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Real and Imagined Effects of Statutes Restricting the Liability of Nonmanufacturing Sellers of Defective Products

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I. Introduction

The liability of nonmanufacturing sellers¹ of defective products has long occupied a peculiar place in product liability law. On the one hand, the negligence origin of product liability law,² which has never been completely submerged, suggests that those who do not manufacture products should not ordinarily be responsible for defects caused by the manufacturer. On the other hand, concern with compensating victims injured by mass-produced products may make a nonmanufacturing supplier an attractive liability target.³

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1. This Article uses the terms "nonmanufacturing seller" and "supplier" interchangeably to refer to those who sell, but do not manufacture, products. Suppliers who have a hand in redesigning or somehow altering a product do not satisfy the definition of nonmanufacturing seller or supplier but probably do satisfy the definition of manufacturers, and thus would be subject to liability rules affecting manufacturers. *See, e.g.*, MODEL UNIFORM PRODUCTS LIABILITY ACT § 105(A) (1979), which provides: "In determining whether a product seller, other than a manufacturer, is subject to liability . . . the trier of fact shall consider the effect of such product seller's own conduct with respect to the design, construction, inspection, or condition of the product"

2. The tenacity of negligence law is evident at every turn. Both design defect and failure to warn liability incorporate some sort of a negligence analysis. *See infra* notes 82-125 and accompanying text. Even regarding liability for simple manufacturing defects, courts have been hesitant to find liable suppliers who serve as "mere conduits" in the chain of distribution. *See, e.g.*, *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 468, 150 P.2d 436, 443-44 (1944); *Sam Shainberg Co. v. Barlow*, 258 So. 2d 242 (Miss. 1972). *See also* Leete, *Products Liability for Non-manufacturer Product Sellers: Is it Time to Draw the Line?*, 17 FORUM 1250 (1982); Gravico, *The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products*, 12 NOVA L. REV. 213 (1987).

3. This concern with compensating the victim of a defective product is most evident in the saving provisions of most state product liability statutes. These statutes initially relieve the supplier of liability absent negligence, but then permit the injured party to recover against the supplier when the manufacturer is either insolvent or not amenable to jurisdiction. *See, e.g.*, COLO. REV. STAT. § 13-21-402 (West 1989); IDAHO CODE § 6-1407 (Michie Supp. 1989); ILL.

Until quite recently, the courts' approach to product liability law reflected the tension between holding liable only the negligent manufacturer and expanding the class of defendants responsible in order to compensate fully the injured party. The courts held suppliers strictly liable for injuries caused by the defective products they sold, but permitted suppliers to seek indemnification against the manufacturer who created the defect.⁴ But increased concern about the proliferation and cost of product liability suits has recently spurred many states to enact legislation that in various ways limits nonmanufacturers' liability.⁵

This Article canvasses recent statutory and judicial developments in supplier liability law, with an eye towards determining both the substantive and practical impact of those developments on suppliers. Part II provides a brief, historical treatment of product liability doctrine, with an emphasis on the relation between the general

ANN. STAT. ch. 110, para. 2-621 (Smith-Hurd Supp. 1990); IOWA CODE ANN. § 613.18 (West Supp. 1990); KAN. STAT. ANN. § 60-3306 (1983); KY. REV. STAT. ANN. § 411.340 (Michie/Bobbs-Merrill Supp. 1990); MD. CTS. & JUD. PROC. CODE ANN. § 5-311 (1984); MINN. STAT. ANN. § 544.41 (West 1990); MO. ANN. STAT. § 537.762 (Vernon 1990); N.C. GEN. STAT. § 99 B-2 (1989); OHIO REV. CODE ANN. § 2307.78 (Banks-Baldwin Supp. 1989); TENN. CODE ANN. § 29-28-106 (Supp. 1990); WASH. REV. CODE ANN. § 7.72.040 (West Supp. 1990).

A few jurisdictions have statutes that do not hold the supplier liable absent some showing of independent fault, even when the manufacturer cannot be reached. *See, e.g.*, GA. CODE ANN. § 51-1-11.1 (Supp. 1989); S.D. CODIFIED LAWS ANN. § 20-9-9 (Supp. 1990).

4. *See, e.g.*, *Smith v. Fiat-Roosevelt Motors, Inc.*, 556 F.2d 728 (5th Cir. 1977), which acknowledged the strength of arguments against holding retailers liable for defects created by manufacturers, but then stated:

[T]he risk that goods sold are not reasonably fit is to fall, not on the consumer, but on those who make and sell them. Remedies looking up the line of distribution and fabrication afford the vendor such recourse as he has and, to the extent they are effective, ameliorate the . . . unfairness.

Id. at 732. *See also* *Vandemark v. Ford Motor Co.*, 61 Cal. 2d 256, 262, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964).

5. The liability insurance crisis has generally been held responsible for the emergence of statutes relieving the supplier of liability. Two commentators explain:

In the mid-1970s, property and casualty insurers decreed sharp increases in product-liability insurance premiums and thereby provoked what has become known as the product-liability 'Crisis.' The manufacturers who had to pay these premiums as well as the insurers who charged them put a lion's share of the blame upon state-court decisions . . . which have expanded the ambit of liability for the benefit of persons claiming injury from defective products, and upon the excessive jury verdicts which these liberalized tort doctrines had facilitated.

Page & Stephens, *The Product Liability Insurance 'Crisis: Causes, Nostrums and Cures*, 13 CAP. U.L. REV. 387, 387 (1984). For a comprehensive discussion of the crisis, see Berger, *The Impact of Tort Law Development on Insurance: The Availability/Affordability Crisis and its Potential Solutions*, 37 AM. U.L. REV. 285 (1988). Berger blames much of the "crisis" on the unpredictability and expansion of tort law, and provides thoughtful suggestions on how to improve the situation. Berger recommends more active regulatory oversight, changes in the contingency fee system, caps on punitive damages, and clear tort standards of liability as productive areas of reform. *Id.* at 318-21. *See also* Abraham, *Making Sense of the Liability Insurance Crisis*, 48 OHIO ST. L.J. 399 (1987), in which Abraham argues that both the underwriting cycle and insurers' own strategies have also played a role in the crisis.

flowering of this area of the law and the more specific evolution of supplier liability.⁶ The section concludes with a wide-angle look at recent supplier liability statutes, which mix codification of decisional law and genuine reform.

The Article then turns to consideration of the impact of such statutes on various types of product liability cases. Part III treats the effect that the various types of supplier liability statutes have had, and may be expected to have, in cases involving simple manufacturing defects.⁷ Finally, Part IV considers the effect that these laws have on the closely related issues of design defect and failure to warn.⁸

II. Development of Product and Supplier Liability Law

Product liability law originally required the plaintiff to show the defendant's negligence. Judge Cardozo's opinion for the New York Court of Appeals in *MacPherson v. Buick Motor Co.*⁹ is famous for its abolition of the privity requirement, but the case is also noteworthy for its adherence to the fault principle.¹⁰ In *MacPherson*, the car manufacturer could be liable only if it had failed to use reasonable care in inspecting the tires supplied by a component manufacturer. This insistence upon a showing of negligence is not surprising, since tort law was primarily a fault-based system with discrete pockets of strict liability.¹¹

6. See *infra* notes 9-48 and accompanying text.

7. See *infra* notes 51-80 and accompanying text.

8. See *infra* notes 81-125 and accompanying text.

9. 217 N.Y. 382, 111 N.E. 1050 (1916).

10. The privity rule limited recovery for injuries caused by defective products to parties who had been in a contractual relation with defendant. Although recognizing that courts had developed exceptions to the privity rule, *Huset v. J.I. Cage Threshing Machine Co.*, 120 F. 864 (8th Cir. 1903) nonetheless reaffirmed the rule:

[T]he liability of the contractor or manufacturer for negligence in the construction or sale of the articles which he makes or vends is limited to the persons to whom he is liable under his contracts of construction or sale. The limits of the liability for negligence and for breaches of contract in cases of this character are held to be identical.

Id. at 867.

Judge Cardozo's landmark decision in *McPherson* emphasized causation and the obvious dangers posed by a defective product:

There is here no break in the chain of cause and effect. In such circumstances, the presence of a known danger, attendant upon a known use, makes vigilance a duty. We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.

217 N.Y. at 390, 111 N.E. at 1053.

11. See generally Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 382-84

Negligence, however, is notoriously difficult to prove in defective product cases. Typically, the manufacturer will have better access to inspection records and quality control information.¹² Further, inspection and quality control may meet the "reasonable person" standard, since no manufacturing process is, or can be, made foolproof.¹³ Showing that the product was defective at all, or that the defect was present when the product left the manufacturer, can also be problematic.¹⁴

To ease plaintiffs' burden, courts turned to devices that, with the benefit of hindsight, were little more than expedients. First, courts began to rely on the law of implied warranty, which imposes strict liability upon the seller of a product.¹⁵ Warranty theory, a mixture of tort and contract principles,¹⁶ requires the seller to produce a product free of injury-causing defects.¹⁷ The problem re-

(1951).

12. See Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1258 (1976); *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 886 (Alaska 1979).

13. See M. SHAPO, *THE LAW OF PRODUCTS LIABILITY* ¶ 5.02[1] (1987): "The general standard for negligence liability is that of a reasonably prudent person who produces or sells a particular product."

14. Initially, it may seem odd to yoke defect to negligence. But showing that defendant manufacturer's process was negligent may assist plaintiff's attempt to show that a product was defective. A negligent operation presumably leads to more defects than a careful one. But identifying the causal link between the defect and the injury is equally difficult under all theories.

[T]he plaintiff has to establish the causal connection between the product's defect and his injury. This last task is almost always difficult, because the damage suffered is never the direct and immediate consequence of the defendant's conduct, as it is in cases of trespass. Instead, the plaintiff must painfully trace his way from the original defect to his ultimate harm through the use and possible abuse of the product either by himself or third parties, all without running afoul of the limitations on remoteness of damage.

R. EPSTEIN, C. GREGORY & B. KALVEN, *CASES AND MATERIALS ON TORTS*, at 638 (4th ed. 1984).

15. The law of implied warranty developed in response to early product liability decisions that refused to impose strict liability upon the seller of a defective product. Under implied warranty, the seller of a defective product is held strictly liable to the consumer by virtue of the sale. There are today several implied warranties as to consumer goods. The most important of these is the implied warranty of merchantability, U.C.C. § 2-314, by which the seller impliedly warrants the product's fitness for ordinary use. In addition, a seller is held to guarantee that its product is fit for a particular use when the consumer, with the seller's knowledge, relies upon the seller's representation as to that use. U.C.C. § 2-315. See PROSSER & KEETON, *THE LAW OF TORTS* § 95A (5th ed. 1984).

16. Although the point is not beyond dispute, the fluidity with which courts have moved back and forth between tort and contract principles in interpreting rights under warranties may be attributed to dissatisfaction with the result obtained under one theory or the other. See generally PROSSER AND KEETON ON *The Law of Torts*, §§ 98-99 (W. Keeton 5th ed. 1984).

17. At first blush, it may seem strange to apply the warranty attending sale of a good to a personal injury action. Why not use the warranty action to address consumer dissatisfaction with the product, as by requiring the seller to replace or repair, leaving the tort action to physical damage — personal injury and property damage — caused by a defective product? See R. EPSTEIN, *CASES AND MATERIALS ON TORTS* (5th ed. 1990). Epstein suggested that

LIABILITY OF NONMANUFACTURING SELLERS

mained, however, that implied warranty claims¹⁸ would only lie against the injured plaintiff's immediate seller because actions based on breach of warranty continued to require privity.¹⁹

Meanwhile, within the walls of negligence itself, courts were turning to the doctrine of *res ipsa loquitur* to allow plaintiffs to reach the jury on the issue of product defect.²⁰ The application of *res*

courts apply the warranty action to claims of consumer dissatisfaction with the product and apply the tort action to physical damage, including personal injury and property damage, caused by the defective product. *Id.* at 632. Despite the appeal of this bifurcated system, courts have continued to apply warranty theory to claims for physical damage. *See, e.g., McCabe v. L.K. Liggett Drug Co.*, 330 Mass. 177, 112 N.E.2d 254 (1953). The perceived inadequacies of the tort remedy, which long required the plaintiff to demonstrate that defendant had been negligent, explains why courts continued to apply warranty theory to claims for physical damage.

18. The notion that the manufacture of a defective good breached an implied warranty first surfaced in cases involving defective foodstuffs. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 16, § 97, at 690-92.

19. The privity requirement in warranty cases was consistent with the nature of the cause of action: Plaintiff was suing the entity with whom he or she had been in a contract of sale. As Prosser and Keeton have stated, "[w]arranties on the sale of goods were governed in most states by the Uniform Sales Act, and then by its successor, the Uniform Commercial Code; and neither of these statutes had been drawn with anything in mind but a contract between a 'seller' and his immediate 'buyer'." *Id.* at 691. Courts and commentators have generally regarded *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), as the landmark case that overturned the privity requirement for actions sounding in implied warranty. *See Prosser, The Fall of The Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). *Henningsen* has receded in importance as the more suitable principles of strict liability have trumped implied warranty. *See, e.g., Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), which confronted the problem of theoretical fit. The court stated that

strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, [but] the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

Id. at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701 (citations omitted).

20. The doctrine of *res ipsa loquitur* enables an injured party to reach the jury with nothing more than circumstantial evidence. Under the doctrine's most accepted formulation, the following conditions are necessary: (1) the event must be one that would not ordinarily occur without someone's negligence; (2) the accident must be caused by an agency or instrumentality within the defendant's exclusive control; and (3) plaintiff must be without voluntary action or contribution in causing the accident. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 16, § 39 at 244. Although the doctrine's unsuitability in many products liability cases seems clear, *res ipsa loquitur* also has more general drawbacks. As one judge has stated: "It adds nothing to the law, has no meaning which is not more clearly expressed . . . in English, and brings confusion to our legal discussions." PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 16, at 244 n.20, *quoting* *Potomac Edison Co. v. Johnson*, 160 Md. 33, 152 A. 633 (1930) (Bond, C.J., dissenting).

Res ipsa loquitur will apply principally to cases involving manufacturing defects since demonstrating what went wrong in those cases is usually difficult. In contrast, *res ipsa loquitur* cannot apply to a determination of design defect because it involves a finding that all units of a particular product are identical and inadequate. *See Dickerson, The ABC's of Products Liability — With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439, 441 (1969).

ipsa loquitur to product liability cases was "heroic and tortured," however, because the exclusive control requirement could never be met; the product was always out of defendant's hands and often had passed through several other entities before reaching plaintiff.²¹ Further, courts relaxed the requirement that the accident be one that does not typically occur absent some negligence.²² Judicial willingness so to attenuate negligence doctrine suggested that acceptance of faultless liability was not far behind.²³

Courts eventually stopped shuffling between inadequate theories and began to impose strict liability in tort on all parties within the chain of distribution — including manufacturers, wholesalers, distributors, and retailers.²⁴ The imposition of strict liability, foretold by Justice Traynor's concurrence in *Escola v. Coca-Cola Bottling Co.*,²⁵ reflected a profound change in judicial and societal attitudes, and was justified by a number of rationales: (1) those who mass-produce consumer goods are best able to absorb the cost of injuries associated with those goods since they can pass those costs on to consumers; (2) placing liability on manufacturers without fault increases the incentive for manufacturers to produce safer products; (3) requiring the plaintiff to demonstrate defendant's negligence in causing the defect imposes an intolerably high evidentiary burden;

21. This phrase is shamelessly cribbed from R. EPSTEIN, C. GREGORY & B. KALVEN, *CASES AND MATERIALS ON TORTS* at 640 (4th ed. 1984), where it was used to summarize the California Supreme Court's use of *res ipsa loquitur* in *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1949). It is understandable why the court decided to focus on the control issue at the time of the negligence, rather than at the time of the accident; it is not understandable why the court disparately treated the manufacturer's evidence concerning quality control, and the bottler's evidence on the same issue.

22. Again, *Escola* provides a good example of the courts' increased willingness to bend this requirement of *res ipsa*. The *Escola* court applied the doctrine in the teeth of defendant's "evidence tending to show that it exercised considerable precaution" *Escola*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1949).

23. Indeed, even some early cases evince policy concerns that would be at home in the era of strict liability. See, e.g., *Stolle v. Anheuser-Busch*, 307 Mo. 520, 271 S.W. 497 (1925), in which the Missouri Supreme Court stated that

bottled beverages, containing explosive gases, are put upon the market with the intention that they will be transported throughout the country and sold to consumers for the profit of the manufacturer. Obviously this should be at his risk. Public policy requires that the manufacturer should assume the risks and hazards of explosion incident to the reasonable and ordinarily careful transportation and handling of these goods in the usual course of business. The rule of liability . . . is fair to the manufacturer, and will afford the consumer . . . and those handling it in the ordinary course of trade reasonable protection, while the contrary rule leaves them practically without redress.

Id. at 529, 271 S.W. at 500.

24. A short chain of distribution has been used to simplify my analysis. Many other parties, including component part manufacturers, lessors and their renters, employers, and nonpurchasing users and bystanders sometimes participate in the chain of distribution.

25. 24 Cal. 2d 453, 461-68, 150 P.2d 436, 440-43 (1944).

(4) plaintiffs are typically incapable of protecting themselves against defective products and should not go uncompensated when injury they could neither have foreseen nor prevented actually occurs.²⁶

When applied to nonmanufacturing sellers, the rationales for imposing strict liability weaken. Although many wholesalers and retailers are generally able to absorb the cost of injuries caused by defective products better than the average consumer, this rationale for imposing strict liability offers no principled limitations. If the goal is to pin the cost on the entity best able to bear it, there is no reason why any sufficiently well-heeled corporate defendant should not have to pay plaintiff in other areas of tort as well. Conversely, if plaintiff is a corporate entity and defendant is an individual, this rationale suggests that defendant not pay.²⁷

Another problem with imposing strict liability on nonmanufacturers is that the incentives to market safer products may not work as well in their case. The argument in favor of imposing strict liability on all parties within the chain of a product's distribution has been that sellers can exert pressure on those manufacturers with whom they regularly deal and whose products are defective, by discontinuing, or imposing conditions on, further dealings. The problem with this argument is its critical dependence on several questionable assumptions: (1) manufacturers who most frequently pay tort judgments are turning out products that are less safe; (2) nonmanufacturing sellers have sufficient knowledge to exert the desired pressure; and (3) nonmanufacturing sellers have sufficient market power and

26. *Id.*

27. See, e.g., Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980). Although the loss-shifting and loss-spreading arguments run only in plaintiff's favor, plaintiff must also establish the causal connection between his or her injury and defendant's conduct. If plaintiff establishes that the defect occurred while the product was in defendant's hands, one question is whether the downstream defendants caused the accident. In one sense, the downstream defendants caused the accident because they were part of the distributional system that passed the product through to defendant. In another sense of causation, however, only the manufacturer actually caused the harm. Some courts seem to have attempted to provide a solution to the question of whether downstream defendants caused the accident by stating that "in a product liability action, the trier of fact must focus on the product, not on the manufacturer's conduct . . ." *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 417, 573 P.2d 443, 447, 143 Cal. Rptr. 225, 229 (1978) (emphasis in original).

Following this emphasis, we would conclude that since the product had caused the injury, liability would extend the length of the chain of distribution. This answer is unsatisfying for two reasons. First, it yields the anomalous result that those "upstream" from the entity creating the defect would be liable even though the defect was not present when it left their hands. More fundamentally, it fails to solve the underlying puzzle: *Why* should the focus be on the product? There is at least no formal reason for preferring a system that imposes chain-wide liability for defective products to one that combines a strict liability basis with defendant-specific causation.

choice to make their decisions count.²⁸

The final problem in imposing strict liability on all parties within the chain of a product's distribution is that typically the supplier has not caused the defect that injures the plaintiff; the defect has occurred during the manufacture of the product.²⁹

Courts have long recognized that the arguments for imposing liability on manufacturers do not work as well for nonmanufacturing sellers.³⁰ Even Judge Traynor, an unalloyed supporter of strict liability against all sellers in the chain of distribution, recognized that manufacturers deserve liability more than nonmanufacturing sellers.³¹ Nonetheless, Traynor believed that liability should be imposed on the retailer as well as on the manufacturer, because the manufacturer may not be amenable to suit and because the retailer is sometimes in a position to exert pressure on the manufacturer to strive toward greater product safety.³² Although concern for the plaintiff's right to recover led Judge Traynor to hold retailers strictly liable, the potential unfairness of having the retailer pay for conduct more properly charged to the manufacturer led him also to support the retailer's indemnity action against the manufacturer.³³

Although courts were not unanimous in following this terraced

28. These arguments appear to have been somewhat overlooked by commentators on both sides of the issue whether to impose strict liability as against suppliers. *See, e.g.,* Waite, *Retail Responsibility and Judicial Law Making*, 34 MICH. L. REV. 494, 519 (1936) ("[i]f there be a reason, a public gain in transfer of the loss from the customer to the retailer, the writer is not aware of it. None seems to be suggested in the decisions other than . . . an unexplained and unproved assertion that holding the dealer liable somehow conduces to public safety."); Brown, *The Liability of Retail Dealers for Defective Food Products*, 23 MINN. L. REV. 585, 606 (1939) (mentioning the retailer's ability to cut off future relations with the producer, but not directly addressing the questions raised in the text).

29. This comment is certainly true of design defects, which are created by the manufacturer who chooses to design a product in a certain way. *See Nichols v. Westfield Indus., Ltd.*, 380 N.W.2d 392, 396-97 (Iowa 1985). It is also generally true that unintended manufacturing defects are typically created by the manufacturer. *See, e.g., Sheward v. Virtue*, 20 Cal. 2d 410, 126 P.2d 345 (1942) (negligence by manufacturer of component part); *Simmons Co. v. Hardon*, 75 Ga. App. 420, 43 S.E.2d 553 (1942) (defective sofa bed put out by manufacturer).

30. For an early, elaborate treatment of the problems with imposing strict liability on all entities within the chain of distribution, see *Bowman Biscuit Co. v. Hines*, 151 Tex. 370, 251 S.W.2d 153 (1952).

31. In *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 468, 150 P.2d 436, 443 (1949), for example, he stated: "There is greater reason to impose liability on the manufacturer than on the retailer who is but a conduit of a product that he is not himself able to test." (Traynor, J., concurring).

32. *Vandemark v. Ford Motor Co.*, 61 Cal. 2d 256, 262, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964).

33. Although Judge Traynor concluded in *Escola* that liability should be imposed on both the retailer and the manufacturer in the warranty context, this conclusion applies with no less force to actions brought under strict liability in tort. *See* 24 Cal. 2d at 464, 150 P.2d at 441-42.

LIABILITY OF NONMANUFACTURING SELLERS

approach to liability as the above might suggest,³⁴ many states were indeed willing to hold suppliers strictly liable, realizing that suppliers were usually guarantors, made to pay only when the manufacturer could not be reached.³⁵ But at least partly because the involvement of nonmanufacturing suppliers in these cases often led to complications during the course of a litigation,³⁶ and partly because of the general clamor for tort reform, a host of statutes now restricts an injured party's right to recover against such suppliers.³⁷

Statutes restricting an injured party's right to recover against suppliers have two components. First, the statutes relieve the supplier of liability based on status as a "mere conduit," requiring instead that plaintiff make some showing that defendant had, or should have had, knowledge of the product defect.³⁸ The statutes take one of three approaches to the degree of knowledge of the product defect required for liability.³⁹ The most generous approach, from

34. See, e.g., *Sam Shainberg Co. v. Barlow*, 258 So. 2d 242 (Miss. 1972). The *Shainberg* court refused to apply strict liability to the retailer or wholesaler of a pair of shoes that never left its original package until the retailer transferred the pair to a rack in the store. The shoes proved to have a latent defect not discernible by either the retailer or the wholesaler, and the manufacturer was "reputable and reliable." The court rejected both the strict liability argument, and the *MacPherson* view that all parties within the chain of distribution have a duty "to inspect and discover a latent defect." *Id.* at 244-45. Although *Sam Shainberg* has never been expressly overruled, a federal court recently stated that it has been "strip[ped] . . . of any precedential value." *Curry v. Sile Distributors*, 727 F. Supp. 1052, 1054 (N.D. Miss. 1990).

35. See, e.g., *Vandemark v. Ford Motor Co.*, 61 Cal. 2d 256, 262-63, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964); *Mead v. Warner Pruyn Div.*, 57 A.D.2d 340, 394 N.Y.S.2d 483 (1977).

36. The Model Uniform Product Liability Act voices concern over imposing a portion of defense costs on nonmanufacturers. See MODEL UNIFORM PRODUCTS LIABILITY ACT, § 105 comment (1979).

37. See *supra* note 3.

38. See statutes *supra* note 3.

39. Certain statutes resist membership in any category. Kentucky's provision on the liability of nonmanufacturers, for example, begins by providing a sealed container defense, but then takes the defense away for those who "knew or should have known . . . that the product was in a defective condition . . ." KY. REV. STAT. ANN. § 411.340 (Baldwin 1988). Similarly, the Maryland statute provides a "sealed container" defense only if the nonmanufacturer satisfies several requirements, including that "the seller had no knowledge of the defect; [and] the seller in the performance of the duties he performed or while the product was in his possession could not have discovered the defect while exercising reasonable care." MD. CTS. & JUD. PROC. CODE ANN. § 5-311(b) (1984).

Other statutes are less clear in defining their terms. For example, whereas Minnesota and North Dakota require a showing of "actual knowledge," MINN. STAT. ANN. § 544.41 (1988); N.D. CENT. CODE § 28-01.1-01-07 (Supp. 1989), Kansas allows the product seller to escape liability absent "knowledge" of the defect. KAN. STAT. ANN. § 60-3306(a) (1983). Although the Kansas statute does not expressly state whether it requires actual or constructive knowledge, subsection (b) strongly suggests that constructive knowledge will suffice. Subsection (b) states that the seller is not liable when "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 . . ." *Id.* at sec. 60-3306(b). Reading these two conjunctive requirements for supplier exculpation together strongly suggests a constructive knowledge basis of liability, but

the supplier's point of view, frees a supplier who does not have *actual* knowledge of the product defect.⁴⁰ An intermediate approach is

subsection (b) raises vexing questions of its own. What duties is the seller "required to perform"? Only those established by contract? Whatever duties the court sees fit to impose?

Georgia's liability-limiting provision is probably the least clear. The statute states that "[f]or purposes of a product liability action based in whole or in part on the doctrine of strict product liability in tort, a product seller is not a manufacturer . . . and is not liable as such." GA. CODE ANN. § 51-1-11.1(b) (1982). Presumably, this subsection was intended to throw the supplier's conduct back into the negligence threshold, but more clarity on this issue would have been welcome.

40. See ILL. ANN. STAT. ch. 110, § 2-621 (Smith-Hurd Supp. 1990); MINN. STAT. ANN. § 544.41 (1988); N.D. CENT. CODE § 28-01.1-06.1 (Supp. 1989). The General Assembly of Pennsylvania also recently passed a bill that, if enacted, would require the seller to have actual knowledge of the defect to be liable. House Bill No. 916, Session of 1989, is currently before the Judiciary Committee of the State Senate. The Pennsylvania bill proposes to couple the substantive limitations on supplier liability with the procedural mechanisms for removing such defendants from a case. The bill provides:

Sec. 8374. Basic Limitations on Liability of Suppliers.

(B) Additional Basic Limitation Applicable to Nonmanufacturing Suppliers.—

(1) Except as provided in Paragraph (2), a supplier of a product who did not manufacture the product in whole or in part shall be liable in a product liability action only if the plaintiff proves one or more of the following in addition to other elements required by this subchapter or otherwise applicable law for imposition of liability on that supplier:

(I) The supplier exercised substantial control over the design, testing, packaging or labeling of or the providing of warning or instruction about that aspect of the product which caused the harm for which recovery of damages is sought.

(II) The supplier altered or modified the product, and that alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought.

(III) The supplier had, at the time that supplier supplied the product, actual knowledge of the product defect which caused the harm for which recovery of damages is sought.

(IV) The supplier made an express factual representation about that aspect of the product which caused the harm for which recovery of damages is sought.

(2) Paragraph (1) shall not apply if:

(I) Valid in personam jurisdiction cannot be obtained in this Commonwealth over either a manufacturer of the product or any other supplier described in paragraph (1) (I) through (IV); or

(II) The court determines that neither a manufacturer of the product nor any other supplier described in paragraph (1)(I) through (IV) would be able to satisfy a judgment if found liable in a product liability action.

(3) A nonmanufacturing supplier shall be dismissed from a product liability action without prejudice upon filing of an affidavit stating:

(I) That all information in the possession of the supplier concerning the identity of the manufacturers and other suppliers of the product at issue has been provided to the plaintiff; and

(II) That the supplier is not described in Paragraph (1) (I) through (IV).

The filing of such affidavit shall have the effect of tolling or extending the statute of limitations as to the supplier filing it. If the court determines that the statements made in any affidavit filed hereunder are inaccurate, or that no manufacturer or other supplier described in para-

LIABILITY OF NONMANUFACTURING SELLERS

negligence-based, and establishes liability when the supplier "knew or should have known" of the defect,⁴¹ or, more simply, when it acted with negligence.⁴² The least generous reform from the supplier's perspective relieves the seller of liability only when knowledge of the defect is presumptively impossible (or at least almost so), as when the product is in a sealed container.⁴³

The statutes' second component permits the plaintiff to retain the supplier as a guarantor. Reflecting Judge Traynor's concern with leaving plaintiff without remedy, most jurisdictions permit the supplier to be "transformed" into a manufacturer (thus subject to strict liability) when the manufacturer is unavailable to plaintiff.⁴⁴ The other, and little followed, alternative is to make plaintiff bear the risk that the manufacturer will be unavailable.⁴⁵

Such remedial legislation also affects indemnification actions. Since holding a supplier liable requires some showing of fault,⁴⁶ the supplier, once held liable, will have difficulty pursuing an action for indemnification, although a contribution claim may remain.⁴⁷ When

graph (1) (I) through (IV) is both subject to valid in personam jurisdiction in this commonwealth and able to satisfy a judgment if found liable in a product liability action, the court shall, upon motion of a party, immediately reinstate the claims against such supplier.

(4) Paragraph (3) is not intended to preclude any other means by which a nonmanufacturing supplier may seek dismissal from a product liability action on the basis of this subsection or otherwise, and this subsection is not intended to preclude any other defense available to a non-manufacturing supplier in a product liability action.

41. See IDAHO CODE § 6-1407(1) (1980); S.D. CODIFIED LAWS ANN. § 20-9-9 (1987).

42. See OHIO REV. CODE ANN. § 2307.78(A)(1) (Baldwin 1989); WASH. REV. CODE ANN. § 7.72.040 (West Supp. 1990).

43. See N.C. GEN. STAT. § 99B-1 - B-4 (1989); TENN. CODE ANN. § 29-28-106 (Supp. 1990).

44. See statutes *supra* note 3. The Model Uniform Products Liability Act imposes liability against the supplier when the manufacturer is not subject to jurisdiction, or is insolvent, or when the court determines that it would be highly likely that the claimant would be unable to enforce a judgment against the manufacturer. MODEL UNIFORM PRODUCTS LIABILITY ACT §§ 105 (1979).

45. See GA. CODE ANN. § 51-1-11.1 (Supp. 1990); NEB. REV. STAT. §§ 25-21, 181 (1989); S.D. CODIFIED LAWS, § 20-9-9 (1987).

46. "Fault" may also include a supplier's failure to discover a defective condition. In such cases, the supplier may obtain indemnification against the manufacturer by application of the active/passive negligence distinction. This liability structure again reflects judicial ambivalence towards the supplier's role in a product liability action. As Professor Shapo states: "Indeed, putting aside the imposition of strict liability on policy grounds, intermediate sellers who are not manufacturers generally do not have a duty to inspect or test specifically for latent defects, especially when the product is sold in the original package." See M. SHAPO, THE LAW OF PRODUCTS LIABILITY ¶ 14.04 [2] [a] (1987).

47. See, e.g., *Frazer v. A.F. Munsterman, Inc.*, 123 Ill. 2d 245, 527 N.E.2d 1248 (1988), in which the Illinois Supreme Court ruled a claim for indemnification in a product liability action could not be maintained by a party who had been found negligent. *Id.* at 269, 527 N.E.2d at 1258-59.

the supplier is not at fault, an action for indemnification should lie.⁴⁸

The structure and interpretation of the various statutes portend changes in the liability relations among manufacturer, supplier, and injured party. A nascent body of case law has begun to redefine this terrain, but has at times done so in apparent disregard of the statutory language. I now turn to this body of statutory and case law. The vehicle for analysis is separate consideration of the various classes of defects: manufacturing defects, design defects, and inadequate warnings.

Before I proceed, however, two comments are in order. First, although I have, for convenience and necessity's sake, grouped these statutes limiting supplier liability into the general categories noted above, important variations exist within these groups. To choose just one obvious example, statutes that I have classified as requiring "negligence" to support supplier liability differ in important respects. Statutes may start by defining negligence differently, and then may multiply that initial dissimilarity in treating issues such as the effect of the manufacturer's unavailability, the level of product involvement necessary to "convert" a supplier into a manufacturer, and defenses.⁴⁹ The example set forth in the footnote highlights the com-

48. Perhaps surprisingly, courts are divided over whether states that have enacted contribution, but not indemnity, statutes intended to do away with all actions for implied indemnity. The Illinois Supreme Court has repeatedly declined to answer the question. *See Frazer v. A.F. Munsterman, Inc.*, 123 Ill. 2d 245, 537 N.E.2d 1248 (1988). In contrast, a federal court applying Michigan law has permitted such an indemnification action by sellers whose "involvement with [the] product, was solely as a seller." *LaFountain v. Sears, Roebuck & Co.*, 680 F. Supp. 251, 253 (E.D. Mich. 1988). Permitting the survival of indemnification actions by faultless suppliers is consistent with the rationale for holding suppliers liable in the first place. *See supra* notes 32-33 and accompanying text.

49. As an illustration of such differences, compare the Ohio and South Dakota responses to the problem of supplier liability. Ohio's statute is among the most detailed. It begins by pegging supplier liability to a showing of "negligence," OHIO REV. CODE § 2307.78(A)(1) (Supp. 1989), or to misrepresentation, *id.*, § 2307.78(A)(2). Those limitations, however, are expressly subordinated to § 2307.78(B), which treats the supplier as a manufacturer when any one of the following applies:

- (1) the manufacturer of that product is not subject to judicial process in [Ohio];
- (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 in question, and the alteration, modification, or failure to maintain

plexity of such differences and the danger of uncritical lumping of these statutes.

Second, although the focus of this paper is descriptive, I will nonetheless preface the remarks that follow by stating here my opposition to legislation limiting liability to those suppliers who have "actual knowledge" that a product is defective. The reasons that might be advanced in favor of such a suffocating restriction I find unpersuasive, and I remain unconvinced that those commercial entities in the chain of a product's distribution should enjoy a restriction on liability not shared by defendants in other types of litigation.⁵⁰

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." *Id.* § 2307.78(B).

After working through that list, application of defenses must be considered. Interestingly, Ohio permits suppliers to assert a contributory negligence defense when the claim against the supplier arises under § 2307.78(A)(1), which is negligence based, but otherwise does not permit the defense against either supplier or manufacturers. *Id.* § 2315.20(C)(2). For the details of the contributory negligence defense, see *id.* § 2315.19.

In contrast, South Dakota has only this to say on the subject of supplier liability:

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 [entity] knew, or in the exercise of reasonable 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.

S.D. CODIFIED LAWS § 20-9-9 (1987).

While it may make no practical difference that one statute uses the term negligence, while the other speaks in negligence terms, South Dakota's use of the troublesome "unreasonably dangerous" phrase may create a divergent body of case law.

A more central difference between the two is that South Dakota allows the supplier to escape liability even when the manufacturer is unavailable, while Ohio shows its preference for compensating the injured party. Because of this difference, there is no need for South Dakota to spell out situations in which the supplier is "transformed" into a manufacturer, and no need for special rules on comparative negligence as applied to strict liability against suppliers.

This first-pass look at two statutes dramatizes the rich variation these statutes exhibit. For this reason, I have resisted the temptation to create a "user-friendly" chart comparing and contrasting these statutes by rough type.

50. Those favoring the "actual knowledge" approach might argue that imposing liability against those suppliers who exercise substantial control over the product's creation, distribution, or alteration provides injured parties with a sufficient safeguard. But negligence can occur in ways unrelated to control; a wholesaler might negligently (or even recklessly) fail to notice a defect that should be obvious. This inadvertent strain of negligence constitutes the bulk of automobile accident cases, for example. One might also defend the "actual knowledge" approach by pointing to the cost of product liability litigation unjustly absorbed by the retailer. See, e.g., MODEL UNIFORM PRODUCT LIABILITY ACT, analysis accompanying § 105. But this argument fails to explain, as a normative matter, why imposing negligence-based liability is "unjust," when it is not so considered in other tort litigation.

III. Supplier Liability for Manufacturing Defects

The great majority of early product liability cases involved manufacturing, or construction, defects.⁵¹ Products exhibiting this type of defect were typically anomalies that the manufacturer did not intend to produce — the tire with defective rubber, the bottle under excessive pressure, the chair made of defective wood. Not until later did courts become concerned about cases in which injured parties sought to hold defendants liable for their conscious design decisions.⁵²

This section considers the effect of supplier liability reform statutes on manufacturing defects. The hypothetical cases and analyses set forth below demonstrate that application of the statutes may yield surprising results, particularly when the statute establishes a "sealed container" defense.

A. Problems with Defining Products that are "Sealed"

Let us begin with the least troublesome case:

Case 1. Retailer is a small, struggling grocery store that purchases canned tuna from Tuna World, a financially successful local manufacturer with an impeccable record for quality control and inspection. A single can, itself sound, is sold to Consumer, who contracts botulism from the tuna. No other cans contain harmful impurities.

This situation is a favorite of those seeking to limit supplier liability; here, the supplier is no more at fault than the consumer. The

51. See, e.g., *Lill v. Murphy Door Bed Co.*, 290 Ill. App. 328, 8 N.E.2d 715 (1937) (defective metal used in construction of bed); *Simmons Co. v. Hardin*, 75 Ga. App. 420, 43 S.E.2d 553 (1947) (defective clamp on sofa bed); *Okker v. Chrome Furniture Mfg. Corp.*, 26 N.J. Super. 295, 97 A.2d 699 (App. Div. 1953) (defective bar stool).

52. See R. EPSTEIN, *CASES AND MATERIALS ON TORTS*, at 612 (5th ed. 1990): "The . . . present stage of products liability law began with a series of important (what are now widely known as) defective design and duty to warn cases, decided shortly after the 1965 Restatement [(Second)]. These cases . . . form the centerpiece of modern products liability law."

Indeed, heavy criticism met the decision to draft section 402A of the *Restatement (Second) of Torts* (which lent impressive pedigree to the theory that liability for defective products should attach without regard to fault) with breadth sufficient to cover design defects. Among the most vocal critics of the *Restatement's* expansive position was Dean Page Keeton, who noted:

I, unlike the authors of the *Restatement*, would limit the use of the word "defective" to the case of an unintended condition, a miscarriage in the manufacturing process. Most of the decisions applying strict liability notions have involved "defective" products in this limited sense, particularly those decisions dealing with mechanical and industrial products.

Keeton, *Manufacturer's Liability: The Meaning of 'Defect' in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 562 (1969).

LIABILITY OF NONMANUFACTURING SELLERS

supplier did not cause the defect, and may not be better positioned than the consumer to bear the loss. Indeed, even the least generous reform legislation is ideally suited to deal with this type of case, which defines a "sealed container" situation — the product simply was not "open" to inspection.

States such as Tennessee and North Carolina follow the "sealed container" approach most closely, affording the supplier a defense only if it was afforded no reasonable opportunity to inspect the product or if such inspection would not have revealed the defect.⁵³ This limited defense proved to be successful in *Grindstaff v. Singer Co.*,⁵⁴ in which the district court, applying Tennessee law, granted prediscovery summary judgment for the seller of an air conditioner allegedly containing a defective compressor.⁵⁵ Plaintiff was unable to point to any facts that might defeat the defense. Moreover, the plaintiff was unable to support any other allegation of negligence since the defect was isolated, the seller had no reasonable opportunity to inspect, and an inspection would not have revealed the defect.⁵⁶

If the plaintiff cannot defeat the sealed container defense, statutes basing liability on a more general showing of negligence and statutes requiring actual knowledge of the defect will also bar recovery. Surprisingly, even if the applicable defense is available, most states still require the supplier to make plaintiff whole when the common law would have reached the same result. For example, in Tennessee, the supplier will be "transformed" into a manufacturer when the manufacturer is either insolvent or not amenable to jurisdiction.⁵⁷ This means that the supplier, although not liable under the statute's general rule, will pay in the very same situations in which an indemnification suit would have been unavailing.

But the statute may have a decisive effect on the supplier's position in settlement negotiations. When the supplier knows that the statute protects it from liability, and when the supplier also knows that the manufacturer is an available defendant, the supplier will have no reason to participate in settlement negotiations. Keeping suppliers out of such negotiations is to be encouraged, since current

53. See N.C. GEN. STAT. § 99B-2(a) (1990); TENN. CODE ANN. § 29-28-106(a) (Supp. 1990).

54. 518 F. Supp. 44 (E.D. Tenn. 1981).

55. *Id.* at 45.

56. Sanctions may have been appropriate since the statute provided that no action "shall be commenced" against a nonmanufacturer unless one of the statutory exceptions is met. See TENN. CODE ANN. § 29-28-106 (Supp. 1990).

57. *Id.* § 29-28-106(A)(2), (3) (Supp. 1990).

law "subjects suppliers to substantial . . . premiums and defense costs. These costs are added to the price of products and waste legal resources."⁵⁸ In contrast, without the "sealed container" defense, even a "pure" supplier faces the spectre of some liability, because a jury's finding that the supplier was in any measure responsible for the accident operates to defeat the supplier's subsequent indemnification action against the manufacturer.⁵⁹ Suppliers have thus felt pressure to contribute to the settlement pot.

Of course, whether the statutes will actually have such a salutary effect on the settlement process depends largely on judicial interpretation of the applicable defense. Interesting questions may arise, particularly when courts try to determine the reach of the sealed container defense. Consider the following situation:

Case 2. A Corporation manufactures trailers equipped with hitches and hooks to secure them to trucks. A Corporation has an excellent reputation for safety and quality control, and regularly sells trailers to B Corporation, which then rents the trailers to drivers. One trailer, properly tethered to a truck by Renter, contains an apparently sound hook which is in fact made of deficient metal. When the hook snaps, the trailer slams into the truck, injuring Renter. Renter sues both A Corporation and B Corporation, alleging that B Corporation was negligent in not inspecting the products it rented.⁶⁰

First, consider the differences between the above case and *Case 1*. The tuna fish retailer from *Case 1* could not inspect the product being sold because that would require opening enough cans to satisfy a court that a reasonable inspection had taken place. Yet, any opened can could not be sold. (If a court took the extra step of requiring inspection of every can in order to defeat an inference of negligence, the practical result would be a return to strict liability — if the retailers were not driven out of business — because at that

58. MODEL UNIFORM PRODUCTS LIABILITY ACT, § 105 analysis (1979).

59. This follows from the proposition that indemnification is generally available when "one . . . is held responsible solely by imputation of law because of a relation to the actual wrongdoer," PROSSER & KEETON, THE LAW OF TORTS § 51 (5th ed. 1984), and not when the party seeking indemnification is also at fault. Prosser and Keeton point out that indemnification has sometimes also been granted to suppliers who negligently rely upon suppliers, *id.*, but presumably indemnification would not be proper when more active evidence of negligence is available.

60. These facts are suggested by *Frazer v. A.F. Munsterman, Inc.*, 123 Ill.2d 245, 527 N.E. 2d 1248 (1988), except that *Frazer* involved other asserted acts of negligence by the renting company, including failure to appreciate the inadequacy of a certain type of hook for vehicles such as the one the renting customer was driving. *Id.* at 271, 527 N.E.2d at 1259 (Miller, J., specially concurring).

point the retailer might as well open no cans.) Once the cans were opened, the retailer would have to inspect the tuna for possible dangers, raising the further question of which tests to run.

Assuming the hook snap defect is detectable upon sight inspection, *Case 2* differs from *Case 1* in that the supplier does not have to tamper with the product and subsequently render it valueless in order to discover the defect. For example, if the hook was half as thick as other hooks received from the manufacturer, a visual inspection would reveal the defect, and the case would, at once, be removed from the sealed container context, thus providing a strong negligence argument for plaintiff.

But if the defect is not discernible upon sight inspection because the defect is in the type of material used, *Case 2* resembles *Case 1* in that testing the hook snaps for the metal's deficiency might require rendering the hook as unusable as the opened can of tuna.⁶¹ And the two cases are also similar in other material respects: the manufacturer and the supplier have an ongoing contractual relationship; the manufacturer is reputable; and the defect is "one-of-a-kind."

The concern with saddling the defendant with an impossible duty has led state legislatures to amend the law to require that the nonmanufacturing supplier have at least a reasonable opportunity to discover the defect before liability will attach.⁶² Courts, in turn, have relied on both the relevant statute and the *Restatement (Second) of Torts* section 402, and have refrained from equating failure to inspect with negligence.⁶³ Thus, *Case 2* is treated in much the same way as *Case 1*, absent some obvious defect that a cursory examination would reveal.⁶⁴

61. For a case involving deficient metal, see *C.L. Pouncey v. Ford Motor Co.*, 464 F.2d 957 (5th Cir. 1972), in which plaintiff's expert testified that the radiator fan that broke off and injured plaintiff suffered from "premature fatigue failure . . . caused by an excessive number of inclusions in the metal of the blade. An inclusion is a non-metallic impurity in the steel which weakens the metal." *Id.* at 958.

62. See *supra* notes 41-43 and accompanying text.

63. Section 402 provides:

Absence of Duty to Inspect Chattel

A seller of a chattel manufactured by a third person, who neither knows nor has reason to know that it is, or is likely to be, dangerous, is not liable in an action for negligence for harm caused by the dangerous character or condition of the chattel because of his failure to discover the danger by an inspection or test of the chattel before selling it.

RESTATEMENT (SECOND) OF TORTS § 402 (1965).

64. Of course, one person's "obvious" defect may be another's mystery. This was the situation in *Crothers v. Cohen*, 384 N.W.2d 562 (Minn. Ct. App. 1986), in which plaintiff claimed that a used car dealership was negligent in not discovering the absence of a stopper in a rebuilt carburetor. Plaintiff and his friend examined the engine, but neither plaintiff nor his friend observed the defect. An engineering expert testified, however, that such a defect would

B. Effect of Statutes on Cases Involving Evidence of Supplier Negligence

As suggested above, any shift toward allowing the jury to consider allegations of negligence such as those raised by *Case 2* may effectively return the supplier to the position of strict liability. Other acts of negligence may also be alleged, however, and at least some of these should result in liability even under statutes insulating the supplier from strict liability. Consider the following:

Case 1a. Assume the same facts as *Case 1*, except Tuna World has the worst record in the tuna industry for safety. Tuna World has been repeatedly cited for health violations, and is reported to be on the brink of bankruptcy. Perhaps as a result of negative publicity, its prices are lower than those of competing manufacturers. There have been published reports of several people becoming ill after eating the tuna, although causation has not been clearly established. Retailer is aware of those reports. The can sold to plaintiff was irregularly shaped.

The new facts in the Tuna World hypothetical strongly suggest that Retailer was negligent in selling the tuna to plaintiff because Retailer should be aware of some risk in selling the tuna. Removing one or more of these signposts of Tuna World's negligence reduces the strength of the inference, but any one of the negligence indications should allow plaintiff to reach the jury under any statute that provides that some showing of negligence is a sufficient basis for imposing liability against the supplier. The statutes that require a showing of actual knowledge for the supplier to be liable, however, would continue to insulate Retailer.

Minnesota provides a good example of the actual knowledge approach, interesting as much for its novel procedural provisions as for its substantive rules of supplier liability. Minnesota statutes permit

have been obvious to a qualified mechanic. The court's decision imposed upon the used car dealership a duty to have "someone with mechanical knowledge inspect the car for obvious defects before reselling it to a member of the public." *Id.* at 565. The *Crothers* holding recognizes that the purchaser of a used car may be relying on the regular seller to make a cursory inspection for any risks to personal safety. The *Crothers* result seems inconsistent with the *Restatement* because the plain language of the *Restatement* does not require inspection of products by sellers. But the *Restatement's* reasons for not requiring an inspection may support requiring an inspection when the defect is obvious. The *Restatement's* rationale for not requiring an inspection is that "[t]he burden on the seller of requiring him to inspect chattels which he reasonably believes to be free from hidden danger outweighs the magnitude of the risk that a particular chattel may be dangerously defective." See *RESTATEMENT (SECOND) OF TORTS*, § 402, comment d (1965). Because the burden of requiring the seller to inspect products for obvious defects does not outweigh the magnitude of the risk, seller should inspect for obvious defects under the *Restatement* rationale. *Id.*

LIABILITY OF NONMANUFACTURING SELLERS

the injured party to bring a cause of action against anyone in the chain of distribution.⁶⁵ The nonmanufacturing supplier must then attempt to certify by affidavit the identity of the manufacturer.⁶⁶ Plaintiff then brings suit against the manufacturer, and the supplier is dismissed, unless the plaintiff can show one of a list of problems with the manufacturer, such as the manufacturer's insolvency, lack of jurisdiction over the manufacturer, or expiration of the statute of limitations.⁶⁷

In addition, the nonmanufacturing supplier remains in the case if the supplier exercises "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. . .; had *actual knowledge* of the defect. . .; or created the defect."⁶⁸

As applied to *Case 1a*, the Minnesota statute's approach would insulate Retailer from liability since none of the bases for holding the supplier liable applies. Retailer neither exercised control over the manufacturing process, nor provided warnings, nor created the defect. But the most startling provision of the Minnesota statute is that unless one of the other exceptions applies, the supplier will not be liable unless plaintiff can prove that defendant acted knowingly. Although the Retailer's conduct in *Case 1a* is probably highly negligent, Retailer's conduct is not *intentional*. A slight change in facts might change the result under the Minnesota statutory approach. For example, if the consumers in *Case 1a* who had become ill could establish causation, some courts may allow reckless conduct to satisfy the "actual knowledge" requirement in order to hold Retailer liable.⁶⁹

The potential result of cases in sealed container jurisdictions is even more anomalous than the result under statutes requiring actual

65. See MINN. STAT. ANN. § 544.41 (West 1988 & Supp. 1990). Thus, the plaintiff avoids sanctions when he sues a supplier who cannot be liable. Compare TENN. CODE ANN. § 29-28-106 (Supp. 1990), which provides that no action shall be brought against a non-negligent supplier. Under the Tennessee approach, sanctions against plaintiff are arguably appropriate when plaintiff, knowing the manufacturer to be solvent and amenable to jurisdiction, and the supplier to be a mere conduit, nonetheless files suit against that supplier. *Id.*

66. MINN. STAT. ANN. § 544.41 (West 1988 & Supp. 1990).

67. *Id.*

68. *Id.* (emphasis added).

69. Language in *Ultramares v. Touche, Niven & Co.*, 255 N.Y. 170, 179 N.E. 441 (1921) supports the theory that reckless conduct could support the "actual knowledge" requirement. *Ultramares* stated that "[e]ven an opinion . . . may be found to be fraudulent if the grounds supporting it are so flimsy as to lead to the conclusion that there was no genuine belief back of it." 255 N.Y. at 186, 174 N.E. at 447. Likewise, Retailer's decision to continue selling the tuna that was suspicious-looking suggests that Retailer's belief that the tuna was safe was not genuine.

knowledge. The sealed container defense is typically more limited than the general negligence defense.⁷⁰ Nevertheless, the sealed container defense could have the unexpected result of protecting the Retailer in *Case 1a*, even though liability would be proper under straight negligence statutes. For example, the North Carolina statute releases from liability those sellers who transfer their products in a sealed container, *or* who are "afforded no reasonable opportunity to inspect the product in such a manner that would have . . . revealed the existence of the condition complained of" ⁷¹

Since the North Carolina provision is in the disjunctive, the supplier can apparently escape liability by meeting either of the two conditions. If the statute is given a straightforward reading, the supplier would not be liable since the tuna is in a sealed container. Even if a court reads the provision as imposing liability on suppliers of sealed containers who fail to take advantage of an opportunity to inspect, it is difficult to see how an inspection would be possible, since (after all) the product is in a sealed container. The only possibility for imposing liability here would seem to hinge on emphasis of the can's irregular shape, which might give rise to a duty to inspect that particular unit (and then to remove it from retail).

One might be tempted to seek to impose liability based on the other indications of negligence in *Case 1a*, such as the published reports that might have made Retailer's decision to sell the tuna unreasonable. But this more general negligence argument seems foreclosed by the statute's definition of "product liability action," which includes "any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture . . . of any product."⁷² Since the statute also prohibits bringing a "product liability action" against suppliers except in the circumstances set forth above, a more traditional negligence case would presumably be unavailable.

Recent North Carolina cases, however, suggest a different interpretation of its products liability statute and underscore the hazards of prediction. In *Morrison v. Sears, Roebuck & Co.*,⁷³ the North Carolina Supreme Court addressed whether an action brought for breach of implied warranty of merchantability⁷⁴ was within the defi-

70. This is so because the sealed container defense applies only to a subset of cases in which a supplier is not negligent.

71. N.C. GEN. STAT. § 99B-2(a) (1989).

72. N.C. GEN. STAT. § 99B-1 (1989).

73. 319 N.C. 298, 354 S.E.2d 495 (1987).

74. N.C. GEN. STAT. § 25-2-314 (1989).

inition of "product liability action."⁷⁵ If so, defendant retailer intended to raise the sealed container defense.

The court used a two-step analysis to conclude that implied warranty claims were indeed covered by the definition of product liability action, and therefore were subject to applicable defenses. First, such claims plainly arise from the "selling" of any product, which means they meet the statutory definition of "product liability action." Second, express warranties are specifically excluded from the sealed container defense. Under the statutory construction rule of *expressio unius est exclusio alterius*,⁷⁶ the court found that implied warranty was amenable to the defense.⁷⁷

Although *Morrison* considered only a breach of implied warranty claim, the decision raises implications for a negligence-based claim meeting the definition of "product liability action." It seems clear that negligence-based claims would also be covered by the sealed container defense, since they are also other than allegations of breach of express warranty. To reiterate the analysis of *Case 1a*: Plaintiff brings a product liability action grounded in negligence and defendant asserts the sealed container defense. Since that defense literally applies, no liability should attach.

Whether the North Carolina Supreme Court will find negligence-based claims to meet the definition of product liability action remains to be seen. At least one intermediate North Carolina court decision suggests that more general allegations of negligence may survive the sealed container defense. In *Sutton v. Major Products Co.*,⁷⁸ the North Carolina Court of Appeals affirmed a summary judgment in favor of product distributors who received and passed along a paint whitener that was in a sealed container.⁷⁹ Besides recognizing the statutory sealed container defense, the court assumed that the defense would *not* have been available if the plaintiffs had been able to substantiate their negligence claim. The court's discus-

75. *Morrison*, 319 N.C. at 305, 354 S.E.2d at 498.

76. "The expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY (6th ed. 1990).

77. *Morrison*, 319 N.C. at 305, 354 S.E.2d at 498-99.

78. 91 N.C. App. 610, 372 S.E.2d 897 (1988).

79. *Id.* at 614; 372 S.E.2d at 899-900. *Sutton* also involved a dispute over whether the defect was a manufacturing or design defect. Plaintiffs alleged that at least one of the nonmanufacturing suppliers had "actual or constructive" knowledge of the dangerous propensities of the whitener, but plaintiffs were unable to substantiate these allegations. The court appears to have treated the case as one involving a manufacturing defect. *Id.* The distinction is important because if a design defect is involved, the case is removed from the "pure" sealed container context since available information may give rise to a duty to warn. See *infra* notes 83-101 and accompanying text. In a manufacturing defect case, the product anomaly cannot be discovered absent an opportunity to inspect.

sion of negligence conspicuously omitted reference to the sealed container statute.⁸⁰ If the state's supreme court follows this approach, of course, the sealed container defense will effectively have been collapsed into a negligence analysis.

The above observations reveal several interesting points. First, in "pure" manufacturing defect cases, such as *Case 1*, the statutory release of suppliers from liability may not affect whether the supplier must pay plaintiff, at least not when the supplier has a statutory or common law right to indemnity. Nonetheless, suppliers may be more confident in their refusal to become involved in settlement negotiations since they are not substantively liable.

Second, courts have the ability to limit the effectiveness of the supplier's defenses. For example, they may be cautious in defining "sealed container" or may invoke a "negligent failure to inspect" analysis. Nevertheless, courts must guard against defeating the legislature's intent to limit the situations in which suppliers may be held liable.

Finally, in those cases that have negligence indications that threaten to knock the supplier from its "mere conduit" perch, careful (perhaps inventive) analysis of the relevant statute may turn up surprises on the question of supplier liability.

IV. Supplier Liability for Defective Design and Breach of the Duty to Warn

It should not be surprising that the statutes limiting supplier liability would have their greatest effect in those manufacturing defect cases in which liability approaches strict.⁸¹ But what effect do such statutes have when the theory of liability incorporates a negligence analysis? One might expect that statutes predicated on supplier

80. In considering the negligence claim, the court stated: "Liability of a distributor or seller of goods depends on whether the seller knew or by the exercise of reasonable care, could have discovered the dangerous character or condition of the goods." 91 N.C. at 613, 372 S.E.2d at 899. Again relying on negligence law, and ignoring the statute, the court reaffirmed the rule that "a seller of a product made by a reputable manufacturer, where he acts as a mere conduit and has no knowledge or reason to know of a product's dangerous propensities, 'is under no affirmative duty to inspect or test for a latent defect'" *Id.* at 614, 372 S.E.2d at 900, *quoting* 2a L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 6.03[1][a] (1988). The contrary implication is that when the manufacturer is *not* reputable, negligence liability is proper. This result, however, ignores the statutory language.

81. One argument is that, even in manufacturing defect cases, liability is not truly strict because the defendant can generally be presumed to be negligent, and the purpose of the strict liability rule is to remove insurmountable proof problems. *See Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986); *Gordon v. General Motors Corp.*, 323 So. 2d 496 (La. Ct. App. 1975); *Wade, On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 850 (1973).

liability on a showing of negligence would have little effect in either design defect or failure to warn cases, because some showing of negligence is already required for the imposition of liability in these cases.⁸²

But statutes limiting supplier liability may have significant effects when the claim is for defective design or for failure to warn. These effects will depend upon the variation of the supplier defense statute, the conduct of both manufacturer and one or more of the suppliers, and the availability of a state of the art defense.

A. Design Defect Cases

Consider a case involving a design defect:

Case 3. Plaintiff was driving a new car he owned and had purchased from AutoLand, an automobile retailer, and which Big-Three Corporation manufactured. Plaintiff was seriously injured when another car struck his car broadside. His subsequent suit alleged that the car was defectively designed, inasmuch as it used an "X frame," as opposed to a safer "box frame," which had steel side rails to protect the car's occupants in the event of a collision from the side. Plaintiff introduced evidence that other manufacturers used the "box frame" construction.⁸³

Case 3 presents an example of an alleged defective design. The manufacturer intended to construct the car with the "X frame," and plaintiff contends that all products in this particular line are culpably defective. In contrast, manufacturing defects are unintentional and occur occasionally.⁸⁴

Theoretically, the liability resulting from manufacturing and design defects is the same; once plaintiff can establish that the product that caused the injury was defective, recovery is permitted

82. "[D]efective design and duty to warn cases . . . have expanded liability within the traditional framework of negligence law" R. EPSTEIN, *CASES AND MATERIALS ON TORTS*, at 612 (5th ed. 1990). See also *infra* text accompanying notes 86-87.

83. See, e.g., *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966), *cert. denied*, 385 U.S. 836 (1966). The facts in *Evans* were identical to the facts in *Case 3*. In *Evans*, the plaintiff lost because of the now largely discredited theory that auto manufacturers had no duty to design their products to withstand collisions because collisions were not the "intended purpose" of automobiles. The modern rule permits recovery against auto manufacturers when the car is involved in an accident, on the theory that a car's involvement in an accident is eminently foreseeable. See, e.g., *Volkswagen of America, Inc. v. Young*, 272 Md. 201, 321 A.2d 737 (1974).

84. Manufacturing defects are "unintended flaws in the product" that are found in "only a small percentage of a manufacturer's products. Such products are easy to identify because the product differs from other similar products in the line." FISCHER & POWERS, *PRODUCTS LIABILITY: CASES AND MATERIALS*, at 57 (1988).

against the manufacturer and against all other parties within the chain of a product's distribution, without proof of negligence. But it is by now well-settled that the means of establishing defect in the manufacturing and design defect cases are greatly dissimilar. A manufacturing defect is established by showing that what took place is not what the manufacturer intended. For example, the bottle exploded; the tuna contained botulism; the metal was badly forged.

In contrast, a claim of defective design cannot be established without resort to some external standard, often one invoked by comparing defendant's products to others'. Thus, plaintiff in *Case 3* claims that the "box frames" design should be the standard, and that BigThree must pay when its inferior design results in injury.

Casting about for some yardstick by which to make these comparisons, courts have struck upon a range of tests.⁸⁵ *Barker v. Lull Engineering Co.*⁸⁶ provides the best-known standard for establishing design defect. In *Barker*, the California Supreme Court stated that "a product may be found defective in design" when the product either fails to meet reasonable consumer expectations, or when "the benefits of the challenged design [do not] outweigh the risk of danger inherent in such design."⁸⁷

The negligence heritage of the latter standard is plain. Commentators have repeatedly urged that the presence of side-by-side claims for strict liability and negligence in the context of defective design serves only to confuse juries, and that the two theories should therefore be merged.⁸⁸ But what should be the effect of statutes limiting supplier liability on cases involving defective design?

85. California's test is perhaps the best known, but is not the only one. To take two other examples, the Pennsylvania Supreme Court has held that a defect may be found "where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use[.]" *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 559, 391 A.2d 1020, 1027 (1978), whereas the Kansas Supreme Court adopted the consumer expectation test in *Lester v. Magic Chef, Inc.*, 230 Kan. 643, 641 P.2d 353 (1982).

86. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

87. *Id.* at 432, 573 P.2d at 455-56, 143 Cal. Rptr. at 237-38. *See also* *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) for an earlier case in which a court engaged in this balancing of risks and benefits.

88. *See generally*, D. NOEL & J. PHILLIPS, *PRODUCTS LIABILITY: CASES AND MATERIALS*, at 358-61 (2d ed. 1982). Noel and Phillips' analysis leaves out possible differences between the two theories. In California, for example, "once the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove . . . that the product is not defective." *Barker*, 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237. But there is no good reason why the same shift in the burden, if it makes sense in the strict liability context, should not also apply when a negligence claim is asserted. Indeed, *Barker* intimated as much. *Id.* As to possible differences between the two theories when defendant raises a state of the art defense, see *infra* notes 111-23 and accompanying text.

LIABILITY OF NONMANUFACTURING SELLERS

The effect that statutes limiting supplier liability will have on cases involving defective design depends largely on the types of reform statutes. If the supplier has only the sealed container defense, the supplier will have a difficult time extricating itself from many design defect cases, since the "defect" in the product may not be hidden.⁸⁹ For example, a supplier entitled only to the sealed container defense might have difficulty escaping liability in the following situation:

Case 4. A car is defectively designed because the gasoline tank is placed too close to the engine. The proximity of the two is obvious to the auto dealer. Owner is injured when the engine overheats and a spark causes the gasoline to ignite.

On the other hand, the impracticability of requiring inspection, which justifies the sealed container defense, may be dispositive in a case such as the following:

Case 5. A lawnmower is defectively designed because one of its internal (and therefore hidden) components cannot withstand the heat generated by the motor. The component breaks off and strikes LawnBoy while he is mowing his lawn. Yard Palace, the seller, neither knows, nor has reason to know, of the mower's defective design. The manufacturer does have such knowledge, and has considered and rejected alternative designs.⁹⁰

The analyses in *Cases 4* and *5* would begin in the same way: the manufacturer is liable because the product was defectively designed. This conclusion requires using negligence principles that presumably would not be applicable against a supplier that did not design the product. In both cases, the defect was present at the time the product left the manufacturer.

Will the suppliers in both *Cases 4* and *5* be liable as "downstream" sellers in a sealed container jurisdiction? Here the cases diverge. Initially, the dealer in *Case 4* appears to be liable since the supplier in a sealed container defense jurisdiction would be liable when that defense does not apply. Because the justification for the

89. One argument is that if the "defect" is obvious to the dealer, the defect must be just as obvious to the consumer. The dealer's more frequent contact with autos, however, may make a certain design more problematic to the dealer than to the consumer. Moreover, in an appropriate case the plaintiff's causal contribution may reduce his recovery. Most courts and legislatures have permitted design defect cases to use principles of comparative fault. For a recent sampling of such pronouncements, see Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 294-303 (1990).

90. This last sentence is included to remove the possibility of a state of the art defense. See *infra* notes 113-25 and accompanying text.

sealed container defense is the impracticability of requiring the kind of inspection that would reveal the defect, *Case 4* does not qualify for the defense.

Nevertheless, a further analysis of *Case 4* is needed. In stating that the sealed container defense is unavailable to the dealer, we are assuming that he, like the manufacturer, is aware that placing the gasoline tank in such proximity to the engine creates a certain risk. Thus, the dealer can be held liable because the manufacturer has made a culpable design decision, which the dealer has ratified by offering the product for sale.

One should then ask whether the statutes, or the courts interpreting them, would be more sympathetic to the supplier if the risk created by the product were appreciated by the manufacturer, but not by the supplier. To determine that such a product is in a sealed container might require inventive use of language.⁹¹ If the supplier has little ability or incentive to discover the defect, he should be able to avoid a finding of negligence, at least for the design defect, because he has acted reasonably under the circumstances.⁹²

The case for the supplier is easier in *Case 5* than in *Case 4*, at least in a sealed container jurisdiction. Yard Palace should be freed from liability if the court determines that the circumstances of distribution and construction made inspection for the defect difficult or impossible.

The above analysis also implies that in *Cases 3, 4* and *5*, if the supplier does have the benefit of a full-dress negligence defense, it may be released from liability even though the manufacturer is in some sense negligent. A court could, however, allow a jury to consider whether the supplier's involvement with a product that the manufacturer had defectively designed amounts to an independent act of negligence.⁹³ For example, *Case 3* raises the issue of whether an auto dealership could be held responsible for purchasing, and then selling to someone who becomes injured, the "X frame" rather than "box frame" cars.

Cases 4 and *5* also raise the issue of whether the supplier should

91. On the one hand, the philosophy underpinning the sealed container defense supports releasing the supplier from liability because a court could not realistically expect the supplier to expend resources in order to obtain the information necessary to find a defect. On the other hand, since the sealed container statutes seek to protect those who are unable to inspect, rather than those who have little *incentive* to inspect, a court may hold liable a supplier who does not try to obtain information that leads to a finding of defect.

92. For a discussion of the possibility that the dealer could incur liability for negligent dealing, see *infra* notes 93-97 and accompanying text.

93. Cf. *Peterson v. Safway Steel Scaffolds Co.*, 400 N.W.2d 909 (S.D. 1987).

LIABILITY OF NONMANUFACTURING SELLERS

refuse to deal with a manufacturer whose products incorporate defective designs. But recall the qualification issued in connection with *Case 4*: If the supplier does not (and, let us assume, reasonably should not) understand that the product is deficient, it may be unjust to cry negligence. Depending upon the relationship between manufacturer and retailer, that same caveat might well apply in any or all of the hypotheticals discussed in this section.

One factor affecting the decision to impose a duty on the supplier to refuse to deal with manufacturers of defective products is the type of relationship between supplier and manufacturer. In *Peterson v. Safeway Steel Scaffolds Co.*,⁹⁴ the South Dakota Supreme Court suggested that the relationship between manufacturer and downstream commercial entity may justify imposing enterprise liability.⁹⁵ *Peterson* involved a suit against the manufacturer and the commercial lessor of parapet clamps by a worker who suffered injuries when the clamps securing his scaffolding platform detached from the wall.⁹⁶ The injured worker pursued his case under the theory of strict liability for both design defect and failure to warn against using the clamps the way plaintiff's coworker had used them.⁹⁷ To decide whether the supplier was liable, the *Peterson* court had to construe an oddly worded statute that expressly mixed strict liability and negligence doctrine by limiting actions against suppliers "based on the doctrine of strict liability in tort" to cases in which the supplier "knew, or, in the exercise of ordinary care, should have known, of the defective condition of the final product."⁹⁸ The *Peterson* court concluded that plaintiff had presented enough evidence to support an inference that the lessor knew, or should have known, that "the clamps were in a defective condition" because the supplier provided no warnings against using them in the manner that caused injury.⁹⁹

Peterson supports the proposition that an intermediary such as a lessor who decides to deal with a particular manufacturer has a duty to become acquainted with that manufacturer's product. Furthermore the lessor has a duty either to refrain from leasing a product

94. 400 N.W.2d 909 (S.D. 1987).

95. *Id.* at 914.

96. *Id.* at 911.

97. The court held that plaintiff had waived the negligence and breach of warranty claims by not arguing those issues on appeal. *Id.* at 911-12. Judge Sabers, who partially dissented, criticized the court's waiver of the negligence and breach of warranty claims on the ground that although plaintiff's brief had emphasized the strict liability theory, plaintiff had also expressly stated that the theories of negligence and breach of warranty were equally applicable to his claim. *Id.* at 916 (Sabers, J., concurring in part and dissenting in part).

98. S.D. CODIFIED LAWS § 20-9-9 (1987).

99. *Peterson v. Safeway Steel Scaffolds Co.*, 400 N.W.2d 909, 915 (S.D. 1987).

that he believes to be defectively designed, or to provide a warning to the ultimate user.¹⁰⁰

Finally, courts in jurisdictions that inculcate suppliers who have "actual knowledge" of the defect may find them liable even absent a determination that they have been negligent.¹⁰¹ In those jurisdictions, the supplier in *Case 3* who knew that he was purchasing defective "X frame" cars would be liable for injuries caused by the defect. A court might reach that result whether or not the court followed the approach of finding negligence based upon a supplier's decision to deal with a defectively designed product. Courts could avoid this anomalous result either by stressing the legislature's intention to eliminate liability when the supplier is a "mere conduit," or by holding that knowledge of the auto's *construction* is not the equivalent of knowledge that the car is *defective*.¹⁰²

B. Failure to Warn

1. *Claims Against Supplier Based on Negligence Principles*.—Claims for defective design and for breach of the duty to warn are often closely related because the seller may have to give directions or warning about a product's use in order to prevent the product from being unreasonably dangerous.¹⁰³ Kinship notwithstanding, the failure to provide an adequate warning is judged against a negligence standard even more so than design defect.¹⁰⁴ The Model Uniform Product Liability Act, for example, requires the trier of fact to make the following findings before a breach of the duty to warn can be found:

[A]t 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 manufacturer's instructions inadequate and . . . the manufacturer should and could have provided the instructions or warnings which claimant alleges would have been adequate.¹⁰⁵

100. This interpretation of *Peterson* is arguably too broad since the lessor in *Peterson* had provided a safety manual to plaintiff's employer to accompany previous rentals of the clamps.

101. See *supra* note 40.

102. See generally MODEL UNIFORM PRODUCTS LIABILITY ACT § 105 (1979) and accompanying analysis section.

103. RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965).

104. But see *supra* notes 85-90 and accompanying text, noting that courts sometimes impose strict liability against "downstream" suppliers when the manufacturer has acted unreasonably.

105. MODEL UNIFORM PRODUCTS LIABILITY ACT § 104(C)(1) (1979).

LIABILITY OF NONMANUFACTURING SELLERS

Because of this close connection between design defect and failure to warn, the analyses offered in Section IV A, *supra*, would often apply to warning cases as well. In *Peterson*, for example, the negligence basis of the supplier liability statute could support a finding against the "middlemen" under either a design defect or warning rationale. The court stressed that the plaintiff had presented enough facts to warrant an inference that the suppliers "knew or should have known" that the product would be defective without a proper warning.¹⁰⁶

Similarly, a court could predicate liability in *Case 3* on a dealer's duty to provide, at minimum, a warning to the consumer that other cars were more safely designed. Imposing that duty on dealers would be more feasible for new auto dealers who have an ongoing relationship with the manufacturer.¹⁰⁷ Even a statute that requires actual knowledge of the defective condition should not dissuade a court from finding that a dealer has a duty to provide a warning to consumers that other cars were more safely designed, at least when knowledge of the defective condition is present. Nonetheless, courts might take the position that the initial duty to warn rests solely with the manufacturer.¹⁰⁸

A more typical case of negligence against the supplier is presented when the manufacturer has included a warning that the

106. *Peterson v. Safway Steel Scaffolds Co.*, 400 N.W. 2d 909, 915 (S.D. 1987).

107. This case is sympathetic to the argument that retailers are in a position to exert influence over manufacturers. *See, e.g., Bryant v. Hercules Inc.*, 325 F. Supp. 241 (W.D. Ky. 1970); *Reed v. Pennwalt Corp.*, 22 Wash. App. 718, 591 P.2d 478 (1979). It states that exculpate suppliers who are without "actual knowledge," a supplier might be liable in *Case 6*. Even though a supplier could argue that he had no "actual knowledge" of the defect, his omission of a warning might rise to the level of reckless behavior. *See supra* note 69 and accompanying text.

It should be noted here that there are two broad types of cases involving the duty to warn. In some cases, the manufacturer has only a duty to convey an adequate warning to a "responsible" intermediary who has a duty to convey the information to plaintiff. Cases involving prescription drugs are usually held to fall within this category; the pharmaceutical company need only inform physicians of the drug's dangers. *See, e.g., McEwen v. Ortho Pharmaceutical Corp.*, 270 Or. 375, 386-87, 528 P.2d 522, 529 (1974). *But see MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 475 N.E.2d 65 (1985) (carving out an exception to the general rule for birth control pills, owing in part to the limited participation by the physician in a patient's continuing use of such pills).

Another class of cases, however, imposes upon the manufacturer a duty to take reasonable steps to convey a warning to the ultimate consumer. Those cases hold that when some act of negligence on the part of a "downstream" supplier causes the warning not to reach the injured consumer, the manufacturer is not liable. *See, e.g., Bryant v. Hercules Inc.*, 325 F. Supp. 241 (W.D. Ky. 1970); *Reed v. Pennwalt Corp.*, 22 Wash. App. 718, 591 P.2d 478 (1979).

108. Tort law abounds with instances of judicial refusal to recognize certain duties. The tortured history of negligent infliction of emotional distress provides an example of the evolution of duty. *See generally* R. EPSTEIN, *CASES AND MATERIALS ON TORTS*, at 1037-63 (5th ed. 1984).

product holds a danger, but the supplier negligently fails to forward that warning to the consumer. Courts have consistently imposed liability against a "downstream" defendant for negligent failure to convey a warning that the manufacturer provided.¹⁰⁹

Imposing a duty to warn upon the seller in *Case 5* would be difficult under any of the statutes we have considered, because the seller did not have, and probably could not have, sufficient information upon which to base a warning. But the following discussion shows that statutory provisions may be *necessary* to release the supplier from liability.

2. *Claims Against Suppliers Based on Strict Liability.*—A final illustration will introduce this section:

Case 6. Manufacturer, a large pharmaceutical concern, markets eye drops that can cause blurred vision in users with a history of sinus problems. Manufacturer is aware of this side effect, but the box containing the bottle makes no mention of it, although other warnings are listed. Drug Store, a retailer, sells the drops to Consumer, who has a history of sinus problems, and who suffers blurred vision after using the drops.

Absent a statute restricting supplier liability, some courts would hold Drug Store liable for Consumer's injuries.¹¹⁰ Although this result is plainly inconsistent with the general negligence basis of the duty to warn, courts have sometimes held that once the manufacturer is found to have acted unreasonably, such as by failing to warn or by issuing an inadequate warning, all entities "downstream" will be liable without regard to fault.¹¹¹ Courts are torn between two possibilities. On the one hand, the injured party could be remediless. Again, this prospect supports imposing strict liability in manufacturing defect cases. On the other hand, the courts realize that, at least

109. *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79 (4th Cir. 1962), assumed the liability of a distributor for issuing an inadequate warning. See Madden, *The Duty to Warn in Products Liability: Contours and Criticism*, 89 W. VA. L. REV. 221, 279-85 (1987) (discussing case law).

Section 402A of the *Restatement (Second) of Torts* supports the imposition of strict liability against the supplier in inadequate warning cases. The *Restatement* provides that liability attaches against one "who sells any product . . . unreasonably dangerous to the user or consumer" although the "seller has exercised all possible care in the . . . sale of his product." RESTATEMENT (SECOND) OF TORTS §§ 402A (1965). Based on section 402A, the product could be "unreasonably dangerous" once the manufacturer has been found negligent. Accordingly, anyone who sells a negligently manufactured product should be liable without fault even though he used all possible care.

110. See cases *supra* note 109.

111. See *supra* note 109.

in sealed container cases, suppliers may be in no better position than the consumer, and are therefore ill-equipped to warn.¹¹²

Statutes applicable to these situations may have the salutary effect of making clear the basis of liability. Under any formulation — sealed container defense, negligence standard, or actual knowledge — the Retailer will be free from liability unless other facts suggesting negligence are present. Thus, these statutes eliminate the current anomalous possibility that manufacturers are not liable unless found negligent, while suppliers who are mere conduits may be liable without any showing of fault at all.

C. Implications of State of the Art Defense for Statutory Modifications of Supplier Liability

Just as holding a “mere conduit” supplier liable for a manufacturer’s negligent failure to warn creates a pocket of strict liability in an otherwise negligence-based theory, so too does at least one view of the so-called “state of the art” raise the possibility of liability without fault. The defense has many formulations.¹¹³ When it applies, the manufacturer can escape strict liability by demonstrating that, at the time of manufacture, the product, including attendant warnings, was the best that could be offered given existing scientific knowledge and reasonable technical feasibility.¹¹⁴ In other words, defendant was not negligent in not creating a safer product. In fact, it is at least partly because of the availability of this defense that strict liability

112. Madden, *supra* note 108, at 221. Professor Madden discusses cases that wrestle with the question of the supplier’s knowledge vis-a-vis the consumer.

113. See, e.g., ARIZ. REV. STAT. ANN. § 12-683 (1982 & Supp. 1989). This statute provides a defense for products conforming to the state of the art, meaning the product was “in existence and reasonably feasible for use at the time of manufacture.” ARIZ. REV. STAT. ANN. § 12-681(6) (1982). A fancier variation exists in New Jersey, providing all sellers with a state of the art defense if, at the time the product left the manufacturer’s control, “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.” N.J. STAT. ANN. § 2A:58C-3 (West 1987). The court, however, may defeat this defense when, “on the basis of clear and convincing evidence,” it determines that the product: is “egregiously unsafe or ultra-hazardous”; poses a risk of serious injury to persons other than the user or consumer; and is of little or no use. *Id.* § 2A:58c-3(b).

114. As we will see, this formulation is too simple because the term “state of the art” has not received a uniform definition. As one commentator has stated:

[State of the art] admits to several different meanings. At one end of [the] spectrum . . . is “customary industry practice,” the definition most favorable to industry. At the other end . . . is the view that the state of the art is the aggregate of product-related knowledge existing at any given point in time. An intermediate possibility would limit the state of the art to the aggregate of product-related knowledge which may feasibly be incorporated into a product.

Note, *Product Liability Reform Proposals: The State of the Art Defense*, 43 ALBANY L. REV. 941, 945-46 (1979).

and negligence theories are said to run together in design defect and warning cases.¹¹⁵

If the state of the art defense renders strict liability equivalent to negligence, then statutory provisions restricting the suppliers' liability to situations when they are negligent would apply when the manufacturer's state of the art defense was successful. Thus, both the manufacturer and the supplier would be free of liability.

The different formulations of the state of the art defense make this conclusion premature, however. One formulation of the state of the art defense relieves defendant of liability when his negligent design conforms to the custom in the relevant industry.¹¹⁶ A more common variation of the defense relieves defendant from liability when the product is manufactured to the limits of reasonable scientific or mechanical — and perhaps economic — feasibility and knowledge.¹¹⁷ Finally, some cases have rejected the state of the art defense altogether, and impose liability even when no one knew, or could have known at the time of manufacture, that the product posed an unreasonable risk that could have been eliminated by a different design.¹¹⁸

What implications do these different formulations have for supplier liability? The most logical approach would be to tie such liability to whichever formulation of the state of the art defense the jurisdiction has chosen. In jurisdictions in which compliance with industry custom is a defense, the action against any party in the chain of distribution would not succeed when the manufacturer successfully establishes the defense. Likewise, in jurisdictions that relieve the manufacturer from liability upon a showing that the product is reasonably feasible, all parties in the chain of distribution would also be relieved of liability.¹¹⁹

Even if this approach is followed, problems arise if the state of the art defense is disallowed. Since such a position essentially charges a supplier or manufacturer "with hindsight,"¹²⁰ there is no

115. See M. SHAPO, *THE LAW OF PRODUCTS LIABILITY* ¶ 10.02 [3][a] (1988 Supp.).

116. Kentucky essentially takes this approach except that the defendant is given only a rebuttable presumption of no liability when the design conforms "to the generally recognized and prevailing standards or the state of the art" KY. REV. STAT. ANN. § 411.310 (2) (Baldwin 1988).

117. See MODEL UNIFORM PRODUCTS LIABILITY ACT § 107(E) (1979).

118. See *Beshada v. Johns-Manville Prod. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982).

119. The supplier may have engaged in some further conduct, such as the granting of an express warranty, that will render him liable. Nevertheless, the issue is whether a supplier who is a mere conduit will be liable when the "upstream" manufacturer is successfully able to maintain a state of the art defense.

120. *C & S Fuel, Inc. v. Clark Equipment Co.*, 552 F. Supp. 340, 343 (E.D. Ky. 1982).

negligence with which to equate a defective design. In Pennsylvania, for example, a host of decisions dating back to *Azzarello v. Black Brothers Co.*¹²¹ indicates a less than receptive view toward any variation of the state of the art defense. But perhaps the most celebrated example of justicial rejection of a "pure" state of the art defense came in *Beshada v. Johns-Mansville Products Corp.*¹²²

In *Beshada*, the defendant, an asbestos manufacturer, argued for the opportunity to demonstrate that the danger posed by its product "was undiscovered at the time the product was marketed and that it was undiscoverable given the state of scientific knowledge at that time."¹²³ The court, stressing the risk-spreading and accident avoidance goals impelling strict products liability, rejected the state of the art defense. The Court stated that risk spreading works equally well for unknown and unknowable risks, and that "imposing on manufacturers the costs of failure to discover hazards, [creates] an incentive for them to invest more actively in safety research."¹²⁴

Although few courts have followed *Beshada*, and the case has been much criticized,¹²⁵ the possibility that design defects can be uncoupled from a negligence standard suggests that reform statutes exculpating non-negligent suppliers could yield disparate results for manufacturers and suppliers. Manufacturers, though wholly non-negligent, could still be liable, but suppliers would not be liable. Moreover, suppliers should also be able to escape liability under either a sealed container or actual knowledge theory, since the supplier has neither imputed nor actual knowledge of the defect.

V. Conclusion

Concern over the rising cost of product liability actions has driven state legislatures to enact "reform" statutes, a euphemism for legislation that often restricts an injured party's ability to recover. One unusually fertile area for change has been the liability of non-manufacturing suppliers, perhaps because of the consistent recognition that nonmanufacturing suppliers are often mere conduits entitled to indemnification against the manufacturer in any event.¹²⁶

121. 480 Pa. 547, 391 A.2d 1020 (1978).

122. 90 N.J. 191, 447 A.2d 539 (1982).

123. *Id.* at 196, 447 A.2d at 542.

124. *Id.* at 207, 447 A.2d at 548.

125. The New Jersey Supreme Court has "restrict[ed] *Beshada* to the circumstances giving rise to its holding." *Feldman v. Lederle Laboratories*, 97 N.J. 429, 455, 479 A.2d 374, 388 (1984). *Feldman* also cites many of the commentaries critical of the *Beshada* holding. *Id.*

126. Recall that in all but a few jurisdictions, the supplier will be "transformed" into a manufacturer when the plaintiff is unable to recover against the manufacturer. *See supra* note

These statutes restricting supplier liability are richly varied in terms of both the substantive liability requirements they announce and the relationship they bear to other provisions, such as contribution, indemnity, and joint and several liability. Focusing on the sections affecting the kind of conduct for which suppliers are sanctioned, this Article has considered the implications of these new liability rules across the spectrum of product liability claims. The aim has been to demonstrate that, although the sections will affect a great number of cases, rarely will their impact be a simple matter to predict. Much depends, of course, on the particular statutory provisions. But just as much may hinge on judicial predilection: Will negligence receive a modified definition under these statutes? How broadly will courts read the "sealed container" defense? Will the "actual knowledge" requirement of a few states be taken seriously?

These questions are only now beginning to be asked. The future of supplier liability statutes may well depend on public taste for the answers yet to be provided.

3 and accompanying text.