVISED STATUTES

(1978, 1981, 1998, 2001)

§ 25–21,180. Terms, defined.

As used in sections 25–224 and 25–21,180 to 25–21,182, unless the context otherwise requires: Product liability action shall mean any action brought against a manufacturer, seller, or lessor of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formulation, installation, preparation, assembly, testing, packaging, or labeling of any product, or the failure to warn or protect against a danger or hazard in the use, misuse, or intended use of any product, or the failure to provide proper instructions for the use of any product.

§ 25–21,181. Action based on strict liability in tort; brought against seller or lessor; when.

No product liability action based on the doctrine of strict liability in tort shall be commenced or maintained against any seller or lessor of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless the seller or lessor is also the manufacturer of the product or the part thereof claimed to be defective.

§ 25–21,182. Product liability action; based upon negligent or defective design, testing, or labeling; defense.

In any product liability action based upon negligent or defective design, testing, or labeling, proof establishing that such design, testing, or labeling was in conformity with the generally recognized and prevailing state of the art in the industry at the time the specific product involved in the action was first sold to any person not engaged in the business of selling such product shall be a defense. State of the art as used in this section shall be defined as the best technology reasonably available at the time.

§ 25–224. Actions on product liability.

(1) All product liability actions, except one governed by subsection (5) of this section, shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs.

(2)(a) Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed by section 2–725, Uniform Commercial Code or by subsection (5) of this section, shall be commenced as follows:

(i) For products manufactured in Nebraska, within ten years after the date the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption; or

(ii) For products manufactured outside Nebraska, within the time allowed by the applicable statute of repose, if any, of the state or country where the product was manufactured, but in no event less than ten years. If the state or country where the product was manufactured does not have an applicable statute of repose, then the only limitation upon the commencement of an action for product liability shall be as set forth in subsection (1) of this section.

(b) If the changes made to this subsection by Laws 2001, LB 489, are declared invalid or unconstitutional, this subsection as it existed prior to September 1, 2001, shall be deemed in full force and effect and shall apply to all claims in which a final order has not been entered.

(3) The limitations contained in subsection (1), (2), or (5) of this section shall not be applicable to indemnity or contribution actions brought by a manufacturer or seller of a product against a person who is or may be liable to such manufacturer or seller for all or any portion of any judgment rendered against a manufacturer or seller.

(4) Notwithstanding the provisions of subsections (1) and (2) of this section, any cause of action or claim which any person may have on July 22, 1978, may be brought not later than two years following such date.

(5) Any action to recover damages based on injury allegedly resulting from exposure to asbestos composed of chrysotile, amosite, crocidolite, tremolite, anthrophyllite, actinolite, or any combination thereof, shall be commenced within four years after the injured person has been informed of discovery of the injury by competent medical authority and that such injury was caused by exposure to asbestos as described herein, or within four years after the discovery of facts which would reasonably lead to such discovery, whichever is earlier. No action commenced under this subsection based on the doctrine of strict liability in tort shall be commenced or maintained against any seller of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless such seller is also the manufacturer of such product or the manufacturer of the part thereof claimed to be defective. Nothing in this subsection shall be construed to permit an action to be brought based on an injury described in this subsection discovered more than two years prior to August 30, 1981.

NEW HAMPSHIRE REVISED STATUTES ANNOTATED

(1978, 1988)

§ 507:8–g. Discoverability of risk.

In product liability actions brought by or in consequence of harm to a user, it is an affirmative defense that the risks complained of by the plaintiff were not discoverable using prevailing research and scientific techniques under the state of the art and were not discoverable using procedures required by federal or state regulatory authorities charged with supervision or licensing of the product in question. Discoverability of risk shall be measured as of the time the manufacturer parted with possession and control of, or sold the product in question, whichever occurred last.

NEW JERSEY REVISED STATUTES

(1987, 1995)

§ 2A:58C–1. Legislative findings; definitions.

a. Legislative findings; definitions. a. The Legislature finds that there is an urgent need for remedial legislation to establish clear rules with respect to certain matters relating to actions for damages for harm caused by products, including certain principles under which liability is imposed and the standards and procedures for the award of punitive damages. This act is not intended to codify all issues relating to product liability, but only to deal with matters that require clarification. The Legislature further finds that such sponsors' or committee statements that may be adopted or included in the legislative history of this act shall be consulted in the interpretation and construction of this act.

b. As used in this Act:

(1) "Claimant" means any person who brings a product liability action, and if such an action is brought through or on behalf of an estate, the term includes the person's decedent, or if an action is brought through or on behalf of a minor, the term includes the person's parent or guardian.

(2) "Harm" means (a) physical damage to property, other than to the product itself; (b) personal physical illness, injury or death; (c) pain and suffering, mental anguish or emotional harm; and (d) any loss of consortium or services or other loss deriving from any type of harm described in subparagraphs (a) through (c) of this paragraph.

(3) "Product liability action" means any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty.

(4) "Environmental tort action" means a civil action seeking damages for harm where the cause of the harm is exposure to toxic chemicals or substances, but does not mean actions involving drugs or products intended for personal consumption or use.

§ 2A:58C–2. Liability of manufacturer or seller.

A manufacturer or seller of a product shall be liable in a product liability action only if the claimant proves by a preponderance of the evidence that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose because it: a. deviated from the design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae, or b. failed to contain adequate warnings or instructions, or c. was designed in a defective manner.

§ 2A:58C–3. Defenses.

a. In any product liability action against a manufacturer or seller for harm allegedly caused by a product that was designed in a defective manner, the manufacturer or seller shall not be liable if:

(1) At the time the product left the control of the manufacturer, there was not a practical and technically feasible alternative design that would have prevented the harm without substantially impairing the reasonably anticipated or intended function of the product; or

(2) The characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended, except that this paragraph shall not apply to industrial machinery or other equipment used in the workplace and it is not intended to apply to dangers posed by products such as machinery or equipment that can feasibly be eliminated without impairing the usefulness of the product; or

(3) The harm was caused by an unavoidably unsafe aspect of the product and the product was accompanied by an adequate warning or instruction as defined in section 4 of this act.

b. The provisions of paragraph (1) of subsection a. of this section shall not apply if the court, on the basis of clear and convincing evidence, makes all of the following determinations:

(1) The product is egregiously unsafe or ultra-hazardous;

(2) The ordinary user or consumer of the product cannot reasonably be expected to have knowledge of the product's risks, or the product poses a risk of serious injury to persons other than the user or consumer; and

(3) The product has little or no usefulness.

c. No provision of subsection a. of this section is intended to establish any rule, or alter any existing rule, with respect to the burden of proof.

§ 2A:58C–4. Adequate product warning or instruction.

In any product liability action the manufacturer or seller shall not be liable for harm caused by a failure to warn if the product contains an adequate warning or instruction or, in the case of dangers a manufacturer or seller discovers or reasonably should discover after the product leaves its control, if the manufacturer or seller provides an adequate warning or instruction. An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates adequate information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons by whom the product is intended to

be used, or in the case of prescription drugs, taking into account the characteristics of, and the ordinary knowledge common to, the prescribing physician. If the warning or instruction given in connection with a drug or device or food or food additive has been approved or prescribed by the federal Food and Drug Administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040, 21 U.S.C. § 301 et seq. or the "Public Health Service Act," 58 Stat. 682, 42 U.S.C. § 201 et seq., a rebuttable presumption shall arise that the warning or instruction is adequate. For purposes of this section, the terms "drug", "device", "food", and "food additive" have the meanings defined in the "Federal Food, Drug, and Cosmetic Act."

§ 2A:58C–5. Punitive damages.

Punitive damages shall not be awarded if a drug or device or food or food additive which caused the claimant's harm was subject to premarket approval or licensure by the federal Food and Drug Administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040, 21 U.S.C. § 301 et seq. or the "Public Health Service Act," 58 Stat. 682, 42 U.S.C. § 201 et seq. and was approved or licensed; or is generally recognized as safe and effective pursuant to conditions established by the federal Food and Drug Administration and applicable regulations, including packaging and labeling regulations. However, where the product manufacturer knowingly withheld or misrepresented information required to be submitted under the agency's regulations, which information was material and relevant to the harm in question, punitive damages may be awarded. For purposes of this subsection, the terms "drug", "device", "food", and "food additive" have the meanings defined in the "Federal Food, Drug, and Cosmetic Act."

§ 2A:58C–6. Environmental tort action—Inapplicability of Act.

The provisions of this act shall not apply to any environmental tort action.

§ 2A:58C–7. Burden of proof rules unaltered.

Except as otherwise expressly provided in this act, no provision of this act is intended to establish any rule, or alter any existing rule, with respect to the burden of proof in a product liability action.

§ 2A:58C–8. Additional definitions.

(1) As used in this act:

"Manufacturer" means (1) any person who designs, formulates, produces, creates, makes, packages, labels or constructs any product or component of a product; (2) a product seller with respect to a given product to the extent the product seller designs, formulates, produces, creates, makes, packages, labels or constructs the product before its sale; (3) any product seller not described in paragraph (2) which holds itself out as a manufacturer to the user of the product; or (4) a United States

domestic sales subsidiary of a foreign manufacturer if the foreign manufacturer has a controlling interest in the domestic sales subsidiary.

"Product liability action" means any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty.

"Product seller" means any person who, in the course of a business conducted for that purpose: sells; distributes; leases; installs; prepares or assembles a manufacturer's product according to the manufacturer's plan, intention, design, specifications or formulations; blends; packages; labels; markets; repairs; maintains or otherwise is involved in placing a product in the line if commerce. The term "product seller" does not include:

(1) A seller of real property; or

(2) A provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill or services; or

(3) Any person who acts in only a financial capacity with respect to the sale of a product.

§ 2A:58C–9. Identification of manufacturer; strict liability of supplier.

a. In any product liability action against a product seller where the manufacturer has not been named a defendant, the product seller may file an affidavit certifying the correct identity of the manufacturer of the product which allegedly caused the injury, death or damage.

b. Upon filing the affidavit pursuant to subsection a. of this section, the product seller shall be relieved of all strict liability claims, subject to the provisions set forth in subsection d. Of this section. Due diligence shall be exercised in providing the plaintiff with the correct identity of the manufacturer or manufacturers.

c. The product seller shall be subject to strict liability if:

(1) The identity of the manufacturer given to the plaintiff by the product seller was incorrect. Once the correct identity of the manufacturer has been provided, the product seller shall again be relieved of all strict liability claims, subject to subsection d. of this section; or

(2) The manufacturer has no known agents, facility, or other presence within the United States; or

(3) The manufacturer has no attachable assets or has been adjudicated bankrupt and a judgment is not otherwise recoverable from the assets of the bankruptcy estate.

d. A product seller shall be liable if:

(1) The product seller has exercised some significant control over the design, manufacture, packaging or labeling of the product relative to the alleged defect in the product which caused the injury, death or damage; or

(2) The product seller knew or should have known of the defect in the product which caused the injury, death or damage or the plaintiff can affirmatively demonstrate that the product seller was in possession of facts from which a reasonable person would conclude that the product seller had or should have had knowledge of the alleged defect in the product which caused the injury, death or damage; or

(3) The product seller created the defect in the product which caused the injury, death or damage.

e. The commencement of a product liability action based in whole or in part on the doctrine of strict liability against a product seller shall toll the applicable statute of limitations with respect to manufacturers who have been identified pursuant to the provisions of subsection a of this section.

§ 2A:58C–10. Definitions relative to health care providers.

As used in this act:

"Health care provider" or "provider" means a provider of health care services and includes, but is not limited to, health care professionals, hospitals, nursing homes and other health care facilities.

"Health care service" means a service or product sold by a health care provider and includes, but is not limited to, hospital, medical, surgical, dental, hearing and vision services or products.

"Medical device" or "device" means a "device" as defined in subsection (h) of section 201 of the "Federal Food, Drug and Cosmetic Act," 52 Stat. 1040 (21 U.S.C. § 321).

§ 2A:58C–11. Liability of health care providers for medical devices.

In any product liability action against a health care provider for harm allegedly caused by a medical device that was manufactured or designed in a defective manner, or for harm caused by a failure to warn of a danger related to the use of a medical device, the provider shall not be liable unless:

(1) the provider has exercised some significant control over the design, manufacture, packaging or labeling of the medical device relative to the alleged defect in the device which caused the injury, death or damage; or

(2) the provider knew or should have known of the defect in the medical device which caused the injury, death or damage, or the plaintiff can affirmatively demonstrate that the provider was in possession of

facts from which a reasonable person would conclude that the provider had or should have had knowledge of the alleged defect in the medical device which caused the injury, death or damage; or

(3) the provider created the defect in the medical device which caused the injury, death or damage.

NORTH CAROLINA GENERAL STATUTES

(1979, 1987, 1995)

§ 99B–1. Definitions.

When used in this Chapter, unless the context otherwise requires:

(1) "Claimant" means a person or other entity asserting a claim and, if said claim is asserted on behalf of an estate, an incompetent or a minor, "claimant" includes plaintiff's decedent, guardian, or guardian ad litem.

(2) "Manufacturer" means a person or entity who designs, assembles, fabricates, produces, constructs or otherwise prepares a product or component part of a product prior to its sale to a user or consumer, including a seller owned in whole or significant part by the manufacturer or a seller owning the manufacturer in whole or significant part.

(3) "Product liability action" includes any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling of any product.

(4) "Seller" includes a retailer, wholesaler, or distributor, and means any individual or entity engaged in the business of selling a product, whether such sale is for resale or for use or consumption. "Seller" also includes a lessor or bailor engaged in the business of leasing or bailment of a product.

§ 99B–1.1. Strict liability.

There shall be no strict liability in tort in product liability actions.

§ 99B–1.2. Breach of warranty.

Nothing in this act shall preclude a product liability action that otherwise exists against a manufacturer or seller for breach of warranty. The defenses provided for in this Chapter shall apply to claims for breach of warranty unless expressly excluded under this Chapter.

§ 99B–2. Seller's opportunity to inspect; privity requirements for warranty claims.

(a) No product liability action, except an action for breach of express warranty, shall be commenced or maintained against any seller when the product was acquired and sold by the seller in a sealed container or when the product was acquired and sold by the seller under circumstances in which the seller was afforded no reasonable opportunity to inspect the product in such a manner that would have or should have, in the exercise of reasonable care, revealed the existence of the condition complained of, unless the seller damaged or mishandled the product while in his possession; provided, that the provisions of this section shall not apply if

the manufacturer of the product is not subject to the jurisdiction of the courts of this State or if such manufacturer has been judicially declared insolvent.

(b) A claimant who is a buyer, as defined in the Uniform Commercial Code, of the product involved, or who is a member or a guest of a member of the family of the buyer, a guest of the buyer, or an employee of the buyer may bring a product liability action directly against the manufacturer of the product involved for breach of implied warranty; and the lack of privity of contract shall not be grounds for the dismissal of such action.

§ 99B–3. Alteration or modification of product.

(a) No manufacturer or seller of a product shall be held liable in any product liability action where a proximate cause of the personal injury, death, or damage to property was either an alteration or modification of the product by a party other than the manufacturer or seller, which alteration or modification occurred after the product left the control of such manufacturer or such seller unless:

(1) The alteration or modification was in accordance with the instructions or specifications of such manufacturer or such seller; or

(2) The alteration or modification was made with the express consent of such manufacturer or such seller.

(b) For the purposes of this section, alteration or modification includes changes in the design, formula, function, or use of the product from that originally designed, tested, or intended by the manufacturer. It includes failure to observe routine care and maintenance, but does not include ordinary wear and tear.

§ 99B–4. Knowledge or reasonable care.

No manufacturer or seller shall be held liable in any product liability action if:

(1) The use of the product giving rise to the product liability action was contrary to any express and adequate instructions or warnings delivered with, appearing on, or attached to the product or on its original container or wrapping, if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings; or

(2) The user knew of or discovered a defect or dangerous condition of the product that was inconsistent with the safe use of the product, and then unreasonably and voluntarily exposed himself or herself to the danger, and was injured by or caused injury with that product; or

(3) The claimant failed to exercise reasonable care under the circumstances in the use of the product, and such failure was a proximate cause of the occurrence that caused the injury or damage complained of.

§ 99B–5. Claims based on inadequate warning or instruction.

(a) No manufacturer or seller of a product shall be held liable in any product liability action for a claim based upon inadequate warning or instruction unless the claimant proves that the manufacturer or seller acted unreasonably in failing to provide such warning or instruction, that the failure to provide adequate warning or instruction was a proximate cause of the harm for which damages are sought, and also proves one of the following:

(1) At the time the product left the control of the manufacturer or seller, the product, without an adequate warning or instruction, created an unreasonably dangerous condition that the manufacturer or seller knew, or in the exercise of ordinary care should have known, posed a substantial risk of harm to a reasonably foreseeable claimant.

(2) After the product left the control of the manufacturer or seller, the manufacturer or seller became aware of or in the exercise of ordinary care should have known that the product posed a substantial risk of harm to a reasonably foreseeable user or consumer and failed to take reasonable steps to give adequate warning or instruction or to take other reasonable action under the circumstances.

(b) Notwithstanding subsection (a) of this section, no manufacturer or seller of a product shall be held liable in any product liability action for failing to warn about an open and obvious risk or a risk that is a matter of common knowledge.

(c) Notwithstanding subsection (a) of this section, no manufacturer or seller of a prescription drug shall be liable in a products liability action for failing to provide a warning or instruction directly to a consumer if an adequate warning or instruction has been provided to the physician or other legally authorized person who prescribes or dispenses that prescription drug for the claimant unless the United States Food and Drug Administration requires such direct consumer warning or instruction to accompany the product.

§ 99B–6. Claims based on inadequate design or formulation.

(a) No manufacturer of a product shall be held liable in any product liability action for the inadequate design or formulation of the product unless the claimant proves that at the time of its manufacture the manufacturer acted unreasonably in designing or formulating the product, that this conduct was a proximate cause of the harm for which damages are sought, and also proves one of the following:

(1) At the time the product left the control of the manufacturer, the manufacturer unreasonably failed to adopt a safer, practical, feasible, and otherwise reasonable alternative design or formulation that could then have been reasonably adopted and that would have prevented or substantially reduced the risk of harm without substantially impairing the usefulness, practicality, or desirability of the product.

(2) At the time the product left the control of the manufacturer, the design or formulation of the product was so unreasonable that a reasonable person, aware of the relevant facts, would not use or consume a product of this design.

(b) In determining whether the manufacturer acted unreasonably under subsection (a) of this section, the factors to be considered shall include, but are not limited to, the following:

(1) The nature and magnitude of the risks of harm associated with the design or formulation in light of the intended and reasonably foreseeable uses, modifications, or alterations of the product.

(2) The likely awareness of product users, whether based on warnings, general knowledge, or otherwise, of those risks of harm.

(3) The extent to which the design or formulation conformed to any applicable government standard that was in effect when the product left the control of its manufacturer.

(4) The extent to which the labeling for a prescription or nonprescription drug approved by the United States Food and Drug Administration conformed to any applicable government or private standard that was in effect when the product left the control of its manufacturer.

(5) The utility of the product, including the performance, safety, and other advantages associated with that design or formulation.

(6) The technical, economic, and practical feasibility of using an alternative design or formulation at the time of manufacture.

(7) The nature and magnitude of any foreseeable risks associated with the alternative design or formulation.

(c) No manufacturer of a product shall be held liable in any product liability action for a claim under this section to the extent that it is based upon an inherent characteristic of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and that is recognized by the ordinary person with the ordinary knowledge common to the community.

(d) No manufacturer of a prescription drug shall be liable in a product liability action on account of some aspect of the prescription drug that is unavoidably unsafe, if an adequate warning and instruction has been provided pursuant to G.S. 99B–5(c). As used in this subsection, "unavoidably unsafe" means that, in the state of technical, scientific, and medical knowledge generally prevailing at the time the product left the control of its manufacturer, an aspect of that product that caused the claimant's harm was not reasonably capable of being made safe.

(e) Nothing in this section precludes an action against a manufacturer in accordance with the provisions of G.S. 99B–5.

NORTH DAKOTA CENTURY CODE

(1993, 1995, 2021)

§ 28–01.3–01. Definitions.

As used in this chapter:

1. "Manufacturer" means a person or entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product prior to the sale of the product to a user or consumer. The term includes any seller of a product who is owned in whole or significant part by the manufacturer or who owns, in whole or significant part, the manufacturer.

2. "Product liability action" means any action brought against a manufacturer or seller of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formula, installation, preparation, assembly, testing, packaging, labeling, or sale of any product, or the failure to warn or protect against a danger or hazard in the use, misuse, or unintended use of any product, or the failure to provide proper instructions for the use of any product.

3. "Seller" means any individual or entity, including a manufacturer, wholesaler, distributor, or retailer, who is engaged in the business of selling or leasing any product for resale, use, or consumption.

4. "Unreasonably dangerous" means that the product is dangerous to an extent beyond which would be contemplated by the ordinary and prudent buyer, consumer, or user of that product in that community considering the product's characteristics, propensities, risks, dangers, and uses, together with any actual knowledge, training, or experience possessed by that particular buyer, user, or consumer.

§ 28–01.3–02. Limitation on ad damnum clause.

If a complaint filed in a products liability action prays for a recovery of money in an amount equal to or less than fifty thousand dollars, the amount must be stated. If a recovery of money in an amount greater than fifty thousand dollars is demanded, the pleading must state merely that recovery of reasonable damages in an amount greater than fifty thousand dollars is demanded. This action may be superseded by an amendment to the North Dakota Rules of Civil Procedure.

§ 28–01.3–03. Alteration or modification of product is defense to action.

No manufacturer or seller of a product may be held liable in any products liability action where a substantial contributing cause of the injury, death, or damage to property was an alteration or modification of the product, which occurred subsequent to the sale by the manufacturer or seller to the initial user or consumer, and which changed the purpose,

use, function, design, or intended use or manner of use of the product from that for which the product was originally designed, tested, or intended.

§ 28–01.3–04. Liability of nonmanufacturing sellers.

1. In any products liability action maintained against a seller of a product who did not manufacture the product, the seller shall upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing the personal injury, death, or damage to property.

2. The court shall order the dismissal of the claim against the certifying seller, unless the plaintiff can show any of the following:

a. That the certifying seller exercised some significant control over the design or manufacture of the product, or provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the personal injury, death, or damage to property.

b. That the certifying seller had actual knowledge of the defect in the product which caused the personal injury, death, or damage to property.

c. That the certifying seller created the defect in the product which caused the personal injury, death, or damage to property.

3. The plaintiff may at any time prior to the beginning of the trial move to vacate the order of dismissal and reinstate the certifying seller if the plaintiff can show any of the following:

a. That the applicable statute of limitation bars a product liability action against the manufacturer of the product allegedly causing the injury, death, or damage.

b. That the identity of the manufacturer given to the plaintiff by the certifying defendant was incorrect.

§ 28–01.3–05. Indemnity of seller.

If a product liability action is commenced against a seller, and it is alleged that a product was defectively designed, contained defectively manufactured parts, had insufficient safety guards, or had inaccurate or insufficient warning; that such condition existed when the product left the control of the manufacturer; that the seller has not substantially altered the product; and that the defective condition or lack of safety guards or adequate warnings caused the injury or damage complained of; the manufacturer from whom the product was acquired by the seller must be required to assume the cost of defense of the action, and any liability that may be imposed on the seller. The obligation to assume the seller's cost of defense should also extend to an action in which the manufacturer and seller are ultimately found not liable.

§ 28–01.3–06. Determination of defective product.

No product may be considered to have a defect or to be in a defective condition, unless at the time the product was sold by the manufacturer or other initial seller, there was a defect or defective condition in the product which made the product unreasonably dangerous to the user or consumer.

§ 28–01.3–07. Declaration of legislative findings and intent.

1. The legislative assembly finds that products liability reforms enacted in 1979, 1987, and 1993 have provided a needed degree of certainty in the laws governing civil actions against product manufacturers and sellers.

2. In recent years it has become increasingly evident that there are still serious problems with the current civil justice system. As a result, there is an urgent need for additional legislation to establish clear and predictable rules with respect to certain matters relating to products liability actions.

3. The purpose of sections 28–01.3–08 and 28–01.3–09 is to clarify and improve the method of determining responsibility for the payment of damages in products liability litigation; to restore balance and predictability between the consumer and the manufacturer or seller in product liability litigation; to bring about a more fair and equitable resolution of controversies in products liability litigation; to reenact a statute of repose to provide a reasonable period of time for the commencement of products liability litigation after a manufacturer or seller has parted with possession of its product; to address problems that have been created by judicial interpretation of our previous enactments; to enact, with minor changes, several provisions of former chapter 28–01.1; and to simplify and provide an increased degree of certainty and predictability to our products liability laws.

§ 28–01.3–08. Statute of limitation and repose.

1. Except as provided in subsections 4 and 5, there may be no recovery of damages in a products liability action unless the injury, death, or property damage occurs within ten years of the date of initial purchase for use or consumption, or within eleven years of the date of manufacture of a product.

2. This section applies to all persons, regardless of minority or other legal disability.

3. If a manufacturer, wholesaler, or retailer issues a recall of a product in any state or becomes aware of any defect in a product at any time and fails to take reasonable steps to warn users of the product defect, the provisions of subsection 1 do not bar a products liability action against the manufacturer or seller by a user of the product who is subsequently injured or damaged as a result of the defect.

4. An action to recover damages based on injury allegedly resulting from exposure to asbestos composed of chrysotile, amosite, crocidolite, tremolite, anthrophyllite, actinolite, or any combination thereof, must be commenced within three years after the injured person has been informed of discovery of the injury by competent medical authority and that the injury was caused by exposure to asbestos as described in this subsection, or within three years after the discovery of facts that would reasonably lead to the discovery, whichever is earlier. No action commenced under this subsection based on the doctrine of strict liability in tort may be commenced or maintained against any seller of a product that is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless the seller is also the manufacturer of the product or the manufacturer of the part of the product claimed to be defective.

5. An action to recover damages based on injury to property allegedly resulting from the presence of products containing asbestos fibers of any type must be commenced within six years of the date upon which the owner of that property knew or should have known of facts giving rise to the cause of action.

[Held unconstitutional, Dickie v. Farmers Union Oil Co. of LaMoure, 611 N.W.2d 168 (N.D. 2000).]

§ 28–01.3–09. Rebuttable presumption against defects.

There is a rebuttable presumption that a product is free from any defect or defective condition where the plans, designs, warnings, or instructions for the product or the methods and techniques of manufacturing, inspecting, and testing the product were in conformity with government standards established for that industry or where no government standards exist then with applicable industry standards, which were in existence at the time the plans, designs, warnings, or instructions for the product or the methods and techniques of manufacturing, inspecting, and testing the product were adopted.

§ 28–01.3–10. Product liability actions and immunity for a firearm or ammunition manufacturer.

A firearm or ammunition manufacturer, importer, or dealer may not be held civilly liable for any physical or emotional injury, physical damage, or death as a third party for the acts of another person.

OHIO REVISED CODE ANNOTATED

(1987, 1996, 2001, 2004, 2007, 2020)

§ 2307.71. Definitions.

(A) As used in sections 2307.71 to 2307.80 of the Revised Code:

(1) "Claimant" means either of the following:

(a) A person who asserts a product liability claim or on whose behalf a product liability claim is asserted;

(b) If a product liability claim is asserted on behalf of the surviving spouse, children, parents, or other next of kin of a decedent or on behalf of the estate of a decedent, whether as a claim in an action for wrongful death under Chapter 2125. of the Revised Code or as a survivorship claim, whichever of the following is appropriate:

(i) The decedent, if the reference is to the person who allegedly sustained harm or economic loss for which, or in connection with which, compensatory damages or punitive or exemplary damages are sought to be recovered;

(ii) The personal representative of the decedent or the estate of the decedent, if the reference is to the person who is asserting or has asserted the product liability claim.

(2) "Economic loss" means direct, incidental, or consequential pecuniary loss, including, but not limited to, damage to the product in question and nonphysical damage to property other than that product. Harm is not "economic loss."

(3) "Environment" means only navigable waters, surface water, ground water, drinking water supplies, land surface, subsurface strata, and air.

(4) "Ethical drug" means a prescription drug that is prescribed or dispensed by a physician or any other person who is legally authorized to prescribe or dispense a prescription drug.

(5) "Ethical medical device" means a medical device that is prescribed, dispensed, or implanted by a physician or any other person who is legally authorized to prescribe, dispense, or implant a medical device and that is regulated under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040, 21 U.S.C. 301–392, as amended.

(6) "Foreseeable risk" means a risk of harm that satisfies both of the following:

(a) It is associated with an intended or reasonably foreseeable use, modification, or alteration of a product in question.

(b) It is a risk that the manufacturer in question should recognize while exercising both of the following:

(i) The attention, perception, memory, knowledge, and intelligence that a reasonable manufacturer should possess;

(ii) Any superior attention, perception, memory, knowledge, or intelligence that the manufacturer in question possesses.

(7) "Harm" means death, physical injury to person, serious emotional distress, or physical damage to property other than the product in question. Economic loss is not "harm."

(8) "Hazardous or toxic substances" include, but are not limited to, hazardous waste as defined in section 3734.01 of the Revised Code, hazardous waste as specified in the rules of the director of environmental protection pursuant to division (A) of section 3734.12 of the Revised Code, hazardous substances as defined in section 3716.01 of the Revised Code, and hazardous substances, pollutants, and contaminants as defined in or by regulations adopted pursuant to the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," 94 Stat. 2767, 42 U.S.C. 9601, as amended.

(9) "Manufacturer" means a person engaged in a business to design, formulate, produce, create, make, construct, assemble, or rebuild a product or a component of a product.

(10) "Person" has the same meaning as in division (C) of section 1.59 of the Revised Code and also includes governmental entities.

(11) "Physician" means a person who is licensed to practice medicine and surgery or osteopathic medicine and surgery by the state medical board.

(12)(a) "Product" means, subject to division (A)(12)(b) of this section, any object, substance, mixture, or raw material that constitutes tangible personal property and that satisfies all of the following:

(i) It is capable of delivery itself, or as an assembled whole in a mixed or combined state, or as a component or ingredient.

(ii) It is produced, manufactured, or supplied for introduction into trade or commerce.

(iii) It is intended for sale or lease to persons for commercial or personal use.

(b) "Product" does not include human tissue, blood, or organs.

(13) "Product liability claim" means a claim that is asserted in a civil action pursuant to sections 2307.71 to 2307.80 of the Revised Code and that seeks to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property other than the product in question, that allegedly arose from any of the following:

(a) The design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product;

(b) Any warning or instruction, or lack of warning or instruction, associated with that product;

(c) Any failure of that product to conform to any relevant representation or warranty.

"Product liability claim" also includes any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public.

(14) "Representation" means an express representation of a material fact concerning the character, quality, or safety of a product.

(15)(a) "Supplier" means, subject to division (A)(15)(b) of this section, either of the following:

(i) A person that, in the course of a business conducted for the purpose, sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce;

(ii) A person that, in the course of a business conducted for the purpose, installs, repairs, or maintains any aspect of a product that allegedly causes harm.

(b) "Supplier" does not include any of the following:

(i) A manufacturer;

(ii) A seller of real property;

(iii) A provider of professional services who, incidental to a professional transaction the essence of which is the furnishing of judgment, skill, or services, sells or uses a product;

(iv) Any person who acts only in a financial capacity with respect to the sale of a product, or who leases a product under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor.

(16) "Unavoidably unsafe" means that, in the state of technical, scientific, and medical knowledge at the time a product left the control of its manufacturer, an aspect of that product was incapable of being made safe.

(B) Sections 2307.71 to 2307.80 of the Revised Code are intended to abrogate all common law product liability causes of action.

§ 2307.711. Assumption of risk as affirmative defense to claim.

(A) Subject to divisions (B)(1), (2), and (3) of this section, sections 2315.32 to 2315.36 of the Revised Code apply to a product liability claim that is asserted pursuant to sections 2307.71 to 2307.80 of the Revised Code.

(B)(1) Express or implied assumption of the risk may be asserted as an affirmative defense to a product liability claim under sections 2307.71 to 2307.80 of the Revised Code, except that express or implied

assumption of the risk may not be asserted as an affirmative defense to an intentional tort claim.

(2) Subject to division (B)(3) of this section, if express or implied assumption of the risk is asserted as an affirmative defense to a product liability claim under sections 2307.71 to 2307.80 of the Revised Code and if it is determined that the claimant expressly or impliedly assumed a risk and that the express or implied assumption of the risk was a direct and proximate cause of harm for which the claimant seeks to recover damages, the express or implied assumption of the risk is a complete bar to the recovery of those damages.

(3) If implied assumption of the risk is asserted as an affirmative defense to a product liability claim against a supplier under division (A)(1) of section 2307.78 of the Revised Code, sections 2315.32 to 2315.36 of the Revised Code are applicable to that affirmative defense and shall be used to determine whether the claimant is entitled to recover compensatory damages based on that claim and the amount of any recoverable compensatory damages.

§ 2307.72. Damage claims; contamination or pollution claims; multiple claims asserted in one civil action.

(A) Any recovery of compensatory damages based on a product liability claim is subject to sections 2307.71 to 2307.79 of the Revised Code.

(B) Any recovery of punitive or exemplary damages in connection with a product liability claim is subject to sections 2307.71 to 2307.80 of the Revised Code.

(C) Any recovery of compensatory damages for economic loss based on a claim that is asserted in a civil action, other than a product liability claim, is not subject to sections 2307.71 to 2307.79 of the Revised Code but may occur under the common law of this state or other applicable sections of the Revised Code.

(D)(1) Sections 2307.71 to 2307.80 of the Revised Code do not supersede, modify, or otherwise affect any statute, regulation, or rule of this state or of the United States, or the common law of this state or of the United States, that relates to liability in compensatory damages or punitive or exemplary damages for injury, death, or loss to person or property, or to relief in the form of the abatement of a nuisance, civil penalties, cleanup costs, cost recovery, an injunction or temporary restraining order, or restitution, that arises, in whole or in part, from contamination or pollution of the environment or a threat of contamination or pollution of the environment, including contamination or pollution or a threat of contamination or pollution from hazardous or toxic substances.

(2) Consistent with the Rules of Civil Procedure, in the same civil action against the same defendant or different defendants, a claimant may assert both of the following:

(a) A product liability claim, including a claim for the recovery of punitive or exemplary damages in connection with a product liability claim;

(b) A claim for the recovery of compensatory damages or punitive or exemplary damages for injury, death, or loss to person or property, or for relief in the form of the abatement of a nuisance, civil penalties, cleanup costs, cost recovery, an injunction or temporary restraining order, or restitution, that arises, in whole or in part, from contamination or pollution of the environment or a threat of contamination or pollution of the environment, including contamination or pollution or a threat of contamination or pollution from hazardous or toxic substances.

§ 2307.73. Standard of proof for manufacturer's liability for compensatory damages; evidence of subsequent remedial measures.

(A) A manufacturer is subject to liability for compensatory damages based on a product liability claim only if the claimant establishes, by a preponderance of the evidence, all of the following:

(1) Subject to division (B) of this section, the manufacturer's product in question was defective in manufacture or construction as described in section 2307.74 of the Revised Code, was defective in design or formulation as described in section 2307.75 of the Revised Code, was defective due to inadequate warning or instruction as described in section 2307.76 of the Revised Code, or was defective because it did not conform to a representation made by the manufacturer as described in section 2307.77 of the Revised Code;

(2) A defective aspect of the manufacturer's product in question as described in division (A)(1) of this section was a proximate cause of harm for which the claimant seeks to recover compensatory damages.

(3) The manufacturer designed, formulated, produced, constructed, created, assembled, or rebuilt the actual product that was the cause of harm for which the claimant seeks to recover compensatory damages.

(B) If a claimant is unable because the manufacturer's product in question was destroyed to establish by direct evidence that the manufacturer's product in question was defective or if a claimant otherwise is unable to establish by direct evidence that the manufacturer's product in question product was defective, then, consistent with the Rules of Evidence, it shall be sufficient for the claimant to present, consistent with the Rules of Evidence, circumstantial or other competent evidence that establishes, by a preponderance of the evidence, that the manufacturer's product in question was defective in any one of the four respects specified in division (A)(1) of this section.

(C) Proof that a manufacturer designed, formulated, produced, constructed, created, assembled, or rebuilt the type of product in question is not proof that the manufacturer designed, formulated, produced,

constructed, created, assembled, or rebuilt the actual defective product in the product liability claim. A manufacturer may not be held liable in a product liability action based on market share, enterprise, or industry wide liability.

§ 2307.74. Products defective in manufacture or construction.

A product is defective in manufacture or construction if, when it left the control of its manufacturer, it deviated in a material way from the design specifications, formula, or performance standards of the manufacturer, or from otherwise identical units manufactured to the same design specifications, formula, or performance standards. A product may be defective in manufacture or construction as described in this section even though its manufacturer exercised all possible care in its manufacture or construction.

§ 2307.75. Products defective in design or formulation; foreseeable risks; benefits; drug or medical device.

(A) Subject to divisions (D), (E), and (F) of this section, a product is defective in design or formulation if at the time it left the control of its manufacturer, the foreseeable risks associated with its design or formulation as determined pursuant to division (B) of this section exceeded the benefits associated with that design or formulation as determined pursuant to division (C) of this section.

(B) The foreseeable risks associated with the design or formulation of a product shall be determined by considering factors including, but not limited to, the following:

(1) The nature and magnitude of the risks of harm associated with that design or formulation in light of the intended and reasonably foreseeable uses, modifications, or alterations of the product;

(2) The likely awareness of product users, whether based on warnings, general knowledge, or otherwise, of those risks of harm;

(3) The likelihood that that design or formulation would cause harm in light of the intended and reasonably foreseeable uses, modifications, or alterations of the product;

(4) The extent to which that design or formulation conformed to any applicable public or private product standard that was in effect when the product left the control of its manufacturer;

(5) The extent to which the design or formulation is more dangerous than a reasonably prudent consumer would expect when used in an intended or reasonably foreseeable manner.

(C) The benefits associated with the design or formulation of a product shall be determined by considering factors including, but not limited to, the following:

(1) The intended or actual utility of the product, including any performance or safety advantages associated with that design or formulation;

(2) The technical and economic feasibility, when the product left the control of its manufacturer, of using an alternative design or formulation;

(3) The nature and magnitude of any foreseeable risks associated with an alternative design or formulation.

(D) An ethical drug or ethical medical device is not defective in design or formulation because some aspect of it is unavoidably unsafe, if the manufacturer of the ethical drug or ethical medical device provides adequate warning and instruction under section 2307.76 of the Revised Code concerning that unavoidably unsafe aspect.

(E) A product is not defective in design or formulation if the harm for which the claimant seeks to recover compensatory damages was caused by an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and which is recognized by the ordinary person with the ordinary knowledge common to the community.

(F) A product is not defective in design or formulation if, at the time the product left the control of its manufacturer, a practical and technically feasible alternative design or formulation was not available that would have prevented the harm for which the claimant seeks to recover compensatory damages without substantially impairing the usefulness or intended purpose of the product.

§ 2307.76. Products defective due to inadequate warning or instruction.

(A) Subject to divisions (B) and (C) of this section, a product is defective due to inadequate warning or instruction if either of the following applies:

(1) it is defective due to inadequate warning or instruction at the time of marketing if, when it left the control of its manufacturer, both of the following applied:

(a) the manufacturer knew or, in the exercise of reasonable care, should have known about a risk that is associated with the product and that allegedly caused harm for which the claimant seeks to recover compensatory damages;

(b) the manufacturer failed to provide the warning or instruction that a manufacturer exercising reasonable care would have provided concerning that risk, in light of the likelihood that the product would cause harm of the type for which the claimant seeks to recover compensatory damages and in light of the likely seriousness of that harm.

(2) It is defective due to inadequate post-marketing warning or instruction if, at a relevant time after it left the control of its manufacturer, both of the following applied:

(a) the manufacturer knew or, in the exercise of reasonable care, should have known about a risk that is associated with the product and that allegedly caused harm for which the claimant seeks to recover compensatory damages;

(b) the manufacturer failed to provide the post-marketing warning or instruction that a manufacturer exercising reasonable care would have provided concerning that risk, in light of the likelihood that the product would cause harm of the type for which the claimant seeks to recover compensatory damages and in light of the likely seriousness of that harm.

(B) A product is not defective due to lack of warning or instruction or inadequate warning or instruction as a result of the failure of its manufacturer to warn or instruct about an open and obvious risk or a risk that is a matter of common knowledge.

(C) An ethical drug is not defective due to inadequate warning or instruction if its manufacturer provides otherwise adequate warning and instruction to the physician or other legally authorized person who prescribes or dispenses that ethical drug for a claimant in question and if the federal Food and Drug Administration has not provided that warning or instruction relative to that ethical drug is to be given directly to the ultimate user of it.

§ 2307.77. Products defective due to nonconformance with manufacturer's representations.

A product is defective if it did not conform, when it left the control of its manufacturer, to a representation made by that manufacturer. A product may be defective because it did not conform to a representation even though its manufacturer did not act fraudulently, recklessly, or negligently in making the representation.

§ 2307.78. Liability of supplier.

(A) Subject to division (B) of this section, a supplier is subject to liability for compensatory damages based on a product liability claim only if the claimant establishes, by a preponderance of the evidence, that either of the following applies:

(1) The supplier in question was negligent and that, the negligence was a proximate cause of harm for which the claimant seeks to recover compensatory damages.

(2) The product in question did not conform, when it left the control of the supplier in question, to a representation made by that supplier, and that representation and the failure to conform to it were a proximate cause of harm for which the claimant seeks to recover compensatory damages. A supplier is subject to liability for such a representation and

the failure to conform to it even though the supplier did not act fraudulently, recklessly, or negligently in making the representation.

(B) A supplier of a product is subject to liability for compensatory damages based on a product liability claim under sections 2307.71 to 2307.77 of the Revised Code, as if it were the manufacturer of that product, if the manufacturer of that product is or would be subject to liability for compensatory damages based on a product liability claim under sections 2307.71 to 2307.77 of the Revised Code and any of the following applies:

(1) The manufacturer of that product is not subject to judicial process in this state;

(2) The claimant will be unable to enforce a judgment against the manufacturer of that product due to actual or asserted insolvency of the manufacturer;

(3) The supplier in question owns or, when it supplied that product, owned, in whole or in part, the manufacturer of that product;

(4) The supplier in question is owned or, when it supplied that product, was owned, in whole or in part, by the manufacturer of that product;

(5) The supplier in question created or furnished a manufacturer with the design or formulation that was used to produce, create, make, construct, assemble, or rebuild that product or a component of that product;

(6) The supplier in question altered, modified, or failed to maintain that product after it came into the possession of, and before it left the possession of, the supplier, and the alteration, modification, or failure to maintain that product rendered it defective;

(7) The supplier in question marketed that product under its own label or trade name;

(8) The supplier in question failed to respond timely and reasonably to a written request by or on behalf of the claimant to disclose to the claimant the name and address of the manufacturer of that product.

§ 2307.79. Compensatory damages.

(A) If a claimant is entitled to recover compensatory damages for harm from a manufacturer in accordance with section 2307.73 of the Revised Code or from a supplier in accordance with division (B) of section 2307.78 of the Revised Code, the claimant may recover from the manufacturer or supplier in question, in that action, compensatory damages for any economic loss that proximately resulted from the defective aspect of the product in question.

(B) If a claimant is entitled to recover compensatory damages for harm from a supplier in accordance with division (A) of section 2307.78 of the Revised Code, the claimant may recover from the supplier in

question, in that action, compensatory damages for any economic loss that proximately resulted from the negligence of that supplier or from the representation made by that supplier and the failure of the product in question to conform to that representation.

§ 2307.80. Punitive or exemplary damages.

(A) Subject to divisions (C) and (D) of this section, punitive or exemplary damages shall not be awarded against a manufacturer or supplier in question in connection with a product liability claim unless the claimant establishes, by clear and convincing evidence, that harm for which the claimant is entitled to recover compensatory damages in accordance with section 2307.73 or 2307.78 of the Revised Code was the result of misconduct of the manufacturer or supplier in question that manifested a flagrant disregard of the safety of persons who might be harmed by the product in question. The fact by itself that a product is defective does not establish a flagrant disregard of the safety of persons who might be harmed by that product.

(B) Whether the trier of fact is a jury or the court, if the trier of fact determines that a manufacturer or supplier in question is liable for punitive or exemplary damages in connection with a product liability claim, the amount of those damages shall be determined by the court. In determining the amount of punitive or exemplary damages, the court shall consider factors including, but not limited to, the following:

(1) The likelihood that serious harm would arise from the misconduct of the manufacturer or supplier in question;

(2) The degree of the awareness of the manufacturer or supplier in question of that likelihood;

(3) The profitability of the misconduct to the manufacturer or supplier in question;

(4) The duration of the misconduct and any concealment of it by the manufacturer or supplier in question;

(5) The attitude and conduct of the manufacturer or supplier in question upon the discovery of the misconduct and whether the misconduct has terminated;

(6) The financial condition of the manufacturer or supplier in question;

(7) The total effect of other punishment imposed or likely to be imposed upon the manufacturer or supplier in question as a result of the misconduct, including awards of punitive or exemplary damages to persons similarly situated to the claimant and the severity of criminal penalties to which the manufacturer or supplier in question has been or is likely to be subjected.

(C)(1) Except as provided in division (C)(2) of this section, if a claimant alleges in a product liability claim that a drug or device caused harm to the claimant, the manufacturer of the drug or device shall not

be liable for punitive or exemplary damages in connection with that product liability claim if the drug or device that allegedly caused the harm satisfies either of the following:

(a) It was manufactured and labeled in relevant and material respects in accordance with the terms of an approval or license issued by the federal food and drug administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C. 301–392, as amended, or the "Public Health Service Act," 58 Stat. 682 (1944), 42 U.S.C. 201–300cc–15, as amended.

(b) It was an over-the-counter drug marketed pursuant to federal regulations, was generally recognized as safe and effective and as not being misbranded pursuant to the applicable federal regulations, and satisfied in relevant and material respects each of the conditions contained in the applicable regulations and each of the conditions contained in an applicable monograph.

(2) Division (C)(1) of this section does not apply if the claimant establishes, by a preponderance of the evidence, that the manufacturer fraudulently and in violation of applicable regulations of the food and drug administration withheld from the food and drug administration information known to be material and relevant to the harm that the claimant allegedly suffered or misrepresented to the food and drug administration information of that type.

(3) For purposes of divisions (C) and (D) of this section:

(a) "Drug" has the same meaning as in the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040, 1041 (1938), 21 U.S.C. 321(g)(1), as amended.

(b) "Device" has the same meaning as in the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040, 1041 (1938), 21 U.S.C. 321(h), as amended.

(D)(1) If a claimant alleges in a product liability claim that a product other than a drug or device caused harm to the claimant, the manufacturer or supplier of the product shall not be liable for punitive or exemplary damages in connection with the claim if the manufacturer or supplier fully complied with all applicable government safety and performance standards, whether or not designated as such by the government, relative to the product's manufacture or construction, the product's design or formulation, adequate warnings or instructions, and representations when the product left the control of the manufacturer or supplier, and the claimant's injury results from an alleged defect of a product's manufacture or construction, the product's design or formulation, adequate warnings or instructions, and representations for which there is an applicable government safety or performance standard.

(2) Division (D)(1) of this section does not apply if the claimant establishes, by a preponderance of the evidence, that the manufacturer or supplier of the product other than a drug or device fraudulently and

in violation of applicable government safety and performance standards, whether or not designated as such by the government, withheld from an applicable government agency information known to be material and relevant to the harm that the claimant allegedly suffered or misrepresented to an applicable government agency information of that type.

(E) The bifurcated trial provisions of division (B) of section 2315.21 of the Revised Code, the ceiling on recoverable punitive or exemplary damages specified in division (D)(1) of that section, and the provisions of division (D)(3) of that section apply to awards of punitive or exemplary damages under this section.

§ 2315.21. Recovery of compensatory, punitive, or exemplary damages in tort action; bifurcated trial; burden of proof.

(A) As used in this section:

(1) "Tort action" means a civil action for damages for injury or loss to person or property.

(a) "Tort action" includes all of the following:

(i) A product liability claim for damages for injury or loss to person or property that is subject to sections 2307.71 to 2307.80 of the Revised Code;

(ii) A civil action based on an unlawful discriminatory practice relating to employment brought under section 4112.052 of the Revised Code;

(iii) A civil action brought under section 4112.14 of the Revised Code.

(b) "Tort action" does not include a civil action for damages for a breach of contract or another agreement between persons. "Tort action" means a civil action for damages for injury or loss to person or property. "Tort action" includes a product liability claim for damages for injury or loss to person or property that is subject to sections 2307.71 to 2307.80 of the Revised Code, but does not include a civil action for damages for a breach of contract or another agreement between persons.

(2) "Trier of fact" means the jury or, in a nonjury action, the court.

(3) "Home" has the same meaning as in section 3721.10 of the Revised Code.

(4) "Employer" includes, but is not limited to, a parent, subsidiary, affiliate, division, or department of the employer. If the employer is an individual, the individual shall be considered an employer under this section only if the subject of the tort action is related to the individual's capacity as an employer.

(5) "Small employer" means an employer who employs not more than one hundred persons on a full-time permanent basis, or, if the

employer is classified as being in the manufacturing sector by the North American industrial classification system, "small employer" means an employer who employs not more than five hundred persons on a full-time permanent basis.

(B)(1) In a tort action that is tried to a jury and in which a plaintiff makes a claim for compensatory damages and a claim for punitive or exemplary damages, upon the motion of any party, the trial of the tort action shall be bifurcated as follows:

(a) The initial stage of the trial shall relate only to the presentation of evidence, and a determination by the jury, with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant. During this stage, no party to the tort action shall present, and the court shall not permit a party to present, evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

(b) If the jury determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant, evidence may be presented in the second stage of the trial, and a determination by that jury shall be made, with respect to whether the plaintiff additionally is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

(2) In a tort action that is tried to a jury and in which a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, the court shall instruct the jury to return, and the jury shall return, a general verdict and, if that verdict is in favor of the plaintiff, answers to an interrogatory that specifies the total compensatory damages recoverable by the plaintiff from each defendant.

(3) In a tort action that is tried to a court and in which a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, the court shall make its determination with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant and, if that determination is in favor of the plaintiff, shall make findings of fact that specify the total compensatory damages recoverable by the plaintiff from the defendant.

(C) Subject to division (E) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:

(1) The actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

(2) The trier of fact has returned a verdict or has made a determination pursuant to division (B)(2) or (3) of this section of the total compensatory damages recoverable by the plaintiff from that defendant.

(D)(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages.

(2) Except as provided in division (D)(6) of this section, all of the following apply regarding any award of punitive or exemplary damages in a tort action:

(a) The court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section.

(b) If the defendant is a small employer or individual, the court shall not enter judgment for punitive or exemplary damages in excess of the lesser of two times the amount of the compensatory damages awarded to the plaintiff from the defendant or ten percent of the employer's or individual's net worth when the tort was committed up to a maximum of three hundred fifty thousand dollars, as determined pursuant to division (B)(2) or (3) of this section.

(c) Any attorneys fees awarded as a result of a claim for punitive or exemplary damages shall not be considered for purposes of determining the cap on punitive damages.

(3) No award of prejudgment interest under division (C)(1) of section 1343.03 of the Revised Code shall include any prejudgment interest on punitive or exemplary damages found by the trier of fact.

(4) In a tort action, the burden of proof shall be upon a plaintiff in question, by clear and convincing evidence, to establish that the plaintiff is entitled to recover punitive or exemplary damages.

(5)(a) In any tort action, except as provided in division (D)(5)(b) or (6) of this section, punitive or exemplary damages shall not be awarded against a defendant if that defendant files with the court a certified judgment, judgment entries, or other evidence showing that punitive or exemplary damages have already been awarded and have been collected, in any state or federal court, against that defendant based on the same act or course of conduct that is alleged to have caused the injury or loss to person or property for which the plaintiff seeks compensatory damages and that the aggregate of those previous punitive or exemplary damage awards exceeds the maximum amount of punitive or exemplary damages that may be awarded under division (D)(2) of this section against that defendant in the tort action.

(b) Notwithstanding division (D)(5)(a) of this section and except as provided in division (D)(6) of this section, punitive or exemplary damages

may be awarded against a defendant in either of the following types of tort actions:

(i) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the plaintiff will offer new and substantial evidence of previously undiscovered, additional behavior of a type described in division (C) of this section on the part of that defendant, other than the injury or loss for which the plaintiff seeks compensatory damages. In that case, the court shall make specific findings of fact in the record to support its conclusion. The court shall reduce the amount of any punitive or exemplary damages otherwise awardable pursuant to this section by the sum of the punitive or exemplary damages awards previously rendered against that defendant in any state or federal court. The court shall not inform the jury about the court's determination and action under division (D)(5)(b)(i) of this section.

(ii) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the total amount of prior punitive or exemplary damages awards was totally insufficient to punish that defendant's behavior of a type described in division (C) of this section and to deter that defendant and others from similar behavior in the future. In that case, the court shall make specific findings of fact in the record to support its conclusion. The court shall reduce the amount of any punitive or exemplary damages otherwise awardable pursuant to this section by the sum of the punitive or exemplary damages awards previously rendered against that defendant in any state or federal court. The court shall not inform the jury about the court's determination and action under division (D)(5)(b)(ii) of this section.

(6) Division (D)(2) of this section does not apply to a tort action where the alleged injury, death, or loss to person or property resulted from the defendant acting with one or more of the culpable mental states of purposely and knowingly as described in section 2901.22 of the Revised Code and when the defendant has been convicted of or pleaded guilty to a criminal offense that is a felony, that had as an element of the offense one or more of the culpable mental states of purposely and knowingly as described in that section, and that is the basis of the tort action.

(E) This section does not apply to tort actions against the state in the court of claims, including, but not limited to, tort actions against a state university or college that are subject to division (B)(1) of section 3345.40 of the Revised Code, to tort actions against political subdivisions of this state that are commenced under or are subject to Chapter 2744. of the Revised Code, or to the extent that another section of the Revised Code expressly provides any of the following:

(1) Punitive or exemplary damages are recoverable from a defendant in question in a tort action on a basis other than that the actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud or on a basis other than that the defendant in question as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

(2) Punitive or exemplary damages are recoverable from a defendant in question in a tort action irrespective of whether the plaintiff in question has adduced proof of actual damages.

(3) The burden of proof upon a plaintiff in question to recover punitive or exemplary damages from a defendant in question in a tort action is one other than clear and convincing evidence.

(4) Punitive or exemplary damages are not recoverable from a defendant in question in a tort action.

(F) If the trier of fact is a jury, the court shall not instruct the jury with respect to the limits on punitive or exemplary damages pursuant to division (D) of this section, and neither counsel for any party or a witness shall inform the jury or potential jurors of those limits.

(G) When determining the amount of an award of punitive or exemplary damages against either a home or a residential facility licensed under section 5123.19 of the Revised Code, the trier of fact shall consider all of the following:

(1) The ability of the home or residential facility to pay the award of punitive or exemplary damages based on the home's or residential facility's assets, income, and net worth;

(2) Whether the amount of punitive or exemplary damages is sufficient to deter future tortious conduct;

(3) The financial ability of the home or residential facility, both currently and in the future, to provide accommodations, personal care services, and skilled nursing care.

OREGON REVISED STATUTES

(1977, 1979, 1989, 1995, 2003, 2005, 2009, 2011)

§ 30.900. "Product liability civil action" defined.

As used in ORS 30.900 to 30.920 "product liability civil action" means a civil action brought against a manufacturer, distributor, seller or lessor of a product for damages for personal injury, death or property damage arising out of:

(1) Any design, inspection, testing, manufacturing or other defect in a product;

(2) Any failure to warn regarding a product; or

(3) Any failure to properly instruct in the use of a product.

§ 30.902. Exceptions for products provided by physicians.

A physician licensed pursuant to ORS chapter 677 is not a manufacturer, distributor, seller or lessor of a product for the purposes of ORS 30.900 to 30.920 if the product is provided by the physician to a patient as part of a medical procedure and the physician was not involved in the design or manufacture of the product.

§ 30.905. Time for commencement of action.

(1) Subject to the limitation imposed by subsection (2) of this section, a product liability civil action for personal injury or property damage must be commenced not later than two years after the plaintiff discovers, or reasonably should have discovered, the personal injury or property damage and the causal relationship between the injury or damage and the product, or the causal relationship between the injury or damage and the conduct of the defendant.

(2) A product liability civil action for personal injury or property damage must be commenced before the later of:

(a) Ten years after the date on which the product was first purchased for use or consumption; or

(b) The expiration of any statute of repose for an equivalent civil action in the state in which the product was manufactured, or, if the product was manufactured in a foreign country, the expiration of any statute of repose for an equivalent civil action in the state into which the product was imported.

(3) Subject to the limitation imposed by subsection (4) of this section, a product liability civil action for death must be commenced not later than three years after the decedent, the personal representative for the decedent or a person for whose benefit an action could be brought under ORS 30.020 discovers, or reasonably should have discovered, the causal relationship between the death and the product, or the causal relationship between the death and the conduct of the defendant.

(4) A product liability civil action for death must be commenced before the earlier of:

(a) Three years after the death of the decedent;

(b) Ten years after the date on which the product was first purchased for use or consumption; or

(c) The expiration of any statute of repose for an equivalent civil action in the state in which the product was manufactured, or, if the product was manufactured in a foreign country, the expiration of any statute of repose for an equivalent civil action in the state into which the product was imported.

(5) This section does not apply to a civil action brought against a manufacturer, distributor, seller or lessor of a manufactured dwelling, as defined in ORS 446.003, or of a prefabricated structure, as defined in ORS 455.010. Actions described in this subsection are subject to the statute of limitations provided by ORS 12.135.

§ 30.907. Asbestos-related disease damages; limitations.

(1) A product liability civil action for damages resulting from asbestos-related disease must be commenced not later than two years after the date on which the plaintiff first discovered, or in the exercise of reasonable care should have discovered, the disease and the cause thereof.

(2) A product liability civil action for damages resulting from asbestos-related disease is not subject to ORS 30.905 or any other statute of limitation or statute of ultimate repose in Oregon Revised Statutes.

(3) A product liability civil action may not be brought against a contractor, as defined in ORS 701.005, for damages resulting from asbestos-related disease if the contractor:

(a) Used or installed products containing asbestos pursuant to plans, specifications or directions prepared for a project by or on behalf of the owner of the project;

(b) Is not the manufacturer or distributor of the products containing asbestos; and

(c) Did not furnish the products containing asbestos independent of the provision of labor.

(4) Subsection (3) of this section does not affect a plaintiff's ability to bring a product liability civil action against a contractor if:

(a) The contractor substituted a product containing asbestos on a project when the plans, specifications or directions for the project prepared by or on behalf of the owner did not specify the use or installation of a product containing asbestos; and

(b) The owner or the owner's representative did not expressly direct or consent to the substitution of the product containing asbestos.

§ 30.908. Action arising out of injury from breast implants; limitations.

(1) Notwithstanding ORS 30.020, a product liability civil action for death, injury or damage resulting from breast implants containing silicone, silica or silicon as a component must be commenced not later than two years after the date on which the plaintiff first discovered, or in the exercise of reasonable care should have discovered:

(a) The death or specific injury, disease or damage for which the plaintiff seeks recovery;

(b) The tortious nature of the act or omission of the defendant that gives rise to a claim for relief against the defendant; and

(c) All other elements required to establish plaintiff's claim for relief.

(2) A product liability civil action for death, injury or damage resulting from breast implants containing silicone, silica or silicon as a component is not subject to ORS 30.905 or any other statute of repose in Oregon Revised Statutes.

(3) For the purposes of subsection (1) of this section, an action for wrongful death must be commenced not later than two years after the earliest date that the discoveries required by subsection (1) of this section are made by any of the following persons:

(a) The decedent;

(b) The personal representative for the decedent; or

(c) Any person for whose benefit the action could be brought.

(4) Subsections (1) to (3) of this section do not apply to a person that supplied component parts or raw materials to manufacturers of breast implants containing silicone, silica or silicon as a component, and the person shall remain subject to the limitations on actions imposed by ORS 30.020 and 30.905, if:

(a) The person did not manufacture breast implants containing silicone, silica or silicon as a component at any time; and

(b) The person was not owned by and did not own a business that manufactured breast implants containing silicone, silica or silicon as a component at any time.

(5) A health care facility licensed under ORS chapter 441 is not a manufacturer, distributor, seller or lessor of a breast implant for the purposes of ORS 30.900 to 30.920 if the implant is provided by the facility to a patient as part of a medical implant procedure.

§ 30.910. Product disputably presumed not unreasonably dangerous.

It is a disputable presumption in a products liability civil action that a product as manufactured and sold or leased is not unreasonably dangerous for its intended use.

§ 30.915. Defenses.

It shall be a defense to a product liability civil action that an alteration or modification of a product occurred under the following circumstances:

(1) The alteration or modification was made without the consent of or was made not in accordance with the instructions or specifications of the manufacturer, distributor, seller or lessor;

(2) The alteration or modification was a substantial contributing factor to the personal injury, death or property damage; and

(3) If the alteration or modification was reasonably foreseeable, the manufacturer, distributor, seller or lessor gave adequate warning.

§ 30.920. When seller or lessor of product liable—Effect of liability rule.

(1) One who sells or leases any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm or damage to property caused by that condition, if:

(a) The seller or lessor is engaged in the business of selling or leasing such a product; and

(b) The product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold or leased.

(2) The rule stated in subsection (1) of this section shall apply, even though:

(a) The seller or lessor has exercised all possible care in the preparation and sale or lease of the product; and

(b) The user, consumer or injured party has not purchased or leased the product from or entered into any contractual relations with the seller or lessor.

(3) It is the intent of the Legislative Assembly that the rule stated in subsections (1) and (2) of this section shall be construed in accordance with the *Restatement (Second) of Torts* § 402A, Comments *a* to *m* (1965). All references in these comments to sale, sell, selling or seller shall be construed to include lease, leases, leasing or lessor.

(4) Nothing in this section shall be construed to limit the rights and liabilities of sellers and lessors under principles of common law negligence or under ORS chapter 72.

§ 30.925. Punitive damages.

(1) In a product liability civil action, punitive damages shall not be recoverable except as provided in ORS 31.730.

(2) Punitive damages, if any, shall be determined and awarded based upon the following criteria:

(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

(b) The degree of the defendant's awareness of that likelihood;

(c) The profitability of the defendant's misconduct;

(d) The duration of the misconduct and any concealment of it;

(e) The attitude and conduct of the defendant upon discovery of the misconduct;

(f) The financial condition of the defendant; and

(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

§ 30.927. When manufacturer of drug not liable for punitive damages; exceptions.

(1) Where a drug allegedly caused the plaintiff harm, the manufacturer of the drug shall not be liable for punitive damages if the drug product alleged to have caused the harm:

(a) Was manufactured and labeled in relevant and material respects in accordance with the terms of an approval or license issued by the Federal Food and Drug Administration under the Federal Food, Drug and Cosmetic Act or the Public Health Service Act; or

(b) Is generally recognized as safe and effective pursuant to conditions established by the Federal Food and Drug Administration and applicable regulations, including packaging and labeling regulations.

(2) Subsection (1) of this section does not apply if the plaintiff proves, in accordance with the standard of proof set forth in ORS 30.925 (1), that the defendant, either before or after making the drug available for public use, knowingly in violation of applicable Federal Food and Drug Administration regulations withheld from or misrepresented to the agency or prescribing physician information known to be material and relevant to the harm which the plaintiff allegedly suffered.

(3) Nothing contained in this section bars an award of punitive damages where a manufacturer of a drug intentionally fails to conduct a recall required by a valid order of a federal or state agency authorized by statute to require such a recall.

(4) For the purposes of this section, the term "drug" has the meaning given to the term in section 1201 (g)(1) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 321 (g)(1).

§ 31.730. Standards for award of punitive damages; required review of award by court; additional reduction of award for remedial measures.

(1) Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.

(2) If an award of punitive damages is made by a jury, the court shall review the award to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole, viewing the statutory and common-law factors that allow an award of punitive damages for the specific type of claim at issue in the proceeding.

(3) In addition to any reduction that may be made under subsection (2) of this section, upon the motion of a defendant the court may reduce the amount of any judgment requiring the payment of punitive damages entered against the defendant if the defendant establishes that the defendant has taken remedial measures that are reasonable under the circumstances to prevent reoccurrence of the conduct that gave rise to the claim for punitive damages. In reducing awards of punitive damages under the provisions of this subsection, the court shall consider the amount of any previous judgment for punitive damages entered against the same defendant for the same conduct giving rise to a claim for punitive damages.

RHODE ISLAND GENERAL LAWS

(1965, 1978, 1985, 2021)

§ 9–1–13. Limitation of actions generally—Product liability.

(a) Except as otherwise specially provided, all civil actions shall be commenced within ten (10) years next after the cause of action shall accrue, and not after.

(b) Notwithstanding the provisions of subsection (a) of this section, an action for the recovery of damages for personal injury, death, or damage to real or personal property, including any action based upon implied warranties arising out of an alleged design, inspection, listing, or manufacturing defect, or any other alleged defect of whatsoever kind or nature in a product, or arising out of any alleged failure to warn regarding a product, or arising out of any alleged failure to properly instruct in the use of a product, shall be commenced within ten (10) years after the date the product was first purchased for use or consumption.

[Subsection (b) was held unconstitutional by Kennedy v. Cumberland Eng'g Co., 471 A.2d 195 (R.I. 1984).]

§ 9–1–32. Effect of alteration of product after sale.

(a) As used in this section:

(1) "Person injured" means the person who sustained damages because of personal injury, death, or property damage.

(2) "Product liability damages" means damages because of personal injury, death, or property damage sustained by reason of an alleged defect in a product, or an alleged failure to warn or protect against a danger or hazard in the use or misuse of the product, or an alleged failure to instruct properly in the use of a product.

(3) "Subsequent alteration or modification" means an alteration or modification of a product made subsequent to the manufacture or sale by the manufacturer or seller that altered, modified, or changed the purpose, use, function, design, or manner of use of the product from that originally designed, tested, or intended by the manufacturer, or the purpose, use, function, design, or manner of use or intended use for which the product was originally designed, tested, or manufactured.

(b) Any defense claimed by the manufacturer or seller that the person injured made a subsequent alteration or modification to the product that is found to be a significant contributing factor to the injury, death, or property damage shall be controlled by the comparative negligence provisions of § 9–20–4.

SOUTH CAROLINA CODE ANNOTATED

(1974, 2000)

§ 15–73–10. Liability of seller for defective product.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate 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.

(2) The rule stated in subsection (1) shall apply although

a. The seller has exercised all possible care in the preparation and sale of his product, and

b. The user or consumer has not bought the product from or entered into any contractual relation with the seller.

§ 15–73–20. Situation in which recovery shall be barred.

If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

§ 15–73–30. Intent of chapter.

Comments to § 402A of the Restatement of Torts, 2d, are incorporated herein by reference thereto as the legislative intent of this chapter.

§ 15–73–40. Actions involving firearms or ammunition; basis for determining design defect; elements to be proved by plaintiff.

(A) In a products liability action involving firearms or ammunition, whether a firearm or ammunition shell is defective in design must not be based on a comparison or weighing of the benefits of the product against the risk of injury, damage, or death posed by its potential to cause that injury, damage, or death when discharged.

(B) In a products liability action brought against a firearm or ammunition manufacturer, importer, distributor, or retailer that alleges a design defect, the burden is on the plaintiff to prove, in addition to any other elements required to be proved that:

(1) the actual design of the firearm or ammunition was defective, causing it not to function in a manner reasonably expected by an ordinary consumer of firearms or ammunition; and

(2) any defective design was the proximate cause of the injury, damage, or death.

SOUTH DAKOTA CODIFIED LAWS

(1985, 1979, 1995)

§ 15–2–12.2. Product liability actions—Prospective application.

An action against a manufacturer, lessor, or seller of a product, regardless of the substantive legal theory upon which the action is brought, for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formula, installation, inspection, preparation, assembly, testing, packaging, labeling, or sale of any product or failure to warn or protect against a danger or hazard in the use, misuse, or unintended use of any product, or the failure to provide proper instructions for the use of any product may be commenced only within three years of the date when the personal injury, death, or property damage occurred, became known or should have become known to the injured party. This section is prospective in application.

§ 20–9–9. Product's dealers and sellers immune from strict liability except for manufacturers or those who knew of defect—Other causes of action against seller not limited.

No cause of action based on the doctrine of strict liability in tort may be asserted or maintained against any distributor, wholesaler, dealer, or retail seller of a product which is alleged to contain or possess a latent defective condition unreasonably dangerous to the buyer, user, or consumer unless said distributor, wholesaler, dealer, or retail seller is also the manufacturer or assembler of said product or the maker of a component part of the final product, or unless said dealer, wholesaler, or retail seller knew, or, in the exercise of ordinary care, should have known, of the defective condition of the final product. Nothing in this section shall be construed to limit any other cause of action from being brought against any seller of a product.

§ 20–9–10. Product's manufacturer, assembler, or seller immune from strict liability for injury caused by certain alterations or modifications.

No manufacturer, assembler, or seller of a product may be held liable for damages for personal injury, death, or property damage sustained by reason of the doctrine of strict liability in tort based on a defect in a product, or failure to warn or protect against a danger or hazard in the use or misuse of such a product, or failure to properly instruct in the use or misuse of such product, where a proximate cause of the injury, death, or damage was an alteration or modification of such product made under all of the following circumstances:

(1) The alteration or modification was made subsequent to the manufacture, assembly, or sale of the product;

(2) The alteration or modification altered or modified the purpose, use, function, design, or manner of use of the product from that originally designed, tested, or intended by the manufacturer, assembler, or seller; and

(3) It was not foreseeable by the manufacturer, assembler, or seller of the product that the alteration or modification would be made, and, if made, that it would render the product unsafe.

§ 20–9–10.1. State of the art defense in product liability actions.

In any product liability action based upon negligence or strict liability, whether the design, manufacture, inspection, testing, packaging, warning, or labeling was in conformity with the generally recognized and prevailing state of the art existing at the time the specific product involved was first sold to any person not engaged in the business of selling such a product, may be considered in determining the standard of care, whether the standard of care was breached or whether the product was in a defective condition or unreasonably dangerous to the user.

TENNESSEE CODE ANNOTATED

(1978, 1993, 2011)

§ 29–28–101. Short title.

This chapter shall be known and may be cited as the "Tennessee Products Liability Act of 1978."

§ 29–28–102. Definitions.

As used in this chapter unless the context otherwise requires:

(1) "Anticipated life." The anticipated life of a product shall be determined by the expiration date placed on the product by the manufacturer when required by law but shall not commence until the date the product was first purchased for use or consumption;

(2) "Defective condition" means a condition of a product that renders it unsafe for normal or anticipatable handling and consumption;

(3) "Employer" means any person exercising legal supervisory control or guidance of users or consumers of products;

(4) "Manufacturer" means the designer, fabricator, producer, compounder, processor or assembler of any product or its component parts;

(5) "Product" means any tangible object or goods produced;

(6) "Product liability action" for purposes of this chapter includes all actions brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging or labeling of any product. "Product liability action" includes, but is not limited to, all actions based upon the following theories: strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent, or innocent; misrepresentation, concealment, or nondisclosure, whether negligent, or innocent; or under any other substantive legal theory in tort or contract whatsoever;

(7) "Seller" includes a retailer, wholesaler, or distributor, and means any individual or entity engaged in the business of selling a product, whether such sale is for resale, or for use or consumption. "Seller" also includes a lessor or bailor engaged in the business of leasing or bailment of a product; and.

(8) "Unreasonably dangerous" means that a product is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics, or that the product because of its dangerous condition would not be put on the market by a reasonably prudent manufacturer or seller, assuming that the manufacturer or seller knew of its dangerous condition.

§ 29–28–103. Limitation of actions.

(a) Any action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition must be brought within the period fixed by §§ 28–3–104, 28–3–105, 28–3–202 and 47–2–725, but notwithstanding any exceptions to these provisions, it must be brought within six (6) years of the date of injury, in any event, the action must be brought within ten (10) years from the date on which the product was first purchased for use or consumption, or within one (1) year after the expiration of the anticipated life of the product, whichever is the shorter, except in the case of injury to minors whose action must be brought within a period of one (1) year after attaining the age of majority, whichever occurs sooner.

(b) The foregoing limitation of actions shall not apply to any action resulting from exposure to asbestos or to the human implantation of silicone gel breast implants.

(c)(1) Any action against a manufacturer or seller for injury to a person caused by a silicone gel breast implant must be brought within a period not to exceed twenty-five (25) years from the date such product was implanted; provided, that such action must be brought within four (4) years from the date the plaintiff knew or should have known of the injury.

(2) For purposes of this subsection only, "seller" does not include a hospital or other medical facility where the procedure took place, nor does "seller" include the physician or other medical personnel involved in the procedure.

(3) The provisions of this subsection only apply to causes of action not pending or decided on or before May 26, 1993. For the purposes of this subsection, a "pending case" is defined as a case actually filed by a silicone gel-filled breast implant recipient.

§ 29–28–104. Government standards; compliance; presumptions.

(a) Compliance by a manufacturer or seller with any federal or state statute or administrative regulation existing at the time a product was manufactured and prescribing standards for design, inspection, testing, manufacture, labeling, warning or instructions for use of a product, shall raise a rebuttable presumption that the product is not in an unreasonably dangerous condition in regard to matters covered by these standards.

(b) A manufacturer or seller, other than a manufacturer of a drug or device, shall not be liable for exemplary or punitive damages if:

(1) The product alleged to have caused the harm was designed, manufactured, packaged, labeled, sold, or represented in relevant and material respects in accordance with the terms of approval, license or similar determination of a government agency; or

(2) The product was in compliance with a statute of the state or the United States, or a standard, rule, regulation, order, or other action of a government agency pursuant to statutory authority, when such statute or agency action is relevant to the event or risk allegedly causing the harm and the product was in compliance at the time the product left the control of the manufacturer or seller.

(c) Subsection (b) shall not apply if the claimant establishes that the manufacturer or seller:

(1) At any time before the event that allegedly caused the harm, sold the product after the effective date of an order of a government agency that ordered the removal of the product from the market or withdrew the agency's approval of the product; or

(2) In violation of applicable regulations, withheld or misrepresented to the government agency information material to the approval and such information is relevant to the harm which the claimant allegedly suffered.

(d) The award of punitive or exemplary damages against a manufacturer of a drug or device shall be governed by § 29–39–104.

§ 29–28–105. Defective or dangerous conditions; determination.

(a) A manufacturer or seller of a product shall not be liable for any injury to a person or property caused by the product unless the product is determined to be in a defective condition or unreasonably dangerous at the time it left the control of the manufacturer or seller.

(b) In making this determination, the state of scientific and technological knowledge available to the manufacturer or seller at the time the product was placed on the market, rather than at the time of injury, is applicable. Consideration is given also to the customary designs, methods, standards and techniques of manufacturing, inspecting and testing by other manufacturers or sellers of similar products.

(c) The provisions of this section do not apply to an action based on express warranty or misrepresentation regarding the chattel.

(d) A product is not unreasonably dangerous because of a failure to adequately warn of a danger or hazard that is apparent to the ordinary user.

§ 29–28–106. Sellers.

No product liability action, as defined in § 29–28–102, shall be commenced or maintained against any seller, other than the manufacturer, unless:

(1) The seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the alleged harm for which recovery of damages is sought;

(2) Altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought;

(3) The seller gave an express warranty as defined by title 47, chapter 2;

(4) The manufacturer or distributor of the product or part in question is not subject to service of process in this state and the long-arm statutes of Tennessee do not serve as the basis for obtaining service of process; or

(5) The manufacturer has been judicially declared insolvent.

§ 29–28–107. Complaint; damages.

Any complaint filed in a products liability action shall state an amount of said suit sought to be recovered from any defendant.

§ 29–28–108. Alteration or improper use.

If a product is not unreasonably dangerous at the time it leaves the control of the manufacturer or seller but was made unreasonably dangerous by subsequent unforeseeable alteration, change, improper maintenance or abnormal use, the manufacturer or seller is not liable.

TEXAS CIVIL PRACTICE AND REMEDIES CODE ANNOTATED

(1993, 2003, 2005, 2007, 2009, 2013, 2015)

§ 16.012. Products Liability.

(a) In this section:

(1) "Claimant," "seller," and "manufacturer" have the meanings assigned by Section 82.001.

(2) "Products liability action" means any action against a manufacturer or seller for recovery of damages or other relief for harm allegedly caused by a defective product, whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories, and whether the relief sought is recovery of damages or any other legal or equitable relief, including a suit for:

(A) injury or damage to or loss of real or personal property;

(B) personal injury;

(C) wrongful death;

(D) economic loss; or

(E) declaratory, injunctive, or other equitable relief.

(b) Except as provided by Subsections (c), (d), and (d–1), a claimant must commence a products liability action against a manufacturer or seller of a product before the end of 15 years after the date of the sale of the product by the defendant.

(c) If a manufacturer or seller expressly warrants in writing that the product has a useful safe life of longer than 15 years, a claimant must commence a products liability action against that manufacturer or seller of the product before the end of the number of years warranted after the date of the sale of the product by that seller.

(d) This section does not apply to a products liability action seeking damages for personal injury or wrongful death in which the claimant alleges:

(1) the claimant was exposed to the product that is the subject of the action before the end of 15 years after the date the product was first sold;

(2) the claimant's exposure to the product caused the claimant's disease that is the basis of the action; and

(3) the symptoms of the claimant's disease did not, before the end of 15 years after the date of the first sale of the product by the defendant, manifest themselves to a degree and for a duration that would put a reasonable person on notice that the person suffered some injury.

(d–1) This section does not reduce a limitations period for a cause of action described by Subsection (d) that accrues before the end of the limitations period under this section.

(e) This section does not extend the limitations period within which a products liability action involving the product may be commenced under any other law.

(f) This section applies only to the sale and not to the lease of a product.

§ 82.001. Definitions.

In this chapter:

(1) "Claimant" means a party seeking relief, including a plaintiff, counterclaimant, or cross-claimant.

(2) "Products liability action" means any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories.

(3) "Seller" means a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.

(4) "Manufacturer" means a person who is a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler of any product or any component part thereof and who places the product or any component part thereof in the stream of commerce.

§ 82.002. Manufacturer's Duty to Indemnify.

(a) A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.

(b) For purposes of this section, "loss" includes court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages.

(c) Damages awarded by the trier of fact shall, on final judgment, be deemed reasonable for purposes of this section.

(d) For purposes of this section, a wholesale distributor or retail seller who completely or partially assembles a product in accordance with the manufacturer's instructions shall be considered a seller.

(e) The duty to indemnify under this section:

(1) applies without regard to the manner in which the action is concluded; and

(2) is in addition to any duty to indemnify established by law, contract, or otherwise.

(f) A seller eligible for indemnification under this section shall give reasonable notice to the manufacturer of a product claimed in a petition or complaint to be defective, unless the manufacturer has been served as a party or otherwise has actual notice of the action.

(g) A seller is entitled to recover from the manufacturer court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages incurred by the seller to enforce the seller's right to indemnification under this section.

§ 82.003. Liability of Nonmanufacturing Sellers.

(a) A seller that did not manufacture a product is not liable for harm caused to the claimant by that product unless the claimant proves:

(1) that the seller participated in the design of the product;

(2) that the seller altered or modified the product and the claimant's harm resulted from that alteration or modification;

(3) that the seller installed the product, or had the product installed, on another product and the claimant's harm resulted from the product's installation onto the assembled product;

(4) that:

(A) the seller exercised substantial control over the content of a warning or instruction that accompanied the product;

(B) the warning or instruction was inadequate; and

(C) the claimant's harm resulted from the inadequacy of the warning or instruction;

(5) that:

(A) the seller made an express factual representation about an aspect of the product;

(B) the representation was incorrect;

(C) the claimant relied on the representation in obtaining or using the product; and

(D) if the aspect of the product had been as represented, the claimant would not have been harmed by the product or would not have suffered the same degree of harm;

(6) that:

(A) the seller actually knew of a defect to the product at the time the seller supplied the product; and

(B) the claimant's harm resulted from the defect; or

(7) that the manufacturer of the product is:

(A) insolvent; or

(B) not subject to the jurisdiction of the court.

(b) This section does not apply to a manufacturer or seller whose liability in a products liability action is governed by Chapter 2301, Occupations Code. In the event of a conflict, Chapter 2301, Occupations Code, prevails over this section.

(c) If after service on a nonresident manufacturer through the secretary of state in the manner prescribed by Subchapter C, Chapter 17, the manufacturer fails to answer or otherwise make an appearance in the time required by law, it is conclusively presumed for the purposes of Subsection (a)(7)(B) that the manufacturer is not subject to the jurisdiction of the court unless the seller is able to secure personal jurisdiction over the manufacturer in the action.

§ 82.004. Inherently Unsafe Products.

(a) In a products liability action, a manufacturer or seller shall not be liable if:

(1) the product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and

(2) the product is a common consumer product intended for personal consumption, such as

(A) sugar, castor oil, alcohol, tobacco, and butter, as identified in Comment i to Section 402A of the Restatement (Second) of Torts; or

(B) an oyster.

(b) For purposes of this section, the term "products liability action" does not include an action based on manufacturing defect or breach of an express warranty.

§ 82.005. Design Defects.

(a) In a products liability action in which a claimant alleges a design defect, the burden is on the claimant to prove by a preponderance of the evidence that:

(1) there was a safer alternative design; and

(2) the defect was a producing cause of the personal injury, property damage, or death for which the claimant seeks recovery.

(b) In this section, "safer alternative design" means a product design other than the one actually used that in reasonable probability:

(1) would have prevented or significantly reduced the risk of the claimant's personal injury, property damage, or death without substantially impairing the product's utility; and

(2) was economically and technologically feasible at the time the product left the control of the manufacturer or seller by the application of existing or reasonably achievable scientific knowledge.

(c) This section does not supersede or modify any statute, regulation, or other law of this state or of the United States that relates to liability for, or to relief in the form of, abatement of nuisance, civil penalties, cleanup costs, cost recovery, an injunction, or restitution that arises from contamination or pollution of the environment.

(d) This section does not apply to:

(1) a cause of action based on a toxic or environmental tort as defined by Sections 33.013(c)(2) and (3); or

(2) a drug or device, as those terms are defined in the federal Food, Drug, and Cosmetic Act (21 U.S.C. Section 321).

(e) This section is not declarative, by implication or otherwise, of the common law with respect to any product and shall not be construed to restrict the courts of this state in developing the common law with respect to any product which is not subject to this section.

§ 82.006. Firearms and Ammunition.

(a) In a products liability action brought against a manufacturer or seller of a firearm or ammunition that alleges a design defect in the firearm or ammunition, the burden is on the claimant to prove, in addition to any other elements that the claimant must prove, that:

(1) the actual design of the firearm or ammunition was defective, causing the firearm or ammunition not to function in a manner reasonably expected by an ordinary consumer of firearms or ammunition; and

(2) the defective design was a producing cause of the personal injury, property damage, or death.

(b) The claimant may not prove the existence of the defective design by a comparison or weighing of the benefits of the firearm or ammunition against the risk of personal injury, property damage, or death posed by its potential to cause such injury, damage, or death when discharged.

§ 82.007. Medicines.

(a) In a products liability action alleging that an injury was caused by a failure to provide adequate warnings or information with regard to a pharmaceutical product, there is a rebuttable presumption that the defendant or defendants, including a health care provider, manufacturer, distributor, and prescriber, are not liable with respect to the allegations involving failure to provide adequate warnings or information if:

(1) the warnings or information that accompanied the product in its distribution were those approved by the United States Food and Drug Administration for a product approved under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. Section 301 et seq.), as amended, or Section 351, Public Health Service Act (42 U.S.C. Section 262), as amended; or

(2) the warnings provided were those stated in monographs developed by the United States Food and Drug Administration for

pharmaceutical products that may be distributed without an approved new drug application.

(b) The claimant may rebut the presumption in Subsection (a) as to each defendant by establishing that:

(1) the defendant, before or after pre-market approval or licensing of the product, withheld from or misrepresented to the United States Food and Drug Administration required information that was material and relevant to the performance of the product and was causally related to the claimant's injury;

(2) the pharmaceutical product was sold or prescribed in the United States by the defendant after the effective date of an order of the United States Food and Drug Administration to remove the product from the market or to withdraw its approval of the product;

(3)(A) the defendant recommended, promoted, or advertised the pharmaceutical product for an indication not approved by the United States Food and Drug Administration;

(B) the product was used as recommended, promoted, or advertised; and

(C) the claimant's injury was causally related to the recommended, promoted, or advertised use of the product;

(4)(A) the defendant prescribed the pharmaceutical product for an indication not approved by the United States Food and Drug Administration;

(B) the product was used as prescribed; and

(C) the claimant's injury was causally related to the prescribed use of the product; or

(5) the defendant, before or after pre-market approval or licensing of the product, engaged in conduct that would constitute a violation of 18 U.S.C. Section 201 and that conduct caused the warnings or instructions approved for the product by the United States Food and Drug Administration to be inadequate.

Recognized as preempted by Ledbetter v. Merck & Co., 2007 WL 1181991 (Tex.Dist.Ct. 2007).

§ 82.008. Compliance With Government Standards.

(a) In a products liability action brought against a product manufacturer or seller, there is a rebuttable presumption that the product manufacturer or seller is not liable for any injury to a claimant caused by some aspect of the formulation, labeling, or design of a product if the product manufacturer or seller establishes that the product's formula, labeling, or design complied with mandatory safety standards or regulations adopted and promulgated by the federal government, or an agency of the federal government, that were applicable to the product

at the time of manufacture and that governed the product risk that allegedly caused harm.

(b) The claimant may rebut the presumption in Subsection (a) by establishing that:

(1) the mandatory federal safety standards or regulations applicable to the product were inadequate to protect the public from unreasonable risks of injury or damage; or

(2) the manufacturer, before or after marketing the product, withheld or misrepresented information or material relevant to the federal government's or agency's determination of adequacy of the safety standards or regulations at issue in the action.

(c) In a products liability action brought against a product manufacturer or seller, there is a rebuttable presumption that the product manufacturer or seller is not liable for any injury to a claimant allegedly caused by some aspect of the formulation, labeling, or design of a product if the product manufacturer or seller establishes that the product was subject to pre-market licensing or approval by the federal government, or an agency of the federal government, that the manufacturer complied with all of the government's or agency's procedures and requirements with respect to pre-market licensing or approval, and that after full consideration of the product's risks and benefits the product was approved or licensed for sale by the government or agency. The claimant may rebut this presumption by establishing that:

(1) the standards or procedures used in the particular pre-market approval or licensing process were inadequate to protect the public from unreasonable risks of injury or damage; or

(2) the manufacturer, before or after pre-market approval or licensing of the product, withheld from or misrepresented to the government or agency information that was material and relevant to the performance of the product and was causally related to the claimant's injury.

(d) This section does not extend to manufacturing flaws or defects even though the product manufacturer has complied with all quality control and manufacturing practices mandated by the federal government or an agency of the federal government.

(e) This section does not extend to products covered by Section 82.007.

§ 90.001. Definitions—Asbestos and Silica-related Claims.

In this chapter:

(1) "Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated or altered.

(2) "Asbestos-related injury" means personal injury or death allegedly caused, in whole or in part, by inhalation or ingestion of asbestos.

(3) "Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers.

(4) "Certified B-reader" means a person who has successfully completed the x-ray interpretation course sponsored by the National Institute for Occupational Safety and Health (NIOSH) and passed the B-reader certification examination for x-ray interpretation and whose NIOSH certification is current at the time of any readings required by this chapter.

(5) "Chest x-ray" means chest films that are taken in accordance with all applicable state and federal regulatory standards and in the posterior-anterior view.

(6) "Claimant" means an exposed person and any person who is seeking recovery of damages for or arising from the injury or death of an exposed person.

(7) "Defendant" means a person against whom a claim arising from an asbestos-related injury or a silica-related injury is made.

(8) "Exposed person" means a person who is alleged to have suffered an asbestos-related injury or a silica-related injury.

(9) "FEV1" means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests.

(10) "FVC" means forced vital capacity, which is the maximal volume of air expired with maximum effort from a position of full inspiration.

(11) "ILO system of classification" means the radiological rating system of the International Labor Office in "Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses" (2000), as amended.

(12) "MDL pretrial court" means the district court to which related cases are transferred for consolidated or coordinated pretrial proceedings under Rule 13, Texas Rules of Judicial Administration.

(13) "MDL rules" means the rules adopted by the supreme court under Subchapter H, Chapter 74, Government Code.

(14) "Mesothelioma" means a rare form of cancer allegedly caused in some instances by exposure to asbestos in which the cancer invades cells in the membrane lining:

(A) the lungs and chest cavity (the pleural region);

(B) the abdominal cavity (the peritoneal region); or

(C) the heart (the pericardial region).

(15) "Nonmalignant asbestos-related injury" means an asbestos-related injury other than mesothelioma or other cancer.

(16) "Nonmalignant silica-related injury" means a silica-related injury other than cancer.

(17) "Physician board certified in internal medicine" means a physician who is certified by the American Board of Internal Medicine or the American Osteopathic Board of Internal Medicine.

(18) "Physician board certified in occupational medicine" means a physician who is certified in the subspecialty of occupational medicine by the American Board of Preventive Medicine or the American Osteopathic Board of Preventive Medicine.

(19) "Physician board certified in oncology" means a physician who is certified in the subspecialty of medical oncology by the American Board of Internal Medicine or the American Osteopathic Board of Internal Medicine.

(20) "Physician board certified in pathology" means a physician who holds primary certification in anatomic pathology or clinical pathology from the American Board of Pathology or the American Osteopathic Board of Internal Medicine and whose professional practice:

(A) is principally in the field of pathology; and

(B) involves regular evaluation of pathology materials obtained from surgical or postmortem specimens.

(21) "Physician board certified in pulmonary medicine" means a physician who is certified in the subspecialty of pulmonary medicine by the American Board of Internal Medicine or the American Osteopathic Board of Internal Medicine.

(22) "Plethysmography" means the test for determining lung volume, also known as "body plethysmography," in which the subject of the test is enclosed in a chamber that is equipped to measure pressure, flow, or volume change.

(23) "Pulmonary function testing" means spirometry, lung volume, and diffusion capacity testing performed in accordance with Section 90.002 using equipment, methods of calibration, and techniques that meet:

(A) the criteria incorporated in the American Medical Association Guides to the Evaluation of Permanent Impairment and reported in 20 C.F.R. Part 404, Subpart P, Appendix 1, Part (A), Sections 3.00(E) and (F)(2003); and

(B) the interpretative standards in the Official Statement of the American Thoracic Society entitled "Lung Function Testing: Selection of Reference Values and Interpretative Strategies," as published in 144 American Review of Respiratory Disease 1202–1218 (1991).

(24) "Report" means a report required by Section 90.003, 90.004, or 90.010(f)(1).

(25) "Respirable," with respect to silica, means particles that are less than 10 microns in diameter.

(26) "Serve" means to serve notice on a party in compliance with Rule 21a, Texas Rules of Civil Procedure.

(27) "Silica" means a respirable form of crystalline silicon dioxide, including alpha quartz, cristobalite, and tridymite.

(28) "Silica-related injury" means personal injury or death allegedly caused, in whole or in part, by inhalation of silica.

(29) "Silicosis" means interstitial fibrosis of the lungs caused by inhalation of silica, including:

(A) acute silicosis, which may occur after exposure to very high levels of silica within a period of months to five years after the initial exposure;

(B) accelerated silicosis; and

(C) chronic silicosis.

§ 90.002. Pulmonary Function Testing.

Pulmonary function testing required by this chapter must be interpreted by a physician:

(1) who is licensed in this state or another state of the United States;

(2) who is board certified in pulmonary medicine, internal medicine, or occupational medicine; and

(3) whose license and certification were not on inactive status at the time the testing was interpreted.

§ 90.003. Reports Required for Claims Involving Asbestos-Related Injury.

(a) A claimant asserting an asbestos-related injury must serve on each defendant the following information:

(1) a report by a physician who is board certified in pulmonary medicine, occupational medicine, internal medicine, oncology, or pathology and whose license and certification were not on inactive status at the time the report was made stating that:

(A) the exposed person has been diagnosed with malignant mesothelioma or other malignant asbestos-related cancer; and

(B) to a reasonable degree of medical probability, exposure to asbestos was a cause of the diagnosed mesothelioma or other cancer in the exposed person; or

(2) a report by a physician who is board certified in pulmonary medicine, internal medicine, or occupational medicine and whose license

and certification were not on inactive status at the time the report was made that:

(A) verifies that the physician or a medical professional employed by and under the direct supervision and control of the physician:

(i) performed a physical examination of the exposed person, or if the exposed person is deceased, reviewed available records relating to the exposed person's medical condition;

(ii) took a detailed occupational and exposure history from the exposed person or, if the exposed person is deceased, from a person knowledgeable about the alleged exposure or exposures that form the basis of the action; and

(iii) took a detailed medical and smoking history that includes a thorough review of the exposed person's past and present medical problems and their most probable cause;

(B) sets out the details of the exposed person's occupational, exposure, medical, and smoking history and verifies that at least 10 years have elapsed between the exposed person's first exposure to asbestos and the date of diagnosis;

(C) verifies that the exposed person has:

(i) a quality 1 or 2 chest x-ray that has been read by a certified B-reader according to the ILO system of classification as showing:

(a) bilateral small irregular opacities (s, t, or u) with a profusion grading of 1/1 or higher, for an action filed on or after May 1, 2005;

(b) bilateral small irregular opacities (s, t, or u) with a profusion grading of 1/0 or higher, for an action filed before May 1, 2005; or

(c) bilateral diffuse pleural thickening graded b2 or higher including blunting of the costophrenic angle; or

(ii) pathological asbestosis graded 1(B) or higher under the criteria published in "Asbestos-Associated Diseases," 106 Archives of Pathology and Laboratory Medicine 11, Appendix 3 (October 8, 1982);

(D) verifies that the exposed person has asbestos-related pulmonary impairment as demonstrated by pulmonary function testing showing:

(i) forced vital capacity below the lower limit of normal or below 80 percent of predicted and FEV1/FVC ratio (using actual values) at or above the lower limit of normal or at or above 65 percent; or

(ii) total lung capacity, by plethysmography or timed gas dilution, below the lower limit of normal or below 80 percent of predicted;

(E) verifies that the physician has concluded that the exposed person's medical findings and impairment were not more probably the result of causes other than asbestos exposure revealed by the exposed person's occupational, exposure, medical, and smoking history; and

(F) is accompanied by copies of all ILO classifications, pulmonary function tests, including printouts of all data, flow volume loops, and other information demonstrating compliance with the equipment, quality, interpretation, and reporting standards set out in this chapter, lung volume tests, diagnostic imaging of the chest, pathology reports, or other testing reviewed by the physician in reaching the physician's conclusions.

(b) The detailed occupational and exposure history required by Subsection (a)(2)(A)(ii) must describe:

(1) the exposed person's principal employments and state whether the exposed person was exposed to airborne contaminants, including asbestos fibers and other dusts that can cause pulmonary impairment; and

(2) the nature, duration, and frequency of the exposed person's exposure to airborne contaminants, including asbestos fibers and other dusts that can cause pulmonary impairment.

(c) If a claimant's pulmonary function test results do not meet the requirements of Subsection (a)(2)(D)(i) or (ii), the claimant may serve on each defendant a report by a physician who is board certified in pulmonary medicine, internal medicine, or occupational medicine and whose license and certification were not on inactive status at the time the report was made that:

(1) verifies that the physician has a physician-patient relationship with the exposed person;

(2) verifies that the exposed person has a quality 1 or 2 chest x-ray that has been read by a certified B-reader according to the ILO system of classification as showing bilateral small irregular opacities (s, t, or u) with a profusion grading of 2/1 or higher;

(3) verifies that the exposed person has restrictive impairment from asbestosis and includes the specific pulmonary function test findings on which the physician relies to establish that the exposed person has restrictive impairment;

(4) verifies that the physician has concluded that the exposed person's medical findings and impairment were not more probably the result of causes other than asbestos exposure revealed by the exposed person's occupational, exposure, medical, and smoking history; and

(5) is accompanied by copies of all ILO classifications, pulmonary function tests, including printouts of all data, flow volume loops, and other information demonstrating compliance with the equipment, quality, interpretation, and reporting standards set out in this chapter, lung volume tests, diagnostic imaging of the chest, pathology reports, or other testing reviewed by the physician in reaching the physician's conclusions.

(d) If a claimant's radiologic findings do not meet the requirements of Subsection (a)(2)(C)(i), the claimant may serve on each defendant a report by a physician who is board certified in pulmonary medicine, internal medicine, or occupational medicine and whose license and certification were not on inactive status at the time the report was made that:

(1) verifies that the physician has a physician-patient relationship with the exposed person;

(2) verifies that the exposed person has asbestos-related pulmonary impairment as demonstrated by pulmonary function testing showing:

(A) either:

(i) forced vital capacity below the lower limit of normal or below 80 percent of predicted and total lung capacity, by plethysmography, below the lower limit of normal or below 80 percent of predicted; or

(ii) forced vital capacity below the lower limit of normal or below 80 percent of predicted and FEV1/FVC ratio (using actual values) at or above the lower limit of normal or at or above 65 percent; and

(B) diffusing capacity of carbon monoxide below the lower limit of normal or below 80 percent of predicted;

(3) verifies that the exposed person has a computed tomography scan or high-resolution computed tomography scan showing either bilateral pleural disease or bilateral parenchymal disease consistent with asbestos exposure;

(4) verifies that the physician has concluded that the exposed person's medical findings and impairment were not more probably the result of causes other than asbestos exposure as revealed by the exposed person's occupational, exposure, medical, and smoking history; and

(5) is accompanied by copies of all computed tomography scans, ILO classifications, pulmonary function tests, including printouts of all data, flow volume loops, and other information demonstrating compliance with the equipment, quality, interpretation, and reporting standards set out in this chapter, lung volume tests, diagnostic imaging of the chest, pathology reports, or other testing reviewed by the physician in reaching the physician's conclusions.

§ 90.004. Reports Required for Claims Involving Silica-related Injury.

(a) A claimant asserting a silica-related injury must serve on each defendant a report by a physician who is board certified in pulmonary medicine, internal medicine, oncology, pathology, or, with respect to a claim for silicosis, occupational medicine and whose license and certification were not on inactive status at the time the report was made that:

(1) verifies that the physician or a medical professional employed by and under the direct supervision and control of the physician:

(A) performed a physical examination of the exposed person, or if the exposed person is deceased, reviewed available records relating to the exposed person's medical condition;

(B) took a detailed occupational and exposure history from the exposed person or, if the exposed person is deceased, from a person knowledgeable about the alleged exposure or exposures that form the basis of the action; and

(C) took a detailed medical and smoking history that includes a thorough review of the exposed person's past and present medical problems and their most probable cause;

(2) sets out the details of the exposed person's occupational, exposure, medical, and smoking history;

(3) verifies that the exposed person has one or more of the following:

(A) a quality 1 or 2 chest x-ray that has been read by a certified B-reader according to the ILO system of classification as showing:

(i) bilateral predominantly nodular opacities (p, q, or r) occurring primarily in the upper lung fields, with a profusion grading of 1/1 or higher, for an action filed on or after May 1, 2005; or

(ii) bilateral predominantly nodular opacities (p, q, or r) occurring primarily in the upper lung fields, with a profusion grading of 1/0 or higher, for an action filed before May 1, 2005;

(B) pathological demonstration of classic silicotic nodules exceeding one centimeter in diameter as published in "Diseases Associated with Exposure to Silica and Nonfibrous Silicate Minerals," 112 Archives of Pathology and Laboratory Medicine 7 (July 1988);

(C) progressive massive fibrosis radiologically established by large opacities greater than one centimeter in diameter; or

(D) acute silicosis; and

(4) is accompanied by copies of all ILO classifications, pulmonary function tests, including printouts of all data, flow volume loops, and other information demonstrating compliance with the equipment, quality, interpretation, and reporting standards set out in this chapter, lung volume tests, diagnostic imaging of the chest, pathology reports, or other testing reviewed by the physician in reaching the physician's conclusions.

(b) If the claimant is asserting a claim for silicosis, the report required by Subsection (a) must also verify that:

(1) there has been a sufficient latency period for the applicable type of silicosis;

(2) the exposed person has at least Class 2 or higher impairment due to silicosis, according to the American Medical Association Guides to

the Evaluation of Permanent Impairment and reported in 20 C.F.R. Part 404, Subpart P, Appendix 1, Part (A), Sections 3.00(E) and (F)(2003); and

(3) the physician has concluded that the exposed person's medical findings and impairment were not more probably the result of causes other than silica exposure revealed by the exposed person's occupational, exposure, medical, and smoking history.

(c) If the claimant is asserting a claim for silica-related lung cancer, the report required by Subsection (a) must also:

(1) include a diagnosis that the exposed person has primary lung cancer and that inhalation of silica was a substantial contributing factor to that cancer; and

(2) verify that at least 15 years have elapsed from the date of the exposed person's first exposure to silica until the date of diagnosis of the exposed person's primary lung cancer.

(d) If the claimant is asserting a claim for any disease other than silicosis and lung cancer alleged to be related to exposure to silica, the report required by Subsection (a) must also verify that the physician has diagnosed the exposed person with a disease other than silicosis or silica-related lung cancer and has concluded that the exposed person's disease is not more probably the result of causes other than silica exposure.

(e) The detailed occupational and exposure history required by Subsection (a)(1)(B) must describe:

(1) the exposed person's principal employments and state whether the exposed person was exposed to airborne contaminants, including silica and other dusts that can cause pulmonary impairment; and

(2) the nature, duration, and frequency of the exposed person's exposure to airborne contaminants, including silica and other dusts that can cause pulmonary impairment.

§ 90.005. Prohibited Basis for Diagnosis.

(a) For purposes of this chapter, a physician may not, as the basis for a diagnosis, rely on the reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the exposed person's medical condition that was conducted in violation of any law, regulation, licensing requirement, or medical code of practice of the state in which the examination, test, or screening was conducted.

(b) If a physician relies on any information in violation of Subsection (a), the physician's opinion or report does not comply with the requirements of this chapter.

§ 90.006. Serving Reports.

(a) In an action filed on or after the date this chapter becomes law, a report prescribed by Section 90.003 or 90.004 must be served on each

defendant not later than the 30th day after the date that defendant answers or otherwise enters an appearance in the action.

(b) In an action pending on the date this chapter becomes law and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, commences on or before the 90th day after the date this chapter becomes law, a claimant is not required to serve a report on any defendant unless a mistrial, new trial, or retrial is subsequently granted or ordered.

(c) In an action pending on the date this chapter becomes law and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, commences after the 90th day after the date this chapter becomes law, a report must be served on each defendant on or before the earlier of the following dates:

(1) the 60th day before trial commences; or

(2) the 180th day after the date this chapter becomes law.

§ 90.007. Motion to Dismiss.

(a) In an action filed on or after September 1, 2005, if a claimant fails to timely serve a report on a defendant, or serves on the defendant a report that does not comply with the requirements of Section 90.003 or 90.004, the defendant may file a motion to dismiss the claimant's asbestos-related claims or silica-related claims. The motion must be filed on or before the 30th day after the date the report is served on the defendant. If a claimant fails to serve a report on the defendant, the motion must be filed on or before the 30th day after the date the report was required to be served on the defendant under Section 90.006. If the basis of the motion is that the claimant has served on the defendant a report that does not comply with Section 90.003 or 90.004, the motion must include the reasons why the report does not comply with that section.

(b) A claimant may file a response to a motion to dismiss on or before the 15th day after the date the motion to dismiss is served. A report required by Section 90.003 or 90.004 may be filed, amended, or supplemented within the time required for responding to a motion to dismiss. The service of an amended or supplemental report does not require the filing of an additional motion to dismiss if the reasons stated in the original motion to dismiss are sufficient to require dismissal under this chapter.

(c) Except as provided by Section 90.010(d) or (e), if the court is of the opinion that a motion to dismiss is meritorious, the court shall, by written order, grant the motion and dismiss all of the claimant's asbestos-related claims or silica-related claims, as appropriate, against the defendant. A dismissal under this section is without prejudice to the claimant's right, if any, to assert claims for an asbestos-related injury or a silica-related injury in a subsequent action.

(d) On the filing of a motion to dismiss under this section, all further proceedings in the action are stayed until the motion is heard and determined by the court.

(e) On the motion of a party showing good cause, the court may shorten or extend the time limits provided in this section for filing or serving motions, responses, or reports.

§ 90.008. Voluntary Dismissal.

Before serving a report required by Section 90.003 or 90.004, a claimant seeking damages arising from an asbestos-related injury or silica-related injury may voluntarily dismiss the claimant's action. If a claimant files a voluntary dismissal under this section, the claimant's voluntary dismissal is without prejudice to the claimant's right to file a subsequent action seeking damages arising from an asbestos-related injury or a silica-related injury.

§ 90.009. Joinder of Claimants.

Unless all parties agree otherwise, claims relating to more than one exposed person may not be joined for a single trial.

§ 90.010. Multidistrict Litigation Proceedings.

(a) The MDL rules apply to any action pending on the date this chapter becomes law in which the claimant alleges personal injury or death from exposure to asbestos or silica unless:

(1) the action was filed before September 1, 2003, and trial has commenced or is set to commence on or before the 90th day after the date this chapter becomes law, except that the MDL rules shall apply to the action if the trial does not commence on or before the 90th day after the date this chapter becomes law;

(2) the action was filed before September 1, 2003, and the claimant serves a report that complies with Section 90.003 or 90.004 on or before the 90th day after the date this chapter becomes law; or

(3) the action was filed before September 1, 2003, and the exposed person has been diagnosed with malignant mesothelioma, other malignant asbestos-related cancer, or malignant silica-related cancer.

(b) If the claimant fails to serve a report complying with Section 90.003 or 90.004 on or before the 90th day after the date this chapter becomes law under Subsection (a)(2), the defendant may file a notice of transfer to the MDL pretrial court. If the MDL pretrial court determines that the claimant served a report that complies with Section 90.003 or 90.004 on or before the 90th day after the date this chapter becomes law, the MDL pretrial court shall remand the action to the court in which the action was filed. If the MDL pretrial court determines that the report was not served on or before the 90th day after the date this chapter becomes law or that the report served does not comply with Section 90.003 or 90.004, the MDL pretrial court shall retain jurisdiction over the action pursuant to the MDL rules.

(c) In an action transferred to an MDL pretrial court in which the exposed person is living and has been diagnosed with malignant mesothelioma, other malignant asbestos-related cancer, malignant silica-related cancer, or acute silicosis, the MDL pretrial court shall expedite the action in a manner calculated to provide the exposed person with a trial or other disposition in the shortest period that is fair to all parties and consistent with the principles of due process. The MDL pretrial court should, as far as reasonably possible, ensure that such action is brought to trial or final disposition within six months from the date the action is transferred to the MDL pretrial court, provided that all discovery and case management requirements of the MDL pretrial court have been satisfied.

(d) In an action that was pending on August 31, 2005, that was transferred to and remains pending in an MDL pretrial court, the MDL pretrial court shall not remand such action for trial unless:

(1) the claimant serves a report complying with Section 90.003 or 90.004; or

(2)(A) the claimant does not serve a report that complies with Section 90.003 or 90.004;

(B) the claimant serves a report complying with Subsection (f)(1); and

(C) the court, on motion and hearing, makes the findings required by Subsection (f)(2).

(d–1) Beginning on September 1, 2014, the MDL pretrial court shall dismiss each action for an asbestos-related injury or a silica-related injury that was pending on August 31, 2005, unless a report was served on or after September 1, 2013, that complies with Section 90.003, Section 90.004, or Subsection (f). The MDL pretrial court shall provide for the dismissal of such actions in a case management order entered for that purpose. All actions for a silica-related injury shall be dismissed on or before August 31, 2015. All actions for an asbestos-related injury shall be dismissed on or before December 31, 2015.

(e) In an action filed on or after the date this chapter becomes law that is transferred to an MDL pretrial court and in which the claimant does not serve on a defendant a report that complies with Section 90.003 or 90.004, the MDL pretrial court shall, on motion by a defendant, dismiss the action under Section 90.007 unless:

(1) the claimant serves a report that complies with Subsection (f)(1); and

(2) the court, on motion and hearing, makes the findings required by Subsection (f)(2).

(f) In an action in which the claimant seeks remand for trial under Subsection (d)(2) or denial of a motion to dismiss under Subsection (e):

(1) the claimant shall serve on each defendant a report that:

(A) complies with the requirements of Sections 90.003(a)(2)(A), (B), (E), and (F) and 90.003(b) or Sections 90.004(a)(1), (2), and (4) and 90.004(e); and

(B) verifies that:

(i) the physician making the report has a physician-patient relationship with the exposed person;

(ii) pulmonary function testing has been performed on the exposed person and the physician making the report has interpreted the pulmonary function testing;

(iii) the physician making the report has concluded, to a reasonable degree of medical probability, that the exposed person has radiographic, pathologic, or computed tomography evidence establishing bilateral pleural disease or bilateral parenchymal disease caused by exposure to asbestos or silica; and

(iv) the physician has concluded that the exposed person has asbestos-related or silica-related physical impairment comparable to the impairment the exposed person would have had if the exposed person met the criteria set forth in Section 90.003 or 90.004; and

(2) the MDL pretrial court shall determine whether:

(A) the report and medical opinions offered by the claimant are reliable and credible;

(B) due to unique or extraordinary physical or medical characteristics of the exposed person, the medical criteria set forth in Sections 90.003 and 90.004 do not adequately assess the exposed person's physical impairment caused by exposure to asbestos or silica; and

(C) the claimant has produced sufficient credible evidence for a finder of fact to reasonably find that the exposed person is physically impaired as the result of exposure to asbestos or silica to a degree comparable to the impairment the exposed person would have had if the exposed person met the criteria set forth in Section 90.003 or 90.004.

(g) A court's determination under Subsection (f) shall be made after conducting an evidentiary hearing at which the claimant and any defendant to the action may offer supporting or controverting evidence. The parties shall be permitted a reasonable opportunity to conduct discovery before the evidentiary hearing.

(h) The court shall state its findings under Subsection (f)(2) in writing and shall address in its findings:

(1) the unique or extraordinary physical or medical characteristics of the exposed person that justify the application of this section; and

(2) the reasons the criteria set forth in Sections 90.003 and 90.004 do not adequately assess the exposed person's physical impairment caused by exposure to asbestos or silica.

(i) Any findings made by a court under Subsection (f) are not admissible for any purpose at a trial on the merits.

(j) Subsections (d)(2) and (e)–(i) apply only in exceptional and limited circumstances in which the exposed person does not satisfy the medical criteria of Section 90.003 or 90.004 but can demonstrate meaningful asbestos-related or silica-related physical impairment that satisfies the requirements of Subsection (f). Subsections (d)(2) and (e)–(i) have limited application and shall not be used to negate the requirements of this chapter.

(k) On or before September 1, 2010, each MDL pretrial court having jurisdiction over cases to which this chapter applies shall deliver a report to the governor, lieutenant governor, and the speaker of the house of representatives stating:

(1) the number of cases on the court's multidistrict litigation docket as of August 1, 2010;

(2) the number of cases on the court's multidistrict litigation docket as of August 1, 2010, that do not meet the criteria of Section 90.003 or 90.004, to the extent known;

(3) the court's evaluation of the effectiveness of the medical criteria established by Sections 90.003 and 90.004;

(4) the court's recommendation, if any, as to how medical criteria should be applied to the cases on the court's multidistrict litigation docket as of August 1, 2010; and

(5) any other information regarding the administration of cases in the MDL pretrial courts that the court deems appropriate.

(*l*) A dismissal under Subsection (d–1) is without prejudice to the claimant's right to file a subsequent action seeking damages arising from an asbestos-related injury or a silica-related injury.

(m) This chapter and Section 16.0031 apply to a subsequent action for an asbestos-related injury or a silica-related injury filed by a claimant whose action was dismissed under Subsection (d–1) or by a claimant in an action described by Subsection (d) who voluntarily dismissed the action under Section 90.008.

(n) If a claimant subsequently refiles an action for an asbestos-related injury or a silica-related injury that was dismissed under Subsection (d–1), the refiled action is treated for purposes of determining the applicable law as if that claimant's action had never been dismissed but, instead, had remained pending until the claimant served a report that complied with Section 90.003, Section 90.004, or Subsection (f).

(*o*) A claimant whose action was dismissed under Subsection (d–1) may serve the petition and citation for any subsequently filed action for an asbestos-related or silica-related injury by certified mail, return receipt requested, or other method approved by the MDL pretrial court

that is likely to accomplish service in a cost-effective manner, on a person who was a defendant in the dismissed action.

§ 90.011. Bankruptcy.

Nothing in this chapter is intended to affect the rights of any party in a bankruptcy proceeding or affect the ability of any person to satisfy the claim criteria for compensable claims or demands under a trust established pursuant to a plan of reorganization under Chapter 11 of the United States Bankruptcy Code (11 U.S.C. Section 1101 et seq.).

§ 90.012. Supreme Court Rulemaking.

The Supreme Court may promulgate amendments to the Texas Rules of Civil Procedure regarding the joinder of claimants in asbestos-related actions or silica-related actions if the rules are consistent with Section 90.009.

§ 90.051. Definitions.

In this subchapter:

(1) "Asbestos or silica trust" means a claims facility, a claims agent, a qualified settlement fund, or any other entity that:

(A) is created under 11 U.S.C. Section 524(g) or another applicable law for the benefit of creditors of a bankrupt person;

(B) is formed for the purpose of compensating claimants for asbestos- or silica-related injuries; and

(C) is in existence on the date trial in an action asserting an asbestos- or silica-related injury is set to commence.

(2) "Trust claim" means any filing with or claim against an asbestos or silica trust seeking recovery of compensation or damages for or arising from the asbestos- or silica-related injury of an exposed person.

(3) "Trust claim material" means documentation filed as part of or in connection with a trust claim, including:

(A) documentation that a claimant submits or provides to an asbestos or silica trust for the purpose of demonstrating asbestos or silica exposure, the existence of an asbestos- or silica-related injury, or the validity of a trust claim; and

(B) claim forms and other materials that an asbestos or silica trust requires a claimant to submit.

§ 90.052. Requirement to Make Trust Claims.

(a) Except as provided by Subsection (d), a claimant who has filed an action to recover damages for or arising from an asbestos- or silica-related injury shall make a trust claim against each asbestos or silica trust the claimant believes may owe compensation or damages to the claimant for the injury that is the basis of the claimant's action.

(b) A claimant must make each trust claim required under this section not later than:

(1) the 150th day before the date trial in the action is set to commence; or

(2) a date provided by court order if trial is set to commence on or before January 31, 2016.

(c) A claimant may file a motion seeking relief from the obligation to make a trust claim otherwise required by this section if the claimant believes that the fees and expenses, including attorney's fees, for filing the trust claim exceed the claimant's reasonably anticipated recovery from the trust.

(d) If a claimant files a motion under Subsection (c), the court shall determine whether the claimant's fees and expenses, including attorney's fees, for making the trust claim exceed the claimant's reasonably anticipated recovery from the trust. If the court determines that the claimant's fees and expenses exceed the claimant's reasonably anticipated recovery, the claimant is not required to make the trust claim but shall provide the court with a verified statement of the exposed person's exposure history to asbestos or silica that is covered by the trust.

§ 90.053. Notice of Trust Claim; Production of Trust Claim Material.

(a) A claimant in an action to recover damages for or arising from an asbestos- or silica-related injury shall serve on each party notice of, and trust claim material relating to, each trust claim made by or on behalf of the exposed person. The notice must:

(1) identify each trust claim made by or on behalf of the exposed person;

(2) state the amount of any trust claim payment made to compensate for the exposed person's injury; and

(3) state the date each trust claim was made and whether a request for individual or enhanced review or for a deferral, delay, suspension, or tolling of the claim has been submitted to the trust.

(b) The claimant shall serve the notice and trust claim materials required by Subsection (a) not later than:

(1) the 120th day before the date trial in the action is set to commence; or

(2) a date provided by court order if the court entered an order under Section 90.052(b).

(c) The notice and trust claim materials required to be served under Subsection (a) are in addition to any notice or materials required to be served or produced under other law, rule, order, or applicable agreement.

(d) If a claimant makes a trust claim after the date provided by Section 90.052(b) but before the date that trial in the action commences, the claimant shall serve the notice of, and trust claim material relating

to, the trust claim as required by Subsection (a) reasonably promptly after making the trust claim, but not later than the earlier of:

(1) the date that trial commences; or

(2) the 15th day after the date the additional trust claim is made.

(e) If a claimant discovers that the notice or trust claim materials provided by the claimant under this section were incomplete or incorrect at the time the notice or trust claim materials were served or that the notice or trust claim materials as served are no longer complete and correct, the claimant shall supplement the notice and the production of trust claim materials. The claimant shall serve the supplemental notice or trust claim materials reasonably promptly after the claimant discovers the necessity for the supplementation, but not later than the 15th day after the date the claimant discovers the necessity for the supplementation.

(f) A claimant shall serve notice of, and trust claim material relating to, a trust claim regardless of whether the claim is for an injury resulting in cancer or an injury not resulting in cancer.

§ 90.054. Failure to Make Trust Claim or Provide Notice and Trust Claim Material.

(a) An MDL pretrial court may not remand an action to a trial court and a trial court may not commence trial in the action unless the claimant has:

(1) made each trust claim as required by this subchapter; and

(2) served the notice of, and trust claim material relating to, those trust claims in accordance with Section 90.053.

(b) If a claimant received compensation from an asbestos or silica trust for an injury that also gave rise to a judgment against a defendant for the same injury and the claimant failed to serve the relevant notice and trust claim material as required by Section 90.053, the trial court, on a defendant's or judgment debtor's motion and after reasonable notice to the parties, may impose an appropriate sanction, including setting aside the judgment and ordering a new trial.

(c) This section may not be construed to require payment of a trust claim by an asbestos or silica trust before the MDL pretrial court remands the action for trial or before a judgment is rendered in the action.

§ 90.055. Motion to Stay.

(a) A defendant may file a motion requesting a stay of the proceedings under Section 90.057 on or before the later of:

(1) the 60th day before the date trial in the action is set to commence;

(2) the 15th day after the date the defendant first obtains asbestos- or silica-exposure information that could support an additional asbestos or silica trust claim by the claimant; or

(3) a date provided by court order if the court entered an order under Section 90.052(b).

(b) The motion described by Subsection (a) must include:

(1) a list of asbestos or silica trusts not disclosed by the claimant against which the defendant in good faith believes the claimant may make a successful trust claim; and

(2) information supporting the additional trust claim described by Subdivision (1), including information that may be used to meet the trust claim requirements of an asbestos or silica trust described by Subdivision (1).

§ 90.056. Response to Motion to Stay.

(a) Not later than the 14th day after the date the defendant files a motion to stay under Section 90.055 or the date provided by court order under Section 90.052(b), the claimant may file a response:

(1) stating and providing proof that the claimant has made a trust claim identified in the defendant's motion and served the notice of, and trust claim material relating to, the claim as prescribed by Section 90.053; or

(2) requesting a determination by the court that the fees and expenses, including attorney's fees, for filing a trust claim identified in the motion exceed the claimant's reasonably anticipated recovery from the trust.

(b) If the claimant files a response making a request under Subsection (a)(2), the court shall determine whether the claimant's fees and expenses, including attorney's fees, for making the relevant trust claim exceed the claimant's reasonably anticipated recovery from the trust. If the court determines that the claimant's fees and expenses exceed the claimant's reasonably anticipated recovery, the claimant is not required to make the trust claim but shall provide the court with a verified statement of the exposed person's exposure history to asbestos or silica that is covered by the trust.

§ 90.057. Stay of Proceedings.

(a) The court shall grant a motion to stay under Section 90.055 if the court determines the motion was timely filed and the claimant is likely to receive compensation from a trust identified by the motion. The stay shall continue until the claimant provides proof that the claimant has made the claim and served notice of, and trust claim material relating to, the claim as prescribed by Section 90.053.

(b) The court may not stay the proceedings if, with respect to each trust claim identified in the motion:

(1) the court determines that the claimant has satisfied the requirements of Section 90.053(a); or

(2) the court makes a determination described by Section 90.052(d) or 90.056(b).

§ 90.058. Evidence of Trust Claims.

(a) Trust claim material is presumed to be authentic, relevant, and discoverable in an action to which this subchapter applies.

(b) Notwithstanding an agreement, including a confidentiality agreement, trust claim material is presumed to not be privileged in an action to which this subchapter applies.

(c) This section may not be construed to affect the application of Section 33.003 to an action governed by this chapter.

UTAH CODE ANNOTATED

(1989, 2000, 2008)

§ 78B–6–701. Short title of act.

This act shall be known and may be cited as the "Utah Product Liability Act."

§ 78B–6–702. Definition—Unreasonably dangerous.

As used in this part, "unreasonably dangerous" means that the product was dangerous to an extent beyond which would be contemplated by the ordinary and prudent buyer, consumer, or user of that product in that community considering the product's characteristics, propensities, risks, dangers, and uses together with any actual knowledge, training, or experience possessed by that particular buyer, user, or consumer.

§ 78B–6–703. Defect or defective condition making product unreasonably dangerous—Rebuttable presumption.

(1) In any action for damages for personal injury, death, or property damage allegedly caused by a defect in a product, a product may not be considered to have a defect or to be in a defective condition, unless at the time the product was sold by the manufacturer or other initial seller, there was a defect or defective condition in the product which made the product unreasonably dangerous to the user or consumer.

(2) There is a rebuttable presumption that a product is free from any defect or defective condition where the alleged defect in the plans or designs for the product or the methods and techniques of manufacturing, inspecting and testing the product were in conformity with government standards established for that industry which were in existence at the time the plans or designs for the product or the methods and techniques of manufacturing, inspecting and testing the product were adopted.

§ 78B–6–704. Prayer for damages.

No dollar amount shall be specified in the prayer of a complaint filed in a product liability action against a product manufacturer, wholesaler or retailer. The complaint shall merely pray for such damages as are reasonable in the premises.

§ 78B–6–705. Alteration or modification of product after sale as substantial contributing cause—Manufacturer or seller not liable.

For purposes of Section 78B–5–818, fault shall include an alteration or modification of the product, which occurred subsequent to the sale by the manufacturer or seller to the initial user or consumer, and which changed the purpose, use, function, design, or intended use or manner of use of the product from that for which the product was originally designed, tested, or intended.

§ 78B–6–706. Statute of limitations.

A civil action under this chapter shall be brought within two years from the time the individual who would be the claimant in such action discovered, or in the exercise of due diligence should have discovered, both the harm and its cause.

§ 78B–6–707. Indemnification provisions void and unenforceable.

Any clause in a sales contract or collateral document that requires a purchaser or end user of a product to indemnify, hold harmless, or defend a manufacturer of a product shall be contrary to public policy and is void and unenforceable if a defect in the design or manufacturing of the product causes an injury or death.

WASHINGTON REVISED CODE ANNOTATED

(1981–91, 2004)

§ 7.72.010. Definitions.

For the purposes of this chapter, unless the context clearly indicates to the contrary:

(1) Product seller. "Product seller" means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. The term also includes a party who is in the business of leasing or bailing such products. The term "product seller" does not include:

(a) A seller of real property, unless that person is engaged in the mass production and sale of standardized dwellings or is otherwise a product seller;

(b) A provider of professional services who utilizes or sells products within the legally authorized scope of the professional practice of the provider;

(c) A commercial seller of used products who resells a product after use by a consumer or other product user: Provided, That when it is resold, the used product is in essentially the same condition as when it was acquired for resale;

(d) A finance lessor who is not otherwise a product seller. A "finance lessor" is one who acts in a financial capacity, who is not a manufacturer, wholesaler, distributor, or retailer, and who leases a product without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor; and

(e) A licensed pharmacist who dispenses a prescription product in the form manufactured by a commercial manufacturer pursuant to a prescription issued by a licensed prescribing practitioner if the claim against the pharmacist is based upon strict liability in tort or the implied warranty provisions under the uniform commercial code, Title 62A RCW, and if the pharmacist complies with recordkeeping requirements pursuant to chapters 18.64, 69.41, and 69.50 RCW, and related administrative rules as provided in RCW 7.72.040. Nothing in this subsection (1)(e) affects a pharmacist's liability under RCW 7.72.040(1).

(2) Manufacturer. "Manufacturer" includes a product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer. The term also includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.

A product seller acting primarily as a wholesaler, distributor, or retailer of a product may be a "manufacturer" but only to the extent that it designs, produces, makes, fabricates, constructs, or remanufactures the product for its sale. A product seller who performs minor assembly of a product in accordance with the instructions of the manufacturer shall not be deemed a manufacturer. A product seller that did not participate in the design of a product and that constructed the product in accordance with the design specifications of the claimant or another product seller shall not be deemed a manufacturer for the purposes of RCW 7.72.030(1)(a).

(3) Product. "Product" means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce. Human tissue and organs, including human blood and its components, are excluded from this term.

The "relevant product" under this chapter is that product or its component part or parts, which gave rise to the product liability claim.

(4) Product liability claim. "Product liability claim" includes any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product. It includes, but is not limited to, any claim or action previously based on: Strict liability in tort; negligence; breach of express or implied warranty; breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or other claim or action previously based on any other substantive legal theory except fraud, intentionally caused harm or a claim or action under the consumer protection act, chapter 19.86 RCW.

(5) Claimant. "Claimant" means a person or entity asserting a product liability claim, including a wrongful death action, and, if the claim is asserted through or on behalf of an estate, the term includes claimant's decedent. "Claimant" includes any person or entity that suffers harm. A claim may be asserted under this chapter even though the claimant did not buy the product from, or enter into any contractual relationship with, the product seller.

(6) Harm. "Harm" includes any damages recognized by the courts of this state: Provided, That the term "harm" does not include direct or consequential economic loss under Title 62A RCW [Uniform Commercial Code].

§ 7.72.020. Scope.

(1) The previous existing applicable law of this state on product liability is modified only to the extent set forth in this chapter.

(2) Nothing in [this] chapter shall prevent the recovery of direct or consequential economic loss under Title 62A RCW [Uniform Commercial Code].

§ 7.72.030. Liability of manufacturers.

(1) A product manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided.

(a) A product is not reasonably safe as designed, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms and the adverse effect that an alternative design that was practical and feasible would have on the usefulness of the product: Provided, That a firearm or ammunition shall not be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.

(b) A product that is not reasonably safe because adequate warnings or instructions were not provided with the product, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate and the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate.

(c) A product is not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured where a manufacturer learned or where a reasonably prudent manufacturer should have learned about a danger connected with the product after it was manufactured. In such a case, the manufacturer is under a duty to act with regard to issuing warnings or instructions concerning the danger in the manner that a reasonably prudent manufacturer would act in the same or similar circumstances. This duty is satisfied if the manufacturer exercises reasonable care to inform product users.

(2) A product manufacturer is subject to strict liability to a claimant if the claimant's harm was proximately caused by the fact that the product was not reasonably safe in construction or not reasonably safe because it did not conform to the manufacturer's express warranty or to the implied warranties under Title 62A RCW [Uniform Commercial Code].

(a) A product is not reasonably safe in construction if, when the product left the control of the manufacturer, the product deviated in some material way from the design specifications or performance standards of

the manufacturer, or deviated in some material way from otherwise identical units of the same product line.

(b) A product does not conform to the express warranty of the manufacturer if it is made part of the basis of the bargain and relates to a material fact or facts concerning the product and the express warranty proved to be untrue.

(c) Whether or not a product conforms to an implied warranty created under Title 62A RCW [Uniform Commercial Code] shall be determined under that title.

(3) In determining whether a product was not reasonably safe under this section, the trier of fact shall consider whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.

§ 7.72.040. Liability of product sellers other than manufacturers.

(1) Except as provided in subsection (2) of this section, a product seller other than a manufacturer is liable to the claimant only if the claimant's harm was proximately caused by:

(a) The negligence of such product seller; or

(b) Breach of an express warranty made by such product seller; or

(c) The intentional misrepresentation of facts about the product by such product seller or the intentional concealment of information about the product by such product seller.

(2) A product seller, other than a manufacturer, shall have the liability of a manufacturer to the claimant if:

(a) No solvent manufacturer who would be liable to the claimant is subject to service of process under the laws of the claimant's domicile or the state of Washington; or

(b) The court determines that it is highly probable that the claimant would be unable to enforce a judgment against any manufacturer; or

(c) The product seller is a controlled subsidiary of a manufacturer, or the manufacturer is a controlled subsidiary of the product seller; or

(d) The product seller provided the plans or specifications for the manufacture or preparation of the product and such plans or specifications were a proximate cause of the defect in the product; or

(e) The product was marketed under a trade name or brand name of the product seller.

(3) Subsection (2) of this section does not apply to a pharmacist who dispenses a prescription product in the form manufactured by a commercial manufacturer pursuant to a prescription issued by a licensed practitioner if the pharmacist complies with recordkeeping requirements

pursuant to chapters 18.64, 69.41, and 69.50 RCW, and related administrative rules.

§ 7.72.050. Relevance of industry custom, technological feasibility, and nongovernmental, legislative or administrative regulatory standards.

(1) Evidence of custom in the product seller's industry, technological feasibility or that the product was or was not, in compliance with nongovernmental standards or with legislative regulatory standards or administrative regulatory standards, whether relating to design, construction or performance of the product or to warnings or instructions as to its use may be considered by the trier of fact.

(2) When the injury-causing aspect of the product was, at the time of manufacture, in compliance with a specific mandatory government contract specification relating to design or warnings, this compliance shall be an absolute defense. When the injury-causing aspect of the product was not, at the time of manufacture, in compliance with a specific mandatory government specification relating to design or warnings, the product shall be deemed not reasonably safe under RCW 7.72.030(1).

§ 7.72.060. Length of time product sellers are subject to liability.

(1) *Useful safe life.*

(a) Except as provided in subsection (1)(b) hereof, a product seller shall not be subject to liability to a claimant for harm under this chapter if the product seller proves by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired.

"Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner. For the purposes of this chapter, "time of delivery" means the time of delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold. In the case of a product which has been remanufactured by a manufacturer, "time of delivery" means the time of delivery of the remanufactured product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold.

(b) A product seller may be subject to liability for harm caused by a product used beyond its useful safe life, if:

(i) The product seller has warranted that the product may be utilized safely for such longer period; or

(ii) The product seller intentionally misrepresents facts about its product, or intentionally conceals information about it, and that conduct was a proximate cause of the claimant's harm; or

(iii) The harm was caused by exposure to a defective product, which exposure first occurred within the useful safe life of the product, even though the harm did not manifest itself until after the useful safe life had expired.

(2) *Presumption regarding useful safe life.* If the harm was caused more than twelve years after the time of delivery, a presumption arises that the harm was caused after the useful safe life had expired. This presumption may only be rebutted by a preponderance of the evidence.

(3) *Statute of limitation.* Subject to the applicable provisions of chapter 4.16 RCW pertaining to the tolling and extension of any statute of limitation, no claim under this chapter may be brought more than three years from the time the claimant discovered or in the exercise of due diligence should have discovered the harm and its cause.

§ 7.72.070. Food and beverage consumption.

(1) Any manufacturer, packer, distributor, carrier, holder, marketer, or seller of a food or nonalcoholic beverage intended for human consumption, or an association of one or more such entities, shall not be subject to civil liability in an action brought by a private party based on an individual's purchase or consumption of food or nonalcoholic beverages in cases where liability is premised upon the individual's weight gain, obesity, or a health condition associated with the individual's weight gain or obesity and resulting from the individual's long-term purchase or consumption of a food or nonalcoholic beverage.

(2) For the purposes of this section, the term "long-term consumption" means the cumulative effect of the consumption of food or nonalcoholic beverages, and not the effect of a single instance of consumption.

WEST VIRGINIA CODE ANNOTATED

(2016)

§ 55–7–30. Adequate pharmaceutical warnings; limiting civil liability for manufacturers or sellers who provide warning to a learned intermediary.

(a) A manufacturer or seller of a prescription drug or device may not be held liable in a product liability action for a claim based upon inadequate warning or instruction unless the claimant proves, among other elements, that:

(1) The manufacturer or seller of a prescription drug or medical device acted unreasonably in failing to provide reasonable instructions or warnings regarding foreseeable risks of harm to prescribing or other health care providers who are in a position to reduce the risks of harm in accordance with the instructions or warnings; and

(2) Failure to provide reasonable instructions or warnings was a proximate cause of harm.

(b) It is the intention of the Legislature in enacting this section to adopt and allow the development of a learned intermediary doctrine as a defense in cases based upon claims of inadequate warning or instruction for prescription drugs or devices.

WISCONSIN STATUTES ANNOTATED

(1971, 1995–2009, 2011, 2013, 2015–16)

§ 895.043. Punitive damages.

(1) Definitions. In this section:

(a) "Defendant" means the party against whom punitive damages are sought.

(b) "Double damages" means those court awards made under a statute providing for twice, 2 times or double the amount of damages suffered by the injured party.

(c) "Plaintiff" means the party seeking to recover punitive damages.

(d) "Treble damages" means those court awards made under a statute providing for 3 times or treble the amount of damages suffered by the injured party.

(2) Scope. This section does not apply to awards of double damages or treble damages, or to the award of exemplary damages under ss. 46.90(9)(a) and (b), 51.30(9), 51.61(7), 55.043(9m)(a) and (b), 103.96(2), 134.93(5), 146.84(1)(b) and (bm), 153.76, 252.14(4), 252.15(8)(a), 610.70(7)(b), 943.245(2) and (3) and 943.51(2) and (3).

(3) Standard of conduct. The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

(4) Procedure. If the plaintiff establishes a prima facie case for the allowance of punitive damages:

(a) The plaintiff may introduce evidence of the wealth of a defendant; and

(b) The judge shall submit to the jury a special verdict as to punitive damages or, if the case is tried to the court, the judge shall issue a special verdict as to punitive damages.

(5) Application of joint and several liability. The rule of joint and several liability does not apply to punitive damages.

(6) Limitation on damages. Punitive damages received by the plaintiff may not exceed twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater. This subsection does not apply to a plaintiff seeking punitive damages from a defendant whose actions under sub. (3) included the operation of a vehicle, including a motor vehicle as defined under s. 340.01(35), an off-highway motorcycle, as defined in s. 23.335(1)(q), a snowmobile as defined under s. 340.01(58a), an all-terrain vehicle as defined under s. 340.01(2g), and a boat as defined under 30.50(2), while under the influence of an intoxicant to a degree that rendered the defendant

incapable of safe operation of the vehicle. In this subsection, intoxicant has the meaning given in s. 30.50(4e).

§ 895.045. Contributory negligence.

(1) Comparative negligence. Contributory negligence does not bar recovery in an action by any person or the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if that negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering. The negligence of the plaintiff shall be measured separately against the negligence of each person found to be causally negligent. The liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed.

(2) Concerted action. Notwithstanding sub. (1), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action, except as provided in s. 895.043(5).

(3) Product liability.

(a) In an action by any person to recover damages for injuries caused by a defective product based on a claim of strict liability, the fact finder shall first determine if the injured party has the right to recover damages. To do so, the fact finder shall determine what percentage of the total causal responsibility for the injury resulted from the contributory negligence of the injured person, what percentage resulted from the defective condition of the product, and what percentage resulted from the contributory negligence of any other person.

(b) If the injured party's percentage of total causal responsibility for the injury is greater than the percentage resulting from the defective condition of the product, the injured party may not, based on the defect in the product, recover damages from the manufacturer, distributor, seller, or any other person responsible for placing the product in the stream of commerce.

(c) If the injured party's percentage of total causal responsibility for the injury is equal to or less than the percentage resulting from the defective condition of the product, the injured party may recover but the damages recovered by the injured party shall be diminished by the percentage attributed to that injured party.

(d) If multiple defendants are alleged to be responsible for the defective condition of the product, and the injured party is not barred from recovery under par. (b), the fact finder shall determine the percentage of causal responsibility of each product defendant for the

defective condition of the product. The judge shall then multiply that percentage of causal responsibility of each product defendant for the defective condition of the product by the percentage of causal responsibility for the injury to the person attributed to the defective product. The result of that multiplication is the individual product defendant's percentage of responsibility for the damages to the injured party. A product defendant whose responsibility for the damages to the injured party is 51 percent or more of the total responsibility for the damages to the injured party is jointly and severally liable for all of the damages to the injured party. The responsibility of a product defendant whose responsibility for the damages to the injured party is less than 51 percent of the total responsibility for the damages to the injured party is limited to that product defendant's percentage of responsibility for the damages to the injured party.

(e) If the injured party is not barred from recovery under par. (b), the fact that the injured party's causal responsibility for the injury is greater than an individual product defendant's responsibility for the damages to the injured party does not bar the injured party from recovering from that individual product defendant.

(f) This subsection does not apply to actions based on negligence or a breach of warranty.

§ 895.046. Remedies against manufacturers, distributors, sellers, and promoters of products. (1g) Legislative findings and intent.

The legislature finds that it is in the public interest to clarify product liability law, generally, and the application of the risk contribution theory of liability first announced by the Wisconsin Supreme Court in *Collins v. Eli Lilly Company*, 116 Wis. 2d 166 (1984), specifically, in order to return tort law to its historical, common law roots. This return both protects the rights of citizens to pursue legitimate and timely claims of injury resulting from defective products, and assures that businesses may conduct activities in this state without fear of being sued for indefinite claims of harm from products which businesses may never have manufactured, distributed, sold, or promoted, or which were made and sold decades ago. The legislature finds that the application of risk contribution to former white lead carbonate manufacturers in *Thomas v. Mallet*, 285 Wis. 2d 236 (2005), was an improperly expansive application of the risk contribution theory of liability announced in *Collins*, and that application raised substantial questions of deprivation of due process, equal protection, and right to jury trial under the federal and Wisconsin constitutions. The legislature finds that this section protects the right to a remedy found in article I, section 9, of the Wisconsin Constitution, by preserving the narrow and limited application of the risk contribution theory of liability announced in *Collins*.

(1r) Definitions. In this section:

(a) "Claimant" means a person seeking damages or other relief for injury or harm to a person or property caused by or arising from a product, or a person on whose behalf a claim for such damages or other relief is asserted.

(b) "Relevant production period" means the time period during which the specific product that allegedly caused a claimant's injury or harm was manufactured, distributed, sold, or promoted.

(2) Applicability. This section applies to all actions in law or equity, whenever filed or accrued, in which a claimant alleges that the manufacturer, distributor, seller, or promoter of a product is liable for an injury or harm to a person or property, including actions based on allegations that the design, manufacture, distribution, sale, or promotion of, or instructions or warnings about, a product caused or contributed to a personal injury or harm to a person or property, a private nuisance, or a public nuisance, and to all related or independent claims, including unjust enrichment, restitution, or indemnification.

(3) Remedy with specific product identification. Except as provided in sub. (4), the manufacturer, distributor, seller, or promoter of a product may be held liable in an action under sub. (2) only if the claimant proves, in addition to any other elements required to prove his or her claim, that the manufacturer, distributor, seller, or promoter of a product manufactured, distributed, sold, or promoted the specific product alleged to have caused the claimant's injury or harm.

(4) Remedy without specific product identification. Subject to sub. (5), if a claimant cannot meet the burden of proof under sub. (3), the manufacturer, distributor, seller, or promoter of a product may be held liable for an action under sub. (2) only if all of the following apply:

(a) The claimant proves all of the following:

1. That no other lawful process exists for the claimant to seek any redress from any other person for the injury or harm.

2. That the claimant has suffered an injury or harm that can be caused only by a manufactured product chemically and physically identical to the specific product that allegedly caused the claimant's injury or harm.

3. That the manufacturer, distributor, seller, or promoter of a product manufactured, distributed, sold, or promoted a complete integrated product, in the form used by the claimant or to which the claimant was exposed, and that meets all of the following criteria:

a. Is chemically and physically identical to the specific product that allegedly caused the claimant's injury or harm.

b. Was manufactured, distributed, sold, or promoted in the geographic market where the injury or harm is alleged to have occurred during the time period in which the specific product that allegedly caused

the claimant's injury or harm was manufactured, distributed, sold, or promoted.

c. Was distributed or sold without labeling or any distinctive characteristic that identified the manufacturer, distributor, seller, or promoter.

(b) The action names, as defendants, those manufacturers of a product who collectively manufactured at least 80 percent of all products sold in this state during the relevant production period by all manufacturers of the product in existence during the relevant production period that are chemically identical to the specific product that allegedly caused the claimant's injury or harm.

(5) Limitation on liability. No manufacturer, distributor, seller, or promoter of a product is liable under sub. (4) if more than 25 years have passed between the date that the manufacturer, distributor, seller, or promoter of a product last manufactured, distributed, sold, or promoted the specific product chemically identical to the specific product that allegedly caused the claimant's injury and the date that the claimant's cause of action accrued.

(6) Apportionment of liability. If more than one manufacturer, distributor, seller, or promoter of a product is found liable for the claimant's injury or harm under subs. (4) and (5), the court shall apportion liability among those manufacturers, distributors, sellers, and promoters, but that liability shall be several and not joint.

[Held unconstitutional, State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964 (W.D. Wis. 2019).]

§ 895.047. Product liability.

(1) Liability of manufacturer.

In an action for damages caused by a manufactured product based on a claim of strict liability, a manufacturer is liable to a claimant if the claimant establishes all of the following by a preponderance of the evidence:

(a) That the product is defective because it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product contains a manufacturing defect if the product departs from its intended design even though all possible care was exercised in the manufacture of the product. A product is defective in design if the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the manufacturer and the omission of the alternative design renders the product not reasonably safe. A product is defective because of inadequate instructions or warnings only if the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or

warnings by the manufacturer and the omission of the instructions or warnings renders the product not reasonably safe.

(b) That the defective condition rendered the product unreasonably dangerous to persons or property.

(c) That the defective condition existed at the time the product left the control of the manufacturer.

(d) That the product reached the user or consumer without substantial change in the condition in which it was sold.

(e) That the defective condition was a cause of the claimant's damages.

(2) Liability of seller or distributor.

(a) A seller or distributor of a product is not liable based on a claim of strict liability to a claimant unless the manufacturer would be liable under sub. (1) and any of the following applies: 1. The claimant proves by a preponderance of the evidence that the seller or distributor has contractually assumed one of the manufacturer's duties to manufacture, design, or provide warnings or instructions with respect to the product.

2. The claimant proves by a preponderance of the evidence that neither the manufacturer nor its insurer is subject to service of process within this state.

3. A court determines that the claimant would be unable to enforce a judgment against the manufacturer or its insurer.

(b) The court shall dismiss a product seller or distributor as a defendant based on par. (a)2. if the manufacturer or its insurer submits itself to the jurisdiction of the court in which the suit is pending.

(3) Defenses.

(a) If the defendant proves by clear and convincing evidence that at the time of the injury the claimant was under the influence of any controlled substance or controlled substance analog to the extent prohibited under s. 346.63(1)(a), or had an alcohol concentration, as defined in s. 340.01(1v), of 0.08 or more, there shall be a rebuttable presumption that the claimant's intoxication or drug use was the cause of his or her injury.

(b) Evidence that the product, at the time of sale, complied in material respects with relevant standards, conditions, or specifications adopted or approved by a federal or state law or agency shall create a rebuttable presumption that the product is not defective.

(c) The damages for which a manufacturer, seller, or distributor would otherwise be liable shall be reduced by the percentage of causal responsibility for the claimant's harm attributable to the claimant's misuse, alteration, or modification of the product.

(d) The court shall dismiss the claimant's action under this section if the damage was caused by an inherent characteristic of the product

that would be recognized by an ordinary person with ordinary knowledge common to the community that uses or consumes the product.

(e) A seller or distributor of a product is not liable to a claimant for damages if the seller or distributor receives the product in a sealed container and has no reasonable opportunity to test or inspect the product. This paragraph does not apply if the seller or distributor may be liable under sub. (2)(a)2. or 3.

(4) Subsequent remedial measures. In an action for damages caused by a manufactured product based on a claim of strict liability, evidence of remedial measures taken subsequent to the sale of the product is not admissible for the purpose of showing a manufacturing defect in the product, a defect in the design of the product, or a need for a warning or instruction. This subsection does not prohibit the admission of such evidence to show a reasonable alternative design that existed at the time when the product was sold.

(5) Time limit. In any action under this section, a defendant is not liable to a claimant for damages if the product alleged to have caused the damage was manufactured 15 years or more before the claim accrues, unless the manufacturer makes a specific representation that the product will last for a period beyond 15 years. This subsection does not apply to an action based on a claim for damages caused by a latent disease.

(6) Inapplicability. This section does not apply to actions based on a claim of negligence or breach of warranty.

CONSUMER PRODUCT SAFETY ACT,* and CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008** Selected Sections

Section

* 15 U.S.C.A. §§ 2051–82.

** Pub.L. 110–34, Title II, § 239(a), 122 Stat. 1207 (2008).

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§ 2051. Congressional findings and declaration of purpose

(a) The Congress finds that—

(1) an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce;

(2) complexities of consumer products and the diverse nature and abilities of consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately;

(3) the public should be protected against unreasonable risks of injury associated with consumer products;

(4) control by State and local governments of unreasonable risks of injury associated with consumer products is inadequate and may be burdensome to manufacturers;

(5) existing Federal authority to protect consumers from exposure to consumer products presenting unreasonable risks of injury is inadequate; and

(6) regulation of consumer products the distribution or use of which affects interstate or foreign commerce is necessary to carry out this chapter.

(b) The purposes of this chapter are—

(1) to protect the public against unreasonable risks of injury associated with consumer products;

(2) to assist consumers in evaluating the comparative safety of consumer products;

(3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and

(4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

(Pub.L. 92–573, § 2, Oct. 27, 1972, 86 Stat. 1207.)

§ 2052. Definitions

(a) In general

In this chapter:

(1) Appropriate Congressional committees

The term "appropriate Congressional committees" means the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate.

(2) Children's product

The term "children's product" means a consumer product designed or intended primarily for children 12 years of age or younger. In determining whether a consumer product is primarily intended for a child 12 years of age or younger, the following factors shall be considered:

(A) A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable.

(B) Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger.

(C) Whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger.

(D) The Age Determination Guidelines issued by the Commission staff in September 2002, and any successor to such guidelines.

(3) Commerce

The term "commerce" means trade, traffic, commerce, or transportation—

(A) between a place in a State and any place outside thereof, or

(B) which affects trade, traffic, commerce, or transportation described in subparagraph (A).

(4) Commission

The term "Commission" means the Consumer Product Safety Commission, established by section 2053 of this title.

(5) Consumer product

The term "consumer product" means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include—

(A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer,

(B) tobacco and tobacco products,

(C) motor vehicles or motor vehicle equipment (as defined by section 30102(a)(6) and (7) of Title 49),

(D) pesticides (as defined by the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C.A. § 136 et seq.]),

(E) any article which, if sold by the manufacturer, producer, or importer, would be subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986 [26 U.S.C.A. § 4181] (determined without regard to any exemptions from such tax provided by section 4182 or 4221, or any other provision of such Code), or any component of any such article,

(F) aircraft, aircraft engines, propellers, or appliances (as defined in section 40102(a) of Title 49),

(G) boats which could be subjected to safety regulation under chapter 43 of Title 46; vessels, and appurtenances to vessels (other than such boats), which could be subjected to safety regulation under title 52 of the Revised Statutes or other marine safety statutes administered by the department in which the Coast Guard is operating; and equipment (including associated equipment, as defined in section 2101(1) of Title 46) to the extent that a risk of injury associated with the use of such equipment on boats or vessels could be eliminated or reduced by actions taken under any statute referred to in this subparagraph,

(H) drugs, devices, or cosmetics (as such terms are defined in sections 201(g), (h), and (i) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 321(g), (h), and (i)]), or

(I) food. The term "food", as used in this subparagraph means all "food", as defined in section 201(f) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 321(f)], including poultry and poultry products (as defined in sections 4(e) and (f) of the Poultry Products Inspection Act [21 U.S.C.A. § 453(e) and (f)]), meat, meat food products (as defined in section 1(j) of the Federal Meat Inspection Act [21 U.S.C.A. § 601(j)]), and eggs and egg products (as defined in section 4 of the Egg Products Inspection Act [21 U.S.C.A. § 1033]).

Such term includes any mechanical device which carries or conveys passengers along, around, or over a fixed or restricted route or course or within a defined area for the purpose of giving its passengers amusement, which is customarily controlled or directed by an individual who is employed for that purpose and who is not a consumer with respect to such device, and which is not permanently fixed to a site. Such term does not include such a device which is permanently fixed to a site. Except for the regulation under this chapter or the Federal Hazardous Substances Act [15 U.S.C.A. § 1261 et seq.] of fireworks devices or any substance intended for use as a component of any such device, the Commission shall have no authority under the functions transferred pursuant to section 2079 of this title to regulate any product or article described in subparagraph (E) of this paragraph or described, without regard to quantity, in section 845(a)(5) of Title 18. See sections 2079(d) and 2080 of this title, for other limitations on Commission's authority to regulate certain consumer products.

(6) Consumer product safety rule

The term "consumer product safety rule" means a consumer products safety standard described in section 2056(a) of this title, or a rule under this chapter declaring a consumer product a banned hazardous product.

(7) Distribution in commerce

The terms "to distribute in commerce" and "distribution in commerce" mean to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce.

(8) Distributor

The term "distributor" means a person to whom a consumer product is delivered or sold for purposes of distribution in commerce, except that such term does not include a manufacturer or retailer of such product.

(9) Importation

The terms "import" and "importation" include reimporting a consumer product manufactured or processed, in whole or in part, in the United States.

(10) Manufactured

The term "manufactured" means to manufacture, produce, or assemble.

(11) Manufacturer

The term "manufacturer" means any person who manufactures or imports a consumer product.

(12) Private labeler

(A) The term "private labeler" means an owner of a brand or trademark on the label of a consumer product which bears a private label.

(B) A consumer product bears a private label if (i) the product (or its container) is labeled with the brand or trademark of a person other than a manufacturer of the product, (ii) the person with whose brand or trademark the product (or container) is labeled has authorized or caused the product to be so labeled, and (iii) the brand or trademark of a manufacturer of such product does not appear on such label.

(13) Retailer

The term "retailer" means a person to whom a consumer product is delivered or sold for purposes of sale or distribution by such person to a consumer.

(14) Risk of injury

The term "risk of injury" means a risk of death, personal injury, or serious or frequent illness.

(15) State

The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, Wake Island, Midway Island, Kingman Reef, Johnston Island, the Canal Zone, American Samoa, or the Trust Territory of the Pacific Islands.

(16) Third-party logistics provider

The term "third-party logistics provider" means a person who solely receives, holds, or otherwise transports a consumer product in the ordinary course of business but who does not take title to the product.

(17) United States

The term "United States", when used in the geographic sense, means all of the States (as defined in paragraph (10)).

(b) A common carrier, contract carrier, third-party logistics provider, or freight forwarder shall not, for purposes of this chapter, be deemed to be a manufacturer, distributor, or retailer of a consumer product solely by reason of receiving or transporting a consumer product in the ordinary course of its business as such a carrier or forwarder.

(Pub.L. 92–573, § 3, Oct. 27, 1972, 86 Stat. 1208; Pub.L. 94–284, § 3(b), (d), May 11, 1976, 90 Stat. 503; Pub.L. 97–35, Title XII, § 1213, Aug. 13, 1981, 95 Stat. 724; Pub.L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 110–314, Title II, § 235(a), (b), (c)(1), Aug. 14, 2008, 122 Stat. 3074.)

§ 2053. Consumer Product Safety Commission

(a) Establishment; Chairman

An independent regulatory commission is hereby established, to be known as the Consumer Product Safety Commission, consisting of five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate. In making such appointments, the

President shall consider individuals who, by reason of their background and expertise in areas related to consumer products and protection of the public from risks to safety, are qualified to serve as members of the Commission. The Chairman shall be appointed by the President, by and with the advice and consent of the Senate, from among the members of the Commission. An individual may be appointed as a member of the Commission and as Chairman at the same time. Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause.

(b) Term; vacancies

(1) Except as provided in paragraph (2), (A) the Commissioners first appointed under this section shall be appointed for terms ending three, four, five, six, and seven years, respectively, after October 27, 1972, the term of each to be designated by the President at the time of nomination; and (B) each of their successors shall be appointed for a term of seven years from the date of the expiration of the term for which his predecessor was appointed.

(2) Any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A Commissioner may continue to serve after the expiration of his term until his successor has taken office, except that he may not so continue to serve more than one year after the date on which his term would otherwise expire under this subsection.

(c) Restrictions on Commissioners' outside activities

Not more than three of the Commissioners shall be affiliated with the same political party. No individual (1) in the employ of, or holding any official relation to, any person engaged in selling or manufacturing consumer products, or (2) owning stock or bonds of substantial value in a person so engaged, or (3) who is in any other manner pecuniarily interested in such a person, or in a substantial supplier of such a person, shall hold the office of Commissioner. A Commissioner may not engage in any other business, vocation, or employment.

(d) Quorum; seal; Vice Chairman

No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission, but three members of the Commission shall constitute a quorum for the transaction of business, except that if there are only three members serving on the Commission because of vacancies in the Commission, two members of the Commission shall constitute a quorum for the transaction of business, and if there are only two members serving on the Commission because of vacancies in the Commission, two members shall constitute a quorum for the six month period beginning on the date of the vacancy which caused the number on the Commission to decline to two. The Commission shall have an official seal of which judicial notice shall

be taken. The Commission shall annually elect a Vice Chairman to act in the absence or disability of the Chairman or in case of a vacancy in the office of the Chairman.

(e) Offices

The Commission shall maintain a principal office and such field offices as it deems necessary and may meet and exercise any of its powers at any other place.

(f) Functions of Chairman

(1) The Chairman of the Commission shall be the principal executive officer of the Commission, and he shall exercise all of the executive and administrative functions of the Commission, including functions of the Commission with respect to (A) the appointment and supervision of personnel employed under the Commission (other than personnel employed regularly and full time in the immediate offices of commissioners other than the Chairman), (B) the distribution of business among personnel appointed and supervised by the Chairman and among administrative units of the Commission, and (C) the use and expenditure of funds.

(2) In carrying out any of his functions under the provisions of this subsection the Chairman shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.

(3) Requests or estimates for regular, supplemental, or deficiency appropriations on behalf of the Commission may not be submitted by the Chairman without the prior approval of the Commission.

(g) Executive Director; officers and employees

(1)(A) The Chairman, subject to the approval of the Commission, shall appoint as officers of the Commission an Executive Director, a General Counsel, an Associate Executive Director for Engineering Sciences, an Associate Executive Director for Epidemiology, an Associate Director for Compliance and Administrative Litigation, an Associate Executive Director for Health Sciences, an Associate Executive Director for Economic Analysis, an Associate Executive Director for Administration, an Associate Executive Director for Field Operations, a Director for Office of Program, Management and Budget, and a Director for Office of Information and Public Affairs. Any other individual appointed to a position designated as an Associate Executive Director shall be appointed by the Chairman subject to the removal of the Commission. The Chairman may only appoint an attorney to the position of Associate Executive Director of Compliance and Administrative Litigation except the position of Acting Associate Executive Director of Compliance and Administrative Litigation.

(B)(i) No individual may be appointed to such a position on an acting basis for a period longer than 90 days unless such appointment is approved by the Commission.

(ii) The Chairman, with the approval of the Commission, may remove any individual serving in a position appointed under subparagraph (A).

(C) Subparagraph (A) shall not be construed to prohibit appropriate reorganizations or changes in classifications.

(2) The Chairman, subject to subsection (f)(2), of this section, may employ such other officers and employees (including attorneys) as are necessary in the execution of the Commission's functions. No regular officer or employee of the Commission who was at any time during the 12 months preceding the termination of his employment with the Commission compensated at a rate in excess of the annual rate of basic pay in effect for grade GS–14 of the General Schedule, shall accept employment or compensation from any manufacturer subject to this chapter, for a period of 12 months after terminating employment with the Commission.

(3) In addition to the number of positions authorized by section 5108(a) of Title 5, the Chairman, subject to the approval of the Commission, and subject to the standards and procedures prescribed by chapter 51 of Title 5, may place a total of twelve positions in grades GS–16, GS–17, and GS–18.

(4) The appointment of any officer (other than a Commissioner) or employee of the Commission shall not be subject, directly or indirectly, to review or approval by any officer or entity within the Executive Office of the President.

(h) Omitted

(i) Civil action against United States

Subsections (a) and (h) of section 2680 of Title 28 do not prohibit the bringing of a civil action on a claim against the United States which—

(1) is based upon—

(A) misrepresentation or deceit on the part of the Commission or any employee thereof, or

(B) any exercise or performance, or failure to exercise or perform, a discretionary function on the part of the Commission or any employee thereof, which exercise, performance, or failure was grossly negligent; and

(2) is not made with respect to any agency action (as defined in section 551(13) of Title 5).

In the case of a civil action on a claim based upon the exercise or performance of, or failure to exercise or perform, a discretionary function, no judgment may be entered against the United States unless the court

in which such action was brought determines (based upon consideration of all the relevant circumstances, including the statutory responsibility of the Commission and the public interest in encouraging rather than inhibiting the exercise of discretion) that such exercise, performance, or failure to exercise or perform was unreasonable.

(j) Agenda and priorities; establishment and comments

At least 30 days before the beginning of each fiscal year, the Commission shall establish an agenda for Commission action under the Acts under its jurisdiction and, to the extent feasible, shall establish priorities for such actions. Before establishing such agenda and priorities, the Commission shall conduct a public hearing on the agenda and priorities and shall provide reasonable opportunity for the submission of comments.

(As amended Pub.L. 94–284, §§ 4, 5(a), May 11, 1976, 90 Stat. 504; Pub.L. 95–631, § 2, Nov. 10, 1978, 92 Stat. 3742; Pub.L. 96–373, Oct. 3, 1980, 94 Stat. 1366; Pub.L. 101–608, Title I §§ 102–104, 105(a), Nov. 16, 1990, 104 Stat. 3110, 3111; Pub.L. 112–74, Div. C, Title V, § 501, Dec. 23, 2011, 125 Stat. 907.)

§ 2053a. Employee training exchanges

(a) In general

The Commission may—

(1) retain or employ officers or employees of foreign government agencies on a temporary basis pursuant to section 2053 of this title or section 3101 or 3109 of Title 5; and

(2) detail officers or employees of the Commission to work on a temporary basis for appropriate foreign government agencies for the purpose of providing or receiving training.

(b) Reciprocity and reimbursement

The Commission may execute the authority contained in subsection (a) with or without reimbursement in money or in kind, and with or without reciprocal arrangements by or on behalf of the foreign government agency involved. Any amounts received as reimbursement for expenses incurred by the Commission under this section shall be credited to the appropriations account from which such expenses were paid.

(c) Standards of conduct

An individual retained or employed under subsection (a)(1) shall be considered to be a Federal employee while so retained or employed, only for purposes of—

(1) injury compensation as provided in chapter 81 of Title 5, and tort claims liability under chapter 171 of Title 28;

(2) the Ethics in Government Act (5 U.S.C. App.) and the provisions of chapter 11 of title 18, United States Code; and

(3) any other statute or regulation governing the conduct of Federal employees.

(Added Pub.L. 110–314, Title II, § 208, Aug. 14, 2008, 122 Stat. 3046.)

§ 2054. Product safety information and research

(a) Injury Information Clearinghouse; duties

The Commission shall—

(1) maintain an Injury Information Clearinghouse to collect, investigate, analyze, and disseminate injury data, and information, relating to the causes and prevention of death, injury, and illness associated with consumer products;

(2) conduct such continuing studies and investigations of deaths, injuries, diseases, other health impairments, and economic losses resulting from accidents involving consumer products as it deems necessary;

(3) following publication of a notice of proposed rulemaking for a product safety rule under any rulemaking authority administered by the Commission, assist public and private organizations or groups of manufacturers, administratively and technically, in the development of safety standards addressing the risk of injury identified in such notice; and

(4) to the extent practicable and appropriate (taking into account the resources and priorities of the Commission), assist public and private organizations or groups of manufacturers, administratively and technically, in the development of product safety standards and test methods.

(b) Research, investigation and testing of consumer products

The Commission may—

(1) conduct research, studies, and investigations on the safety of consumer products and on improving the safety of such products;

(2) test consumer products and develop product safety test methods and testing devices; and

(3) offer training in product safety investigation and test methods.

(c) Grants and contracts for conduct of functions

In carrying out its functions under this section, the Commission may make grants or enter into contracts for the conduct of such functions with any person (including a governmental entity).

(d) Availability to public of information

Whenever the Federal contribution for any information, research, or development activity authorized by this chapter is more than minimal, the Commission shall include in any contract, grant, or other arrangement for such activity, provisions effective to insure that the rights to all information, uses, processes, patents, and other developments resulting from that activity will be made available to the public without charge on a nonexclusive basis. Nothing in this subsection shall be construed to deprive any person of any right which he may have had, prior to entering into any arrangement referred to in this subsection, to any patent, patent application, or invention.

(Pub.L. 92–573, § 5, Oct. 27, 1972, 86 Stat. 1211; Pub.L. 97–35, Title XII, § 1209(a), (b), Aug. 13, 1981, 95 Stat. 720; Pub.L. 110–314, Title II, § 204(a)(2), Aug. 14, 2008, 122 Stat. 3041.)

§ 2055. Public disclosure of information

(a) Disclosure requirements for manufacturers or private labelers; procedures applicable

(1) Nothing contained in this Act shall be construed to require the release of any information described by subsection (b) of section 552 of Title 5 or which is otherwise protected by law from disclosure to the public.

(2) All information reported to or otherwise obtained by the Commission or its representative under this Act which information contains or relates to a trade secret or other matter referred to in section 1905 of Title 18 or subject to section 552(b)(4) of Title 5 shall be considered confidential and shall not be disclosed.

(3) The Commission shall, prior to the disclosure of any information which will permit the public to ascertain readily the identity of a manufacturer or private labeler of a consumer product, offer such manufacturer or private labeler an opportunity to mark such information as confidential and therefore barred from disclosure under paragraph (2). A manufacturer or private labeler shall submit any such mark within 15 calendar days after the date on which it receives the Commission's offer.

(4) All information that a manufacturer or private labeler has marked to be confidential and barred from disclosure under paragraph (2), either at the time of submission or pursuant to paragraph (3), shall not be disclosed, except in accordance with the procedures established in paragraphs (5) and (6).

(5) If the Commission determines that a document marked as confidential by a manufacturer or private labeler to be barred from disclosure under paragraph (2) may be disclosed because it is not confidential information as provided in paragraph (2), the Commission shall notify such person in writing that the Commission intends to

disclose such document at a date not less than 10 days after the date of receipt of notification.

(6) Any person receiving such notification may, if he believes such disclosure is barred by paragraph (2), before the date set for release of the document, bring an action in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the documents are located, or in the United States District Court for the District of Columbia to restrain disclosure of the document. Any person receiving such notification may file with the appropriate district court or court of appeals of the United States, as appropriate, an application for a stay of disclosure. The documents shall not be disclosed until the court has ruled on the application for a stay.

(7) Nothing in this Act shall authorize the withholding of information by the Commission or any officer or employee under its control from the duly authorized committees or subcommittees of the Congress, and the provisions of paragraphs (2) through (6) shall not apply to such disclosures, except that the Commission shall immediately notify the manufacturer or private labeler of any such request for information designated as confidential by the manufacturer or private labeler.

(8) The provisions of paragraphs (2) through (6) shall not prohibit the disclosure of information to other officers, employees, or representatives of the Commission (including contractors) concerned with carrying out this Act or when relevant in any administrative proceeding under this Act or in judicial proceedings to which the Commission is a party. Any disclosure of relevant information—

(A) in Commission administrative proceedings or in judicial proceedings to which the Commission is a party, or

(B) to representatives of the Commission (including contractors), shall be governed by the rules of the Commission (including in camera review rules for confidential material) for such proceedings or for disclosures to such representatives or by court rules or orders, except that the rules of the Commission shall not be amended in a manner inconsistent with the purposes of this section.

(b) Additional disclosure requirements for manufacturers or private labelers; procedures applicable

(1) Except as provided by paragraph (4) of this subsection, not less than 15 days prior to its public disclosure of any information obtained under this Act, or to be disclosed to the public in connection therewith (unless the Commission publishes a finding that the public health and safety requires a lesser period of notice), the Commission shall, to the extent practicable, notify and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler,

and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information. The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this Act. In disclosing any information under this subsection, the Commission may, and upon the request of the manufacturer or private labeler shall, include with the disclosure any comments or other information or a summary thereof submitted by such manufacturer or private labeler to the extent permitted by and subject to the requirements of this section.

(2) If the Commission determines that a document claimed to be inaccurate by a manufacturer or private labeler under paragraph (1) should be disclosed because the Commission believes it has complied with paragraph (1), the Commission shall notify the manufacturer or private labeler that the Commission intends to disclose such document at a date not less than 5 days after the date of the receipt of notification. The Commission may provide a lesser period of notice of intent to disclose if the Commission publishes a finding that the public health and safety requires a lesser period of notice.

(3)(A) Prior to the date set for release of the document, the manufacturer or private labeler receiving the notice described in paragraph (2) may bring an action in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the documents are located or in the United States District Court for the District of Columbia to enjoin disclosure of the document. The district court may enjoin such disclosure if the Commission has failed to take the reasonable steps prescribed in paragraph (1).

(B) If the Commission determines that the public health and safety requires expedited consideration of an action brought under subparagraph (A), the Commission may file a request with the District Court for such expedited consideration. If the Commission files such a request, the District Court shall—

(i) assign the matter for hearing at the earliest possible date;

(ii) give precedence to the matter, to the greatest extent practicable, over all other matters pending on the docket of the court at the time;

(iii) expedite consideration of the matter to the greatest extent practicable; and

(iv) grant or deny the requested injunction within 30 days after the date on which the Commission's request was filed with the court.

(4) Paragraphs (1) through (3) of this subsection shall not apply to the public disclosure of (A) information about any consumer product with respect to which product the Commission has filed an action under section 2061 of this title (relating to imminently hazardous products), or which the Commission has reasonable cause to believe is in violation any consumer product safety rule or provision of this Act or similar rule or provision of any other Act enforced by the Commission; or (B) information in the course of or concerning a rulemaking proceeding (which shall commence upon the publication of an advance notice of proposed rulemaking or a notice of proposed rulemaking), an adjudicatory proceeding (which shall commence upon the issuance of a complaint) or other administrative or judicial proceeding under this Act.

(5) In addition to the requirements of paragraph (1), the Commission shall not disclose to the public information submitted pursuant to section 2064(b) of this title respecting a consumer product unless—

(A) the Commission has issued a complaint under section 2064(c) or (d) of this title alleging that such product presents a substantial product hazard;

(B) in lieu of proceeding against such product under section 2064(c) or (d) of this title, the Commission has accepted in writing a remedial settlement agreement dealing with such product;

(C) the person who submitted the information under section 2064(b) of this title agrees to its public disclosure; or

(D) the Commission publishes a finding that the public health and safety requires public disclosure with a lesser period of notice than is required under paragraph (1).

The provisions of this paragraph shall not apply to the public disclosure of information with respect to a consumer product which is the subject of an action brought under section 2061 of this title, or which the Commission has reasonable cause to believe is in violation of any consumer product safety rule or provision under this Act or similar rule or provision of any other Act enforced by the Commission, or information in the course of or concerning a judicial proceeding.

(6) Where the Commission initiates the public disclosure of information that reflects on the safety of a consumer product or class of consumer products, whether or not such information would enable the public to ascertain readily the identity of a manufacturer or private labeler, the Commission shall establish procedures designed to ensure that such information is accurate and not misleading.

(7) If the Commission finds that, in the administration of this Act, it has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product or class of consumer products, or the practices of any manufacturer, private labeler, distributor, or retailer of consumer products, it shall, in a manner

equivalent to that in which such disclosure was made, take reasonable steps to publish a retraction of such inaccurate or misleading information.

(8) If, after the commencement of a rulemaking or the initiation of an adjudicatory proceeding, the Commission decides to terminate the proceeding before taking final action, the Commission shall, in a manner equivalent to that in which such commencement or initiation was publicized, take reasonable steps to make known the decision to terminate.

(c) Communications with manufacturers

The Commission shall communicate to each manufacturer of a consumer product, insofar as may be practicable, information as to any significant risk of injury associated with such product.

(d) "Act" defined; coverage

(1) For purposes of this section, the term "Act" means the Consumer Product Safety Act [15 U.S.C.A. § 2051 et seq.], the Flammable Fabrics Act [15 U.S.C.A. § 1191 et seq.], the Poison Prevention Packaging Act [15 U.S.C.A. § 1471 et seq.], and the Federal Hazardous Substances Act [15 U.S.C.A. § 1261 et seq.].

(2) The provisions of this section shall apply whenever information is to be disclosed by the Commission, any member of the Commission, or any employee, agent, or representative of the Commission in an official capacity.

(e) Disclosure of information regarding civil actions involving consumer product alleged to have caused death or injury

(1) Notwithstanding the provisions of section 552 of Title 5, subsection (a)(7) of this section, or of any other law, except as provided in paragraphs (2), (3), and (4), no member of the Commission, no officer or employee of the Commission, and no officer or employee of the Department of Justice may—

(A) publicly disclose information furnished under subsection (c)(1) or (c)(2)(A) of section 2084 of this title;

(B) use such information for any purpose other than to carry out the Commission's responsibilities; or

(C) permit anyone (other than the members, officers, and employees of the Commission or officers or employees of the Department of Justice who require such information for an action filed on behalf of the Commission) to examine such information.

(2) Any report furnished under subsection (c)(1) or (c)(2)(A) of section 2084 of this title shall be immune from legal process and shall not be subject to subpoena or other discovery in any civil action in a State or Federal court or in any administrative proceeding, except in an action

against such manufacturer under section 2069, 2070, or 2071 of this title for failure to furnish information required by section 2084 of this title.

(3) The Commission may, upon written request, furnish to any manufacturer or to the authorized agent of such manufacturer authenticated copies of reports furnished by or on behalf of such manufacturer in accordance with section 2084 of this title, upon payment of the actual or estimated cost of searching the records and furnishing such copies.

(4) Upon written request of the Chairman or Ranking Minority Member of either of the appropriate Congressional committees or any subcommittee thereof, the Commission shall provide to the Chairman or Ranking Minority Member any information furnished to the Commission under section 2084 of this title for purposes that are related to the jurisdiction of such committee or subcommittee.

(5) Any officer or employee of the Commission or other officer or employee of the Federal Government who receives information provided under section 2084 of this title, who willfully violates the requirements of this subsection shall be subject to dismissal or other appropriate disciplinary action consistent with procedures and requirements established by the Office of Personnel Management.

(Pub.L. 92–573, § 6, Oct. 27, 1972, 86 Stat. 1212; Pub.L. 97–35, Title XII, § 1204, Aug. 13, 1981, 95 Stat. 713; Pub.L. 97–414, § 9(j)(1), Jan. 4, 1983, 96 Stat. 2064; Pub.L. 101–608, Title I, §§ 106, 112(c), Nov. 16, 1990, 104 Stat. 3111, 3116; Pub.L. 110–314, Title II, §§ 211, 235(c)(2), Aug. 14, 2008, 122 Stat. 3047, 3074.)

§ 2055a. Publicly available consumer product safety information database

(a) Database required

(1) In general

Subject to the availability of appropriations, the Commission shall, in accordance with the requirements of this section, establish and maintain a database on the safety of consumer products, and other products or substances regulated by the Commission, that is—

(A) publicly available;

(B) searchable; and

(C) accessible through the Internet website of the Commission.

(2) Submission of detailed implementation plan to Congress

Not later than 180 days after August 14, 2008, the Commission shall transmit to the appropriate Congressional committees a detailed plan for establishing and maintaining the database required by paragraph (1), including plans for the operation, content, maintenance, and functionality of the database. The plan shall detail the integration of the

database into the Commission's overall information technology improvement objectives and plans. The plan submitted under this subsection shall include a detailed implementation schedule for the database, and plans for a public awareness campaign to be conducted by the Commission to increase consumer awareness of the database.

(3) Date of initial availability

Not later than 18 months after the date on which the Commission submits the plan required by paragraph (2), the Commission shall establish the database required by paragraph (1).

(b) Content and organization

(1) Contents

Except as provided in subsection (c)(4), the database shall include the following:

(A) Reports of harm relating to the use of consumer products, and other products or substances regulated by the Commission, that are received by the Commission from—

(i) consumers;

(ii) local, State, or Federal government agencies;

(iii) health care professionals;

(iv) child service providers; and

(v) public safety entities.

(B) Information derived by the Commission from notice under section 2064(c) of this title or any notice to the public relating to a voluntary corrective action taken by a manufacturer, in consultation with the Commission, of which action the Commission has notified the public.

(C) The comments received by the Commission under subsection (c)(2)(A) to the extent requested under subsection (c)(2)(B).

(2) Submission of information

In implementing the database, the Commission shall establish the following:

(A) Electronic, telephonic, and paper-based means of submitting, for inclusion in the database, reports described in paragraph (1)(A) of this subsection.

(B) A requirement that any report described in paragraph (1)(A) submitted for inclusion in such database include, at a minimum—

(i) a description of the consumer product (or other product or substance regulated by the Commission) concerned;

(ii) identification of the manufacturer or private labeler of the consumer product (or other product or substance regulated by the Commission);

(iii) a description of the harm relating to the use of the consumer product (or other product or substance regulated by the Commission);

(iv) contact information for the person submitting the report; and

(v) a verification by the person submitting the information that the information submitted is true and accurate to the best of the person's knowledge and that the person consents that such information be included in the database.

(3) Additional information

In addition to the reports received under paragraph (1), the Commission shall include in the database, consistent with the requirements of section 2055(a) and (b) of this title, any additional information it determines to be in the public interest.

(4) Organization of database

The Commission shall categorize the information available on the database in a manner consistent with the public interest and in such manner as it determines to facilitate easy use by consumers and shall ensure, to the extent practicable, that the database is sortable and accessible by—

(A) the date on which information is submitted for inclusion in the database;

(B) the name of the consumer product (or other product or substance regulated by the Commission);

(C) the model name;

(D) the manufacturer's or private labeler's name; and

(E) such other elements as the Commission considers in the public interest.

(5) Notice requirements

The Commission shall provide clear and conspicuous notice to users of the database that the Commission does not guarantee the accuracy, completeness, or adequacy of the contents of the database.

(6) Availability of contact information

The Commission may not disclose, under this section, the name, address, or other contact information of any individual or entity that submits to the Commission a report described in paragraph (1)(A), except that the Commission may provide such information to the manufacturer or private labeler of the product with the express written consent of the person submitting the information. Consumer information provided to a

manufacturer or private labeler under this section may not be used or disseminated to any other party for any purpose other than verifying a report submitted under paragraph (1)(A).

(c) Procedural requirements

(1) Transmission of reports to manufacturers and private labelers

Not later than 5 business days after the Commission receives a report described in subsection (b)(1)(A) which includes the information required by subsection (b)(2)(B), the Commission shall to the extent practicable transmit the report, subject to subsection (b)(6), to the manufacturer or private labeler identified in the report.

(2) Opportunity to comment

(A) In general

If the Commission transmits a report under paragraph (1) to a manufacturer or private labeler, the Commission shall provide such manufacturer or private labeler an opportunity to submit comments to the Commission on the information contained in such report.

(B) Request for inclusion in database

A manufacturer or private labeler may request the Commission to include its comments in the database.

(C) Confidential matter

(i) In general

If the Commission transmits a report received under paragraph (1) to a manufacturer or private labeler, the manufacturer or private labeler may review the report for confidential information and request that portions of the report identified as confidential be so designated.

(ii) Redaction

If the Commission determines that the designated information contains, or relates to, a trade secret or other matter referred to in section 1905 of Title 18, or that is subject to section 552(b)(4) of Title 5, the Commission shall redact the designated information in the report before it is placed in the database.

(iii) Review

If the Commission determines that the designated information is not confidential under clause (ii), the Commission shall notify the manufacturer or private labeler and include the information in the database. The manufacturer or private labeler may bring an action in the district court of the United States in the district in which the complainant resides, or has its principal place of business, or in the United States District Court for the District of Columbia, to seek removal of the information from the database.

(3) Publication of reports and comments

(A) Reports

Except as provided in paragraph (4)(A) or paragraph (5), if the Commission receives a report described in subsection (b)(1)(A), the Commission shall make the report available in the database not later than the 10th business day after the date on which the Commission transmits the report under paragraph (1) of this subsection.

(B) Comments

Except as provided in paragraph (4)(A), if the Commission receives a comment under paragraph (2)(A) with respect to a report described in subsection (b)(1)(A) and a request with respect to such comment under paragraph (2)(B) of this subsection, the Commission shall make such comment available in the database at the same time as such report or as soon as practicable thereafter.

(4) Inaccurate information

(A) Inaccurate information in reports and comments received

If, prior to making a report described in subsection (b)(1)(A) or a comment described in paragraph (2) of this subsection available in the database, the Commission receives notice that the information in such report or comment is materially inaccurate, the Commission shall stay the publication of the report on the database as required under paragraph (3) for a period of no more than 5 additional days. If the Commission determines that the information in such report or comment is materially inaccurate, the Commission shall—

(i) decline to add the materially inaccurate information to the database;

(ii) correct the materially inaccurate information in the report or comment and add the report or comment to the database; or

(iii) add information to correct inaccurate information in the database.

(B) Inaccurate information in database

If the Commission determines, after investigation, that information previously made available in the database is materially inaccurate or duplicative of information in the database, the Commission shall, not later than 7 business days after such determination—

(i) remove such information from the database;

(ii) correct such information; or

(iii) add information to correct inaccurate information in the database.

(5) Obtaining certain product identification information

(A) In general

If the Commission receives a report described in subsection (b)(1)(A) that does not include the model or serial number of the consumer product concerned, the Commission shall seek from the individual or entity submitting the report such model or serial number or, if such model or serial number is not available, a photograph of the product. If the Commission obtains information relating to the serial or model number of the product or a photograph of the product, it shall immediately forward such information to the manufacturer of the product. The Commission shall make the report available in the database on the 15th business day after the date on which the Commission transmits the report under paragraph (1) and shall include in the database any additional information about the product obtained under this paragraph.

(B) Rule of construction

Nothing in this paragraph shall be construed to—

(i) permit the Commission to delay transmission of the report under paragraph (1) until the Commission has obtained the model or serial number or a photograph of the consumer product concerned; or

(ii) make inclusion in the database of a report described in subsection (b)(1)(A) contingent on the availability of the model or serial number or a photograph of the consumer product concerned.

(d) Annual report

The Commission shall submit to the appropriate Congressional committees an annual report on the database, including—

(1) the operation, content, maintenance, functionality, and cost of the database for the reporting year; and

(2) the number of reports and comments for the year—

(A) received by the Commission under this section;

(B) posted on the database; and

(C) corrected on or removed from the database.

(e) GAO study

Within 2 years after the date on which the Commission establishes the database under this section, the Comptroller General shall submit a report to the appropriate Congressional committees containing—

(1) an analysis of the general utility of the database, including—

(A) an assessment of the extent of use of the database by consumers, including whether the database is accessed by a broad

range of the public and whether consumers find the database to be useful; and

(B) efforts by the Commission to inform the public about the database; and

(2) recommendations for measures to increase use of the database by consumers and to ensure use by a broad range of the public.

(f) Application of certain notice and disclosure requirements

(1) In general

The provisions of section 2055(a) and (b) of this title shall not apply to the disclosure under this section of a report described in subsection (b)(1)(A) of this section.

(2) Construction

Paragraph (1) shall not be construed to exempt from the requirements of section 2055(a) and (b) of this title information received by the Commission under—

(A) section 2064(b) of this title; or

(B) any other mandatory or voluntary reporting program established between a retailer, manufacturer, or private labeler and the Commission.

(g) Harm defined

In this section, the term "harm" means—

(1) injury, illness, or death; or

(2) risk of injury, illness, or death, as determined by the Commission.

(Pub.L. 92–573, § 6A, as added Pub.L. 110–314, Title II, § 212(a), Aug. 14, 2008, 122 Stat. 3048; Pub.L. 112–28, § 7, Aug. 12, 2011, 125 Stat. 281.)

§ 2056. Consumer product safety standards

(a) Types of requirements

The Commission may promulgate consumer product safety standards in accordance with the provisions of section 2058 of this title. A consumer product safety standard shall consist of one or more of any of the following types of requirements:

(1) Requirements expressed in terms of performance requirements.

(2) Requirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions.

Any requirement of such a standard shall be reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product.

(b) Reliance of Commission upon voluntary standards

(1) The Commission shall rely upon voluntary consumer product safety standards rather than promulgate a consumer product safety standard prescribing requirements described in subsection (a) of this section whenever compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards.

(2) The Commission shall devise procedures to monitor compliance with any voluntary standards—

(A) upon which the Commission has relied under paragraph (1);

(B) which were developed with the participation of the Commission; or

(C) whose development the Commission has monitored.

(c) Contribution of Commission to development cost

If any person participates with the Commission in the development of a consumer product safety standard, the Commission may agree to contribute to the person's cost with respect to such participation, in any case in which the Commission determines that such contribution is likely to result in a more satisfactory standard than would be developed without such contribution, and that the person is financially responsible. Regulations of the Commission shall set forth the items of cost in which it may participate, and shall exclude any contribution to the acquisition of land or buildings. Payments under agreements entered into under this subsection may be made without regard to section 3324(a) and (b) of Title 31.

(As amended Pub.L. 94–284, §§ 6–8(a), May 11, 1976, 90 Stat. 505, 506; Pub.L. 95–631, §§ 3, 4(a)–(c), 5, Nov. 10, 1978, 92 Stat. 3742–3744; Pub.L. 97–35, Title XII, § 1202, Aug. 13, 1981, 95 Stat. 703, 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067; Pub.L. 101–608, Title I, § 107(a), Nov. 16, 1990, 104 Stat. 3111.)

§ 2056a. Standards and consumer registration of durable nursery products

(a) Short title

This section may be cited as the "Danny Keysar Child Product Safety Notification Act".

(b) Safety standards

(1) In general

The Commission shall—

(A) in consultation with representatives of consumer groups, juvenile product manufacturers, and independent child product engineers and experts, examine and assess the effectiveness of any voluntary consumer product safety standards for durable infant or toddler products; and

(B) in accordance with section 553 of Title 5, promulgate consumer product safety standards that—

(i) are substantially the same as such voluntary standards; or

(ii) are more stringent than such voluntary standards, if the Commission determines that more stringent standards would further reduce the risk of injury associated with such products.

(2) Timetable for rulemaking

Not later than 1 year after August 14, 2008, the Commission shall commence the rulemaking required under paragraph (1) and shall promulgate standards for no fewer than 2 categories of durable infant or toddler products every 6 months thereafter, beginning with the product categories that the Commission determines to be of highest priority, until the Commission has promulgated standards for all such product categories. Thereafter, the Commission shall periodically review and revise the standards set forth under this subsection to ensure that such standards provide the highest level of safety for such products that is feasible.

(3) Judicial review

Any person adversely affected by such standards may file a petition for review under the procedures set forth in section 2060(g) of this title, as added by section 236 of this Act.

(4) Process for considering subsequent revisions to voluntary standard

(A) Notice of adoption of voluntary standard

When the Commission promulgates a consumer product safety standard under this subsection that is based, in whole or in part, on a voluntary standard, the Commission shall notify the organization that issued the voluntary standard of the Commission's action and shall provide a copy of the consumer product safety standard to the organization.

(B) Commission action on revised voluntary standard

If an organization revises a standard that has been adopted, in whole or in part, as a consumer product safety standard under this

subsection, it shall notify the Commission. The revised voluntary standard shall be considered to be a consumer product safety standard issued by the Commission under section 2058 of this title, effective 180 days after the date on which the organization notifies the Commission (or such later date specified by the Commission in the Federal Register) unless, within 90 days after receiving that notice, the Commission notifies the organization that it has determined that the proposed revision does not improve the safety of the consumer product covered by the standard and that the Commission is retaining the existing consumer product safety standard.

(c) Cribs

(1) In general

It shall be a violation of section 2068(a)(1) of this title for any person to which this subsection applies to manufacture, sell, contract to sell or resell, lease, sublet, offer, provide for use, or otherwise place in the stream of commerce a crib that is not in compliance with a standard promulgated under subsection (b).

(2) Persons to which subsection applies

This subsection applies to any person that—

(A) manufactures, distributes in commerce, or contracts to sell cribs;

(B) based on the person's occupation, holds itself out as having knowledge or skill peculiar to cribs, including child care facilities and family child care homes;

(C) is in the business of contracting to sell or resell, lease, sublet, or otherwise place cribs in the stream of commerce; or

(D) owns or operates a place of public accommodation affecting commerce (as defined in section 2203 of this title applied without regard to the phrase "not owned by the Federal Government").

(3) Application of any revision

With respect to any revision of the standard promulgated under subsection (b)(1)(B) subsequent to the initial promulgation of a standard under such subsection, paragraph (1) shall apply only to a person that manufactures or imports cribs, unless the Commission determines that application to any other person described in paragraph (2) is necessary to protect against an unreasonable risk to health or safety. If the Commission determines that application to a person described in paragraph (2) is necessary, it shall provide not less than 12 months for such person to come into compliance.

(4) Crib defined

In this subsection, the term "crib" includes—

(A) new and used cribs;

(B) full-sized or nonfull-sized cribs; and

(C) portable cribs and crib-pens.

(d) Consumer registration requirement

(1) Rulemaking

Notwithstanding any provision of chapter 6 of Title 5, or the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.), not later than 1 year after August 14, 2008, the Commission shall, pursuant to its authority under section 2065(b) of this title, promulgate a final consumer product safety rule to require each manufacturer of a durable infant or toddler product—

(A) to provide consumers with a postage-paid consumer registration form with each such product;

(B) to maintain a record of the names, addresses, e-mail addresses, and other contact information of consumers who register their ownership of such products with the manufacturer in order to improve the effectiveness of manufacturer campaigns to recall such products; and

(C) to permanently place the manufacturer name and contact information, model name and number, and the date of manufacture on each durable infant or toddler product.

(2) Requirements for registration form

The registration form required to be provided to consumers under paragraph (1) shall—

(A) include spaces for a consumer to provide the consumer's name, address, telephone number, and e-mail address;

(B) include space sufficiently large to permit easy, legible recording of all desired information;

(C) be attached to the surface of each durable infant or toddler product so that, as a practical matter, the consumer must notice and handle the form after purchasing the product;

(D) include the manufacturer's name, model name and number for the product, and the date of manufacture;

(E) include a message explaining the purpose of the registration and designed to encourage consumers to complete the registration;

(F) include an option for consumers to register through the Internet; and

(G) include a statement that information provided by the consumer shall not be used for any purpose other than to facilitate a recall of or safety alert regarding that product.

In issuing regulations under this section, the Commission may prescribe the exact text and format of the required registration form.

(3) Record keeping and notification requirements

The rules required under this section shall require each manufacturer of a durable infant or toddler product to maintain a record of registrants for each product manufactured that includes all of the information provided by each consumer registered, and to use such information to notify such consumers in the event of a voluntary or involuntary recall of or safety alert regarding such product. Each manufacturer shall maintain such a record for a period of not less than 6 years after the date of manufacture of the product. Consumer information collected by a manufacturer under this Act may not be used by the manufacturer, nor disseminated by such manufacturer to any other party, for any purpose other than notification to such consumer in the event of a product recall or safety alert.

(4) Study

The Commission shall conduct a study at such time as it considers appropriate on the effectiveness of the consumer registration forms required by this section in facilitating product recalls and whether such registration forms should be required for other children's products. Not later than 4 years after August 14, 2008, the Commission shall report its findings to the appropriate Congressional committees.

(e) Use of alternative recall notification technology

(1) Technology assessment and report

The Commission shall—

(A) beginning 2 years after a rule is promulgated under subsection (d), regularly review recall notification technology and assess the effectiveness of such technology in facilitating recalls of durable infant or toddler products; and

(B) not later than 3 years after August 14, 2008, and periodically thereafter as the Commission considers appropriate, transmit a report on such assessments to the appropriate Congressional committees.

(2) Determination

If, based on the assessment required by paragraph (1), the Commission determines by rule that a recall notification technology is likely to be as effective or more effective in facilitating recalls of durable infant or toddler products as the registration forms required by subsection (d), the Commission—

(A) shall submit to the appropriate Congressional committees a report on such determination; and

(B) shall permit a manufacturer of durable infant or toddler products to use such technology in lieu of such registration forms to facilitate recalls of durable infant or toddler products.

(f) Definition of durable infant or toddler product

As used in this section, the term "durable infant or toddler product"—

(1) means a durable product intended for use, or that may be reasonably expected to be used, by children under the age of 5 years; and

(2) includes—

(A) full-size cribs and nonfull-size cribs;

(B) toddler beds;

(C) high chairs, booster chairs, and hook-on chairs;

(D) bath seats;

(E) gates and other enclosures for confining a child;

(F) play yards;

(G) stationary activity centers;

(H) infant carriers;

(I) strollers;

(J) walkers;

(K) swings; and

(L) bassinets and cradles.

(Pub.L. 110–314, Title I, § 104, Aug. 14, 2008, 122 Stat. 3028; Pub.L. 112–28, § 3, Aug. 12, 2011, 125 Stat. 279.)

§ 2056b. Mandatory toy safety standards

(a) In general

Beginning 180 days after August 14, 2008, the provisions of ASTM International Standard F963–07 Consumer Safety Specifications for Toy Safety (ASTM F963), as it exists on August 14, 2008 (except for section 4.2 and Annex 4 or any provision that restates or incorporates an existing mandatory standard or ban promulgated by the Commission or by statute or any provision that restates or incorporates a regulation promulgated by the Food and Drug Administration or any statute administered by the Food and Drug Administration) shall be considered to be consumer product safety standards issued by the Commission under section 2058 of this title.

(b) Rulemaking for specific toys, components and risks

(1) Evaluation

Not later than 1 year after August 14, 2008, the Commission, in consultation with representatives of consumer groups, juvenile product manufacturers, and independent child product engineers and experts, shall examine and assess the effectiveness of ASTM F963 or its successor standard (except for section 4.2 and Annex 4), as it relates to safety

requirements, safety labeling requirements, and test methods related to—

(A) internal harm or injury hazards caused by the ingestion or inhalation of magnets in children's products;

(B) toxic substances;

(C) toys with spherical ends;

(D) hemispheric-shaped objects;

(E) cords, straps, and elastics; and

(F) battery-operated toys.

(2) Rulemaking

Within 1 year after the completion of the assessment required by paragraph (1), the Commission shall promulgate rules in accordance with section 553 of Title 5, that—

(A) take into account other children's product safety rules; and

(B) are more stringent than such standards, if the Commission determines that more stringent standards would further reduce the risk of injury of such toys.

(c) Periodic review

The Commission shall periodically review and revise the rules set forth under this section to ensure that such rules provide the highest level of safety for such products that is feasible.

(d) Consideration of remaining ASTM standards

After promulgating the rules required by subsection (b), the Commission shall—

(1) in consultation with representatives of consumer groups, juvenile product manufacturers, and independent child product engineers and experts, examine and assess the effectiveness of ASTM F963 (and alternative health protective requirements to prevent or minimize flammability of children's products) or its successor standard, and shall assess the adequacy of such standards in protecting children from safety hazards; and

(2) in accordance with section 553 of Title 5, promulgate consumer product safety rules that—

(A) take into account other children's product safety rules; and

(B) are more stringent than such standards, if the Commission determines that more stringent standards would further reduce the risk of injury associated with such toys.

(e) Prioritization

The Commission shall promulgate rules beginning with the product categories that the Commission determines to be of highest priority, until

the Commission has promulgated standards for all such product categories.

(f) Treatment as consumer product safety standards

Rules issued under this section shall be considered consumer product safety standards issued by the Commission under section 2058 of this title.

(g) Revisions

If ASTM International (or its successor entity) proposes to revise ASTM F963–07, or a successor standard, it shall notify the Commission of the proposed revision. The Commission shall incorporate the revision or a section of the revision into the consumer product safety rule. The revised standard shall be considered to be a consumer product safety standard issued by the Consumer Product Safety Commission under section 2058 of this title, effective 180 days after the date on which ASTM International notifies the Commission of the revision unless, within 90 days after receiving that notice, the Commission notifies ASTM International that it has determined that the proposed revision does not improve the safety of the consumer product covered by the standard. If the Commission so notifies ASTM International with respect to a proposed revision of the standard, the existing standard shall continue to be considered to be a consumer product safety rule without regard to the proposed revision.

(h) Rulemaking to consider exemption from preemption

(1) Exemption of State law from preemption

Upon application of a State or political subdivision of a State, the Commission shall, after notice and opportunity for oral presentation of views, consider a rulemaking to exempt from the provisions of section 2075(a) of this title (under such conditions as it may impose in the rule) any proposed safety standard or regulation which is described in such application and which is designed to protect against a risk of injury associated with a children's product subject to the consumer product safety standards described in subsection (a) or any rule promulgated under this section. The Commission shall grant such an exemption if the State or political subdivision standard or regulation—

(A) provides a significantly higher degree of protection from such risk of injury than the consumer product safety standard or rule under this section; and

(B) does not unduly burden interstate commerce.

In determining the burden, if any, of a State or political subdivision standard or regulation on interstate commerce, the Commission shall consider and make appropriate (as determined by the Commission in its discretion) findings on the technological and economic feasibility of complying with such standard or regulation, the cost of complying with such standard or regulation, the

geographic distribution of the consumer product to which the standard or regulation would apply, the probability of other States or political subdivisions applying for an exemption under this subsection for a similar standard or regulation, and the need for a national, uniform standard under this Act for such consumer product.

(2) Effect of standards on established State laws

Nothing in this section or in section 2075 of this title shall prevent a State or political subdivision of a State from continuing in effect a safety requirement applicable to a toy or other children's product that is designed to deal with the same risk of injury as the consumer product safety standards established by this section and that is in effect on August 14, 2008, if such State or political subdivision has filed such requirement with the Commission within 90 days after August 14, 2008, in such form and in such manner as the Commission may require.

(i) Judicial review

The issuance of any rule under this section is subject to judicial review as provided in section 2060(g) of this title, as added by section 236 of this Act.

(Pub.L. 110–314, Title I, § 106, Aug. 14, 2008, 122 Stat. 3033; Pub.L. 112–28, § 4, Aug. 12, 2011, 125 Stat. 280.)

§ 2057. Banned hazardous products

Whenever the Commission finds that—

(1) a consumer product is being, or will be, distributed in commerce and such consumer product presents an unreasonable risk of injury; and

(2) no feasible consumer product safety standard under this chapter would adequately protect the public from the unreasonable risk of injury associated with such product,

the Commission may, in accordance with section 2058 of this title, promulgate a rule declaring such product a banned hazardous product.

(As amended Pub.L. 97–35, Title XII, § 1203(c), Aug. 13, 1981, 95 Stat. 713.)

§ 2057c. Prohibition on sale of certain products containing specified phthalates

(a) Prohibition on the sale of certain products containing phthalates

Beginning on the date that is 180 days after August 14, 2008, it shall be unlawful for any person to manufacture for sale, offer for sale, distribute in commerce, or import into the United States any children's toy or child care article that contains concentrations of more than 0.1

percent of di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP).

(b) Prohibition on the sale of additional products containing certain phthalates

(1) Interim prohibition

Beginning on the date that is 180 days after August 14, 2008, and until a final rule is promulgated under paragraph (3), it shall be unlawful for any person to manufacture for sale, offer for sale, distribute in commerce, or import into the United States any children's toy that can be placed in a child's mouth or child care article that contains concentrations of more than 0.1 percent of diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP).

(2) Chronic hazard advisory panel

(A) Appointment

Not earlier than 180 days after August 14, 2008, the Commission shall begin the process of appointing a Chronic Hazard Advisory Panel pursuant to the procedures of section 28 of the Consumer Product Safety Act (15 U.S.C. 2077) to study the effects on children's health of all phthalates and phthalate alternatives as used in children's toys and child care articles.

(B) Examination

The panel shall, within 18 months after its appointment under subparagraph (A), complete an examination of the full range of phthalates that are used in products for children and shall—

(i) examine all of the potential health effects (including endocrine disrupting effects) of the full range of phthalates;

(ii) consider the potential health effects of each of these phthalates both in isolation and in combination with other phthalates;

(iii) examine the likely levels of children's, pregnant women's, and others' exposure to phthalates, based on a reasonable estimation of normal and foreseeable use and abuse of such products;

(iv) consider the cumulative effect of total exposure to phthalates, both from children's products and from other sources, such as personal care products;

(v) review all relevant data, including the most recent, best-available, peer-reviewed, scientific studies of these phthalates and phthalate alternatives that employ objective data collection practices or employ other objective methods;

(vi) consider the health effects of phthalates not only from ingestion but also as a result of dermal, hand-to-mouth, or other exposure;

(vii) consider the level at which there is a reasonable certainty of no harm to children, pregnant women, or other susceptible individuals and their offspring, considering the best available science, and using sufficient safety factors to account for uncertainties regarding exposure and susceptibility of children, pregnant women, and other potentially susceptible individuals; and

(viii) consider possible similar health effects of phthalate alternatives used in children's toys and child care articles.

The panel's examinations pursuant to this paragraph shall be conducted de novo. The findings and conclusions of any previous Chronic Hazard Advisory Panel on this issue and other studies conducted by the Commission shall be reviewed by the panel but shall not be considered determinative.

(C) Report

Not later than 180 days after completing its examination, the panel appointed under subparagraph (A) shall report to the Commission the results of the examination conducted under this section and shall make recommendations to the Commission regarding any phthalates (or combinations of phthalates) in addition to those identified in subsection (a) or phthalate alternatives that the panel determines should be declared banned hazardous substances.

(3) Permanent prohibition by rule

Not later than 180 days after receiving the report of the panel under paragraph (2)(C), the Commission shall, pursuant to section 553 of Title 5, promulgate a final rule to—

(A) determine, based on such report, whether to continue in effect the prohibition under paragraph (1), in order to ensure a reasonable certainty of no harm to children, pregnant women, or other susceptible individuals with an adequate margin of safety; and

(B) evaluate the findings and recommendations of the Chronic Hazard Advisory Panel and declare any children's product containing any phthalates to be a banned hazardous product under section 8 of the Consumer Product Safety Act (15 U.S.C. 2057), as the Commission determines necessary to protect the health of children.

(c) Application

Effective on the date of enactment of this Act, subsections (a) and (b)(1) and any rule promulgated under subsection (b)(3) shall apply to any plasticized component part of a children's toy or child care article or any other component part of a children's toy or child care article that is made of other materials that may contain phthalates.

(d) Exclusion for inaccessible component parts

(1) In general

The prohibitions established under subsections (a) and (b) shall not apply to any component part of a children's toy or child care article that is not accessible to a child through normal and reasonably foreseeable use and abuse of such product, as determined by the Commission. A component part is not accessible under this paragraph if such component part is not physically exposed by reason of a sealed covering or casing and does not become physically exposed through reasonably foreseeable use and abuse of the product. Reasonably foreseeable use and abuse shall include swallowing, mouthing, breaking, or other children's activities, and the aging of the product.

(2) Limitation

The Commission may revoke an exclusion or all exclusions granted under paragraph (1) at any time and require that any or all component parts manufactured after such exclusion is revoked comply with the prohibitions established under subsections (a) and (b) if the Commission finds, based on scientific evidence, that such compliance is necessary to protect the public health or safety.

(3) Inaccessibility proceeding

Within 1 year after the date of enactment of this subsection, the Commission shall—

(A) promulgate a rule providing guidance with respect to what product components, or classes of components, will be considered to be inaccessible for purposes of paragraph (1); or

(B) adopt the same guidance with respect to inaccessibility that was adopted by the Commission with regards to accessibility of lead under section 1278a(b)(2)(B) of this title, with additional consideration, as appropriate, of whether such component can be placed in a child's mouth.

(4) Application pending Commission guidance

Until the Commission promulgates a rule pursuant to paragraph (3), the determination of whether a product component is inaccessible to a child shall be made in accordance with the requirements laid out in paragraph (1) for considering a component to be inaccessible to a child.

(e) Treatment of violation

A violation of subsection (a) or (b)(1) or any rule promulgated by the Commission under subsection (b)(3) shall be treated as a violation of section 19(a)(1) of the Consumer Product Safety Act (15 U.S.C. 2068(a)(1)).

(f) Treatment as consumer product safety standards; effect on State laws

Subsections (a) and (b)(1) and any rule promulgated under subsection (b)(3) shall be considered consumer product safety standards under the Consumer Product Safety Act. Nothing in this section or the Consumer Product Safety Act (15 U.S.C. 2051 et seq.) shall be construed to preempt or otherwise affect any State requirement with respect to any phthalate alternative not specifically regulated in a consumer product safety standard under the Consumer Product Safety Act.

(g) Definitions

(1) Defined terms

As used in this section:

(A) The term "phthalate alternative" means any common substitute to a phthalate, alternative material to a phthalate, or alternative plasticizer.

(B) The term "children's toy" means a consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays.

(C) The term "child care article" means a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething.

(D) The term "consumer product" has the meaning given such term in section 3(a)(1) of the Consumer Product Safety Act (15 U.S.C. 2052(a)(1)).

(2) Determination guidelines

(A) Age

In determining whether products described in paragraph (1) are designed or intended for use by a child of the ages specified, the following factors shall be considered:

(i) A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable.

(ii) Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children of the ages specified.

(iii) Whether the product is commonly recognized by consumers as being intended for use by a child of the ages specified.

(iv) The Age Determination guidelines issued by the Commission staff in September 2002 and any successor to such guidelines.

(B) Toy that can be placed in a child's mouth

For purposes of this section a toy can be placed in a child's mouth if any part of the toy can actually be brought to the mouth and kept in the mouth by a child so that it can be sucked and chewed. If the children's product can only be licked, it is not regarded as able to be placed in the mouth. If a toy or part of a toy in one dimension is smaller than 5 centimeters, it can be placed in the mouth.

(Pub.L. 110–314, Title I, § 108, Aug. 14, 2008, 122 Stat. 3036; Pub.L. 112–28, § 5, Aug. 12, 2011, 125 Stat. 280.)

§ 2058. Procedure for consumer product safety rules

(a) Commencement of proceeding; publication of prescribed notice of proposed rulemaking; transmittal of notice

A proceeding for the development of a consumer product safety rule may be commenced by the publication in the Federal Register of an advance notice of proposed rulemaking which shall—

(1) identify the product and the nature of the risk of injury associated with the product;

(2) include a summary of each of the regulatory alternatives under consideration by the Commission (including voluntary consumer product safety standards);

(3) include information with respect to any existing standard known to the Commission which may be relevant to the proceedings, together with a summary of the reasons why the Commission believes preliminarily that such standard does not eliminate or adequately reduce the risk of injury identified in paragraph (1);

(4) invite interested persons to submit to the Commission, within such period as the Commission shall specify in the notice (which period shall not be less than 30 days or more than 60 days after the date of publication of the notice), comments with respect to the risk of injury identified by the Commission, the regulatory alternatives being considered, and other possible alternatives for addressing the risk;

(5) invite any person (other than the Commission) to submit to the Commission, within such period as the Commission shall specify in the notice (which period shall not be less than 30 days after the date of publication of the notice), an existing standard or a portion of a standard as a proposed consumer product safety standard; and

(6) invite any person (other than the Commission) to submit to the Commission, within such period as the Commission shall specify in the notice (which period shall not be less than 30 days after the date of publication of the notice), a statement of intention to modify or develop a voluntary consumer product safety standard to address

the risk of injury identified in paragraph (1) together with a description of a plan to modify or develop the standard.

The Commission shall transmit such notice within 10 calendar days to the appropriate Congressional committees.

(b) Voluntary standard; publication as proposed rule; notice of reliance of Commission on standard

(1) If the Commission determines that any standard submitted to it in response to an invitation in a notice published under subsection (a)(5) of this section if promulgated (in whole, in part, or in combination with any other standard submitted to the Commission or any part of such a standard) as a consumer product safety standard, would eliminate or adequately reduce the risk of injury identified in a notice under subsection (a)(1) of this section, the Commission may publish such standard, in whole, in part, or in such combination and with nonmaterial modifications, as a proposed consumer product safety rule.

(2) If the Commission determines that—

(A) compliance with any standard submitted to it in response to an invitation in a notice published under subsection (a)(6) of this section is likely to result in the elimination or adequate reduction of the risk of injury identified in the notice, and

(B) it is likely that there will be substantial compliance with such standard, the Commission shall terminate any proceeding to promulgate a consumer product safety rule respecting such risk of injury and shall publish in the Federal Register a notice which includes the determination of the Commission and which notifies the public that the Commission will rely on the voluntary standard to eliminate or reduce the risk of injury, except that the Commission shall terminate any such proceeding and rely on a voluntary standard only if such voluntary standard is in existence. For purposes of this section, a voluntary standard shall be considered to be in existence when it is finally approved by the organization or other person which developed such standard, irrespective of the effective date of the standard. Before relying upon any voluntary consumer product safety standard, the Commission shall afford interested persons (including manufacturers, consumers, and consumer organizations) a reasonable opportunity to submit written comments regarding such standard. The Commission shall consider such comments in making any determination regarding reliance on the involved voluntary standard under this subsection.

(c) Publication of proposed rule; preliminary regulatory analysis; contents; transmittal of notice

No consumer product safety rule may be proposed by the Commission unless the Commission publishes in the Federal Register the text of the proposed rule, including any alternatives, which the

Commission proposes to promulgate, together with a preliminary regulatory analysis containing—

(1) a preliminary description of the potential benefits and potential costs of the proposed rule, including any benefits or costs that cannot be quantified in monetary terms, and an identification of those likely to receive the benefits and bear the costs;

(2) a discussion of the reasons any standard or portion of a standard submitted to the Commission under subsection (a)(5) of this section was not published by the Commission as the proposed rule or part of the proposed rule;

(3) a discussion of the reasons for the Commission's preliminary determination that efforts proposed under subsection (a)(6) of this section and assisted by the Commission as required by section 2054(a)(3) of this title would not, within a reasonable period of time, be likely to result in the development of a voluntary consumer product safety standard that would eliminate or adequately reduce the risk of injury addressed by the proposed rule; and

(4) a description of any reasonable alternatives to the proposed rule, together with a summary description of their potential costs and benefits, and a brief explanation of why such alternatives should not be published as a proposed rule.

The Commission shall transmit such notice within 10 calendar days to the appropriate Congressional committees. Any proposed consumer product safety rule shall be issued within twelve months after the date of publication of the notice, unless the Commission determines that such proposed rule is not reasonably necessary to eliminate or reduce the risk of injury associated with the product or is not in the public interest. The Commission may extend the twelve-month period for good cause. If the Commission extends such period, it shall immediately transmit notice of such extension to the appropriate Congressional committees. Such notice shall include an explanation of the reasons for such extension, together with an estimate of the date by which the Commission anticipates such rulemaking will be completed. The Commission shall publish notice of such extension and the information submitted to the Congress in the Federal Register. Nothing in this subsection shall preclude any person from submitting an existing standard or portion of a standard as a proposed consumer product safety standard.

(d) Promulgation of rule; time

(1) Within 60 days after the publication under subsection (c) of this section of a proposed consumer product safety rule respecting a risk of injury associated with a consumer product, the Commission shall—

(A) promulgate a consumer product safety rule respecting the risk of injury associated with such product, if it makes the findings required under subsection (f) of this section, or

(B) withdraw the applicable notice of proposed rulemaking if it determines that such rule is not (i) reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product, or (ii) in the public interest; except that the Commission may extend such 60-day period for good cause shown (if it publishes its reasons therefor in the Federal Register).

(2) Consumer product safety rules shall be promulgated in accordance with section 553 of Title 5, except that the Commission shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation.

(e) Expression of risk of injury; consideration of available product data; needs of elderly and handicapped

A consumer product safety rule shall express in the rule itself the risk of injury which the standard is designed to eliminate or reduce. In promulgating such a rule the Commission shall consider relevant available product data including the results of research, development, testing, and investigation activities conducted generally and pursuant to this chapter. In the promulgation of such a rule the Commission shall also consider and take into account the special needs of elderly and handicapped persons to determine the extent to which such persons may be adversely affected by such rule.

(f) Findings; final regulatory analysis; judicial review of rule

(1) Prior to promulgating a consumer product safety rule, the Commission shall consider, and shall make appropriate findings for inclusion in such rule with respect to—

(A) the degree and nature of the risk of injury the rule is designed to eliminate or reduce;

(B) the approximate number of consumer products, or types or classes thereof, subject to such rule;

(C) the need of the public for the consumer products subject to such rule, and the probable effect of such rule upon the utility, cost, or availability of such products to meet such need; and

(D) any means of achieving the objective of the order while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices consistent with the public health and safety.

(2) The Commission shall not promulgate a consumer product safety rule unless it has prepared, on the basis of the findings of the Commission under paragraph (1) and on other information before the Commission, a final regulatory analysis of the rule containing the following information:

(A) A description of the potential benefits and potential costs of the rule, including costs and benefits that cannot be quantified in

monetary terms, and the identification of those likely to receive the benefits and bear the costs.

(B) A description of any alternatives to the final rule which were considered by the Commission, together with a summary description of their potential benefits and costs and a brief explanation of the reasons why these alternatives were not chosen.

(C) A summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.

The Commission shall publish its final regulatory analysis with the rule.

(3) The Commission shall not promulgate a consumer product safety rule unless it finds (and includes such finding in the rule)—

(A) that the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product;

(B) that the promulgation of the rule is in the public interest;

(C) in the case of a rule declaring the product a banned hazardous product, that no feasible consumer product safety standard under this chapter would adequately protect the public from the unreasonable risk of injury associated with such product;

(D) in the case of a rule which relates to a risk of injury with respect to which persons who would be subject to such rule have adopted and implemented a voluntary consumer product safety standard, that—

(i) compliance with such voluntary consumer product safety standard is not likely to result in the elimination or adequate reduction of such risk of injury; or

(ii) it is unlikely that there will be substantial compliance with such voluntary consumer product safety standard;

(E) that the benefits expected from the rule bear a reasonable relationship to its costs; and

(F) that the rule imposes the least burdensome requirement which prevents or adequately reduces the risk of injury for which the rule is being promulgated.

(4)(A) Any preliminary or final regulatory analysis prepared under subsection (c) or (f)(2) of this section shall not be subject to independent judicial review, except that when an action for judicial review of a rule is instituted, the contents of any such regulatory analysis shall constitute part of the whole rulemaking record of agency action in connection with such review.

(B) The provisions of subparagraph (A) shall not be construed to alter the substantive or procedural standards otherwise applicable to judicial review of any action by the Commission.

(g) Effective date of rule or standard; stockpiling of product

(1) Each consumer product safety rule shall specify the date such rule is to take effect not exceeding 180 days from the date promulgated, unless the Commission finds, for good cause shown, that a later effective date is in the public interest and publishes its reasons for such finding. The effective date of a consumer product safety standard under this chapter shall be set at a date at least 30 days after the date of promulgation unless the Commission for good cause shown determines that an earlier effective date is in the public interest. In no case may the effective date be set at a date which is earlier than the date of promulgation. A consumer product safety standard shall be applicable only to consumer products manufactured after the effective date.

(2) The Commission may by rule prohibit a manufacturer of a consumer product from stockpiling any product to which a consumer product safety rule applies, or to which a rule under this chapter or similar rule, regulation, standard, or ban under any other Act enforced by the Commission applies, so as to prevent such manufacturer from circumventing the purpose of such rule, regulation, standard, or ban. For purposes of this paragraph, the term "stockpiling" means manufacturing or importing a product between the date of promulgation of such rule, regulation, standard, or ban and its effective date at a rate which is significantly greater (as determined under the rule under this paragraph) than the rate at which such product was produced or imported during a base period (prescribed in the rule under this paragraph) ending before the date of promulgation of the rule, regulation, standard, or ban.

(h) Amendment or revocation of rule

The Commission may by rule amend or revoke any consumer product safety rule. Such amendment or revocation shall specify the date on which it is to take effect which shall not exceed 180 days from the date the amendment or revocation is published unless the Commission finds for good cause shown that a later effective date is in the public interest and publishes its reasons for such finding. Where an amendment involves a material change in a consumer product safety rule, sections 2056 and 2057 of this title, and subsections (a) through (g) of this section shall apply. In order to revoke a consumer product safety rule, the Commission shall publish a proposal to revoke such rule in the Federal Register, and allow oral and written presentations in accordance with subsection (d)(2) of this section. It may revoke such rule only if it determines that the rule is not reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product. Section 2060 of this title shall apply to any amendment of a consumer product safety rule which involves a material change and to any

revocation of a consumer product safety rule, in the same manner and to the same extent as such section applies to the Commission's action in promulgating such a rule.

(i) Petition to initiate rulemaking

The Commission shall grant, in whole or in part, or deny any petition under section 553(e) of Title 5 requesting the Commission to initiate a rulemaking, within a reasonable time after the date on which such petition is filed. The Commission shall state the reasons for granting or denying such petition. The Commission may not deny any such petition on the basis of a voluntary standard unless the voluntary standard is in existence at the time of the denial of the petition, the Commission has determined that the voluntary standard is likely to result in the elimination or adequate reduction of the risk of injury identified in the petition, and it is likely that there will be substantial compliance with the standard.

(Pub.L. 92–573, § 9, Oct. 27, 1972, 86 Stat. 1215; Pub.L. 94–284, § 9, May 11, 1976, 90 Stat. 506; Pub.L. 95–631; § 4(d), Nov. 10, 1978, 92 Stat. 3744; Pub.L. 97–35, Title XII, § 1203(a), Aug. 13, 1981, 95 Stat. 704; Pub.L. 101–608, Title I, §§ 108(a), 109, 110(a), Nov. 16, 1990, 104 Stat. 3112, 3113; Pub.L. 110–314, Title II, §§ 204(a)(1), 213, 235(c)(3), Aug. 14, 2008, 122 Stat. 3040, 3052, 3074.)

§ 2060. Judicial review of consumer product safety rules

(a) Petition by persons adversely affected, consumers, or consumer organizations

Not later than 60 days after a consumer product safety rule is promulgated by the Commission, any person adversely affected by such rule, or any consumer or consumer organization, may file a petition with the United States court of appeals for the District of Columbia or for the circuit in which such person, consumer, or organization resides or has his principal place of business for judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose and to the Attorney General. The record of the proceedings on which the Commission based its rule shall be filed in the court as provided for in section 2112 of Title 28. For purposes of this section, the term "record" means such consumer product safety rule; any notice or proposal published pursuant to section 2056, 2057, or 2058 of this title; the transcript required by section 2058(d)(2) of this title of any oral presentation; any written submission of interested parties; and any other information which the Commission considers relevant to such rule.

(b) Additional data, views, or arguments

If the petitioner applies to the court for leave to adduce additional data, views, or arguments and shows to the satisfaction of the court that such additional data, views, or arguments are material and that there

were reasonable grounds for the petitioner's failure to adduce such data, views, or arguments in the proceeding before the Commission, the court may order the Commission to provide additional opportunity for the oral presentation of data, views, or arguments and for written submissions. The Commission may modify its findings, or make new findings by reason of the additional data, views, or arguments so taken and shall file such modified or new findings, and its recommendation, if any, for the modification or setting aside of its original rule, with the return of such additional data, views, or arguments.

(c) Jurisdiction; costs and attorneys' fees; substantial evidence to support administrative findings

Upon the filing of the petition under subsection (a) of this section the court shall have jurisdiction to review the consumer product safety rule in accordance with chapter 7 of Title 5, and to grant appropriate relief, including interim relief, as provided in such chapter. A court may in the interest of justice include in such relief an award of the costs of suit, including reasonable attorneys' fees (determined in accordance with subsection (f) of this section and reasonable expert witnesses' fees). Attorneys' fees may be awarded against the United States (or any agency or official of the United States) without regard to section 2412 of Title 28 or any other provision of law. The consumer product safety rule shall not be affirmed unless the Commission's findings under sections 2058(f)(1) and 2058(f)(3) of this title are supported by substantial evidence on the record taken as a whole.

(d) Supreme Court review

The judgment of the court affirming or setting aside, in whole or in part, any consumer product safety rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of Title 28.

(e) Other remedies

The remedies provided for in this section shall be in addition to and not in lieu of any other remedies provided by law.

(f) Computation of reasonable fee for attorney

For purposes of this section and sections 2072(a) and 2073 of this title, a reasonable attorney's fee is a fee (1) which is based upon (A) the actual time expended by an attorney in providing advice and other legal services in connection with representing a person in an action brought under this section, and (B) such reasonable expenses as may be incurred by the attorney in the provision of such services, and (2) which is computed at the rate prevailing for the provision of similar services with respect to actions brought in the court which is awarding such fee.

(g) Expedited judicial review

(1) Application

This subsection applies, in lieu of the preceding subsections of this section, to judicial review of—

(A) any consumer product safety rule promulgated by the Commission pursuant to section 2064(j) of this title (relating to identification of substantial hazards);

(B) any consumer product safety standard promulgated by the Commission pursuant to section 2089 of this title (relating to all-terrain vehicles);

(C) any standard promulgated by the Commission under section 2056a of this title (relating to durable infant and toddler products); and

(D) any consumer product safety standard promulgated by the Commission under section 2056b of this title (relating to mandatory toy safety standards).

(2) In general

Not later than 60 days after the promulgation, by the Commission, of a rule or standard to which this subsection applies, any person adversely affected by such rule or standard may file a petition with the United States Court of Appeals for the District of Columbia Circuit for judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose and to the Attorney General. The record of the proceedings on which the Commission based its rule shall be filed in the court as provided for in section 2112 of Title 28.

(3) Review

Upon the filing of the petition under paragraph (2) of this subsection, the court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5, and to grant appropriate relief, including interim relief, as provided in such chapter.

(4) Conclusiveness of judgment

The judgment of the court affirming or setting aside, in whole or in part, any final rule under this section shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of Title 28.

(5) Further review

A rule or standard with respect to which this subsection applies shall not be subject to judicial review in proceedings under section 2066 of this title (relating to imported products) or in civil or criminal proceedings for enforcement.

(Pub.L. 92–573, § 11, Oct. 27, 1972, 86 Stat. 1218; Pub.L. 94–284, §§ 10(b), 11(a), May 11, 1976, 90 Stat. 507; Pub.L. 97–35, Title XII,

§ 1211(h)(1) to (3)(A), Aug. 13, 1981, 95 Stat. 723; Pub.L. 97–414, § 9(j)(2), Jan. 4, 1983, 96 Stat. 2064; Pub.L. 110–314, Title II, § 236(a), Aug. 14, 2008, 122 Stat. 3075.)

§ 2061. Imminent hazards

(a) Filing of action

The Commission may file in a United States district court an action (1) against an imminently hazardous consumer product for seizure of such product under subsection (b)(2) of this section, or (2) against any person who is a manufacturer, distributor, or retailer of such product, or (3) against both. Such an action may be filed notwithstanding the existence of a consumer product safety rule applicable to such product, or the pendency of any administrative or judicial proceedings under any other provision of this chapter. As used in this section, and hereinafter in this chapter, the term "imminently hazardous consumer product" means a consumer product which presents imminent and unreasonable risk of death, serious illness, or severe personal injury.

(b) Relief; product condemnation and seizure

(1) The district court in which such action is filed shall have jurisdiction to declare such product an imminently hazardous consumer product, and (in the case of an action under subsection (a)(2) of this section) to grant (as ancillary to such declaration or in lieu thereof) such temporary or permanent relief as may be necessary to protect the public from such risk. Such relief may include a mandatory order requiring the notification of such risk to purchasers of such product known to the defendant, public notice, the recall, the repair or the replacement of, or refund for, such product.

(2) In the case of an action under subsection (a)(1) of this section, the consumer product may be proceeded against by process of libel for the seizure and condemnation of such product in any United States district court within the jurisdiction of which such consumer product is found. Proceedings and cases instituted under the authority of the preceding sentence shall conform as nearly as possible to proceedings in rem in admiralty.

(c) Consumer product safety rule

Where appropriate, concurrently with the filing of such action or as soon thereafter as may be practicable, the Commission shall initiate a proceeding to promulgate a consumer product safety rule applicable to the consumer product with respect to which such action is filed.

(d) Jurisdiction and venue; process; subpoena

(1) An action under subsection (a)(2) of this section may be brought in the United States district court for the District of Columbia or in any judicial district in which any of the defendants is found, is an inhabitant or transacts business; and process in such an action may be served on a

defendant in any other district in which such defendant resides or may be found. Subpenas requiring attendance of witnesses in such an action may run into any other district. In determining the judicial district in which an action may be brought under this section in instances in which such action may be brought in more than one judicial district, the Commission shall take into account the convenience of the parties.

(2) Whenever proceedings under this section involving substantially similar consumer products are pending in courts in two or more judicial districts, they shall be consolidated for trial by order of any such court upon application reasonably made by any party in interest, upon notice to all other parties in interest.

(e) Employment of attorneys by Commission

Notwithstanding any other provision of law, in any action under this section, the Commission may direct attorneys employed by it to appear and represent it.

(g)[1] Consideration of cost of compliance

Nothing in this section shall be construed to require the Commission, in determining whether to bring an action against a consumer product or a person under this section, to prepare a comparison of the costs that would be incurred in complying with the relief that may be ordered in such action with the benefits to the public from such relief. [Note: this subsection was added at the end, notwithstanding the fact that no subsection (f) has been enacted.]

(As amended Pub.L. 97–35, Title XII, § 1205(a)(2), Aug. 13, 1981, 95 Stat. 716; Pub.L. 101–608, Title I, § 111(a)(1), Nov. 16, 1990, 104 Stat. 3114.)

§ 2063. Product certification and labeling

(a) Certification accompanying product; products with more than one manufacturer

(1) General conformity certification

Except as provided in paragraphs (2) and (3), every manufacturer of a product which is subject to a consumer product safety rule under this chapter or similar rule, ban, standard, or regulation under any other chapter enforced by the Commission and which is imported for consumption or warehousing or distributed in commerce (and the private labeler of such product if such product bears a private label) shall issue a certificate which—

(A) shall certify, based on a test of each product or upon a reasonable testing program, that such product complies with all rules, bans, standards, or regulations applicable to the product under this Act or any other Act enforced by the Commission; and

[1] So in original. Probably should be "(f)".

(B) shall specify each such rule, ban, standard, or regulation applicable to the product.

(2) Third party testing requirement

Effective on the dates provided in paragraph (3), before importing for consumption or warehousing or distributing in commerce any children's product that is subject to a children's product safety rule, every manufacturer of such children's product (and the private labeler of such children's product if such children's product bears a private label) shall—

(A) submit sufficient samples of the children's product, or samples that are identical in all material respects to the product, to a third party conformity assessment body accredited under paragraph (3) to be tested for compliance with such children's product safety rule; and

(B) based on such testing, issue a certificate that certifies that such children's product complies with the children's product safety rule based on the assessment of a third party conformity assessment body accredited to conduct such tests.

A manufacturer or private labeler shall issue either a separate certificate for each children's product safety rule applicable to a product or a combined certificate that certifies compliance with all applicable children's product safety rules, in which case each such rule shall be specified.

(3) Schedule for implementation of third party testing

(A) General application

Except as provided under subparagraph (F), the requirements of paragraph (2) shall apply to any children's product manufactured more than 90 days after the Commission has established and published notice of the requirements for accreditation of third party conformity assessment bodies to assess conformity with a children's product safety rule to which such children's product is subject.

(B) Time line for accreditation

(i) Lead paint

Not later than 30 days after August 14, 2008, the Commission shall publish notice of the requirements for accreditation of third party conformity assessment bodies to assess conformity with part 1303 of title 16, Code of Federal Regulations.

(ii) Full-size cribs; non full-size cribs; pacifiers

Not later than 60 days after August 14, 2008, the Commission shall publish notice of the requirements for accreditation of third party conformity assessment bodies to assess conformity with parts 1508, 1509, and 1511 of such title.

(iii) Small parts

Not later than 90 days after August 14, 2008, the Commission shall publish notice of the requirements for accreditation of third party conformity assessment bodies to assess conformity with part 1501 of such title.

(iv) Children's metal jewelry

Not later than 120 days after August 14, 2008, the Commission shall publish notice of the requirements for accreditation of third party conformity assessment bodies to assess conformity with the requirements of section 1278a(a)(2) of this title with respect to children's metal jewelry.

(v) Baby bouncers, walkers, and jumpers

Not later than 210 days after August 14, 2008, the Commission shall publish notice of the requirements for accreditation of third party conformity assessment bodies to assess conformity with parts 1500.18(a)(6) and 1500.86(a) of such title.[1]

(vi) All other children's product safety rules

The Commission shall publish notice of the requirements for accreditation of third party conformity assessment bodies to assess conformity with other children's product safety rules at the earliest practicable date, but in no case later than 10 months after August 14, 2008, or, in the case of children's product safety rules established or revised 1 year or more after August 14, 2008, not later than 90 days before such rules or revisions take effect.

(C) Accreditation

Accreditation of third party conformity assessment bodies pursuant to the requirements established under subparagraph (B) may be conducted either by the Commission or by an independent accreditation organization designated by the Commission.

(D) Periodic review

The Commission shall periodically review and revise the accreditation requirements established under subparagraph (B) to ensure that the requirements assure the highest conformity assessment body quality that is feasible.

(E) Publication of accredited entities

The Commission shall maintain on its Internet website an up-to-date list of entities that have been accredited to assess conformity with children's product safety rules in accordance with the requirements published by the Commission under this paragraph.

[1] So in original. Such title refers to title 16, Code of Federal Regulations.

(F) Extension

If the Commission determines that an insufficient number of third party conformity assessment bodies have been accredited to permit certification for a children's product safety rule under the accelerated schedule required by this paragraph, the Commission may extend the deadline for certification to such rule by not more than 60 days.

(G) Rulemaking

Until the date that is 3 years after August 14, 2008, Commission proceedings under this paragraph shall be exempt from the requirements of sections 553 and 601 through 612 of Title 5.

(4) In the case of a consumer product for which there is more than one manufacturer or more than one private labeler, the Commission may by rule designate one or more of such manufacturers or one or more of such private labelers (as the case may be) as the persons who shall issue the certificate required under paragraph (1), (2), or (3) of this subsection, and may exempt all other manufacturers of such product or all other private labelers of the product (as the case may be) from the requirement under paragraph (1), (2), or (3) to issue a certificate with respect to such product.

(5)(A) Effective 1 year after August 14, 2008, the manufacturer of a children's product shall place permanent, distinguishing marks on the product and its packaging, to the extent practicable, that will enable—

(i) the manufacturer to ascertain the location and date of production of the product, cohort information (including the batch, run number, or other identifying characteristic), and any other information determined by the manufacturer to facilitate ascertaining the specific source of the product by reference to those marks; and

(ii) the ultimate purchaser to ascertain the manufacturer or private labeler, location and date of production of the product, and cohort information (including the batch, run number, or other identifying characteristic).

(B) The Commission may, by regulation, exclude a specific product or class of products from the requirements in subparagraph (A) if the Commission determines that it is not practicable for such product or class of products to bear the marks required by such subparagraph. The Commission may establish alternative requirements for any product or class of products excluded under the preceding sentence consistent with the purposes described in clauses (i) and (ii) of subparagraph (A).

(b) Rules to establish reasonable testing programs

The Commission may by rule prescribe reasonable testing programs for any product which is subject to a consumer product safety rule under

this chapter, or a similar rule, regulation, standard, or ban under any other Act enforced by the Commission, and for which a certificate is required under subsection (a) of this section. Any test or testing program on the basis of which a certificate is issued under subsection (a) of this section may, at the option of the person required to certify the product, be conducted by an independent third party qualified to perform such tests, unless the Commission, by rule, requires testing by an independent third party for a particular rule, regulation, standard, or ban, or for a particular class of products.

(c) Form and contents of labels

The Commission may by rule require the use and prescribe the form and content of labels which contain the following information (or that portion of it specified in the rule)—

(1) The date and place of manufacture of any consumer product.

(2) The cohort information (including the batch, run number, or other identifying characteristic) of the product.

(3) A suitable identification of the manufacturer of the consumer product, unless the product bears a private label in which case it shall identify the private labeler and shall also contain a code mark which will permit the seller of such product to identify the manufacturer thereof to the purchaser upon his request.

(4) In the case of a consumer product subject to a consumer product safety rule, a certification that the product meets all applicable consumer product safety standards and a specification of the standards which are applicable.

Such labels, where practicable, may be required by the Commission to be permanently marked on or affixed to any such consumer product. The Commission may, in appropriate cases, permit information required under paragraphs (1) and (2) of this subsection to be coded.

(d) Additional regulations for third party testing

(1) Audit

Not later than 10 months after August 14, 2008, the Commission shall by regulation establish requirements for the periodic audit of third party conformity assessment bodies as a condition for the continuing accreditation of such conformity assessment bodies under subsection (a)(3)(C).

(2) Compliance; continuing testing

Not later than 15 months after August 14, 2008, the Commission shall by regulation—

(A) initiate a program by which a manufacturer or private labeler may label a consumer product as complying with the certification requirements of subsection (a); and

(B) Establish protocols and standards

(i) for ensuring that a children's product tested for compliance with an applicable children's product safety rule is subject to testing periodically and when there has been a material change in the product's design or manufacturing process, including the sourcing of component parts;

(ii) for the testing of representative samples to ensure continued compliance;

(iii) for verifying that a children's product tested by a conformity assessment body complies with applicable children's product safety rules; and

(iv) for safeguarding against the exercise of undue influence on a third party conformity assessment body by a manufacturer or private labeler.

(3) Reducing third party testing burdens

(A) Assessment

Not later than 60 days after August 12, 2011, the Commission shall seek public comment on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. The request for public comment shall include the following:

(i) The extent to which the use of materials subject to regulations of another government agency that requires third party testing of those materials may provide sufficient assurance of conformity with an applicable consumer product safety rule, ban, standard, or regulation without further third party testing.

(ii) The extent to which modification of the certification requirements may have the effect of reducing redundant third party testing by or on behalf of 2 or more importers of a product that is substantially similar or identical in all material respects.

(iii) The extent to which products with a substantial number of different components subject to third party testing may be evaluated to show compliance with an applicable rule, ban, standard, or regulation by third party testing of a subset of such components selected by a third party conformity assessment body.

(iv) The extent to which manufacturers with a substantial number of substantially similar products subject to third party testing may reasonably make use of sampling procedures that reduce the overall test burden without compromising the benefits of third party testing.

(v) The extent to which evidence of conformity with other national or international governmental standards may provide assurance of conformity to consumer product safety rules, bans, standards, or regulations applicable under this chapter.

(vi) The extent to which technology, other than the technology already approved by the Commission, exists for third party conformity assessment bodies to test or to screen for testing consumer products subject to a third party testing requirement.

(vii) Other techniques for lowering the cost of third party testing consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.

(B) Regulations

Following the public comment period described in subparagraph (A), but not later than 1 year after August 12, 2011, the Commission shall review the public comments and may prescribe new or revised third party testing regulations if it determines that such regulations will reduce third party testing costs consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.

(C) Report

If the Commission determines that it lacks authority to implement an opportunity for reducing the costs of third-party testing consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations, it shall transmit a report to Congress reviewing those opportunities, along with any recommendations for any legislation to permit such implementation.

(4) Special rules for small batch manufacturers

(A) Special consideration; exemption

(i) Consideration; alternative requirements

Subject to subparagraph (C), in implementing third party testing requirements under this section, the Commission shall take into consideration any economic, administrative, or other limits on the ability of small batch manufacturers to comply with such requirements and shall, after notice and a hearing, provide alternative testing requirements for covered products manufactured by small batch manufacturers in lieu of those required under subsection (a) or (b). Any such alternative requirements shall provide for reasonable methods to assure compliance with any applicable consumer product safety rule, ban, standard, or regulation. The Commission may allow such alternative testing requirements for small batch manufacturers

with respect to a specific product or product class or with respect to a specific safety rule, ban, standard, or regulation, or portion thereof.

(ii) Exemption

If the Commission determines that no alternative testing requirement is available or economically practicable, it shall exempt small batch manufacturers from third party testing requirements under subsections (a) and (b).

(iii) Certification

In lieu of or as part of any alternative testing requirements provided under clause (i), the Commission may allow certification of a product to an applicable consumer product safety rule, ban, standard, or regulation, or portion thereof, based on documentation that the product complies with another national or international governmental standard or safety requirement that the Commission determines is the same or more stringent than the consumer product safety rule, ban, standard, or regulation, or portion thereof. Any such certification shall only be allowed to the extent of the equivalency with a consumer product safety rule, ban, standard, or regulation and not to any other part of the consumer product safety rule, ban, standard, or regulation.

(iv) Restriction

Except as provided in subparagraph (C), and except where the Commission determines that the manufacturer does not meet the definition of a small batch manufacturer, for any small batch manufacturer registered pursuant to subparagraph (B), the Commission may not require third party testing of a covered product by a third party conformity assessment body until the Commission has provided either an alternative testing requirement or an exemption in accordance with clause (i) or (ii), respectively.

(B) Registration

Any small batch manufacturer that utilizes alternative requirements or an exemption under this paragraph shall register with the Commission prior to using such alternative requirements or exemptions pursuant to any guidelines issued by the Commission to carry out this requirement.

(C) Limitation

The Commission shall not provide or permit to continue in effect any alternative requirements or exemption from third party testing requirements under this paragraph where it determines, based on notice and a hearing, that full compliance with subsection (a) or (b) is reasonably necessary to protect public health or safety. The

Commission shall not provide any alternative requirements or exemption for—

(i) any of the third party testing requirements described in clauses (i) through (v) of subsection (a)(3)(B); or

(ii) durable infant or toddler products, as defined in section 2056a(f) of this title.

(D) Subsequent manufacturer

Nothing in this paragraph shall be construed to affect third party testing or any other requirements with respect to a subsequent manufacturer or other entity that uses components provided by one or more small batch manufacturers.

(E) Definitions

For purposes of this paragraph—

(i) the term "covered product" means a consumer product manufactured by a small batch manufacturer where no more than 7,500 units of the same product were manufactured in the previous calendar year; and

(ii) the term "small batch manufacturer" means a manufacturer that had no more than $1,000,000 in total gross revenue from sales of all consumer products in the previous calendar year. The dollar amount contained in this paragraph shall be adjusted annually by the percentage increase in the Consumer Price Index for all urban consumers published by the Department of Labor.

For purposes of determining the total gross revenue for all sales of all consumer products of a manufacturer under this subparagraph, such total gross revenue shall be considered to include all gross revenue from all sales of all consumer products of each entity that controls, is controlled by, or is under common control with such manufacturer. The Commission shall take steps to ensure that all relevant business affiliations are considered in determining whether or not a manufacturer meets this definition.

(5) Exclusion from third party testing

(A) Certain printed materials

(i) In general

The third party testing requirements established under subsection (a) shall not apply to ordinary books or ordinary paper-based printed materials.

(ii) Definitions

(I) Ordinary book

The term "ordinary book" means a book printed on paper or cardboard, printed with inks or toners, and bound and finished using a conventional method, and that is intended to be read or has educational value. Such term does not include books with inherent play value, books designed or intended for a child 3 years of age or younger, and does not include any toy or other article that is not a book that is sold or packaged with an ordinary book.

(II) Ordinary paper-based printed materials

The term "ordinary paper-based printed materials" means materials printed on paper or cardboard, such as magazines, posters, greeting cards, and similar products, that are printed with inks or toners and bound and finished using a conventional method.

(III) Exclusions

Such terms do not include books or printed materials that contain components that are printed on material other than paper or cardboard or contain nonpaper-based components such as metal or plastic parts or accessories that are not part of the binding and finishing materials used in a conventional method.

(B) Metal component parts of bicycles

The third party testing requirements established under subsection (a) shall not apply to metal component parts of bicycles with respect to compliance with the lead content limits in place pursuant to section 1278a(b)(6) of this title.

(e) Withdrawal of accreditation

(1) In general

The Commission may withdraw its accreditation or its acceptance of the accreditation of a third party conformity assessment body accredited under this section if the Commission finds, after notice and investigation, that—

(A) a manufacturer, private labeler, or governmental entity has exerted undue influence on such conformity assessment body or otherwise interfered with or compromised the integrity of the testing process with respect to the certification of a children's product under this section; or

(B) such conformity assessment body failed to comply with an applicable protocol, standard, or requirement established by the Commission under subsection (d).

(2) Procedure

In any proceeding to withdraw the accreditation of a conformity assessment body, the Commission—

(A) shall consider the gravity of the conformity assessment body's action or failure to act, including—

(i) whether the action or failure to act resulted in injury, death, or the risk of injury or death;

(ii) whether the action or failure to act constitutes an isolated incident or represents a pattern or practice; and

(iii) whether and when the conformity assessment body initiated remedial action; and

(B) may—

(i) withdraw its acceptance of the accreditation of the conformity assessment body on a permanent or temporary basis; and

(ii) establish requirements for reaccreditation of the conformity assessment body.

(3) Failure to cooperate

The Commission may suspend the accreditation of a conformity assessment body if it fails to cooperate with the Commission in an investigation under this section.

(f) Definitions

In this section:

(1) Children's product safety rule

The term "children's product safety rule" means a consumer product safety rule under this chapter or similar rule, regulation, standard, or ban under any other Act enforced by the Commission, including a rule declaring a consumer product to be a banned hazardous product or substance.

(2) Third party conformity assessment body

(A) In general

The term "third party conformity assessment body" means a conformity assessment body that, except as provided in subparagraph (D), is not owned, managed, or controlled by the manufacturer or private labeler of a product assessed by such conformity assessment body.

(B) Governmental participation

Such term may include an entity that is owned or controlled in whole or in part by a government if—

(i) to the extent practicable, manufacturers or private labelers located in any nation are permitted to choose

conformity assessment bodies that are not owned or controlled by the government of that nation;

(ii) the entity's testing results are not subject to undue influence by any other person, including another governmental entity;

(iii) the entity is not accorded more favorable treatment than other third party conformity assessment bodies in the same nation who have been accredited under this section;

(iv) the entity's testing results are accorded no greater weight by other governmental authorities than those of other third party conformity assessment bodies accredited under this section; and

(v) the entity does not exercise undue influence over other governmental authorities on matters affecting its operations or on decisions by other governmental authorities controlling distribution of products based on outcomes of the entity's conformity assessments.

(C) Testing and certification of art materials and products

A certifying organization (as defined in appendix A to section 1500.14(b)(8) of title 16, Code of Federal Regulations (or any successor regulation or ruling)) meets the requirements of subparagraph (A) with respect to the certification of art material and art products required under this section or by regulations prescribed under the Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.).

(D) Firewalled conformity assessment bodies

Upon request, the Commission may accredit a conformity assessment body that is owned, managed, or controlled by a manufacturer or private labeler as a third party conformity assessment body if the Commission by order finds that—

(i) accreditation of the conformity assessment body would provide equal or greater consumer safety protection than the manufacturer's or private labeler's use of an independent third party conformity assessment body; and

(ii) the conformity assessment body has established procedures to ensure that—

(I) its test results are protected from undue influence by the manufacturer, private labeler or other interested party;

(II) the Commission is notified immediately of any attempt by the manufacturer, private labeler or other interested party to hide or exert undue influence over test results; and

(III) allegations of undue influence may be reported confidentially to the Commission.

(g) Requirements for certificates

(1) Identification of issuer and conformity assessment body

Every certificate required under this section shall identify the manufacturer or private labeler issuing the certificate and any third party conformity assessment body on whose testing the certificate depends. The certificate shall include, at a minimum, the date and place of manufacture, the date and place where the product was tested, each party's name, full mailing address, telephone number, and contact information for the individual responsible for maintaining records of test results.

(2) English language

Every certificate required under this section shall be legible and all content required by this section shall be in the English language. A certificate may also contain the same content in any other language.

(3) Availability of certificates

Every certificate required under this section shall accompany the applicable product or shipment of products covered by the same certificate and a copy of the certificate shall be furnished to each distributor or retailer of the product. Upon request, the manufacturer or private labeler issuing the certificate shall furnish a copy of the certificate to the Commission.

(4) Electronic filing of certificates for imported products

In consultation with the Commissioner of U.S. Customs and Border Protection, the Commission may, by rule, provide for the electronic filing of certificates under this section up to 24 hours before arrival of an imported product. Upon request, the manufacturer or private labeler issuing the certificate shall furnish a copy to the Commission and to the Commissioner of U.S. Customs and Border Protection.

(h) Rule of construction

Compliance of any children's product with third party testing and certification or general conformity certification requirements under this section shall not be construed to exempt such children's product from any requirement that such product actually be in conformity with all applicable rules, regulation, standards, or ban under any Act enforced by the Commission.

(i) Requirement for advertisements

No advertisement for a consumer product or label or packaging of such product may contain a reference to a consumer product safety rule or a voluntary consumer product safety standard unless such product conforms with the applicable safety requirements of such rule or standard.

(Pub.L. 92–573, § 14, Oct. 27, 1972, 86 Stat. 1220; Pub.L. 110–314, Title I, §§ 102(a)(1)(A), (2), (3), (b), (d), 103(a), (b), (c), August 14, 2008, 122 Stat. 3022, 3024, 3027, 3028; Pub.L. 112–28, §§ 2(a), 6, 10(a), Aug. 12, 2011, 125 Stat. 276, 281, 283; Pub.L. 114–125, § 802, Feb. 24, 2016, 130 Stat. 122.)

§ 2064. Substantial product hazards

(a) "Substantial product hazard" defined

For purposes of this section, the term "substantial product hazard" means—

(1) a failure to comply with an applicable consumer product safety rule under this chapter or a similar rule, regulation, standard, or ban under any other Act enforced by the Commission which creates a substantial risk of injury to the public, or

(2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

(b) Noncompliance with applicable consumer product safety rules; product defects; notice to Commission by manufacturer, distributor, or retailer

Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product—

(1) fails to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard upon which the Commission has relied under section 2058 of this title;

(2) contains a defect which could create a substantial product hazard described in subsection (a)(2) of this section; or

(3) creates an unreasonable risk of serious injury or death,

shall immediately inform the Commission of such failure to comply, of such defect, or of such risk, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect, failure to comply, or such risk.

(c) Public notice of defect or failure to comply; mail notice

(1) If the Commission determines (after affording interested persons, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f) of this section) that a product distributed in commerce presents a substantial product hazard and that notification is required in order to adequately protect the public from such substantial product hazard, or if the Commission, after notifying the manufacturer, determines a product to be an imminently hazardous consumer product and has filed an action under

section 2061 of this title, the Commission may order the manufacturer or any distributor or retailer of the product to take any one or more of the following actions:

(A) To cease distribution of the product.

(B) To notify all persons that transport, store, distribute, or otherwise handle the product, or to which the product has been transported, sold, distributed, or otherwise handled, to cease immediately distribution of the product.

(C) To notify appropriate State and local public health officials.

(D) To give public notice of the defect or failure to comply, including posting clear and conspicuous notice on its Internet website, providing notice to any third party Internet website on which such manufacturer, retailer, distributor, or licensor has placed the product for sale, and announcements in languages other than English and on radio and television where the Commission determines that a substantial number of consumers to whom the recall is directed may not be reached by other notice.

(E) To mail notice to each person who is a manufacturer, distributor, or retailer of such product.

(F) To mail notice to every person to whom the person required to give notice knows such product was delivered or sold.

Any such order shall specify the form and content of any notice required to be given under such order.

(2) The Commission may require a notice described in paragraph (1) to be distributed in a language other than English if the Commission determines that doing so is necessary to adequately protect the public.

(3) If a district court determines, in an action filed under section 2061 of this title, that the product that is the subject of such action is not an imminently hazardous consumer product, the Commission shall rescind any order issued under this subsection with respect to such product.

(d) Repair; replacement; refunds; action plan

(1) If the Commission determines (after affording interested parties, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f) of this section) that a product distributed in commerce presents a substantial product hazard and that action under this subsection is in the public interest, it may order the manufacturer or any distributor or retailer of such product to provide the notice required by subsection (c) and to take any one or more of the following actions it determines to be in the public interest:

(A) To bring such product into conformity with the requirements of the applicable rule, regulation, standard, or ban or to repair the defect in such product.

(B) To replace such product with a like or equivalent product which complies with the applicable rule, regulation, standard, or ban or which does not contain the defect.

(C) To refund the purchase price of such product (less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more (i) at the time of public notice under subsection (c) of this section, or (ii) at the time the consumer receives actual notice of the defect or noncompliance, whichever first occurs).

(2) An order under this subsection shall also require the person to whom it applies to submit a plan, for approval by the Commission, for taking action under whichever of the preceding subparagraphs under which such person has been ordered to act. The Commission shall specify in the order the persons to whom refunds must be made if the Commission orders the action described in subparagraph (1)(C). An order under this subsection may prohibit the person to whom it applies from manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States (as defined in general note 2 of the Harmonized Tariff Schedule of the United States), or from doing any combination of such actions, the product with respect to which the order was issued.

(3)(A) If the Commission approves an action plan, it shall indicate its approval in writing.

(B) If the Commission finds that an approved action plan is not effective or appropriate under the circumstances, or that the manufacturer, retailer, or distributor is not executing an approved action plan effectively, the Commission may, by order, amend, or require amendment of, the action plan. In determining whether an approved plan is effective or appropriate under the circumstances, the Commission shall consider whether a repair or replacement changes the intended functionality of the product.

(C) If the Commission determines, after notice and opportunity for comment, that a manufacturer, retailer, or distributor has failed to comply substantially with its obligations under its action plan, the Commission may revoke its approval of the action plan. The manufacturer, retailer, or distributor to which the action plan applies may not distribute in commerce the product to which the action plan relates after receipt of notice of a revocation of the action plan.

(e) Reimbursement

(1) No charge shall be made to any person (other than a manufacturer, distributor, or retailer) who avails himself of any remedy provided under an order issued under subsection (d) of this section, and the person subject to the order shall reimburse each person (other than a manufacturer, distributor, or retailer) who is entitled to such a remedy

for any reasonable and foreseeable expenses incurred by such person in availing himself of such remedy.

(2) An order issued under subsection (c) or (d) of this section with respect to a product may require any person who is a manufacturer, distributor, or retailer of the product to reimburse any other person who is a manufacturer, distributor, or retailer of such product for such other person's expenses in connection with carrying out the order, if the Commission determines such reimbursement to be in the public interest.

(f) Hearing

(1) Except as provided in paragraph (2), an order under subsection (c) or (d) of this section may be issued only after an opportunity for a hearing in accordance with section 554 of Title 5 except that, if the Commission determines that any person who wishes to participate in such hearing is a part of a class of participants who share an identity of interest, the Commission may limit such person's participation in such hearing to participation through a single representative designated by such class (or by the Commission if such class fails to designate such a representative). Any settlement offer which is submitted to the presiding officer at a hearing under this subsection shall be transmitted by the officer to the Commission for its consideration unless the settlement offer is clearly frivolous or duplicative of offers previously made.

(2) The requirement for a hearing in paragraph (1) shall not apply to an order issued under subsection (c) or (d) relating to an imminently hazardous consumer product with regard to which the Commission has filed an action under section 2061 of this title.

(g) Preliminary injunction

(1) If the Commission has initiated a proceeding under this section for the issuance of an order under subsection (d) of this section with respect to a product which the Commission has reason to believe presents a substantial product hazard, the Commission (without regard to section 2076(b)(7) of this title) or the Attorney General may, in accordance with section 2061(d)(1) of this title, apply to a district court of the United States for the issuance of a preliminary injunction to restrain the distribution in commerce of such product pending the completion of such proceeding. If such a preliminary injunction has been issued, the Commission (or the Attorney General if the preliminary injunction was issued upon an application of the Attorney General) may apply to the issuing court for extensions of such preliminary injunction.

(2) Any preliminary injunction, and any extension of a preliminary injunction, issued under this subsection with respect to a product shall be in effect for such period as the issuing court prescribes not to exceed a period which extends beyond the thirtieth day from the date of the issuance of the preliminary injunction (or, in the case of a preliminary injunction which has been extended, the date of its extension) or the date

of the completion or termination of the proceeding under this section respecting such product, whichever date occurs first.

(3) The amount in controversy requirement of section 1331 of Title 28 does not apply with respect to the jurisdiction of a district court of the United States to issue or extend a preliminary injunction under this subsection.

(h) Cost-benefit analysis of notification or other action not required

Nothing in this section shall be construed to require the Commission, in determining that a product distributed in commerce presents a substantial product hazard and that notification or other action under this section should be taken, to prepare a comparison of the costs that would be incurred in providing notification or taking other action under this section with the benefits from such notification or action.

(i) Requirements for recall notices

(1) Guidelines

Not later than 180 days after August 14, 2008, the Commission shall, by rule, establish guidelines setting forth a uniform class of information to be included in any notice required under an order under subsection (c) or (d) of this section or under section 2061 of this title. Such guidelines shall include any information that the Commission determines would be helpful to consumers in—

(A) identifying the specific product that is subject to such an order;

(B) understanding the hazard that has been identified with such product (including information regarding incidents or injuries known to have occurred involving such product); and

(C) understanding what remedy, if any, is available to a consumer who has purchased the product.

(2) Content

Except to the extent that the Commission determines with respect to a particular product that one or more of the following items is unnecessary or inappropriate under the circumstances, the notice shall include the following:

(A) description of the product, including—

(i) the model number or stock keeping unit (SKU) number of the product;

(ii) the names by which the product is commonly known; and

(iii) a photograph of the product.

(B) A description of the action being taken with respect to the product.

(C) The number of units of the product with respect to which the action is being taken.

(D) A description of the substantial product hazard and the reasons for the action.

(E) An identification of the manufacturers and significant retailers of the product.

(F) The dates between which the product was manufactured and sold.

(G) The number and a description of any injuries or deaths associated with the product, the ages of any individuals injured or killed, and the dates on which the Commission received information about such injuries or deaths.

(H) A description of—

(i) any remedy available to a consumer;

(ii) any action a consumer must take to obtain a remedy; and

(iii) any information a consumer needs in order to obtain a remedy or information about a remedy, such as mailing addresses, telephone numbers, fax numbers, and email addresses.

(I) Other information the Commission deems appropriate.

(j) Substantial product hazard list

(1) In general

The Commission may specify, by rule, for any consumer product or class of consumer products, characteristics whose existence or absence shall be deemed a substantial product hazard under subsection (a)(2), if the Commission determines that—

(A) such characteristics are readily observable and have been addressed by voluntary standards; and

(B) such standards have been effective in reducing the risk of injury from consumer products and that there is substantial compliance with such standards.

(2) Judicial review

Not later than 60 days after promulgation of a rule under paragraph (1), any person adversely affected by such rule may file a petition for review under the procedures set forth in section 2060 of this title.

(Pub.L. 92–573, § 15, Oct. 27, 1972, 86 Stat. 1221; Pub.L. 94–284, § 12(a), May 11, 1976, 90 Stat. 508; Pub.L. 97–35, Title XII, § 1211(h)(4), Aug. 13, 1981, 95 Stat. 723; Pub.L. 97–414, § 9(j)(3), (m), Jan. 4, 1983, 96 Stat. 2064, 2065; Pub.L. 100–418, Title I, § 1214(d), Aug. 23, 1988, 102 Stat.

1156; Pub.L. 101–608, Title I, §§ 111(a)(2), 112(a), 113, Nov. 16, 1990, 104 Stat. 3114, 3115, 3117; Pub.L. 110–314, Title II, §§ 214(a), (b), (c), 223(a), Aug. 14, 2008, 122 Stat. 3052, 3053, 3068.)

§ 2065. Inspection and recordkeeping

(a) Inspection

For purposes of implementing this chapter, or rules or orders prescribed under this chapter, officers or employees duly designated by the Commission, upon presenting appropriate credentials and a written notice from the Commission to the owner, operator, or agent in charge, are authorized—

(1) to enter, at reasonable times, (A) any factory, warehouse, or establishment in which consumer products are manufactured or held, in connection with distribution in commerce, (B) any firewalled conformity assessment bodies accredited under section 2063(f)(2)(D) of this title, or (C) any conveyance being used to transport consumer products in connection with distribution in commerce; and

(2) to inspect, at reasonable times and in a reasonable manner such conveyance or those areas of such factory, firewalled conformity assessment body, warehouse, or establishment where such products are manufactured, held, or transported and which may relate to the safety of such products. Each such inspection shall be commenced and completed with reasonable promptness.

(b) Recordkeeping

Every person who is a manufacturer, private labeler, or distributor of a consumer product shall establish and maintain such records, make such reports, and provide such information as the Commission may, by rule, reasonably require for the purposes of implementing this chapter, or to determine compliance with rules or orders prescribed under this chapter. Upon request of an officer or employee duly designated by the Commission, every such manufacturer, private labeler, or distributor shall permit the inspection of appropriate books, records, and papers relevant to determining whether such manufacturer, private labeler, or distributor has acted or is acting in compliance with this chapter and rules under this chapter.

(c) Identification of manufacturers, importers, retailers, and distributors

Upon request by an officer or employee duly designated by the Commission—

(1) every importer, retailer, or distributor of a consumer product (or other product or substance over which the Commission has jurisdiction under this or any other Act) shall identify the manufacturer of that product by name, address, or such other identifying information as the officer or employee may request, to

the extent that such information is known or can be readily determined by the importer, retailer, or distributor; and

(2) every manufacturer shall identify by name, address, or such other identifying information as the officer or employee may request—

(A) each retailer or distributor to which the manufacturer directly supplied a given consumer product (or other product or substance over which the Commission has jurisdiction under this or any other Act);

(B) each subcontractor involved in the production or fabrication of such product or substance; and

(C) each subcontractor from which the manufacturer obtained a component thereof.

(d) The Commission shall, by rule, condition the manufacturing for sale, offering for sale, distribution in commerce, or importation into the United States of any consumer product or other product on the manufacturer's compliance with the inspection and recordkeeping requirements of this chapter and the Commission's rules with respect to such requirements.

(Pub.L. 92–573, § 16, Oct. 27, 1972, 86 Stat. 1222; Pub.L. 110–314, Title II, §§ 215, 223(c)(2), Aug. 14, 2008, 122 Stat. 3056, 3069.)

§ 2066. Imported products

(a) Refusal of admission

Any consumer product offered for importation into the customs territory of the United States (as defined in general note 2 of the Harmonized Tariff Schedule of the United States) shall be refused admission into such customs territory if such product—

(1) fails to comply with an applicable consumer product safety rule;

(2) is not accompanied by a certificate required by this chapter or any other Act enforced by the Commission, or is accompanied by a false certificate, if the manufacturer in the exercise of due care has reason to know that the certificate is false or misleading in any material respect, or is not accompanied by any label or certificate (including tracking labels) required under section 2063 of this title or any rule or regulation under such section;

(3) is or has been determined to be an imminently hazardous consumer product in a proceeding brought under section 2061 of this title;

(4) has a product defect which constitutes a substantial product hazard (within the meaning of section 2064(a)(2) of this title); or

(5) is a product which was manufactured by a person who the Commission has informed the Secretary of the Treasury is in violation of subsection (g) of this section.

(b) Samples

The Secretary of the Treasury shall obtain without charge and deliver to the Commission, upon the latter's request, a reasonable number of samples of consumer products being offered for import. Except for those owners or consignees who are or have been afforded an opportunity for a hearing in a proceeding under section 2061 of this title with respect to an imminently hazardous product, the owner or consignee of the product shall be afforded an opportunity by the Commission for a hearing in accordance with section 554 of Title 5 with respect to the importation of such products into the customs territory of the United States. If it appears from examination of such samples or otherwise that a product must be refused admission under the terms of subsection (a) of this section, such product shall be refused admission, unless subsection (c) of this section applies and is complied with.

(c) Modification

If it appears to the Commission that any consumer product which may be refused admission pursuant to subsection (a) of this section can be so modified that it need not (under the terms of paragraphs (1) through (4) of subsection (a) of this section) be refused admission, the Commission may defer final determination as to the admission of such product and, in accordance with such regulations as the Commission and the Secretary of the Treasury shall jointly agree to, permit such product to be delivered from customs custody under bond for the purpose of permitting the owner or consignee an opportunity to so modify such product.

(d) Supervision of modifications

All actions taken by an owner or consignee to modify such product under subsection (c) of this section shall be subject to the supervision of an officer or employee of the Commission and of the Department of the Treasury. If it appears to the Commission that the product cannot be so modified or that the owner or consignee is not proceeding satisfactorily to modify such product, it shall be refused admission into the customs territory of the United States, and the Commission may direct the Secretary to demand redelivery of the product into customs custody, and to seize the product in accordance with section 2071(b) of this title if it is not so redelivered.

(e) Product destruction

Products refused admission into the customs territory of the United States shall be destroyed unless, upon application by the owner, consignee, or importer of record, the Secretary of the Treasury permits the export of the product in lieu of destruction. If the owner, consignee,

or importer of record does not export the product within 90 days of approval to export, such product shall be destroyed.

(f) Payment of expenses occasioned by refusal of admission

All expenses (including travel, per diem or subsistence, and salaries of officers or employees of the United States) in connection with the destruction provided for in this section (the amount of such expenses to be determined in accordance with regulations of the Secretary of the Treasury) and all expenses in connection with the storage, cartage, or labor with respect to any consumer product refused admission under this section, shall be paid by the owner or consignee and, in default of such payment, shall constitute a lien against any future importations made by such owner or consignee.

(g) Importation conditioned upon manufacturer's compliance

Manufacturers of imported products shall be in compliance with all inspection and recordkeeping requirements under section 16 applicable to such products, and the Commission shall advise the Secretary of the Treasury of any manufacturer who is not in compliance with all inspection and recordkeeping requirements under section 2065 of this title.

(h) Product surveillance program

(1) The Commission shall establish and maintain a permanent product surveillance program, in cooperation with other appropriate Federal agencies, for the purpose of carrying out the Commission's responsibilities under this chapter and the other Acts administered by the Commission and preventing the entry of unsafe consumer products into the commerce of the United States.

(2) The Commission may provide to the agencies with which it is cooperating under paragraph (1) such information, data, violator lists, test results, and other support, guidance, and documents as may be necessary or helpful for such agencies to cooperate with the Commission to carry out the product surveillance program under paragraph (1).

(3) The Commission shall periodically report to the appropriate Congressional committees the results of the surveillance program under paragraph (1).

(Pub.L. 92–573, § 17, Oct. 27, 1972, 86 Stat. 1223; Pub.L. 100–418, Title I, § 1214(d), Aug. 23, 1988, 102 Stat. 1156; Pub.L. 101–608, Title I, § 114, Nov. 16, 1990, 104 Stat. 3118; Pub.L. 110–314, Title II, §§ 216(b), 223(b), (c)(1), 235(c)(6), Aug. 14, 2008, 122 Stat. 3058, 3068, 3069, 3075.)

§ 2067. Exemption of exports

(a) Risk of injury to consumers within United States

This chapter shall not apply to any consumer product if (1) it can be shown that such product is manufactured, sold, or held for sale for export from the United States (or that such product was imported for export),

unless (A) such consumer product is in fact distributed in commerce for use in the United States, or (B) the Commission determines that exportation of such product presents an unreasonable risk of injury to consumers within the United States, and (2) such consumer product when distributed in commerce, or any container in which it is enclosed when so distributed, bears a stamp or label stating that such consumer product is intended for export; except that this chapter shall apply to any consumer product manufactured for sale, offered for sale, or sold for shipment to any installation of the United States located outside of the United States.

(b) Statement of exportation: filing period, information; notification of foreign country; petition for minimum filing period: good cause

Not less than thirty days before any person exports to a foreign country any product which is not in conformity with an applicable consumer product safety rule in effect under this chapter, such person shall file a statement with the Commission notifying the Commission of such exportation, and the Commission, upon receipt of such statement, shall promptly notify the government of such country of such exportation and the basis for such safety standard or rule. Any statement filed with the Commission under the preceding sentence shall specify the anticipated date of shipment of such product, the country and port of destination of such product, and the quantity of such product that will be exported, and shall contain such other information as the Commission may by regulation require. Upon petition filed with the Commission by any person required to file a statement under this subsection respecting an exportation, the Commission may, for good cause shown, exempt such person from the requirement of this subsection that such a statement be filed no less than thirty days before the date of the exportation, except that in no case shall the Commission permit such a statement to be filed later than the tenth day before such date.

(c) The Commission may prohibit a person from exporting from the United States for purpose of sale any consumer product that is not in conformity with an applicable consumer product safety rule under this chapter, unless the importing country has notified the Commission that such country accepts the importation of such consumer product, provided that if the importing country has not so notified the Commission within 30 days after the Commission has provided notice to the importing country of the impending shipment, the Commission may take such action as appropriate within its authority with respect to the disposition of the product under the circumstances.

(d) Nothing in this section shall apply to any consumer product, the export of which is permitted by the Secretary of the Treasury pursuant to section 2066(e) of this title.

(Pub.L. 92–573, § 18, Oct. 27, 1972, 86 Stat. 1224; Pub.L. 95–631, § 6(a), Nov. 10, 1978, 92 Stat. 3745; Pub.L. 110–314, Title II, § 221(a), Aug. 14, 2008, 122 Stat. 3065.)

§ 2068. Prohibited acts

(a) Designation

It shall be unlawful for any person to—

(1) sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States any consumer product, or other product or substance that is regulated under this chapter or any other Act enforced by the Commission, that is not in conformity with an applicable consumer product safety rule under this chapter, or any similar rule, regulation, standard, or ban under any other Act enforced by the Commission;

(2) sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States any consumer product, or other product or substance that is—

(B)[1] subject to voluntary corrective action taken by the manufacturer, in consultation with the Commission, of which action the Commission has notified the public or if the seller, distributor, or manufacturer knew or should have known of such voluntary corrective action;

(C) subject to an order issued under section 12 or 15 of this Act; or

(D) a banned hazardous substance within the meaning of section 1261(q)(1) of this title;

(3) fail or refuse to permit access to or copying of records, or fail or refuse to establish or maintain records, or fail or refuse to make reports or provide information, or fail or refuse to permit entry or inspection, as required under this chapter or rule thereunder;

(4) fail to furnish information required by section 2064(b) of this title;

(5) fail to comply with an order issued under section 2064(c) or (d) of this title (relating to notification, to repair, replacement, and refund, and to prohibited acts);

(6) fail to furnish a certificate required by this chapter or any other Act enforced by the Commission, or to issue a false certificate if such person in the exercise of due care has reason to know that the certificate is false or misleading in any material respect; or to fail to comply with any requirement of section 2063 of this title (including the requirement for tracking labels) or any rule or regulation under such section;

[1] So in original. No subpar. (A) has been enacted.

(7) fail to comply with any rule under section 2058(g) (2) of this title (relating to stockpiling);

(8) fail to comply with any rule under section 2076(e) of this title (relating to provision of performance and technical data);

(9) fail to comply with any rule or requirement under section 2082 of this title (relating to labeling and testing of cellulose insulation);

(10) fail to file a statement with the Commission pursuant to section 2067(b) of this title;

(11) fail to furnish information required by section 2084 of this title.[2]

(12) sell, offer for sale, distribute in commerce, or import into the United States any consumer product bearing a registered safety certification mark owned by an accredited conformity assessment body, which mark is known, or should have been known, by such person to be used in a manner unauthorized by the owner of that certification mark;

(13) misrepresent to any officer or employee of the Commission the scope of consumer products subject to an action required under section 2061 or 2064 of this title, or to make a material misrepresentation to such an officer or employee in the course of an investigation under this chapter or any other Act enforced by the Commission; or[3]

(14) exercise, or attempt to exercise, undue influence on a third party conformity assessment body (as defined in section 2063(f)(2) of this title) with respect to the testing, or reporting of the results of testing, of any product for compliance under this chapter or any other Act enforced by the Commission, or to subdivide the production of any children's product into small quantities that have the effect of evading any third party testing requirements under section 2063(a)(2) of this title;

(15) export from the United States for purpose of sale any consumer product, or other product or substance regulated by the Commission (other than a consumer product or substance, the export of which is permitted by the Secretary of the Treasury pursuant to section 2066(e) of this title) that—

(A) is subject to an order issued under section 2061 or 2064 of this title or is a banned hazardous substance within the meaning of section 1261(q)(1) of this title; or

(B) is subject to a voluntary corrective action taken by the manufacturer, in consultation with the Commission, of which action the Commission has notified the public; or

(16) violate an order of the Commission issued under section 2067(c) of this title.

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[2] So in original. The period probably should be a semi-colon.

[3] So in original. The word "or" probably should not appear.

(b) Exception

Paragraphs (1) and (2) of subsection (a) of this section shall not apply to any person (1) who holds a certificate issued in accordance with section 2063(a) of this title to the effect that such consumer product conforms to all applicable consumer product safety rules, unless such person knows that such consumer product does not conform, or (2) who relies in good faith on the representation of the manufacturer or a distributor of such product that the product is not subject to an applicable product safety rule.

(Pub.L. 92–573, § 19, Oct. 27, 1972, 86 Stat. 1224; Pub.L. 94–284, §§ 12(b), 13(a), May 11, 1976, 90 Stat. 508, 509; Pub.L. 95–319, § 3(b), July 11, 1978, 92 Stat. 390; Pub.L. 95–631, § 6(b), Nov. 10, 1978, 92 Stat. 3745; Pub.L. 97–414, § 9(j)(4), Jan. 4, 1983, 96 Stat. 2064; Pub.L. 101–608, Title I, § 112(d), Nov. 16, 1990, 104 Stat. 3117; Pub.L. 110–314, Title II, § 216(a), Aug. 14, 2008, 122 Stat. 3056; Pub.L. 112–28, § 2(b), Aug. 12, 2011, 125 Stat. 279.)

§ 2069. Civil penalties

(a) Amount of penalty

(1) Any person who knowingly violates section 2068 of this title shall be subject to a civil penalty not to exceed $5,000 for each such violation. Subject to paragraph (2), a violation of section 2068(a)(1), (2), (4), (5), (6), (7), (8), (9), (10), or (11) of this title shall constitute a separate offense with respect to each consumer product involved, except that the maximum civil penalty shall not exceed $1,250,000 for any related series of violations. A violation of section 2068(a)(3) of this title shall constitute a separate violation with respect to each failure or refusal to allow or perform an act required thereby; and, if such violation is a continuing one, each day of such violation shall constitute a separate offense, except that the maximum civil penalty shall not exceed $1,250,000 for any related series of violations.

(2) The second sentence of paragraph (1) of this subsection shall not apply to violations of paragraph (1) or (2) of section 2068(a) of this title—

(A) if the person who violated such paragraphs is not the manufacturer or private labeler or a distributor of the products involved, and

(B) if such person did not have either (i) actual knowledge that his distribution or sale of the product violated such paragraphs or (ii) notice from the Commission that such distribution or sale would be a violation of such paragraphs.

(3)(A) The maximum penalty amounts authorized in paragraph (1) shall be adjusted for inflation as provided in this paragraph.

(B) Not later than December 1, 1994, and December 1 of each fifth calendar year thereafter, the Commission shall prescribe and

publish in the Federal Register a schedule of maximum authorized penalties that shall apply for violations that occur after January 1 of the year immediately following such publication.

(C) The schedule of maximum authorized penalties shall be prescribed by increasing each of the amounts referred to in paragraph (1) by the cost-of-living adjustment for the preceding five years. Any increase determined under the preceding sentence shall be rounded to—

(i) in the case of penalties greater than $1,000 but less than or equal to $10,000, the nearest multiple of $1,000;

(ii) in the case of penalties greater than $10,000 but less than or equal to $100,000, the nearest multiple of $5,000;

(iii) in the case of penalties greater than $100,000 but less than or equal to $200,000, the nearest multiple of $10,000; and

(iv) in the case of penalties greater than $200,000, the nearest multiple of $25,000.

(D) For purposes of this subsection:

(i) The term "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

(ii) The term "cost-of-living adjustment for the preceding five years" means the percentage by which—

(I) the Consumer Price Index for the month of June of the calendar year preceding the adjustment; exceeds

(II) the Consumer Price Index for the month of June preceding the date on which the maximum authorized penalty was last adjusted.

(b) Relevant factors in determining amount of penalty

In determining the amount of any penalty to be sought upon commencing an action seeking to assess a penalty for a violation of section 2068(a) of this title, the Commission shall consider the nature, circumstances, extent, and gravity of the violation, including the nature of the product defect, the severity of the risk of injury, the occurrence or absence of injury, the number of defective products distributed, the appropriateness of such penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses, and such other factors as appropriate.

(c) Compromise of penalty; deductions from penalty

Any civil penalty under this section may be compromised by the Commission. In determining the amount of such penalty or whether it should be remitted or mitigated and in what amount, the Commission shall consider the appropriateness of such penalty to the size of the business of the person charged, including how to mitigate undue adverse

economic impacts on small businesses, the nature, circumstances, extent, and gravity of the violation, including, the nature of the product defect, the severity of the risk of injury, the occurrence or absence of injury, and the number of defective products distributed, and such other factors as appropriate. The amount of such penalty when finally determined, or the amount agreed on compromise, may be deducted from any sums owing by the United States to the person charged.

(d) "Knowingly" defined

As used in the first sentence of subsection (a)(1) of this section, the term "knowingly" means (1) the having of actual knowledge, or (2) the presumed having of knowledge deemed to be possessed by a reasonable man who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations.

(Pub.L. 92–573, § 20, Oct. 27, 1972, 86 Stat. 1225; Pub.L. 94–284, § 13(b), May 11, 1976, 90 Stat. 509; Pub.L. 95–631, § 6(c), Nov. 10, 1978, 92 Stat. 3745; Pub.L. 97–35, Title XII, § 1211(c), Aug. 13, 1981, 95 Stat. 721; Pub.L. 101–608, Title I, §§ 112(e), 115(a), Nov. 16, 1990, 104 Stat. 3117, 3118; Pub.L. 110–314, Title II, § 217(a)(1), (b)(1)(A), Aug. 14, 2008, 122 Stat. 3058.)

§ 2070. Criminal penalties

(a) Violation of section 2068 of this title is punishable by—

(1) imprisonment for not more than 5 years for a knowing and willful violation of that section;

(2) a fine determined under section 3571 of Title 18; or

(3) both.

(b) Any individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of section 2068 of this title shall be subject to penalties under this section without regard to any penalties to which that corporation may be subject under subsection (a) of this section.

(c)(1) In addition to the penalties provided by subsection (a), the penalty for a criminal violation of this chapter or any other Act enforced by the Commission may include the forfeiture of assets associated with the violation.

(2) In this subsection, the term "criminal violation" means a violation of this chapter or any other Act enforced by the Commission for which the violator is sentenced to pay a fine, be imprisoned, or both.

(Pub.L. 92–573, § 21, Oct. 27, 1972, 86 Stat. 1225; Pub.L. 110–314, Title II, § 217(c)(1), (2), (d), Aug. 14, 2008, 122 Stat. 3060.)

§ 2071. Injunctive enforcement and seizure

(a) The United States district courts shall have jurisdiction to take the following action:

(1) Restrain any violation of section 2068 of this title.

(2) Restrain any person from manufacturing for sale, offering for sale, distributing in commerce, or importing into the United States a product in violation of an order in effect under section 2064(d) of this title.

(3) Restrain any person from distributing in commerce a product which does not comply with a consumer product safety rule.

Such actions may be brought by the Commission (without regard to section 2076(b)(7)(A) of this title) or by the Attorney General in any United States district court for a district wherein any act, omission, or transaction constituting the violation occurred, or in such court for the district wherein the defendant is found or transacts business. In any action under this section process may be served on a defendant in any other district in which the defendant resides or may be found.

(b) Any consumer product—

(1) which fails to conform with an applicable consumer product safety rule, or

(2) the manufacture for sale, offering for sale, distribution in commerce, or the importation into the United States of which has been prohibited by an order in effect under section 2064(d) of this title, when introduced into or while in commerce or while held for sale after shipment in commerce shall be liable to be proceeded against on libel of information and condemned in any district court of the United States within the jurisdiction of which such consumer product is found. Proceedings in cases instituted under the authority of this subsection shall conform as nearly as possible to proceedings in rem in admiralty. Whenever such proceedings involving substantially similar consumer products are pending in courts of two or more judicial districts they shall be consolidated for trial by order of any such court upon application reasonably made by any party in interest upon notice to all other parties in interest.

(As amended Pub.L. 94–284, §§ 11(b), 12(c), May 11, 1976, 90 Stat. 507, 508.)

§ 2072. Suits for damages

(a) Persons injured; costs; amount in controversy

Any person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule, or any other rule or order issued by the Commission may sue any person who knowingly (including willfully) violated any such rule or order in any

district court of the United States in the district in which the defendant resides or is found or has an agent, shall recover damages sustained, and may, if the court determines it to be in the interest of justice, recover the costs of suit, including reasonable attorneys' fees (determined in accordance with section 2060(f) of this title) and reasonable expert witnesses' fees: Provided, That the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, unless such action is brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Denial and imposition of costs

Except when express provision is made in a statute of the United States, in any case in which the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) Remedies available

The remedies provided for in this section shall be in addition to and not in lieu of any other remedies provided by common law or under Federal or State law.

(As amended Pub.L. 94–284, § 10(c), May 11, 1976, 90 Stat. 507; Pub.L. 96–486, § 3, Dec. 1, 1980, 94 Stat. 2369; Pub.L. 97–35, Title XII, § 1211(h)(3)(B), Aug. 13, 1981, 95 Stat. 723.)

§ 2073. Additional enforcement

(a) In general

Any interested person (including any individual or nonprofit, business, or other entity) may bring an action in any United States district court for the district in which the defendant is found or transacts business to enforce a consumer product safety rule or an order under section 2064 of this title, and to obtain appropriate injunctive relief. Not less than thirty days prior to the commencement of such action, such interested persons shall give notice by registered mail to the Commission, to the Attorney General, and to the person against whom such action is directed. Such notice shall state the nature of the alleged violation of any such standard or order, the relief to be requested, and the court in which the action will be brought. No separate suit shall be brought under this section if at the time the suit is brought the same alleged violation is the subject of a pending civil or criminal action by the United States under this chapter. In any action under this section the court may in the interest of justice award the costs of suit, including reasonable attorneys' fees (determined in accordance with section 2060(f) of this title) and reasonable expert witnesses' fees.

(b) State attorney general enforcement

(1) Right of action

Except as provided in paragraph (5), the attorney general of a State, or other authorized State officer, alleging a violation of section 2068(a)(1), (2), (5), (6), (7), (9), or (12) of this title that affects or may affect such State or its residents may bring an action on behalf of the residents of the State in any United States district court for the district in which the defendant is found or transacts business to obtain appropriate injunctive relief.

(2) Initiation of civil action

(A) Notice to Commission required in all cases

A State shall provide written notice to the Commission regarding any civil action under paragraph (1). Except when proceeding under subparagraph (C), the State shall provide the notice at least 30 days before the date on which the State intends to initiate the civil action by filing a complaint.

(B) Filing of complaint

A State may initiate the civil action by filing a complaint—

(i) at any time after the date on which the 30-day period ends; or

(ii) earlier than such date if the Commission consents to an earlier initiation of the civil action by the State.

(C) Actions involving substantial product hazard

Notwithstanding subparagraph (B), a State may initiate a civil action under paragraph (1) by filing a complaint immediately after notifying the Commission of the State's determination that such immediate action is necessary to protect the residents of the State from a substantial product hazard (as defined in section 2064(a) of this title).

(D) Form of notice

The written notice required by this paragraph may be provided by electronic mail, facsimile machine, or any other means of communication accepted by the Commission.

(E) Copy of complaint

A State shall provide a copy of the complaint to the Commission upon filing the complaint or as soon as possible thereafter.

(3) Intervention by the Commission

The Commission may intervene in such civil action and upon intervening—

(A) be heard on all matters arising in such civil action; and

(B) file petitions for appeal of a decision in such civil action.

(4) Construction

Nothing in this section, section 1264(d) of this title, section 1477 of this title, or section 1194(d) of this title shall be construed—

(A) to prevent the attorney general of a State, or other authorized State officer, from exercising the powers conferred on the attorney general, or other authorized State officer, by the laws of such State; or

(B) to prohibit the attorney general of a State, or other authorized State officer, from proceeding in State or Federal court on the basis of an alleged violation of any civil or criminal statute of that State.

(5) Limitation

No separate suit shall be brought under this subsection (other than a suit alleging a violation of paragraph (1) or (2) of section 2068(a) of this title) if, at the time the suit is brought, the same alleged violation is the subject of a pending civil or criminal action by the United States under this chapter.

(6) Restrictions on private counsel

If private counsel is retained to assist in any civil action under paragraph (1), the private counsel retained to assist the State may not—

(A) share with participants in other private civil actions that arise out of the same operative facts any information that is—

(i) subject to attorney-client or work product privilege; and

(ii) was obtained during discovery in the action under paragraph (1); or

(B) use any information that is subject to attorney-client or work product privilege that was obtained while assisting the State in the action under paragraph (1) in any other private civil actions that arise out of the same operative facts.

(Pub.L. 92–573, § 24, Oct. 27, 1972, 86 Stat. 1226; Pub.L. 94–284, § 10(d), May 11, 1976, 90 Stat. 507; Pub.L. 97–35, Title XII, § 1211(a), (h)(3)(C), Aug. 13, 1981, 95 Stat. 721, 723; Pub.L. 110–314, Title II, § 218(a), Aug. 14, 2008, 122 Stat. 3060.)

§ 2074. Private remedies

(a) Liability at common law or under State statute not relieved by compliance

Compliance with consumer product safety rules or other rules or orders under this chapter shall not relieve any person from liability at common law or under State statutory law to any other person.

(b) Evidence of Commission's inaction inadmissible in actions relating to consumer products

The failure of the Commission to take any action or commence a proceeding with respect to the safety of a consumer product shall not be admissible in evidence in litigation at common law or under State statutory law relating to such consumer product.

(c) Public information

Subject to sections 2055(a)(2) and 2055(b) of this title but notwithstanding section 2055(a)(1) of this title, (1) any accident or investigation report made under this chapter by an officer or employee of the Commission shall be made available to the public in a manner which will not identify any injured person or any person treating him, without the consent of the person so identified, and (2) all reports on research projects, demonstration projects, and other related activities shall be public information.

(Pub.L. 92–573, § 25, Oct. 27, 1972, 86 Stat. 1227.)

§ 2075. State standards

(a) State compliance to Federal standards

Whenever a consumer product safety standard under this chapter is in effect and applies to a risk of injury associated with a consumer product, no State or political subdivision of a State shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging, or labeling of such product which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are identical to the requirements of the Federal standard.

(b) Consumer product safety requirements which impose performance standards more stringent than Federal standards

Subsection (a) of this section does not prevent the Federal Government or the government of any State or political subdivision of a State from establishing or continuing in effect a safety requirement applicable to a consumer product for its own use which requirement is designed to protect against a risk of injury associated with the product and which is not identical to the consumer product safety standard applicable to the product under this chapter if the Federal, State, or political subdivision requirement provides a higher degree of protection from such risk of injury than the standard applicable under this chapter.

(c) Exemptions

Upon application of a State or political subdivision of a State, the Commission may by rule, after notice and opportunity for oral presentation of views, exempt from the provisions of subsection (a) of this

section (under such conditions as it may impose in the rule) any proposed safety standard or regulation which is described in such application and which is designed to protect against a risk of injury associated with a consumer product subject to a consumer product safety standard under this chapter if the State or political subdivision standard or regulation—

(1) provides a significantly higher degree of protection from such risk of injury than the consumer product safety standard under this chapter, and

(2) does not unduly burden interstate commerce.

In determining the burden, if any, of a State or political subdivision standard or regulation on interstate commerce, the Commission shall consider and make appropriate (as determined by the Commission in its discretion) findings on the technological and economic feasibility of complying with such standard or regulation, the cost of complying with such standard or regulation, the geographic distribution of the consumer product to which the standard or regulation would apply, the probability of other States or political subdivisions applying for an exemption under this subsection for a similar standard or regulation, and the need for a national, uniform standard under this chapter for such consumer product.

(As amended Pub.L. 94–284, § 17(d), May 11, 1976, 90 Stat. 514.)

§ 2076. Additional functions of Consumer Product Safety Commission

(a) Authority to conduct hearings or other inquiries

The Commission may, by one or more of its members or by such agents or agency as it may designate, conduct any hearing or other inquiry necessary or appropriate to its functions anywhere in the United States. A Commissioner who participates in such a hearing or other inquiry shall not be disqualified solely by reason of such participation from subsequently participating in a decision of the Commission in the same matter. The Commission shall publish notice of any proposed hearing in the Federal Register and shall afford a reasonable opportunity for interested persons to present relevant testimony and data.

(b) Commission powers; orders

The Commission shall also have the power—

(1) to require, by special or general orders, any person to submit in writing such reports and answers to questions as the Commission may prescribe to carry out a specific regulatory or enforcement function of the Commission; and such submission shall be made within such reasonable period and under oath or otherwise as the Commission may determine;

(2) to administer oaths;

(3) to require by subpena the attendance and testimony of witnesses and the production of all documentary and physical evidence relating to the execution of its duties;

(4) in any proceeding or investigation to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3) of this subsection;

(5) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States;

(6) to accept gifts and voluntary and uncompensated services, notwithstanding the provisions of section 1342 of Title 31;

(7) to—

(A) initiate, prosecute, defend, or appeal (other than to the Supreme Court of the United States), through its own legal representative and in the name of the Commission, any civil action if the Commission makes a written request to the Attorney General for representation in such civil action and the Attorney General does not within the 45-day period beginning on the date such request was made notify the Commission in writing that the Attorney General will represent the Commission in such civil action, and

(B) initiate, prosecute, or appeal, through its own legal representative, with the concurrence of the Attorney General or through the Attorney General, any criminal action, for the purpose of enforcing the laws subject to its jurisdiction;

(8) to lease buildings or parts of buildings in the District of Columbia, without regard to section 8141 of Title 40, for the use of the Commission;

(9) to delegate to the general counsel of the Commission the authority to issue subpoenas solely to Federal, State, or local government agencies for evidence described in paragraph (3); and

(10) to delegate any of its functions or powers, other than the power to issue subpenas under paragraph (3) (except as provided in paragraph (9)), to any officer or employee of the Commission.

An order issued under paragraph (1) shall contain a complete statement of the reason the Commission requires the report or answers specified in the order to carry out a specific regulatory or enforcement function of the Commission. Such an order shall be designed to place the least burden on the person subject to the order as is practicable taking into account the purpose for which the order was issued.

(c) Noncompliance with subpena or Commission order; contempt

Any United States district court within the jurisdiction of which any inquiry is carried on, may, upon petition by the Commission (subject to subsection (b)(7) of this section) or by the Attorney General, in case of refusal to obey a subpena or order of the Commission issued under subsection (b) of this section, issue an order requiring compliance therewith; and any failure to obey the order of the court may be punished by the court as a contempt thereof.

(d) Disclosure of information

No person shall be subject to civil liability to any person (other than the Commission or the United States) for disclosing information at the request of the Commission.

(e) Performance and technical data

The Commission may by rule require any manufacturer of consumer products to provide to the Commission such performance and technical data related to performance and safety as may be required to carry out the purposes of this chapter, and to give such notification of such performance and technical data at the time of original purchase to prospective purchasers and to the first purchaser of such product for purposes other than resale, as it determines necessary to carry out the purposes of this chapter.

(f) Purchase of consumer products by Commission

For purposes of carrying out this chapter, the Commission may purchase any consumer product and it may require any manufacturer, distributor, or retailer of a consumer product to sell the product to the Commission at manufacturer's, distributor's, or retailer's cost.

(g) Contract authority

The Commission is authorized to enter into contracts with governmental entities, private organizations, or individuals for the conduct of activities authorized by this chapter.

(h) Research, development, and testing facilities

The Commission may plan, construct, and operate a facility or facilities suitable for research, development, and testing of consumer products in order to carry out this chapter.

(i) Recordkeeping; audit

(1) Each recipient of assistance under this chapter pursuant to grants or contracts entered into under other than competitive bidding procedures shall keep such records as the Commission by rule shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project undertaken in connection with which such assistance is given or used, and the amount of that portion of the cost of the project

or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

(2) The Commission and the Comptroller General of the United States, or their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of the recipients that are pertinent to the grants or contracts entered into under this chapter under other than competitive bidding procedures.

(j) Report to President and Congress

Notwithstanding section 3003 of the Federal Reports Elimination and Sunset Act of 1995 (31 U.S.C. 1113 note), the Commission shall prepare and submit to the President and the Congress at the beginning of each regular session of Congress a comprehensive report on the administration of this chapter for the preceding fiscal year. Such report shall include—

(1) a thorough appraisal, including statistical analyses, estimates, and long-term projections, of the incidence of injury and effects to the population resulting from consumer products, with a breakdown, insofar as practicable, among the various sources of such injury;

(2) a list of consumer product safety rules prescribed or in effect during such year;

(3) an evaluation of the degree of observance of consumer product safety rules, including a list of enforcement actions, court decisions, and compromises of alleged violations, by location and company name;

(4) a summary of outstanding problems confronting the administration of this chapter in order of priority;

(5) the number and a summary of recall orders issued under section 2061 or 2064 of this title during such year and a summary of voluntary corrective actions taken by manufacturers in consultation with the Commission of which the Commission has notified the public, and an assessment of such orders and actions;

(6) beginning not later than 1 year after August 14, 2008.

(A) progress reports and incident updates with respect to action plans implemented under section 2064(d) of this title;

(B) statistics with respect to injuries and deaths associated with products that the Commission determines present a substantial product hazard under section 2064(c) of this title; and

(C) the number and type of communication from consumers to the Commission with respect to each product with

respect to which the Commission takes action under section 2064(d) of this title;

(7) an analysis and evaluation of public and private consumer product safety research activities;

(8) a list, with a brief statement of the issues, of completed or pending judicial actions under this chapter;

(9) the extent to which technical information was disseminated to the scientific and commercial communities and consumer information was made available to the public;

(10) the extent of cooperation between Commission officials and representatives of industry and other interested parties in the implementation of this chapter, including a log or summary of meetings held between Commission officials and representatives of industry and other interested parties;

(11) an appraisal of significant actions of State and local governments relating to the responsibilities of the Commission;

(12) with respect to voluntary consumer product safety standards for which the Commission has participated in the development through monitoring or offering of assistance and with respect to voluntary consumer product safety standards relating to risks of injury that are the subject of regulatory action by the Commission, a description of—

(A) the number of such standards adopted;

(B) the nature and number of the products which are the subject of such standards;

(C) the effectiveness of such standards in reducing potential harm from consumer products;

(D) the degree to which staff members of the Commission participate in the development of such standards;

(E) the amount of resources of the Commission devoted to encouraging development of such standards; and

(F) such other information as the Commission determines appropriate or necessary to inform the Congress on the current status of the voluntary consumer product safety standard program; and

(13) such recommendations for additional legislation as the Commission deems necessary to carry out the purposes of this chapter.

(k) Budget estimates and requests; legislative recommendations; testimony; comments on legislation

(1) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of that estimate or request to the Congress.

(2) Whenever the Commission submits any legislative recommendations, or testimony, or comments on legislation to the President or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

(Pub.L. 92–573, § 27, Oct. 27, 1972, 86 Stat. 1227; Pub.L. 94–273, § 31, Apr. 21, 1976, 90 Stat. 380; Pub.L. 94–284, §§ 8(b), 11(c), (d), 14, May 11, 1976, 90 Stat. 506 to 509; Pub.L. 95–631, § 11, Nov. 10, 1978, 92 Stat. 3748; Pub.L. 97–35, Title XII, §§ 1207(b), 1208, 1209(c), 1211(d), Aug. 13, 1981, 95 Stat. 718, 720, 721; Pub.L. 110–314, Title II, § 209(a), Aug. 14, 2008, 122 Stat. 3046; Pub.L. 112–28, § 8, Aug. 12, 2011, 125 Stat. 282.)

§ 2076a. Report on civil penalties

(1) Beginning 1 year after Nov. 16, 1990, and every year thereafter, the Consumer Product Safety Commission shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives the information specified in paragraph (2) of this subsection. Such information may be included in the annual report to the Congress submitted by the Commission.

(2) The Commission shall submit information with respect to the imposition of civil penalties under the statutes which it administers. The information shall include the number of civil penalties imposed, an identification of the violations that led to the imposition of such penalties, and the amount of revenue recovered from the imposition of such penalties.

(Pub.L. 101–608, Title I, § 115(d), Nov. 16, 1990, 104 Stat. 3121.)

§ 2076b. Inspector General audits and reports

(a) Improvements by the Commission

The Inspector General of the Commission shall conduct reviews and audits to assess—

(1) the Commission's capital improvement efforts, including improvements and upgrades of the Commission's information technology architecture and systems and the development of the database of publicly available information on incidents involving injury or death required under section 6A of the Consumer Product Safety Act, as added by section 212 of this Act; and

(2) the adequacy of procedures for accrediting conformity assessment bodies as authorized by section 14(a)(3) of the Consumer

Product Safety Act (15 U.S.C. 2063(a)(3)), as amended by this Act, and overseeing the third party testing required by such section.

(b) Employee complaints

Within 1 year after August 14, 2008, the Inspector General shall conduct a review of—

(1) complaints received by the Inspector General from employees of the Commission about failures of other employees to enforce the rules or regulations of the Consumer Product Safety Act or any other Act enforced by the Commission or otherwise carry out their responsibilities under such Acts if such alleged failures raise issues of conflicts of interest, ethical violations, or the absence of good faith; and

(2) actions taken by the Commission to address such failures and complaints, including an assessment of the timeliness and effectiveness of such actions.

(c) Public internet website links

Not later than 30 days after August 14, 2008, the Commission shall establish and maintain—

(1) a direct link on the homepage of its Internet website to the Internet webpage of the Commission's Office of Inspector General; and

(2) a mechanism on the webpage of the Commission's Office of Inspector General by which individuals may anonymously report cases of waste, fraud, or abuse with respect to the Commission.

(d) Reports

(1) Activities and needs of Inspector General

Not later than 60 days after August 14, 2008, the Inspector General of the Commission shall transmit a report to the appropriate Congressional committees on the activities of the Inspector General, any structural barriers which prevent the Inspector General from providing robust oversight of the activities of the Commission, and any additional authority or resources that would facilitate more effective oversight.

(2) Reviews of improvements and employee complaints

Beginning for fiscal year 2010, the Inspector General of the Commission shall include in an annual report to the appropriate Congressional committees the Inspector General's findings, conclusions, and recommendations from the reviews and audits under subsections (a) and (b).

(Pub.L. 110–314, Title II, § 205, Aug. 14, 2008, 122 Stat. 3043.)

§ 2077. Chronic Hazard Advisory Panels

(a) Appointment; purposes

The Commission shall appoint Chronic Hazard Advisory Panels (hereinafter referred to as the Panel or Panels) to advise the Commission in accordance with the provisions of section 2080(b) of this title respecting the chronic hazards of cancer, birth defects, and gene mutations associated with consumer products.

(b) Composition; membership

Each Panel shall consist of 7 members appointed by the Commission from a list of nominees who shall be nominated by the President of the National Academy of Sciences from scientists—

(1) who are not officers or employees of the United States (other than employees of the National Institutes of Health, the National Toxicology Program, or the National Center for Toxicological Research), and who do not receive compensation from or have any substantial financial interest in any manufacturer, distributor, or retailer of a consumer product; and

(2) who have demonstrated the ability to critically assess chronic hazards and risks to human health presented by the exposure of humans to toxic substances or as demonstrated by the exposure of animals to such substances.

The President of the National Academy of Sciences shall nominate for each Panel a number of individuals equal to three times the number of members to be appointed to the Panel.

(c) Chairman and Vice Chairman; election; term

The Chairman and Vice Chairman of the Panel shall be elected from among the members and shall serve for the duration of the Panel.

(d) Majority vote

Decisions of the Panel shall be made by a majority of the Panel.

(e) Administrative support services

The Commission shall provide each Panel with such administrative support services as it may require to carry out its duties under section 2080 of this title.

(f) Compensation

A member of a Panel appointed under subsection (a) of this section shall be paid at a rate not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS–18 of the General Schedule for each day (including travel time) during which the member is engaged in the actual performance of the duties of the Panel.

(g) Requests for and disclosures of information

Each Panel shall request information and disclose information to the public, as provided in subsection (h) of this section, only through the Commission.

(h) Information from other Federal departments and agencies

(1) Notwithstanding any statutory restriction on the authority of agencies and departments of the Federal Government to share information, such agencies and departments shall provide the Panel with such information and data as each Panel, through the Commission, may request to carry out its duties under section 2080 of this title. Each Panel may request information, through the Commission, from States, industry and other private sources as it may require to carry out its responsibilities.

(2) Section 2055 of this title shall apply to the disclosure of information by the Panel but shall not apply to the disclosure of information to the Panel.

(Pub.L. 92–573, § 28, as added Pub.L. 97–35, Title XII, § 1206(a), Aug. 13, 1981, 95 Stat. 716, and amended Pub.L. 101–608, Title I, § 116, Nov. 16, 1990, 104 Stat. 3121; Pub.L. 110–314, Title II, § 235(c)(6), Aug. 14, 2008, 122 Stat. 3075.)

§ 2078. Cooperation with States and other Federal agencies

(a) Programs to promote Federal-State cooperation

The Commission shall establish a program to promote Federal-State cooperation for the purposes of carrying out this chapter. In implementing such program the Commission may—

(1) accept from any State or local authorities engaged in activities relating to health, safety, or consumer protection assistance in such functions as injury data collection, investigation, and educational programs, as well as other assistance in the administration and enforcement of this chapter which such States or localities may be able and willing to provide and, if so agreed, may pay in advance or otherwise for the reasonable cost of such assistance, and

(2) commission any qualified officer or employee of any State or local agency as an officer of the Commission for the purpose of conducting examinations, investigations, and inspections.

(b) Appropriateness of State and local programs

In determining whether such proposed State and local programs are appropriate in implementing the purposes of this chapter, the Commission shall give favorable consideration to programs which establish separate State and local agencies to consolidate functions relating to product safety and other consumer protection activities.

(c) Cooperation of Federal departments and agencies

The Commission may obtain from any Federal department or agency such statistics, data, program reports, and other materials as it may deem necessary to carry out its functions under this chapter. Each such department or agency may cooperate with the Commission and, to the extent permitted by law, furnish such materials to it. The Commission and the heads of other departments and agencies engaged in administering programs related to product safety shall, to the maximum extent practicable, cooperate and consult in order to insure fully coordinated efforts.

(d) Utilization of National Institute of Standards and Technology

The Commission shall, to the maximum extent practicable, utilize the resources and facilities of the National Institute of Standards and Technology, on a reimbursable basis, to perform research and analyses related to risks of injury associated with consumer products (including fire and flammability risks), to develop test methods, to conduct studies and investigations, and to provide technical advice and assistance in connection with the functions of the Commission.

(e) Copies of accident or investigation reports to other agencies; conditions

Notwithstanding section 2055(a)(3) of this title, the Commission may provide to another Federal agency or a State or local agency or authority engaged in activities relating to health, safety, or consumer protection, copies of any accident or investigation report made under this chapter by any officer, employee, or agent of the Commission only if (1) information which under section 2055(a)(2) of this title is to be considered confidential is not included in any copy of such report which is provided under this subsection; and (2) each Federal agency and State and local agency and authority which is to receive under this subsection a copy of such report provides assurances satisfactory to the Commission that the identity of any injured person and any person who treated an injured person will not, without the consent of the person identified, be included in—

(A) any copy of any such report, or

(B) any information contained in any such report, which the agency or authority makes available to any member of the public. No Federal agency or State or local agency or authority may disclose to the public any information contained in a report received by the agency or authority under this subsection unless with respect to such information the Commission has complied with the applicable requirements of section 2055(b) of this title.

(f) Sharing of information with Federal, State, local, and foreign Government agencies

(1) Agreements and conditions

Notwithstanding the requirements of subsections (a)(3) and (b) of section 2055 of this title, relating to public disclosure of information, the Commission may make information obtained by the Commission available to any Federal, State, local, or foreign government agency upon the prior certification of an appropriate official of any such agency, either by a prior agreement or memorandum of understanding with the Commission or by other written certification, that such material will be maintained in confidence and will be used only for official law enforcement or consumer protection purposes, if—

(A) the agency has set forth a bona fide legal basis for its authority to maintain the material in confidence;

(B) the materials are to be used for purposes of investigating, or engaging in enforcement proceedings related to, possible violations of—

(i) laws regulating the manufacture, importation, distribution, or sale of defective or unsafe consumer products, or other practices substantially similar to practices prohibited by any law administered by the Commission;

(ii) a law administered by the Commission, if disclosure of the material would further a Commission investigation or enforcement proceeding; or

(iii) with respect to a foreign law enforcement agency, with the approval of the Attorney General, other foreign criminal laws, if such foreign criminal laws are offenses defined in or covered by a criminal mutual legal assistance treaty in force between the government of the United States and the foreign law enforcement agency's government; and

(C) in the case of a foreign government agency, such agency is not from a foreign state that the Secretary of State has determined, in accordance with section 2405(j) of Title 50, Appendix, has repeatedly provided support for acts of international terrorism, unless and until such determination is rescinded pursuant to section 2405(j)(4) of Title 50, Appendix.

(2) Abrogation of agreements

The Commission may abrogate any agreement or memorandum of understanding with another agency if the Commission determines that the other agency has failed to maintain in confidence any information provided under such agreement or memorandum of understanding, or has used any such information for purposes other than those set forth in such agreement or memorandum of understanding.

(3) Additional rules against disclosure

Except as provided in paragraph (4), the Commission shall not be required to disclose under section 552 of Title 5, or any other provision of law—

(A) any material obtained from a foreign government agency, if the foreign government agency has requested confidential treatment, or has precluded such disclosure under other use limitations, as a condition of providing the material;

(B) any material reflecting a consumer complaint obtained from any other foreign source, if that foreign source supplying the material has requested confidential treatment as a condition of providing the material; or

(C) any material reflecting a consumer complaint submitted to a Commission reporting mechanism sponsored in part by foreign government agencies.

(4) Limitation

Nothing in this subsection authorizes the Commission to withhold information from the Congress or prevent the Commission from complying with an order of a court of the United States in an action commenced by the United States or the Commission.

(5) Definition

In this subsection, the term "foreign government agency" means—

(A) any agency or judicial authority of a foreign government, including a foreign state, a political subdivision of a foreign state, or a multinational organization constituted by and comprised of foreign states, that is vested with law enforcement or investigative authority in civil, criminal, or administrative matters; and

(B) any multinational organization, to the extent that it is acting on behalf of an entity described in subparagraph (A).

(g) Notification to State health departments

Whenever the Commission is notified of any voluntary corrective action taken by a manufacturer (or a retailer in the case of a retailer selling a product under its own label) in consultation with the Commission, or issues an order under section 2064(c) or (d) of this title with respect to any product, the Commission shall notify each State's health department (or other agency designated by the State) of such voluntary corrective action or order.

(Pub.L. 92–573, § 29, Oct. 27, 1972, 86 Stat. 1230; Pub.L. 94–284, § 15, May 11, 1976, 90 Stat. 510; Pub.L. 100–418, Title V, § 5115(c), Aug. 23, 1988, 102 Stat. 1433; Pub.L. 110–314, Title II, §§ 207, 235(c)(7), Aug. 14, 2008, 122 Stat. 3046, 3075.)

§ 2079. Transfers of functions

(a) Hazardous substances and poisons

The functions of the Secretary of Health, Education, and Welfare under the Federal Hazardous Substances Act [15 U.S.C.A. § 1261 et seq.] and the Poison Prevention Packaging Act of 1970 [15 U.S.C.A. § 1471 et seq.] are transferred to the Commission. The functions of the Secretary of Health, Education, and Welfare under the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 301 et seq.], to the extent such functions relate to the administration and enforcement of the Poison Prevention Packaging Act of 1970, are transferred to the Commission.

(b) Flammable fabrics

The functions of the Secretary of Health, Education, and Welfare, the Secretary of Commerce, and the Federal Trade Commission under the Flammable Fabrics Act [15 U.S.C.A. § 1191 et seq.] are transferred to the Commission. The functions of the Federal Trade Commission under the Federal Trade Commission Act [15 U.S.C.A. § 41 et seq.], to the extent such functions relate to the administration and enforcement of the Flammable Fabrics Act, are transferred to the Commission.

(c) Household refrigerators

The functions of the Secretary of Commerce and the Federal Trade Commission under the Act of August 2, 1956 [15 U.S.C.A. § 1211 et seq.] are transferred to the Commission.

(d) Repealed. Pub.L. 110–314, Title II, § 237, Aug. 14, 2008, 122 Stat. 3076

(e) Transfer of personnel, property, records, etc.; continued application of orders, rules, etc.

(1)(A) All personnel, property, records, obligations, and commitments, which are used primarily with respect to any function transferred under the provisions of subsections (a), (b) and (c) of this section shall be transferred to the Commission, except those associated with fire and flammability research in the National Institute of Standards and Technology. The transfer of personnel pursuant to this paragraph shall be without reduction in classification or compensation for one year after such transfer, except that the Chairman of the Commission shall have full authority to assign personnel during such one-year period in order to efficiently carry out functions transferred to the Commission under this section.

(B) Any commissioned officer of the Public Health Service who upon the day before the effective date of this section, is serving as such officer primarily in the performance of functions transferred by this chapter to the Commission, may, if such officer so elects, acquire competitive status and be transferred to a competitive position in the Commission subject to subparagraph (A) of this paragraph, under the terms prescribed in

paragraphs (3) through (8)(A) of section 15(b) of the Clean Air Amendments of 1970.

(2) All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges (**A**) which have been issued, made, granted, or allowed to become effective in the exercise of functions which are transferred under this section by any department or agency, any functions of which are transferred by this section, and (**B**) which are in effect at the time this section takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Commission, by any court of competent jurisdiction, or by operation of law.

(3) The provisions of this section shall not affect any proceedings pending at the time this section takes effect before any department or agency, functions of which are transferred by this section; except that such proceedings, to the extent that they relate to functions so transferred, shall be continued before the Commission. Orders shall be issued in such proceedings, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this section had not been enacted; and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or repealed by the Commission, by a court of competent jurisdiction, or by operation of law.

(4) The provisions of this section shall not affect suits commenced prior to the date this section takes effect and in all such suits proceedings shall be had, appeals taken, and judgments rendered, in the same manner and effect as if this section had not been enacted; except that if before the date on which this section takes effect, any department or agency (or officer thereof in his official capacity) is a party to a suit involving functions transferred to the Commission, then such suit shall be continued by the Commission. No cause of action, and no suit, action, or other proceeding, by or against any department or agency (or officer thereof in his official capacity) functions of which are transferred by this section, shall abate by reason of the enactment of this section. Causes of actions, suits, actions, or other proceedings may be asserted by or against the United States or the Commission as may be appropriate and, in any litigation pending when this section takes effect, the court may at any time, on its own motion or that of any party, enter an order which will give effect to the provisions of this paragraph.

(f) "Function" defined

For purposes of this section, (1) the term "function" includes power and duty, and (2) the transfer of a function, under any provision of law, of an agency, or the head of a department shall also be a transfer of all functions under such law which are exercised by any office or officer of such agency or department.

(Pub.L. 92–573, § 30, Oct. 27, 1972, 86 Stat. 1231; Pub.L. 94–284, §§ 3(f), 16, May 11, 1976, 90 Stat. 504, 510; Pub.L. 100–418, Title V, § 5115(c), Aug. 23, 1988, 102 Stat. 1433; Pub.L. 110–314, Title II, § 237, Aug. 14, 2008, 122 Stat. 3076.)

§ 2080. Limitations on Jurisdiction of Consumer Product Safety Commission

(a) Authority to regulate

The Commission shall have no authority under this chapter to regulate any risk of injury associated with a consumer product if such risk could be eliminated or reduced to a sufficient extent by actions taken under the Occupational Safety and Health Act of 1970; the Atomic Energy Act of 1954; or the Clean Air Act. The Commission shall have no authority under this chapter to regulate any risk of injury associated with electronic product radiation emitted from an electronic product (as such terms are defined by sections 355(1) and (2) of the Public Health Service Act) if such risk of injury may be subjected to regulation under subpart 3 of part F of title III of the Public Health Service Act.

(b) Certain notices of proposed rulemaking; duties of Chronic Hazard Advisory Panel

(1) The Commission may not issue—

(A) an advance notice of proposed rulemaking for a consumer product safety rule,

(B) a notice of proposed rulemaking for a rule under section 2076(e) of this title, or

(C) an advance notice of proposed rulemaking for regulations under section 1261(q)(1) of this title, relating to a risk of cancer, birth defects, or gene mutations from a consumer product unless a Chronic Hazard Advisory Panel, established under section 2077 of this title, has, in accordance with paragraph (2), submitted a report to the Commission with respect to whether a substance contained in such product is a carcinogen, mutagen, or teratogen.

(2)(A) Before the Commission issues an advance notice of proposed rulemaking for—

(i) a consumer product safety rule,

(ii) a rule under section 2076(e) of this title, or

(iii) a regulation under section 1261(q)(1) of this title, relating to a risk of cancer, birth defects, or gene mutations from a consumer product, the Commission shall request the Panel to review the scientific data and other relevant information relating to such risk to determine if any substance in the product is a carcinogen, mutagen, or a teratogen and to report its determination to the Commission.

(B) When the Commission appoints a Panel, the Panel shall convene within 30 days after the date the final appointment is made to the Panel. The Panel shall report its determination to the Commission not later than 120 days after the date the Panel is convened or, if the Panel requests additional time, within a time period specified by the Commission. If the determination reported to the Commission states that a substance in a product is a carcinogen, mutagen, or a teratogen, the Panel shall include in its report an estimate, if such an estimate is feasible, of the probable harm to human health that will result from exposure to the substance.

(C) A Panel appointed under section 2077 of this title shall terminate when it has submitted its report unless the Commission extends the existence of the Panel.

(D) The Federal Advisory Committee Act shall not apply with respect to any Panel established under this section.

(c) Panel report; incorporation into advance notice and final rule

Each Panel's report shall contain a complete statement of the basis for the Panel's determination. The Commission shall consider the report of the Panel and incorporate such report into the advance notice of proposed rulemaking and final rule.

(Pub.L. 97–35, Title XII, § 1206(b), Aug. 13, 1981, 95 Stat. 717, Pub.L. 97–414, § 9(j)(5), Jan. 4, 1983, 96 Stat. 2064.)

§ 2081. Authorization of appropriations

(a) General authorization of appropriations

(1) In general

There are authorized to be appropriated to the Commission for the purpose of carrying out the provisions of this chapter and any other provision of law the Commission is authorized or directed to carry out—

(A) $118,200,000 for fiscal year 2010;

(B) $115,640,000 for fiscal year 2011;

(C) $123,994,000 for fiscal year 2012;

(D) $131,783,000 for fiscal year 2013; and

(E) $136,409,000 for fiscal year 2014.

(2) Travel allowance

From amounts appropriated pursuant to paragraph (1), there shall be made available $1,200,000 for fiscal year 2010, $1,248,000 for fiscal year 2011, $1,297,000 for fiscal year 2012, $1,350,000 for fiscal year 2013, and $1,403,000 for fiscal year 2014, for travel, subsistence, and related expenses incurred in furtherance of the official duties of Commissioners and employees with respect to attendance at meetings or similar

functions, which shall be used by the Commission for such purposes in lieu of acceptance of payment or reimbursement for such expenses from any person—

(A) seeking official action from, doing business with, or conducting activities regulated by, the Commission; or

(B) whose interests may be substantially affected by the performance or nonperformance of the Commissioner's or employee's official duties.

(b) Limitation

No funds appropriated under subsection (a) of this section may be used to pay any claim described in section 2053(i) of this title whether pursuant to a judgment of a court or under any award, compromise, or settlement of such claim made under section 2672 of Title 28, or under any other provision of law.

(Pub.L. 92–573, § 32, Oct. 27, 1972, 86 Stat. 1233; Pub.L. 94–284, §§ 2, 5(b), May 11, 1976, 90 Stat. 503, 505; Pub.L. 95–631, § 1, Nov. 10, 1978, 92 Stat. 3742; Pub.L. 97–35, Title XII, § 1214, Aug. 13, 1981, 95 Stat. 724; Pub.L. 101–608, Title I, § 117, Nov. 16, 1990, 104 Stat. 3121; Pub.L. 103–437, § 5(c)(1), Nov. 2, 1994, 108 Stat. 4582; Pub.L. 110–314, Title II, §§ 201(a), (c), 235(c)(4), Aug. 14, 2008, 122 Stat. 3039, 3075.)

§ 2082. Interim cellulose insulation safety standard

(a) Applicability of specification of General Services Administration; authority and effect of interim standard; modifications; criteria; labeling requirements

(1) Subject to the provisions of paragraph (2), on and after the last day of the 60-day period beginning on July 11, 1978, the requirements for flame resistance and corrosiveness set forth in the General Services Administration's specification for cellulose insulation, HH–I–515C (as such specification was in effect on February 1, 1978), shall be deemed to be an interim consumer product safety standard which shall have all the authority and effect of any other consumer product safety standard promulgated by the Commission under this chapter. During the 45-day period beginning on July 11, 1978, the Commission may make, and shall publish in the Federal Register, such technical, nonsubstantive changes in such requirements as it deems appropriate to make such requirements suitable for promulgation as a consumer product safety standard. At the end to the 60-day period specified in the first sentence of this paragraph, the Commission shall publish in the Federal Register such interim consumer product safety standard, as altered by the Commission under this paragraph.

(2) The interim consumer product safety standard established in paragraph (1) shall provide that any cellulose insulation which is produced or distributed for sale or use as a consumer product shall have

a flame spread rating of 0 to 25, as such rating is set forth in the General Services Administration's specification for cellulose insulation, HH–I–515C.

(3) During the period for which the interim consumer product safety standard established in subsection (a) of this section is in effect, in addition to complying with any labeling requirement established by the Commission under this chapter, each manufacturer or private labeler of cellulose insulation shall include the following statement on any container of such cellulose insulation: "ATTENTION: This material meets the applicable minimum Federal flammability standard. This standard is based upon laboratory tests only, which do not represent actual conditions which may occur in the home." Such statement shall be located in a conspicuous place on such container and shall appear in conspicuous and legible type in contrast by typography, layout, and color with other printed matter on such container.

(b) Scope of judicial review

Judicial review of the interim consumer product safety standard established in subsection (a) of this section, as such standard is in effect on and after the last day of the 60-day period specified in such subsection, shall be limited solely to the issue of whether any changes made by the Commission under paragraph (1) are technical, nonsubstantive changes. For purposes of such review, any change made by the Commission under paragraph (1) which requires that any test to determine the flame spread rating of cellulose insulation shall include a correction for variations in test results caused by equipment used in the test shall be considered a technical, nonsubstantive change.

(c) Enforcement; violations; promulgation of final standard; procedures applicable to promulgation; revision of interim standard; procedures applicable to revision

(1)(A) Any interim consumer product safety standard established pursuant to this section shall be enforced in the same manner as any other consumer product safety standard until such time as there is in effect a final consumer product safety standard promulgated by the Commission, as provided in subparagraph (B), or until such time as it is revoked by the Commission under section 2058(e) of this title. A violation of the interim consumer product safety standard shall be deemed to be a violation of a consumer product safety standard promulgated by the Commission under section 2058 of this title.

(B) If the Commission determines that the interim consumer product safety standard does not adequately protect the public from the unreasonable risk of injury associated with flammable or corrosive cellulose insulation, it shall promulgate a final consumer product safety standard to protect against such risk. Such final standard shall be promulgated pursuant to section 553 of Title 5, except that the Commission shall give interested persons an opportunity for the oral

presentation of data, views, or arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation. The provisions of section 2058(b), (c), and (d) of this title shall apply to any proceeding to promulgate such final standard. In any judicial review of such final standard under section 2060 of this title, the court shall not require any demonstration that each particular finding made by the Commission under section 2058(c) of this title is supported by substantial evidence. The court shall affirm the action of the Commission unless the court determines that such action is not supported by substantial evidence on the record taken as a whole.

(2)(A) Until there is in effect such a final consumer product safety standard, the Commission shall incorporate into the interim consumer product safety standard, in accordance with the provisions of this paragraph, each revision superseding the requirements for flame resistance and corrosiveness referred to in subsection (a) of this section and promulgated by the General Services Administration.

(B) At least 45 days before any revision superseding such requirements is to become effective, the Administrator of the General Services Administration shall notify the Commission of such revision. In the case of any such revision which becomes effective during the period beginning on February 1, 1978, and ending on July 11, 1978, such notice from the Administrator of the General Services Administration shall be deemed to have been made on July 11, 1978.

(C)(i) No later than 45 days after receiving any notice under subparagraph (B), the Commission shall publish the revision, including such changes in the revision as it considers appropriate to make the revision suitable for promulgation as an amendment to the interim consumer product safety standard, in the Federal Register as a proposed amendment to the interim consumer product safety standard.

(ii) The Commission may extend the 45-day period specified in clause (i) for an additional period of not more than 150 days if the Commission determines that such extension is necessary to study the technical and scientific basis for the revision involved, or to study the safety and economic consequences of such revision.

(D)(i) Additional extensions of the 45-day period specified in subparagraph (C)(i) may be taken by the Commission if—

(I) the Commission makes the determination required in subparagraph (C)(ii) with respect to each such extension; and

(II) in the case of further extensions proposed by the Commission after an initial extension under this clause, such further extensions have not been disapproved under clause (iv).

(ii) Any extension made by the Commission under this subparagraph shall be for a period of not more than 45 days.

(iii) Prior notice of each extension made by the Commission under this subparagraph, together with a statement of the reasons for such extension and an estimate of the length of time required by the Commission to complete its action upon the revision involved, shall be published in the Federal Register and shall be submitted to the appropriate Congressional committees.

(iv) In any case in which the Commission takes an initial 45-day extension under clause (i), the Commission may not take any further extensions under clause (i) if each committee referred to in clause (iii) disapproves by committee resolution any such further extensions before the end of the 15-day period following notice of such initial extension made by the Commission in accordance with clause (iii).

(E) The Commission shall give interested persons an opportunity to comment upon any proposed amendment to the interim consumer product safety standard during the 30-day period following any publication by the Commission under subparagraph (C).

(F) No later than 90 days after the end of the period specified in subparagraph (E), the Commission shall promulgate the amendment to the interim consumer product safety standard unless the Commission determines, after consultation with the Secretary of Energy, that—

(i) such amendment is not necessary for the protection of consumers from the unreasonable risk of injury associated with flammable or corrosive cellulose insulation; or

(ii) implementation of such amendment will create an undue burden upon persons who are subject to the interim consumer product safety standard.

(G) The provisions of section 2060 of this title shall not apply to any judicial review of any amendment to the interim product safety standard promulgated under this paragraph.

(d) Reporting requirements of other Federal departments, agencies, etc., of violations

Any Federal department, agency, or instrumentality, or any Federal independent regulatory agency, which obtains information which reasonably indicates that cellulose insulation is being manufactured or distributed in violation of this chapter shall immediately inform the Commission of such information.

(e) Reporting requirements of Commission to Congressional committees; contents, time of submission, etc.

(1) The Commission, no later than 45 days after July 11, 1978, shall submit a report to the appropriate Congressional committees which shall contain a detailed statement of the manner in which the Commission intends to carry out the enforcement of this section.

(2)(A) The Commission, no later than 6 months after the date upon which the report required in paragraph (1) is due (and no later than

the end of each 6-month period thereafter), shall submit a report to each committee referred to in paragraph (1) which shall describe the enforcement activities of the Commission with respect to this section during the most recent 6-month period.

(B) The first report which the Commission submits under subparagraph (A) shall include the results of tests of cellulose insulation manufactured by at least 25 manufacturers which the Commission shall conduct to determine whether such cellulose insulation complies with the interim consumer product safety standard. The second such report shall include the results of such tests with respect to 50 manufacturers who were not included in testing conducted by the Commission for inclusion in the first report.

(f) Compliance with certification requirements; implementation; waiver; rules and regulations

(1) The Commission shall have the authority to require that any person required to comply with the certification requirements of section 2063 of this title with respect to the manufacture of cellulose insulation shall provide for the performance of any test or testing program required for such certification through the use of an independent third party qualified to perform such test or testing program. The Commission may impose such requirement whether or not the Commission has established a testing program for cellulose insulation under section 2063(b) of this title.

(2) The Commission, upon petition by a manufacturer, may waive the requirements of paragraph (1) with respect to such manufacturer if the Commission determines that the use of an independent third party is not necessary in order for such manufacturer to comply with the certification requirements of section 2063 of this title.

(3) The Commission may prescribe such rules as it considers necessary to carry out the provisions of this subsection.

(g) Authorization of appropriations

There are authorized to be appropriated, for each of the fiscal years 1978, 1979, 1980, and 1981, such sums as may be necessary to carry out the provisions of this section.

(Pub.L. 92–573, § 35, as added Pub.L. 95–319, § 3(a), July 11, 1978, 92 Stat. 386, and amended Pub.L. 103–437, § 5(c)(2), Nov. 2, 1994, 108 Stat. 4582; Pub.L. 110–314, Title II, § 235(c)(3), (5), Aug. 14, 2008, 122 Stat. 3074, 3075.)

§ 2083. Congressional veto of consumer product safety rules

Unconstitutionality of Legislative Veto Provisions

The provisions of former section 1254(c)(2) of Title 8, Aliens and Nationality, which authorized a House of Congress, by resolution, to

invalidate an action of the Executive Branch, were declared unconstitutional in Immigration and Naturalization Service v. Chadha, 1983, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317. See similar provisions in this section.

(a) Transmission to Congress

The Commission shall transmit to the Secretary of the Senate and the Clerk of the House of Representatives a copy of any consumer product safety rule promulgated by the Commission under section 2058 of this title.

(b) Disapproval by concurrent resolution

Any rule specified in subsection (a) of this section shall not take effect if—

(1) within the 90 calendar days of continuous session of the Congress which occur after the date of the promulgation of such rule, both Houses of the Congress adopt a concurrent resolution, the matter after the resolving clause of which is as follows (with the blank spaces appropriately filled): "That the Congress disapproves the consumer product safety rule which was promulgated by the Consumer Product Safety Commission with respect to _____ and which was transmitted to the Congress on _____ and disapproves the rule for the following reasons: _____."; or

(2) within the 60 calendar days of continuous session of the Congress which occur after the date of the promulgation of such rule, one House of the Congress adopts such concurrent resolution and transmits such resolution to the other House and such resolution is not disapproved by such other House within the 30 calendar days of continuous session of the Congress which occur after the date of such transmittal.

(c) Presumptions from Congressional action or inaction

Congressional inaction on, or rejection of, a concurrent resolution of disapproval under this section shall not be construed as an expression of approval of the rule involved, and shall not be construed to create any presumption of validity with respect to such rule.

(d) Continuous session of Congress

For purposes of this section—

(1) continuity of session is broken only by an adjournment of the Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the periods of continuous session of the Congress specified in subsection (b) of this section.

(Pub.L. 92–573, § 36, as added Pub.L. 97–35, Title XII, § 1207(a), Aug. 13, 1981, 95 Stat. 718.)

§ 2084. Information reporting

(a) Notification of settlements or judgments

If a particular model of a consumer product is the subject of at least 3 civil actions that have been filed in Federal or State court for death or grievous bodily injury which in each of the 24-month periods defined in subsection (b) of this section result in either a final settlement involving the manufacturer or a court judgment in favor of the plaintiff, the manufacturer of said product shall, in accordance with subsection (c) of this section, report to the Commission each such civil action within 30 days after the final settlement or court judgment in the third of such civil actions, and, within 30 days after any subsequent settlement or judgment in that 24-month period, any other such action.

(b) Calculation of the 24 month period

The 24-month periods referred to in subsection (a) of this section are in the 24-month period commencing on January 1, 1991, and subsequent 24-month periods beginning January 1 of the calendar year that is two years following the beginning of the previous 24-month period.

(c) Information required to be reported

(1) The information required by subsection (a) of this section to be reported to the Commission with respect to each civil action described in subsection (a) of this section, shall include and in addition to any voluntary information provided under paragraph (2) shall be limited to the following:

(A) The name and address of the manufacturer.

(B) The model and model number or designation of the consumer product subject to the civil action.

(C) A statement as to whether the civil action alleged death or grievous bodily injury, and in the case of an allegation of grievous bodily injury, a statement of the category of such injury.

(D) A statement as to whether the civil action resulted in a final settlement or a judgment in favor of the plaintiff.

(E) in the case of a judgment in favor of the plaintiff, the name of the civil action, the number assigned the civil action, and the court in which the civil action was filed.

(2) A manufacturer furnishing the report required by paragraph (1) may include (A) a statement as to whether any judgment in favor of the plaintiff is under appeal or is expected to be appealed or (B) any other information which the manufacturer chooses to provide. A manufacturer reporting to the Commission under subsection (a) of this section need not admit or may specifically deny that the information it submits reasonably supports the conclusion that its consumer product caused a death or grievous bodily injury.

(3) No statement of the amount paid by the manufacturer in a final settlement shall be required as part of the report furnished under subsection (a) of this section, nor shall such a statement of settlement amount be required under any other section of this chapter.

(d) Report not deemed an admission of liability

The reporting of a civil action described in subsection (a) of this section by a manufacturer shall not constitute an admission of—

(1) an unreasonable risk of injury,

(2) a defect in the consumer product which was the subject of this action,

(3) a substantial product hazard,

(4) an imminent hazard, or

(5) any other admission of liability under any statute or under any common law.

(e) Definitions

For purposes of this section:

(1) A grievous bodily injury includes any of the following categories of injury: mutilation, amputation, dismemberment, disfigurement, loss of important bodily functions, debilitating internal disorder, severe burn, severe electric shock, and injuries likely to require extended hospitalization.

(2) For purposes of this section, a particular model of a consumer product is one that is distinctive in functional design, construction, warnings or instructions related to safety, function, user population, or other characteristics which could affect the product's safety related performance.

(Pub.L. 92–573, § 37, as added Pub.L. 101–608, § 112(b), Nov. 16, 1990, 104 Stat. 3115.)

§ 2086. Prohibition on industry-sponsored travel

Notwithstanding section 1353 of Title 31, and section 2076(b)(6) of this title, no Commissioner or employee of the Commission shall accept travel, subsistence, or related expenses with respect to attendance by a Commissioner or employee at any meeting or similar function relating to official duties of a Commissioner or an employee, from a person—

(1) seeking official action from, doing business with, or conducting activities regulated by, the Commission; or

(2) whose interests may be substantially affected by the performance or nonperformance of the Commissioner's or employee's official duties.

(Pub.L. 92–573, § 39, as added Pub.L. 110–314, Title II, § 206(a), Aug. 14, 2008, 122 Stat. 3044.)

§ 2087. Whistleblower protection

(a) No manufacturer, private labeler, distributor, or retailer, may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee, whether at the employee's initiative or in the ordinary course of the employee's duties (or any person acting pursuant to a request of the employee)—

(1) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of this chapter or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts;

(2) testified or is about to testify in a proceeding concerning such violation;

(3) assisted or participated or is about to assist or participate in such a proceeding; or

(4) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this chapter or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts.

(b)(1) A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 180 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination and identifying the person responsible for such act. Upon receipt of such a complaint, the Secretary shall notify, in writing, the person named in the complaint of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

(2)(A) Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the complainant and the person named in the complaint an opportunity to submit to the Secretary a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary shall initiate an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary concludes that there is reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany

the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Any such hearing shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

(B)(i) The Secretary shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(3)(A) Not later than 120 days after the date of conclusion of any hearing under paragraph (2), the Secretary shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary, the complainant, and the person alleged to have committed the violation.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) has occurred, the Secretary shall order the person who committed such violation—

(i) to take affirmative action to abate the violation;

(ii) to reinstate the complainant to his or her former position together with compensation (including back pay) and restore the

terms, conditions, and privileges associated with his or her employment; and

(iii) to provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(C) If the Secretary finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary may award to the prevailing employer a reasonable attorneys' fee, not exceeding $1,000, to be paid by the complainant.

(4) If the Secretary has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after receiving a written determination, the complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States with jurisdiction, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury. The proceedings shall be governed by the same legal burdens of proof specified in paragraph (2)(B). The court shall have jurisdiction to grant all relief necessary to make the employee whole, including injunctive relief and compensatory damages, including—

(A) reinstatement with the same seniority status that the employee would have had, but for the discharge or discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.

(5)(A) Unless the complainant brings an action under paragraph (4), any person adversely affected or aggrieved by a final order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary. Review shall conform to chapter 7 of Title 5. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

(B) An order of the Secretary with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

(6) Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur, or in the United States district court for the District of Columbia, to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

(7)(A) A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(B) The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorneys' and expert witness fees) to any party whenever the court determines such award is appropriate.

(c) Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of Title 28.

(d) Subsection (a) shall not apply with respect to an employee of a manufacturer, private labeler, distributor, or retailer who, acting without direction from such manufacturer, private labeler, distributor, or retailer (or such person's agent), deliberately causes a violation of any requirement relating to any violation or alleged violation of any order, regulation, or consumer product safety standard under this chapter or any other law enforced by the Commission.

(Pub.L. 92–573, § 40, as added Pub.L. 110–314, Title II, § 219(a), Aug. 14, 2008, 122 Stat. 3062.)

§ 2088. Financial responsibility

(a) Identification and determination of bond

The Commission, in consultation with U.S. Customs and Border Protection and other relevant Federal agencies, shall identify any consumer product, or other product or substance that is regulated under this chapter or any other Act enforced by the Commission, for which the cost of destruction would normally exceed bond amounts determined under sections 1623 and 1624 of Title 19 and shall recommend to U.S. Customs and Border Protection a bond amount sufficient to cover the cost of destruction of such products or substances.

(b) Study of requiring escrow for recalls and destruction of products

(1) Study

The Comptroller General shall conduct a study to determine the feasibility of requiring—

(A) the posting of an escrow, proof of insurance, or security sufficient in amount to cover the cost of destruction of a domestically-produced product or substance regulated under this chapter or any other Act enforced by the Commission; and

(B) the posting of an escrow, proof of insurance, or security sufficient in amount to cover the cost of an effective recall of a product or substance, domestic or imported, regulated under this chapter or any other Act enforced by the Commission.

(2) Report

Not later than 180 days after August 14, 2008, the Comptroller General shall transmit to the appropriate Congressional committees a report on the conclusions of the study required under paragraph (1), including an assessment of whether such an escrow requirement could be implemented and any recommendations for such implementation.

(Pub.L. 92–573, § 41, as added Pub.L. 110–314, Title II, § 224(a), Aug. 14, 2008, 122 Stat. 3069.)

§ 2089. All-terrain vehicles

(a) In general

(1) Mandatory standard

Notwithstanding any other provision of law, within 90 days after August 14, 2008, the Commission shall publish in the Federal Register as a mandatory consumer product safety standard the American National Standard for Four Wheel All-Terrain Vehicles Equipment Configuration, and Performance Requirements developed by the Specialty Vehicle Institute of America (American National Standard ANSI/SVIA–1–2007). The standard shall take effect 150 days after it is published.

(2) Compliance with standard

After the standard takes effect, it shall be unlawful for any manufacturer or distributor to import into or distribute in commerce in the United States any new assembled or unassembled all-terrain vehicle unless—

(A) the all-terrain vehicle complies with each applicable provision of the standard;

(B) the ATV is subject to an ATV action plan filed with the Commission before August 14, 2008, or subsequently filed with and approved by the Commission, and bears a label certifying such

compliance and identifying the manufacturer, importer or private labeler and the ATV action plan to which it is subject; and

(C) the manufacturer or distributor is in compliance with all provisions of the applicable ATV action plan.

(3) Violation

The failure to comply with any requirement of paragraph (2) shall be deemed to be a failure to comply with a consumer product safety standard under this chapter and subject to all of the penalties and remedies available under this chapter.

(4) Compliant models with additional features

Paragraph (2) shall not be construed to prohibit the distribution in commerce of new all-terrain vehicles that comply with the requirements of that paragraph but also incorporate characteristics or components that are not covered by those requirements. Any such characteristics or components shall be subject to the requirements of section 2064 of this title.

(b) Modification of standard

(1) ANSI revisions

If the American National Standard ANSI/SVIA–1–2007 is revised through the applicable consensus standards development process after the date on which the product safety standard for all-terrain vehicles is published in the Federal Register, the American National Standards Institute shall notify the Commission of the revision.

(2) Commission action

Within 120 days after it receives notice of such a revision by the American National Standards Institute, the Commission shall issue a notice of proposed rulemaking in accordance with section 553 of Title 5, to amend the product safety standard for all-terrain vehicles to include any such revision that the Commission determines is reasonably related to the safe performance of all-terrain vehicles, and notify the Institute of any provision it has determined not to be so related. The Commission shall promulgate an amendment to the standard for all-terrain vehicles within 180 days after the date on which the notice of proposed rulemaking for the amendment is published in the Federal Register.

(3) Unreasonable risk of injury

Notwithstanding any other provision of this chapter, the Commission may, pursuant to sections 2056 and 2058 of this title, amend the product safety standard for all-terrain vehicles to include any additional provision that the Commission determines is reasonably necessary to reduce an unreasonable risk of injury associated with the performance of all-terrain vehicles.

(4) Certain provisions not applicable

Sections 2056 and 2058 of this title shall not apply to promulgation of any amendment of the product safety standard under paragraph (2). Judicial review of any amendment of the standard under paragraph (2) shall be in accordance with chapter 7 of Title 5.

(c) Requirements for 3-wheeled all-terrain vehicles

Until a mandatory consumer product safety standard applicable to 3-wheeled all-terrain vehicles promulgated pursuant to this chapter is in effect, new 3-wheeled all-terrain vehicles may not be imported into or distributed in commerce in the United States. Any violation of this subsection shall be considered to be a violation of section 2068(a)(1) of this title and may also be enforced under section 2066 of this title.

(d) Further proceedings

(1) Deadline

The Commission shall issue a final rule in its proceeding entitled "Standards for All Terrain Vehicles and Ban of Three-wheeled All-Terrain Vehicles".

(2) Categories of youth ATVs

In the final rule, the Commission, in consultation with the National Highway Traffic Safety Administration, may provide for a multiple factor method of categorization that, at a minimum, takes into account—

(A) the weight of the ATV;

(B) the maximum speed of the ATV;

(C) the velocity at which an ATV of a given weight is traveling at the maximum speed of the ATV;

(D) the age of children for whose operation the ATV is designed or who may reasonably be expected to operate the ATV; and

(E) the average weight of children for whose operation the ATV is designed or who may reasonably be expected to operate the ATV.

(3) Additional safety standards

In the final rule, the Commission, in consultation with the National Highway Traffic Safety Administration, shall review the standard published under subsection (a)(1) and establish additional safety standards for all-terrain vehicles to the extent necessary to protect the public health and safety. As part of its review, the Commission shall consider, at a minimum, establishing or strengthening standards on—

(A) suspension;

(B) brake performance;

(C) speed governors;

(D) warning labels;

(E) marketing; and

(F) dynamic stability.

(e) Definitions

In this section:

(1) All-terrain vehicle or ATV

The term "all-terrain vehicle" or "ATV" means—

(A) any motorized, off-highway vehicle designed to travel on 3 or 4 wheels, having a seat designed to be straddled by the operator and handlebars for steering control; but

(B) does not include a prototype of a motorized, off-highway, all-terrain vehicle or other motorized, off-highway, all-terrain vehicle that is intended exclusively for research and development purposes unless the vehicle is offered for sale.

(2) ATV action plan

The term "ATV action plan" means a written plan or letter of undertaking that describes actions the manufacturer or distributor agrees to take to promote ATV safety, including rider training, dissemination of safety information, age recommendations, other policies governing marketing and sale of the ATVs, the monitoring of such sales, and other safety related measures, and that is substantially similar to the plans described under the heading 'The Undertakings of the Companies in the Commission Notice' published in the Federal Register on September 9, 1998 (63 FR 48199–48204).

(Pub.L. 92–573, § 42, as added Pub.L. 110–314, Title II, § 232(a), Aug. 14, 2008, 122 Stat. 3071.)

NOTE: The following statute was included in the 2008 Amendments to the Consumer Product Safety Act and is a part of the Federal Hazardous Substances Act, 15 U.S.C. § 1261 et seq., which addresses children's products and is administered by the CPSC.

§ 1278a. Children's products containing lead; lead paint rule

(a) General lead ban

(1) Treatment as a banned hazardous substance

Except as expressly provided in subsection (b) beginning on the dates provided in paragraph (2), any children's product (as defined in section 2052(a)(16) of this title) that contains more lead than the limit established by paragraph (2) shall be treated as a banned hazardous substance under the Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.).

(2) Lead limit

(A) 600 parts per million

Except as provided in subparagraphs (B), (C), (D), and (E), beginning 180 days after August 14, 2008, the lead limit referred to in paragraph (1) is 600 parts per million total lead content by weight for any part of the product.

(B) 300 parts per million

Except as provided by subparagraphs (C), (D), and (E), beginning on the date that is 1 year after August 14, 2008, the lead limit referred to in paragraph (1) is 300 parts per million total lead content by weight for any part of the product.

(C) 100 parts per million

Except as provided in subparagraphs (D) and (E), beginning on the date that is 3 years after August 14, 2008, subparagraph (B) shall be applied by substituting "100 parts per million" for "300 parts per million" unless the Commission determines that a limit of 100 parts per million is not technologically feasible for a product or product category. The Commission may make such a determination only after notice and a hearing and after analyzing the public health protections associated with substantially reducing lead in children's products.

(D) Alternate reduction of limit

If the Commission determines under subparagraph (C) that the 100 parts per million limit is not technologically feasible for a product or product category, the Commission shall, by regulation, establish an amount that is the lowest amount of lead, lower than 300 parts per million, the Commission determines to be technologically feasible to achieve for that product or product category. The amount of lead established by the Commission under the preceding sentence shall be substituted for the 300 parts per million limit under subparagraph (B) beginning on the date that is 3 years after August 14, 2008.

(E) Periodic review and further reductions

The Commission shall, based on the best available scientific and technical information, periodically review and revise downward the limit set forth in this subsection, no less frequently than every 5 years after promulgation of the limit under subparagraph (C) or (D) to require the lowest amount of lead that the Commission determines is technologically feasible to achieve. The amount of lead established by the Commission under the preceding sentence shall be substituted for the lead limit in effect immediately before such revision.

(3) Application

Each limit set forth in paragraph (2) (except for the limit set forth in subparagraphs (A) and (B)) shall apply only to a children's product (as

defined in section 2052(a) of this title) that is manufactured after the effective date of such respective limit.

(b) Exclusion of certain materials or products and inaccessible component parts

(1) Functional purpose exception

(A) In general

The Commission, on its own initiative or upon petition by an interested party, shall grant an exception to the limit in subsection (a) for a specific product, class of product, material, or component part if the Commission, after notice and a hearing, determines that—

(i) the product, class of product, material, or component part requires the inclusion of lead because it is not practicable or not technologically feasible to manufacture such product, class of product, material, or component part, as the case may be, in accordance with subsection (a) by removing the excessive lead or by making the lead inaccessible;

(ii) the product, class of product, material, or component part is not likely to be placed in the mouth or ingested, taking into account normal and reasonably foreseeable use and abuse of such product, class of product, material, or component part by a child; and

(iii) an exception for the product, class of product, material, or component part will have no measurable adverse effect on public health or safety, taking into account normal and reasonably foreseeable use and abuse.

(B) Measurement

For purposes of subparagraph (A)(iii), there is no measurable adverse effect on public health or safety if the exception described in subparagraph (A) will result in no measurable increase in blood lead levels of a child. The Commission may adopt an alternative method of measurement other than blood lead levels if it determines, after notice and a hearing, that such alternative method is a better scientific method for measuring adverse effect on public health and safety.

(C) Procedures for granting exception

(i) Burden of proof

A party seeking an exception under subparagraph (A) has the burden of demonstrating that it meets the requirements of such subparagraph.

(ii) Grounds for decision

In the case where a party has petitioned for an exception, in determining whether to grant the exception, the Commission

may base its decision solely on the materials presented by the party seeking the exception and any materials received through notice and a hearing.

(iii) Admissible evidence

In demonstrating that it meets the requirements of subparagraph (A), a party seeking an exception under such subparagraph may rely on any nonproprietary information submitted by any other party seeking such an exception and such information shall be considered part of the record presented by the party that relies on that information.

(iv) Scope of exception

If an exception is sought for an entire product, the burden is on the petitioning party to demonstrate that the criteria in subparagraph (A) are met with respect to every accessible component or accessible material of the product.

(D) Limitation on exception

If the Commission grants an exception for a product, class of product, material, or component part under subparagraph (A), the Commission may, as necessary to protect public health or safety—

(i) establish a lead limit that such product, class of product, material, or component part may not exceed; or

(ii) place a manufacturing expiration date on such exception or establish a schedule after which the manufacturer of such product, class of product, material, or component part shall be in full compliance with the limit established under clause (i) or the limit set forth in subsection (a).

(E) Application of exception

An exception under subparagraph (A) for a product, class of product, material, or component part shall apply regardless of the date of manufacture unless the Commission expressly provides otherwise.

(F) Previously submitted petitions

A party seeking an exception under this paragraph may rely on materials previously submitted in connection with a petition for exclusion under this section. In such cases, petitioners must notify the Commission of their intent to rely on materials previously submitted. Such reliance does not affect petitioners' obligation to demonstrate that they meet all requirements of this paragraph as required by subparagraph (C)(i).

(2) Exception for inaccessible component parts

(A) In general

The limits established under subsection (a) shall not apply to any component part of a children's product that is not accessible to

a child through normal and reasonably foreseeable use and abuse of such product, as determined by the Commission. A component part is not accessible under this subparagraph if such component part is not physically exposed by reason of a sealed covering or casing and does not become physically exposed through reasonably foreseeable use and abuse of the product. Reasonably foreseeable use and abuse shall include, swallowing, mouthing, breaking, or other children's activities, and the aging of the product.

(B) Inaccessibility proceeding

Within 1 year after August 14, 2008, the Commission shall promulgate a rule providing guidance with respect to what product components, or classes of components, will be considered to be inaccessible for purposes of subparagraph (A).

(C) Application pending CPSC guidance

Until the Commission promulgates a rule pursuant to subparagraph (B), the determination of whether a product component is inaccessible to a child shall be made in accordance with the requirements laid out in subparagraph (A) for considering a component to be inaccessible to a child.

(3) Certain barriers disqualified

For purposes of this subsection, paint, coatings, or electroplating may not be considered to be a barrier that would render lead in the substrate inaccessible to a child, or to prevent absorption of any lead into the human body, through normal and reasonably foreseeable use and abuse of the product.

(4) Certain electronic devices

If the Commission determines that it is not technologically feasible for certain electronic devices, including devices containing batteries, to comply with subsection (a), the Commission, by regulation, shall—

(A) issue requirements to eliminate or minimize the potential for exposure to and accessibility of lead in such electronic devices, which may include requirements that such electronic devices be equipped with a child-resistant cover or casing that prevents exposure to and accessibility of the parts of the product containing lead; and

(B) establish a schedule by which such electronic devices shall be in full compliance with the limits in subsection (a), unless the Commission determines that full compliance will not be technologically feasible for such devices within a schedule set by the Commission.

(5) Exception for off-highway vehicles

(A) In general

Subsection (a) shall not apply to an off-highway vehicle.

(B) Off-highway vehicle defined

For purposes of this section, the term "off-highway vehicle"—

(i) means any motorized vehicle—

(I) that is manufactured primarily for use off public streets, roads, and highways;

(II) designed to travel on 2, 3, or 4 wheels; and

(III) that has either—

(aa) a seat designed to be straddled by the operator and handlebars for steering control; or

(bb) a nonstraddle seat, steering wheel, seat belts, and roll-over protective structure; and

(ii) includes a snowmobile.

(6) Bicycles and related products

In lieu of the lead limits established in subsection (a)(2), the limits set forth for each respective material in the notice of the Commission entitled "Notice of Stay of Enforcement Pertaining to Bicycles and Related Products", published June 30, 2009 (74 Fed. Reg. 31254), shall apply to any metal component part of the products to which the stay of enforcement described in such notice applies, except that after December 31, 2011, the limits set forth in such notice shall not be more than 300 parts per million total lead content by weight for any metal component part of the products to which such stay pertains.

(7) Exclusion of certain used children's products

(A) General exclusion

The lead limits established under subsection (a) shall not apply to a used children's product.

(B) Definition

In this paragraph, the term "used children's product" means a children's product (as defined in section 2052(a) of this title) that was obtained by the seller for use and not for the purpose of resale or was obtained by the seller, either directly or indirectly, from a person who obtained such children's product for use and not for the purpose of resale. Such term also includes a children's product that was donated to the seller for charitable distribution or resale to support charitable purposes. Such term shall not include—

(i) children's metal jewelry;

(ii) any children's product for which the donating party or the seller has actual knowledge that the product is in violation of the lead limits in this section; or

(iii) any other children's product or product category that the Commission determines, after notice and a hearing.

For purposes of this definition, the term "seller" includes a person who lends or donates a used children's product.

(8) Periodic review

The Commission shall, based on the best available scientific and technical information, periodically review and revise the regulations promulgated pursuant to this subsection no less frequently than every 5 years after the first promulgation of a regulation under this subsection to make them more stringent and to require the lowest amount of lead the Commission determines is technologically feasible to achieve.

(c) Application with ASTM F963

To the extent that any regulation promulgated by the Commission under this section (or any section of the Consumer Product Safety Act or any other Act enforced by the Commission, as such Acts are affected by this section) is inconsistent with the ASTM F963 standard, such promulgated regulation shall supersede the ASTM F963 standard to the extent of the inconsistency.

(d) Technological feasibility defined

For purposes of this section, a limit shall be deemed technologically feasible with regard to a product or product category if—

(1) a product that complies with the limit is commercially available in the product category;

(2) technology to comply with the limit is commercially available to manufacturers or is otherwise available within the common meaning of the term;

(3) industrial strategies or devices have been developed that are capable or will be capable of achieving such a limit by the effective date of the limit and that companies, acting in good faith, are generally capable of adopting; or

(4) alternative practices, best practices, or other operational changes would allow the manufacturer to comply with the limit.

(e) Pending rulemaking proceedings to have no effect

The pendency of a rulemaking proceeding to consider—

(1) a delay in the effective date of a limit or an alternate limit under this section related to technological feasibility,

(2) an exception for certain products or materials or inaccessibility guidance under subsection (b) of this section, or

(3) any other request for modification of or exemption from any regulation, rule, standard, or ban under this Act or any other Act enforced by the Commission,

shall not delay the effect of any provision or limit under this section nor shall it stay general enforcement of the requirements of this section.

(f) More stringent lead paint ban

(1) In general

Effective on the date that is 1 year after August 14, 2008, the Commission shall modify section 1303.1 of its regulations (16 C.F.R. 1301.1) by substituting "0.009 percent" for "0.06 percent" in subsection (a) of that section.

(2) Periodic review and reduction

The Commission shall, no less frequently than every 5 years after the date on which the Commission modifies the regulations pursuant to paragraph (1), review the limit for lead in paint set forth in section 1303.1 of title 16, Code of Federal Regulations (as revised by paragraph (1)), and shall by regulation revise downward the limit to require the lowest amount of lead that the Commission determines is technologically feasible to achieve.

(3) Methods for screening lead in small painted areas

In order to provide for effective and efficient enforcement of the limit set forth in section 1303.1 of title 16, Code of Federal Regulations, the Commission may rely on x-ray fluorescence technology or other alternative methods for measuring lead in paint or other surface coatings on products subject to such section where the total weight of such paint or surface coating is no greater than 10 milligrams or where such paint or surface coating covers no more than 1 square centimeter of the surface area of such products. Such alternative methods for measurement shall not permit more than 2 micrograms of lead in a total weight of 10 milligrams or less of paint or other surface coating or in a surface area of 1 square centimeter or less.

(4) Alternative methods of measuring lead in paint generally

(A) Study

Not later than 1 year after August 14, 2008, the Commission shall complete a study to evaluate the effectiveness, precision, and reliability of x-ray fluorescence technology and other alternative methods for measuring lead in paint or other surface coatings when used on a children's product or furniture article in order to determine compliance with part 1303 of title 16, Code of Federal Regulations, as modified pursuant to this subsection.

(B) Rulemaking

If the Commission determines, based on the study in subparagraph (A), that x-ray fluorescence technology or other alternative methods for measuring lead in paint are as effective, precise, and reliable as the methodology used by the Commission for compliance determinations prior to August 14, 2008, the Commission may promulgate regulations governing the use of such methods in determining the compliance of products with part 1303 of title 16, Code of Federal Regulations, as modified pursuant to this

subsection. Any regulations promulgated by the Commission shall ensure that such alternative methods are no less effective, precise, and reliable than the methodology used by the Commission prior to August 14, 2008.

(5) Periodic review

The Commission shall, no less frequently than every 5 years after the Commission completes the study required by paragraph (4)(A), review and revise any methods for measurement utilized by the Commission pursuant to paragraph (3) or pursuant to any regulations promulgated under paragraph (4) to ensure that such methods are the most effective methods available to protect children's health. The Commission shall conduct an ongoing effort to study and encourage the further development of alternative methods for measuring lead in paint and other surface coating that can effectively, precisely, and reliably detect lead levels at or below the level set forth in part 1303 of title 16, Code of Federal Regulations, or any lower level established by regulation.

(6) No effect on legal limit

Nothing in paragraph (3), nor reliance by the Commission on any alternative method of measurement pursuant to such paragraph, nor any rule prescribed pursuant to paragraph (4), nor any method established pursuant to paragraph (5) shall be construed to alter the limit set forth in section 1303 of title 16, Code of Federal Regulations, as modified pursuant to this subsection, or provide any exemption from such limit.

(7) Construction

Nothing in this subsection shall be construed to affect the authority of the Commission or any other person to use alternative methods for detecting lead as a screening method to determine whether further testing or action is needed.

(g) Treatment as a regulation under the FHSA

Any ban imposed by subsection (a) or rule promulgated under subsection (a) or (b) of this section, and section 1303.1 of title 16, Code of Federal Regulations (as modified pursuant to subsection (f)(1) or (2)), or any successor regulation, shall be considered a regulation of the Commission promulgated under or for the enforcement of section 1261(q) of this title.

(Pub.L. 110–314, Title I, § 101, Aug. 14, 2008, 122 Stat. 3017; Pub.L. 112–28 §§ 1, 10(b), Aug. 12, 2011, 125 Stat. 273, 283.)

MAGNUSON-MOSS WARRANTY ACT*

Enacted as Title I of "Magnuson-Moss Warranty—Federal Trade Commission Improvement Act"

Sec.

* 15 U.S.C.A. §§ 2301–2312.

Code of Federal Regulations

For Rules, Regulations, Statements and Interpretations under the Magnuson-Moss Warranty Act, see 16 CFR 701.1 et seq.

§ 2301. Definitions

For the purposes of this chapter:

(1) The term "consumer product" means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).

(2) The term "Commission" means the Federal Trade Commission.

(3) The term "consumer" means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the (warranty or service contract).

(4) The term "supplier" means any person engaged in the business of making a consumer product directly or indirectly available to consumers.

(5) The term "warrantor" means any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty.

(6) The term "written warranty" means—

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material

or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking.

Which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

(7) The term "implied warranty" means an implied warranty arising under State law (as modified by sections 2308 and 2304(a) of this title) in connection with the sale by a supplier of a consumer product.

(8) The term "service contract" means a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product.

(9) The term "reasonable and necessary maintenance" consists of those operations (A) which the consumer reasonably can be expected to perform or have performed and (B) which are necessary to keep any consumer product performing its intended function and operating at a reasonable level of performance.

(10) The term "remedy" means whichever of the following actions the warrantor elects:

(A) repair,

(B) replacement, or

(C) refund;

except that the warrantor may not elect refund unless (i) the warrantor is unable to provide replacement and repair is not commercially practicable or cannot be timely made, or (ii) the consumer is willing to accept such refund.

(11) The term "replacement" means furnishing a new consumer product which is identical or reasonably equivalent to the warranted consumer product.

(12) The term "refund" means refunding the actual purchase price (less reasonable depreciation based on actual use where permitted by rules of the Commission).

(13) The term "distributed in commerce" means sold in commerce, introduced or delivered for introduction into commerce, or held for sale or distribution after introduction into commerce.

(14) The term "commerce" means trade, traffic, commerce, or transportation—

(A) between a place in a State and any place outside thereof, or

(B) which affects trade, traffic, commerce, or transportation described in subparagraph (A).

(15) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Canal Zone, or American Samoa. The term "State law" includes a law of the United States applicable only to the District of Columbia or only to a territory or possession of the United States; and the term "Federal law" excludes any State law.

(Pub.L. 93–637, Title I, § 101, Jan. 4, 1975, 88 Stat. 2183.)

§ 2302. Rules governing contents of warranties

(a) Full and conspicuous disclosure of terms and conditions; additional requirements for contents

In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. Such rules may require inclusion in the written warranty of any of the following items among others:

(1) The clear identification of the names and addresses of the warrantors.

(2) The identity of the party or parties to whom the warranty is extended.

(3) The products or parts covered.

(4) A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warranty—at whose expense—and for what period of time.

(5) A statement of what the consumer must do and expenses he must bear.

(6) Exceptions and exclusions from the terms of the warranty.

(7) The step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty, including the identification of any person or class of persons authorized to perform the obligation set forth in the warranty.

(8) Information respecting the availability of any informal dispute settlement procedure offered by the warrantor and a recital,

where the warranty so provides, that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts.

(9) A brief, general description of the legal remedies available to the consumer.

(10) The time at which the warrantor will perform any obligations under the warranty.

(11) The period of time within which, after notice of a defect, malfunction, or failure to conform with the warranty, the warrantor will perform any obligations under the warranty.

(12) The characteristics or properties of the products, or parts thereof, that are not covered by the warranty.

(13) The elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty.

(b) Availability of terms to consumer; manner and form for presentation and display of information; duration; extension of period for written warranty or service contract

(1)(A) The Commission shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him.

(B) The Commission may prescribe rules for determining the manner and form in which information with respect to any written warranty of a consumer product shall be clearly and conspicuously presented or displayed so as not to mislead the reasonable, average consumer, when such information is contained in advertising, labeling, point-of-sale material, or other representations in writing.

(2) Nothing in this chapter (other than paragraph (3) of this subsection) shall be deemed to authorize the Commission to prescribe the duration of written warranties given or to require that a consumer product or any of its components be warranted.

(3) The Commission may prescribe rules for extending the period of time a written warranty or service contract is in effect to correspond with any period of time in excess of a reasonable period (not less than 10 days) during which the consumer is deprived of the use of such consumer product by reason of failure of the product to conform with the written warranty or by reason of the failure of the warrantor (or service contractor) to carry out such warranty (or service contract) within the period specified in the warranty (or service contract).

(4)(A) Except as provided in subparagraph (B), the rules prescribed under this subsection shall allow for the satisfaction of all requirements concerning the availability of terms of a written warranty on a consumer product under this subsection by—

(i) making available such terms in an accessible digital format on the Internet website of the manufacturer of the consumer product in a clear and conspicuous manner; and

(ii) providing to the consumer (or prospective consumer) information with respect to how to obtain and review such terms by indicating on the product or product packaging or in the product manual—

(I) the Internet website of the manufacturer where such terms can be obtained and reviewed; and

(II) the phone number of the manufacturer, the postal mailing address of the manufacturer, or another reasonable non-Internet based means of contacting the manufacturer to obtain and review such terms.

(B) With respect to any requirement that the terms of any written warranty for a consumer product be made available to the consumer (or prospective consumer) prior to sale of the product, in a case in which a consumer product is offered for sale in a retail location, by catalog, or through door-to-door sales, subparagraph (A) shall only apply if the seller makes available, through electronic or other means, at the location of the sale to the consumer purchasing the consumer product the terms of the warranty for the consumer product before the purchase.

(c) Prohibition on conditions for written or implied warranty; waiver by Commission

No warrantor of a consumer product may condition his written or implied warranty of such product on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name; except that the prohibition of this subsection may be waived by the Commission if—

(1) the warrantor satisfies the Commission that the warranted product will function properly only if the article or service so identified is used in connection with the warranted product, and

(2) the Commission finds that such a waiver is in the public interest.

The Commission shall identify in the Federal Register, and permit public comment on, all applications for waiver of the prohibition of this subsection, and shall publish in the Federal Register its disposition of any such application, including the reasons therefor.

(d) Incorporation by reference of detailed substantive warranty provisions

The Commission may by rule devise detailed substantive warranty provisions which warrantors may incorporate by reference in their warranties.

(e) Applicability to consumer products costing more than $5.00

The provisions of this section apply only to warranties which pertain to consumer products actually costing the consumer more than $5.

(Pub.L. 93–637, Title I, § 102, Jan. 4, 1975, 88 Stat. 2185; Pub.L. 114–51, § 3(a), Sept. 24, 2015, 129 Stat. 494.)

§ 2303. Designation of written warranties

(a) Full (statement of duration) or limited warranty

Any warrantor warranting a consumer product by means of a written warranty shall clearly and conspicuously designate such warranty in the following manner, unless exempted from doing so by the Commission pursuant to subsection (c) of this section:

(1) If the written warranty meets the Federal minimum standards for warranty set forth in section 2304 of this title, then it shall be conspicuously designated a "full (statement of duration) warranty".

(2) If the written warranty does not meet the Federal minimum standards for warranty set forth in section 2304 of this title, then it shall be conspicuously designated a "limited warranty".

(b) Applicability of requirements, standards, etc., to representations or statements of customer satisfaction

This section and sections 2302 and 2304 of this title shall not apply to statements or representations which are similar to expressions of general policy concerning customer satisfaction and which are not subject to any specific limitations.

(c) Exemptions by Commission

In addition to exercising the authority pertaining to disclosure granted in section 2302 of this title, the Commission may by rule determine when a written warranty does not have to be designated either "full (statement of duration)" or "limited" in accordance with this section.

(d) Applicability to consumer products costing more than $10.00 and not designated as full warranties

The provisions of subsections (a) and (c) of this section apply only to warranties which pertain to consumer products actually costing the consumer more than $10 and which are not designated "full (statement of duration) warranties".

(Pub.L. 93–637, Title I, § 103, Jan. 4, 1975, 88 Stat. 2187.)

§ 2304. Federal minimum standards for warranties

(a) Remedies under written warranty; duration of implied warranty; exclusion or limitation on consequential damages for

breach of written or implied warranty; election of refund or replacement

In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty—

(1) such warrantor must as a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;

(2) notwithstanding section 2308(b) of this title, such warrantor may not impose any limitation on the duration of any implied warranty on the product;

(3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty; and

(4) if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may be). The Commission may by rule specify for purposes of this paragraph, what constitutes a reasonable number of attempts to remedy particular kinds of defects or malfunctions under different circumstances. If the warrantor replaces a component part of a consumer product, such replacement shall include installing the part in the product without charge.

(b) Duties and conditions imposed on consumer by warrantor

(1) In fulfilling the duties under subsection (a) of this section respecting a written warranty, the warrantor shall not impose any duty other than notification upon any consumer as a condition of securing remedy of any consumer product which malfunctions, is defective, or does not conform to the written warranty, unless the warrantor has demonstrated in a rulemaking proceeding, or can demonstrate in an administrative or judicial enforcement proceeding (including private enforcement), or in an informal dispute settlement proceeding, that such a duty is reasonable.

(2) Notwithstanding paragraph (1), a warrantor may require, as a condition to replacement of, or refund for, any consumer product under subsection (a) of this section, that such consumer product shall be made available to the warrantor free and clear of liens and other encumbrances, except as otherwise provided by rule or order of the Commission in cases in which such a requirement would not be practicable.

(3) The Commission may, by rule define in detail the duties set forth in subsection (a) of this section and the applicability of such duties to warrantors of different categories of consumer products with "full (statement of duration)" warranties.

(4) The duties under subsection (a) of this section extend from the warrantor to each person who is a consumer with respect to the consumer product.

(c) Waiver of standards

The performance of the duties under subsection (a) of this section shall not be required of the warrantor if he can show that the defect, malfunction, or failure of any warranted consumer product to conform with a written warranty, was caused by damage (not resulting from defect or malfunction) while in the possession of the consumer, or unreasonable use (including failure to provide reasonable and necessary maintenance).

(d) Remedy without charge

For purposes of this section and of section 2302(c) of this title, the term "without charge" means that the warrantor may not assess the consumer for any costs the warrantor or his representatives incur in connection with the required remedy of a warranted consumer product. An obligation under subsection (a)(1)(A) of this section to remedy without charge does not necessarily require the warrantor to compensate the consumer for incidental expenses; however, if any incidental expenses are incurred because the remedy is not made within a reasonable time or because the warrantor imposed an unreasonable duty upon the consumer as a condition of securing remedy, then the consumer shall be entitled to recover reasonable incidental expenses which are so incurred in any action against the warrantor.

(e) Incorporation of standards to products designated with full warranty for purposes of judicial actions

If a supplier designates a warranty applicable to a consumer product as a "full (statement of duration)" warranty, then the warranty on such product shall, for purposes of any action under section 2310(d) of this title or under any State law, be deemed to incorporate at least the minimum requirements of this section and rules prescribed under this section.

(Pub.L. 93–637, Title I, § 104, Jan. 4, 1975, 88 Stat. 2187.)

§ 2305. Full and limited warranting of a consumer product

Nothing in this chapter shall prohibit the selling of a consumer product which has both full and limited warranties if such warranties are clearly and conspicuously differentiated.

(Pub.L. 93–637, Title I, § 105, Jan. 4, 1975, 88 Stat. 2188.)

§ 2306. Service contracts; rules for full, clear and conspicuous disclosure of terms and conditions; addition to or in lieu of written warranty

(a) The Commission may prescribe by rule the manner and form in which the terms and conditions of service contracts shall be fully, clearly, and conspicuously disclosed.

(b) Nothing in this chapter shall be construed to prevent a supplier or warrantor from entering into a service contract with the consumer in addition to or in lieu of a written warranty if such contract fully, clearly, and conspicuously discloses its terms and conditions in simple and readily understood language.

(Pub.L. 93–637, Title I, § 106, Jan. 4, 1975, 88 Stat. 2188.)

§ 2307. Designation of representatives by warrantor to perform duties under written or implied warranty

Nothing in this chapter shall be construed to prevent any warrantor from designating representatives to perform duties under the written or implied warranty: *Provided,* That such warrantor shall make reasonable arrangements for compensation of such designated representatives, but no such designation shall relieve the warrantor of his direct responsibilities to the consumer or make the representative a cowarrantor.

(Pub.L. 93–637, Title I, § 107, Jan. 4, 1975, 88 Stat. 2189.)

§ 2308. Implied warranties

(a) Restrictions on disclaimers or modifications

No supplier may disclaim or modify (except as provided in subsection (b) of this section) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) Limitation on duration

For purposes of this chapter (other than section 2304(a)(2) of this title), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

(c) Effectiveness of disclaimers, modifications, or limitations

A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this chapter and State law.

(Pub.L. 93–637, Title I, § 108, Jan. 4, 1975, 88 Stat. 2189.)

§ 2309. Procedures applicable to promulgation of rules by Commission; rulemaking proceeding for warranty and warranty practices involved in sale of used motor vehicles

(a) Any rule prescribed under this chapter shall be prescribed in accordance with section 553 of Title 5; except that the Commission shall give interested persons an opportunity for oral presentations of data, views, and arguments, in addition to written submissions. A transcript shall be kept of any oral presentation. Any such rule shall be subject to judicial review under section 57a(e) of this title in the same manner as rules prescribed under section 57a(a)(1)(B) of this title, except that section 57a(e)(3)(B) of this title shall not apply.

(b) The Commission shall initiate within one year after January 4, 1975, a rulemaking proceeding dealing with warranties and warranty practices in connection with the sale of used motor vehicles; and, to the extent necessary to supplement the protections offered the consumer by this chapter, shall prescribe rules dealing with such warranties and practices. In prescribing rules under this subsection, the Commission may exercise any authority it may have under this chapter, or other law, and in addition it may require disclosure that a used motor vehicle is sold without any warranty and specify the form and content of such disclosure.

(Pub.L. 93–637, Title I, § 109, Jan. 4, 1975, 88 Stat. 2189.)

§ 2310. Remedies in consumer disputes

(a) Informal dispute settlement procedures; establishment; rules setting forth minimum requirements; effect of compliance by warrantor; review of informal procedures or implementation by Commission; application to existing informal procedures

(1) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.

(2) The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies. Such rules shall provide for participation in such procedure by independent or governmental entities.

(3) One or more warrantors may establish an informal dispute settlement procedure which meets the requirements of the Commission's rules under paragraph (2). If—

(A) a warrantor establishes such a procedure,

(B) such procedure, and its implementation, meets the requirements of such rules, and

(C) he incorporates in a written warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty, then (i) the consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he initially resorts to such procedure; and (ii) a class of consumers may not proceed in a class action under subsection (d) of this section except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the named plaintiffs (upon notifying the defendant that they are named plaintiffs in a class action with respect to a warranty obligation) initially resort to such procedure. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure. In any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence.

(4) The Commission on its own initiative may, or upon written complaint filed by any interested person shall, review the bona fide operation of any dispute settlement procedure resort to which is stated in a written warranty to be a prerequisite to pursuing a legal remedy under this section. If the Commission finds that such procedure or its implementation fails to comply with the requirements of the rules under paragraph (2), the Commission may take appropriate remedial action under any authority it may have under this chapter or any other provision of law.

(5) Until rules under paragraph (2) take effect, this subsection shall not affect the validity of any informal dispute settlement procedure respecting consumer warranties, but in any action under subsection (d) of this section, the court may invalidate any such procedure if it finds that such procedure is unfair.

(b) Prohibited acts

It shall be a violation of section 45(a)(1) of this title for any person to fail to comply with any requirement imposed on such person by this chapter (or a rule thereunder) or to violate any prohibition contained in this chapter (or a rule thereunder).

(c) Injunction proceedings by Attorney General or Commission for deceptive warranty, noncompliance with requirements, or violating prohibitions; procedures; definitions

(1) The district courts of the United States shall have jurisdiction of any action brought by the Attorney General (in his capacity as such), or by the Commission by any of its attorneys designated by it for such purpose, to restrain (A) any warrantor from making a deceptive warranty with respect to a consumer product, or (B) any person from failing to

comply with any requirement imposed on such person by or pursuant to this chapter or from violating any prohibition contained in this chapter. Upon proper showing that, weighing the equities and considering the Commission's or Attorney General's likelihood of ultimate success, such action would be in the public interest and after notice to the defendant, a temporary restraining order or preliminary injunction may be granted without bond. In the case of an action brought by the Commission, if a complaint under section 45 of Title 15 is not filed within such period (not exceeding 10 days) as may be specified by the court after the issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect. Any suit shall be brought in the district in which such person resides or transacts business. Whenever it appears to the court that the ends of justice require that other persons should be parties in the action, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and to that end process may be served in any district.

(2) For the purposes of this subsection, the term "deceptive warranty" means (A) a written warranty which (i) contains an affirmation, promise, deception, or representation which is either false or fraudulent, or which, in light of all the circumstances, would mislead a reasonable individual exercising due care; or (ii) fails to contain information which is necessary in light of all of the circumstances, to make the warranty not misleading to a reasonable individual exercising due care; or (B) a written warranty created by the use of such terms as "guaranty" or "warranty", if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual.

(d) Civil action by consumer for damages, etc.; jurisdiction; recovery of costs and expenses; cognizable claims

(1) Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief—

(A) in any court of competent jurisdiction in any State or the District of Columbia; or

(B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution

of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

(3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection—

(A) if the amount in controversy of any individual claim is less than the sum or value of $25;

(B) if the amount in controversy is less than the sum or value of $50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit; or

(C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

(e) Class actions; conditions; procedures applicable

No action (other than a class action or an action respecting a warranty to which subsection (a)(3) of this section applies) may be brought under subsection (d) of this section for failure to comply with any obligation under any written or implied warranty or service contract, and a class of consumers may not proceed in a class action under such subsection with respect to such a failure except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the person obligated under the warranty or service contract is afforded a reasonable opportunity to cure such failure to comply. In the case of such a class action (other than a class action respecting a warranty to which subsection (a)(3) of this section applies) brought under subsection (d) of this section for breach of any written or implied warranty or service contract, such reasonable opportunity will be afforded by the named plaintiffs and they shall at that time notify the defendant that they are acting on behalf of the class. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure.

(f) Warrantors subject to enforcement of remedies

For purposes of this section, only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced under this section only against such warrantor and no other person.

(Pub.L. 93–637, Title I, § 110, Jan. 4, 1975, 88 Stat. 2189.)

§ 2311. Applicability of provisions to other Federal or State laws and requirements

(a)(1) Nothing contained in this chapter shall be construed to repeal, invalidate, or supersede the Federal Trade Commission Act or any statute defined therein as an Antitrust Act.

(2) Nothing in this chapter shall be construed to repeal, invalidate, or supersede the Federal Seed Act and nothing in this chapter shall apply to seed for planting.

(b)(1) Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law.

(2) Nothing in this chapter (other than sections 2304(a)(2) and (4) and 2308 of this title) shall (A) affect the liability of, or impose liability on, any person for personal injury, or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury.

(c)(1) Except as provided in subsection (b) of this section and in paragraph (2) of this subsection, a State requirement—

(A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;

(B) which is within the scope of an applicable requirement of sections 2302, 2303, and 2304 of this title (and rules implementing such sections), and

(C) which is not identical to a requirement of section 2302, 2303, or 2304 of this title (or a rule thereunder), shall not be applicable to written warranties complying with such sections (or rules thereunder).

(2) If, upon application of an appropriate State agency, the Commission determines (pursuant to rules issued in accordance with section 2309 of this title) that any requirement of such State covering any transaction to which this chapter applies (A) affords protection to consumers greater than the requirements of this chapter and (B) does not unduly burden interstate commerce, then such State requirement shall be applicable (notwithstanding the provisions of paragraph (1) of this subsection) to the extent specified in such determination for so long as the State administers and enforces effectively any such greater requirement.

(d) This chapter (other than section 2302(c) of this title) shall be inapplicable to any written warranty the making or content of which is otherwise governed by Federal law. If only a portion of a written warranty is so governed by Federal law, the remaining portion shall be subject to this chapter.

(Pub.L. 93–637, Title I, § 111, Jan. 4, 1975, 88 Stat. 2192.)

§ 2312. Effective dates; time for promulgation of rules by Commission

(a) Except as provided in subsection (b) of this section, this chapter shall take effect 6 months after January 4, 1975, but shall not apply to consumer products manufactured prior to such date.

(b) Section 2302(a) of this title shall take effect 6 months after the final publication of rules respecting such section; except that the Commission, for good cause shown, may postpone the applicability of such sections until one year after such final publication in order to permit any designated classes of suppliers to bring their written warranties into compliance with rules promulgated pursuant to this chapter.

(c) The Commission shall promulgate rules for initial implementation of this chapter as soon as possible after January 4, 1975, but in no event later than one year after such date.

(Pub.L. 93–637, Title I, § 112, Jan. 4, 1975, 88 Stat. 2192.)

PROTECTION OF LAWFUL COMMERCE IN ARMS ACT*

Section

§ 7901. Findings; purposes.

(a) Findings

Congress finds the following:

(1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.

(2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.

(3) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

(4) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

(5) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

(6) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system,

* 15 U.S.C.A. §§ 7901–7903.

erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

(7) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(8) The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

(b) Purposes

The purposes of this chapter are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely,

to assemble peaceably, and to petition the Government for a redress of their grievances.

(6) To preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States.

(7) To exercise congressional power under article IV, section 1 (the Full Faith and Credit Clause) of the United States Constitution.

(Pub.L. 109–92, § 2, Oct. 26, 2005, 119 Stat. 2095.)

§ 7902. Prohibition on bringing of qualified civil liability actions in Federal or State court.

(a) In general

A qualified civil liability action may not be brought in any Federal or State court.

(b) Dismissal of pending actions

A qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending.

(Pub.L. 109–92, § 3, Oct. 26, 2005, 119 Stat. 2096.)

§ 7903. Definitions.

In this chapter:

(1) Engaged in the business

The term "engaged in the business" has the meaning given that term in section 921(a)(21) of Title 18, and, as applied to a seller of ammunition, means a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) Manufacturer

The term "manufacturer" means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of Title 18.

(3) Person

The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) Qualified product

The term "qualified product" means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of Title 18), including any antique firearm (as defined in section 921(a)(16) of such title), or

ammunition (as defined in section 921(a)(17)(A) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) Qualified civil liability action

(A) In general

The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include—

(i) an action brought against a transferor convicted under section 924(h) of Title 18, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including—

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18;

(iv) an action for breach of contract or warranty in connection with the purchase of the product;

(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a

reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or

(vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of Title 18 or chapter 53 of Title 26.

(B) Negligent entrustment

As used in subparagraph (A)(ii), the term "negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

(C) Rule of construction

The exceptions enumerated under clauses (i) through (v) of subparagraph (A) shall be construed so as not to be in conflict, and no provision of this chapter shall be construed to create a public or private cause of action or remedy.

(D) Minor child exception

Nothing in this chapter shall be construed to limit the right of a person under 17 years of age to recover damages authorized under Federal or State law in a civil action that meets 1 of the requirements under clauses (i) through (v) of subparagraph (A).

(6) Seller

The term "seller" means, with respect to a qualified product—

(A) an importer (as defined in section 921(a)(9) of Title 18) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of Title 18;

(B) a dealer (as defined in section 921(a)(11) of Title 18) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of Title 18; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(A) of Title 18) in interstate or foreign commerce at the wholesale or retail level.

(7) State

The term "State" includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the

Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) Trade association

The term "trade association" means—

(A) any corporation, unincorporated association, federation, business league, professional or business organization not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(B) that is an organization described in section 501(c)(6) of Title 26 and exempt from tax under section 501(a) of such title; and

(C) 2 or more members of which are manufacturers or sellers of a qualified product.

(9) Unlawful misuse

The term "unlawful misuse" means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.

(Pub.L. 109–92, § 4, Oct. 26, 2005, 119 Stat. 2097.)

EEC DIRECTIVE ON LIABILITY FOR DEFECTIVE PRODUCTS

COUNCIL DIRECTIVE

of

25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products

(85/374/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

[Prologue—Why Producers Should Be Strictly Liable for Product Defects]

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary because the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property;

Whereas liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production;

Whereas liability without fault should apply only to movables which have been industrially produced; whereas, as a result, it is appropriate to exclude liability for agricultural products and game, except where they have undergone a processing of an industrial nature which could cause a defect in these products; whereas the liability provided for in this Directive should also apply to movables which are used in the construction of immovables or are installed in immovables;

Whereas protection of the consumer requires that all producers involved in the production process should be made liable, in so far as their finished product, component part or any raw material supplied by them was defective; whereas, for the same reason, liability should extend to importers of products into the Community and to persons who present themselves as producers by affixing their name, trade mark or other distinguishing feature or who supply a product the producer of which cannot be identified;

Whereas, in situations where several persons are liable for the same damage, the protection of the consumer requires that the injured person should be able to claim full compensation for the damage from any one of them;

Whereas, to protect the physical well-being and property of the consumer, the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety which the public at large is entitled to expect; whereas the safety is assessed by excluding any misuse of the product not reasonable under the circumstances;

Whereas a fair apportionment of risk between the injured person and the producer implies that the producer should be able to free himself from liability if he furnishes proof as to the existence of certain exonerating circumstances;

Whereas the protection of the consumer requires that the liability of the producer remains unaffected by acts or omissions of other persons having contributed to cause the damage; whereas, however, the contributory negligence of the injured person may be taken into account to reduce or disallow such liability;

Whereas the protection of the consumer requires compensation for death and personal injury as well as compensation for damage to property; whereas the latter should nevertheless be limited to goods for private use or consumption and be subject to a deduction of a lower threshold of a fixed amount in order to avoid litigation in an excessive number of cases; whereas this Directive should not prejudice compensation for pain and suffering and other non-material damages payable, where appropriate, under the law applicable to the case;

Whereas a uniform period of limitation for the bringing of action for compensation is in the interests both of the injured person and of the producer;

Whereas products age in the course of time, higher safety standards are developed and the state of science and technology progresses; whereas, therefore, it would not be reasonable to make the producer liable for an unlimited period for the defectiveness of his product; whereas, therefore, liability should expire after a reasonable length of time, without prejudice to claims pending at law;

Whereas, to achieve effective protection of consumers, no contractual derogation should be permitted as regards the liability of the producer in relation to the injured person;

Whereas under the legal systems of the Member States an injured party may have a claim for damages based on grounds of contractual liability or on grounds of non-contractual liability other than that provided for in this Directive; in so far as these provisions also serve to attain the objective of effective protection of consumers, they should remain unaffected by this Directive; whereas, in so far as effective protection of

consumers in the sector of pharmaceutical products is already also attained in a Member State under a special liability system, claims based on this system should similarly remain possible;

Whereas, to the extent that liability for nuclear injury or damage is already covered in all Member States by adequate special rules, it has been possible to exclude damage of this type from the scope of this Directive;

Whereas, since the exclusion of primary agricultural products and game from the scope of this Directive may be felt, in certain Member States, in view of what is expected for the protection of consumers, to restrict unduly such protection, it should be possible for a Member State to extend liability to such products;

Whereas, for similar reasons, the possibility offered to a producer to free himself from liability if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered may be felt in certain Member States to restrict unduly the protection of the consumer; whereas it should therefore be possible for a Member State to maintain in its legislation or to provide by new legislation that this exonerating circumstance is not admitted; whereas, in the case of new legislation, making use of this derogation should, however, be subject to a Community stand-still procedure, in order to raise, if possible, the level of protection in a uniform manner throughout the Community;

Whereas, taking into account the legal traditions in most of the Member States, it is inappropriate to set any financial ceiling on the producer's liability without fault; whereas, in so far as there are, however, differing traditions, it seems possible to admit that a Member State may derogate from the principle of unlimited liability by providing a limit for the total liability of the producer for damage resulting from a death or personal injury and caused by identical items with the same defect, provided that this limit is established at a level sufficiently high to guarantee adequate protection of the consumer and the correct functioning of the common market;

Whereas the harmonization resulting from this cannot be total at the present stage, but opens the way towards greater harmonization; whereas it is therefore necessary that the Council receive at regular intervals, reports from the Commission on the application of this Directive, accompanied, as the case may be, by appropriate proposals;

Whereas it is particularly important in this respect that a re-examination be carried out of those parts of the Directive relating to the derogations open to the Member States, at the expiry of a period of sufficient length to gather practical experience on the effects of these derogations on the protection of consumers and on the functioning of the common market,

HAS ADOPTED THIS DIRECTIVE:

Article 1
[Producer Liability for Damage Caused by Product Defects]

The producer shall be liable for damage caused by a defect in his product.

Article 2
["Product"]

For the purpose of this Directive "product" means all movables even if incorporated into another movable or into an immovable. "Product" includes electricity. [1999/34/EC Directive, May 10, 1999 revision.]

Article 3
["Producers" and Suppliers]

1. "Producer" means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.

2. Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer.

3. Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated.

Article 4
[Burden of Proof]

The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage.

Article 5
[Joint & Several Liability]

Where, as a result of the provisions of this Directive, two or more persons are liable for the same damage, they shall be liable jointly and severally, without prejudice to the provisions of national law concerning the rights of contribution or recourse.

Article 6
["Defective"]

1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:

(a) the presentation of the product;

(b) the use to which it could reasonably be expected that the product would be put;

(c) the time when the product was put into circulation.

2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

Article 7
[Defenses]

The producer shall not be liable as a result of this Directive if he proves:

(a) that he did not put the product into circulation; or

(b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards; or

(c) that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business; or

(d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or

(e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered; or

(f) in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.

Article 8
[When Damages Apportioned]

1. Without prejudice to the provisions of national law concerning the right of contribution or recourse, the liability of the producer shall not be reduced when the damage is caused both by a defect in product and by the act or omission of a third party.

2. The liability of the producer may be reduced or disallowed when, having regard to all the circumstances, the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible.

Article 9
["Damage"]

For the purpose of Article 1, "damage" means:

(a) damage caused by death or by personal injuries;

(b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ECU, provided that the item of property:

(i) is of a type ordinarily intended for private use or consumption, and

(ii) was used by the injured person mainly for his own private use or consumption.

This Article shall be without prejudice to national provisions relating to non-material damage.

Article 10
[3-Year Limitation After Constructive Awareness]

1. Member States shall provide in their legislation that a limitation period of three years shall apply to proceedings for the recovery of damages as provided for in this Directive. The limitation period shall begin to run from the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.

2. The laws of Member States regulating suspension or interruption of the limitation period shall not be affected by this Directive.

Article 11
[10-Year Repose After Product Sale]

Member States shall provide in their legislation that the rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer.

Article 12
[Producers May Not Limit Liability Contractually]

The liability of the producer arising from this Directive may not, in relation to the injured person, be limited or excluded by a provision limiting his liability or exempting him from liability.

Article 13
[Directive Does Not Diminish Injured Persons' Other Rights]

This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified.

Article 14
[Directive Inapplicable to Nuclear Accidents]

This Directive shall not apply to injury or damage arising from nuclear accidents and covered by international conventions ratified by the Member States.

Article 15
[States May Opt Out of State-of-the-Art Defense]

1. Each Member State may:

(a) deleted by 1999/34/EC Directive, May 10, 1999;

(b) by way of derogation from Article 7(e), maintain or, subject to the procedure set out in paragraph 2 of this Article, provide in this legislation that the producer shall be liable even if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered.

2. A Member State wishing to introduce the measure specified in paragraph 1(b) shall communicate the text of the proposed measure to the Commission. The Commission shall inform the other Member States thereof.

The Member State concerned shall hold the proposed measure in abeyance for nine months after the Commission is informed and provided that in the meantime the Commission has not submitted to the Council a proposal amending this Directive on the relevant matter. However, if within three months of receiving the said information, the Commission does not advise the Member State concerned that it intends submitting such a proposal to the Council, the Member State may take the proposed measure immediately.

If the Commission does submit to the Council such a proposal amending this Directive within the aforementioned nine months, the Member State concerned shall hold the proposed measure in abeyance for a further period of 18 months from the date on which the proposal is submitted.

3. Ten years after the date of notification of this Directive, the Commission shall submit to the Council a report on the effect that rulings by the courts as to the application of Article 7(e) and of paragraph 1(b) of this Article have on consumer protection and the functioning of the

common market. In the light of this report the Council, acting on a proposal from the Commission and pursuant to the terms of Article 100 of the Treaty, shall decide whether to repeal Article 7(e).

Article 16
[States May Limit a Producer's Total Liability for Same Defect]

1. Any Member State may provide that a producer's total liability for damage resulting from a death or personal injury and caused by identical items with the same defect shall be limited to an amount which may not be less than 70 million ECU.

2. Ten years after the date of notification of this Directive, the Commission shall submit to the Council a report on the effect on consumer protection and the functioning of the common market of the implementation of the financial limit on liability by those Member States which have used the option provided for in paragraph 1. In the light of this report the Council, acting on a proposal from the Commission and pursuant to the terms of Article 100 of the Treaty, shall decide whether to repeal paragraph 1.

Article 17
[Directive Not Retroactive]

This Directive shall not apply to products put into circulation before the date on which the provisions referred to in Article 19 enter into force.

Article 18
[Variations in Value of Euro]

1. For the purposes of this Directive, the ECU shall be that defined by Regulation (EEC) No 3180/78, as amended by Regulation (EEC) No 2626/84. The equivalent in national currency shall initially be calculated at the rate obtaining on the date of adoption of this Directive.

2. Every five years the Council, acting on a proposal from the Commission, shall examine and, if need be, revise the amounts in this Directive, in the light of economic and monetary trends in the Community.

Article 19
[States Shall Adopt Conforming Legislation within 3 Years]

1. Member States shall bring into force, not later than three years from the date of notification of this Directive, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.

2. The procedure set out in Article 15(2) shall apply from the date of notification of this Directive.

Article 20
[Such Legislation to be Sent to Commission]

Member States shall communicate to the Commission the texts of the main provisions of national law which they subsequently adopt in the field governed by this Directive.

Article 21
[Directive to be Reexamined Periodically]

Every five years the Commission shall present a report to the Council on the application of this Directive and, if necessary, shall submit appropriate proposals to it.

Article 22
[EEC Provides Member States Notice of Directive 25 July 1985]

This Directive is addressed to the Member States.

Done at Brussels, 25 July 1985.

For the Council

The President

J. POOS