The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products

Frank J. Cavico Jr.*
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Abstract

Strict tort liability is a mechanism the law employs to compensate innocent consumers who have been injured by the use of defective products.

KEYWORDS: liability, products, retailers
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I. Introduction

Strict tort liability is a mechanism the law employs to compensate innocent consumers who have been injured by the use of defective products. At its inception, the doctrine of strict tort liability was applied to the manufacturer of the product. Parties in the distribution chain other than manufacturers, however, play an important part in providing consumers with defective products. Accordingly, it was not until non-manufacturers in the chain of distribution, namely wholesalers, distributors, and retailers, were subject to the doctrine. The ramifications of imposing strict tort liability on non-manufacturers, however, have only recently materialized.

This paper will primarily address that portion of products liability dealing with the strict tort liability of non-manufacturing product resellers. The focus will be on the sale, as opposed to the lease or bailment, and on the new, as opposed to used, products. Negligence and warranty will not be discussed in any great detail. One must remain cognizant, of course, that these theories generally continue to be viable alternatives and concurrent theories of recovery.

The purposes of the paper are first to examine the current case law concerning the strict liability of resellers and to discern the theoretical and pragmatic underpinnings of the majority and minority views, with particular attention to the ongoing debate between the utilitarian and formalist schools and the debate over judicial versus legislative lawmaking.

After examining the common law, the paper will then scrutinize the recent, significant state statutory changes in the majority common law view imposing strict liability on resellers. Specifically, the thesis will analyze the four general types of state statutes, to wit: those amounting to an absolute bar against strict liability for resellers, those amounting to a partial bar, those affording particular defenses to resellers, and those dealing with indemnification between manufacturers and resellers. The theoretical and economic concerns that prompted the state legislatures to supersede the common law will also be discussed.

The paper will also briefly examine the Model Uniform Products Liability Act and the current bills in the Congress to determine how these proposals treat the liability of product resellers, and will explore the impetus behind the movement to limit the reseller's strict tort liability. The debate as to whether legislative uniformity of products liability law is desirable, and, if so, whether uniformity should be implemented at the state or federal level, will also be addressed briefly.

II. Applicability of Strict Tort Liability to Retailers, Wholesalers, and Distributors

A. Historical Background

Products liability is the name presently given to the field of law concerning the liability of those who supply goods for the use of others to purchasers, users, and bystanders for losses of various types resulting from defects in those goods. As opposed to most other areas of the common law, products liability is almost entirely a Twentieth Century development. The delay may be attributed to the barring of actions through the doctrine of privity by a consumer against a remote manufacturer. Early in the Nineteenth Century in the United States, a seller could be held liable for a breach of the implied warranty of quality that the seller's product was merchantable; but due to the privity doctrine, the warranty extended only to the seller's immediate vendee. In the significant 1842 case of Winterbottom v. Wright, described as a "fishbone in the throat of the law," the privity doctrine was extended to the negligence cause of action. A predominant rationale for

2. Id. at 681-82.
3. Id. at 680-81.
5. PROSSER, supra note 1, at 681.
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A 1944 case which nicely illustrates a court’s attempt to lessen a plaintiff’s burden in proving negligence as well as an emerging utilitarian philosophy is Escola v. Coca Cola Bottling Co. While the court held that where a plaintiff cannot, in fact, show any specific acts of negligence, the court may consider an instruction on res ipsa loquitur appropriate, the decision is particularly noteworthy for the concurring opinion of Justice Traynor. Justice Traynor contended that a manufacturer’s negligence should no longer be singled out as the basis of a plaintiff’s right to recover, rather, compelling policy reasons existed in support of imposing strict liability in tort. He stressed the primacy and fairness of compensating an innocent consumer, especially when the manufacturer can insure against the risk and distribute the cost, as well as the safety incentive and deterrent aspects to the doctrine.

The doctrine which Justice Traynor thus justified in so comprehensive a way was not adopted by the court until almost twenty years later. In Greenman v. Yuba Power Products, Inc. the California Supreme Court adopted strict liability in tort for defective products causing personal injury. Justice Traynor, speaking for the Court, stated that “[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.” An injured plaintiff, therefore, no longer faced the obstacles of proving negligence or privity of conduct. The Greenman decision thus sets the stage for adoption of strict product liability in tort. Courts thereafter concluded that the proper and efficacious theory of liability was strict liability in tort.

Widespread acceptance of the doctrine of strict liability in tort for products was measurably enhanced by the formulation, overwhelming acceptance by the American Law Institute, and publication in 1965 of the Restatement (Second) of Torts, Section 402A. The Restatement approach holds the seller of a product strictly liable if the product is unreasonably dangerous and it reaches the consumer in the same condition in which it was sold. The Institute, moreover, extended the scope of strict liability to encompass physical harm to the plaintiff’s property as well as person. As with Greenman, the central focus is on the product, not the conduct of the defendant. A vast majority of states have
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6. Id. at 682.
7. Id.
8. Id.
10. Id.
11. Id. at 389, 111 N.E. at 1057.
16. Id. at 458-59, 130 P.2d at 438-39.
17. Id. at 460, 130 P.2d at 440-42.
18. Id.
20. Id. at 60, 377 P.2d at 900, 27 Cal. Rptr. at 700.
22. Id.
either specifically adopted Section 402A or have adopted a similar version in the ensuing years.83

B. Retailers

Retailers have been a subject for strict liability consideration from the very onset of the doctrine. Justice Traynor, in his concurrence opinion in Escoda, asserted that even though a retailer is not equipped to test a product, the retailer is nonetheless liable to the consumer.84 It was not unprecedented, therefore, that when confronted with a cause of action against a retailer, the California Supreme Court took the lead in imposing strict liability in tort on a non-manufacturer. Accordingly, in *Vandermark v. Ford Motor Co.*, 206 Cal. App. 2d 404 (1964) involving a suit against the manufacturer of the product and the local dealer who sold the product to the plaintiff, the court rejected the local dealer's assertion that strict liability applied only to manufacturers and held that the doctrine applies to retailers.85 A great majority of states have followed the *Vandermark* principle.86

It is implicit in *Vandermark* that a retailer is subject to strict tort liability for a defective product notwithstanding the fact that the retailer was not responsible for creating the defect in the product or that the retailer's reasonable inspection of the product failed to disclose the defect.87 Furthermore, the retailer's liability is coextensive with that of the manufacturer of the product.88 Retailers will also be strictly liable to one who did not purchase the defective product, such as an innocent bystander.89 Even a potential sale by a retailer, rather than an actual sale and transfer of the product, is sufficient to trigger the doctrine of strict tort liability.90

Another convincing rationale for applying the doctrine to non-manufacturers emerges as the authoritative Section 402A which provides in part that strict tort liability applies if "the seller is engaged in the business of selling a product," even though "the seller has exercised all possible care in the preparation and sale of his product."91 Comment f to Section 402A, moreover, makes it very clear that any professional seller is subject to strict liability.92

31. See, e.g., Davis v. Gibson Prod. Co., 505 S.W.2d 682 (Tex. Ct. App. 1973) (plaintiff suffered severe cut while examining a machine on display in defendant's self-service store; notwithstanding the absence of any sale of the product, the court concluded that "strict liability runs on foreseeability and not on esthetic concepts relating to transfer of delivery of possession." Id. at 691. The concept of strict tort liability was imposed on the retailer because the retailer outlet displayed the machines with the expectation that people would examine, handle, and purchase them. Id. at 691-92; *Accord*, Shoppers World of Villarreal, 518 S.W.2d 913, 917 (Tex. Ct. App. 1975) (plaintiff slipped on soap leaking from split plastic bottle of liquid soap which plaintiff placed in shopping cart. The court held that no sale occurred but defendant retailer was held strictly liable in tort because container of soap reached potential customer in an unreasonably dangerous condition. Id. at 919-21).
32. Restatement (Second) of Torts § 402A (1965).
33. Id. Comment f states: The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor. . . . The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaken on the part of those who purchase such goods. But see Epstein, Modern Products Liability Law 60 (1980). This Comment f extension of strict liability principles to those intermedi-
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26. Id. at 262-63, 391 P.2d at 171-72, 37 Cal. Rptr. at 899-900.


C. Wholesalers and Distributors

The strict liability rule announced in Greenman and expanded in Vandermark has also been extended to wholesalers and distributors.\(^8\) Neither a transfer of title nor technical sale is required; the expectation of future sales from the distribution of a product is sufficient to trigger strict tort liability.\(^9\) The doctrine also extends to claims seeking property damage from the distribution of defective products.\(^8\) A wholesaler, furthermore, has been held strictly liable for a defective product which passed through its warehouse unopened in its original package,\(^7\) even though the wholesaler never had possession of the defective product, having passed on the customer’s order to the manufacturer who shipped directly to the customer.\(^8\)

of the pre-Restatement cases all recognized the limited liability of distributors and retailers of defective products which had been manufactured and packaged by others.


35. See, e.g., Barth, 265 Cal. App. 2d at 251-52, 71 Cal. Rptr. at 329-30 (defendant tire company sold tires to a dealer through a national fleet account; defendant could not avoid liability for defective tire by arguing that it was not a seller); McKisson, 416 S.W.2d at 792 (permanent wave solution distributed as advertising sample to beauty shop without charge; court noted that “one who delivers an ad sample to another with the expectation of profiting therefrom through future sales is in the same position as one who sells the product.”).

36. See, e.g., O.M. Franklin Serum Co. v. C.A. Hoover & Son, 418 S.W.2d 482 (Tex. 1967) (distributor of defective animal serum that caused plaintiff’s cattle to die).

37. See, e.g., Dunham v. Vaughn & Bushnell Mfg. Co., 42 Ill. 339, 346, 247 N.E.2d 401, 408 (Ill. 1969) (defective hammer which severely injured plaintiff was pre-packaged in box and merely passed through wholesaler’s warehouse).

38. See, e.g., Canifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (Ct. App. 1965) (wholesaler powder company never had possession of the product; rather, it took an order from a jobber and placed it with the manufacturer, who shipped the defective product directly to the customer; the contact the wholesaler had with the product was solely on paper); Little v. Maxim, Inc., 310 F. Supp. 875, 877 (N.D. Ill. 1970) (distributor had a machine shipped directly to his customer and took no part in its installation); Kirby v. Rousselle Corp., 108 Misc. 2d 291, 293, 437 N.Y.S.2d 512, 514 (N.Y. Sup. Ct. 1981) (distributor who, pursuant to a buyer’s instructions, directs the manufacturer to ship a specifically designated product directly to the buyer, can still be found strictly liable if the product is defective when shipped directly to the buyer and the distributor never inspects, controls, installs, or services product).

D. Reasons for Imposing Strict Tort Liability on Retailers, Wholesalers, and Distributors

The policy reasons advanced for imposing strict tort liability on non-manufacturers were enunciated in the landmark Vandermark decision. Justice Traynor observed that “retailers, like manufacturers, are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from the product.”\(^8\) This “marketing enterprise” approach was further refined in Kasel v. Remington Arms Co.,\(^4\) in which the court held that under the stream-of-commerce approach to strict liability no precise legal relationship to the member of the enterprise causing the defect . . . or to the member most closely connected with the customer is required before the courts will impose strict liability. It is the defendant’s participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise which created consumer demand for and reliance upon the product [and not the defendant’s legal relationship (such as agency) with the manufacturer or other entities involved in the manufacturing-marketing system] which calls for imposition of strict liability.\(^4\)

Thus, although not responsible for the manufacture and production of the product, retailers, wholesalers, and distributors occupy a position in, and derive benefits from, the marketing chain, which is sufficient to impose strict tort liability.

877 (N.D. Ill. 1970) (distributor had a machine shipped directly to his customer and took no part in its installation); Kirby v. Rousselle Corp., 108 Misc. 2d 291, 293, 437 N.Y.S.2d 512, 514 (N.Y. Sup. Ct. 1981) (distributor who, pursuant to a buyer’s instructions, directs the manufacturer to ship a specifically designated product directly to the buyer, can still be found strictly liable if the product is defective when shipped directly to the buyer and the distributor never inspects, controls, installs, or services product).\(^9\)

39. Vandermark, 61 Cal. 2d at 259, 391 P.2d at 171, 37 Cal. Rptr. at 899.

40. 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (Ct. App. 1972) (American, hunting in Mexico, whose gun exploded in his hand due to an excessive charge of powder in the shotgun shell, which was manufactured and sold in Mexico by an affiliate of Remington, pursuant to a trademark license agreement); Accord, Taylor v. General Motors, Inc., 337 F. Supp. 949, 953 (E.D. Ky. 1982) (Canifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965)).

41. Kasel, 24 Cal. App. 3d at 725, 101 Cal. Rptr. at 323.
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packaged by others.

34. See, e.g., Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 250-51, 71
App. 2d 44, 52, 46 Cal. Rptr. 552, 560 (Ct. App. 1965); Dunham v. Vaughan &
International Harvester Co., 246 N.W.2d 298, 303 (Iowa 1976); Keener v. Dayton
Ohio App. 2d 25, 30, 257 N.E.2d 759, 764 (Ct. App. 1969); Kirkland v. General Mo-
A.2d 853, 854 (1966); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 790 n.3
(Tex. 1967); Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779, 785 (Tex.
1967) (distributor not insurer); Dippel v. Sciano, 37 Wisc. 2d 443, 450, 155 N.W.2d
55, 62 (1967) (seller not insurer; no absolute liability).

35. See, e.g., Barth, 265 Cal. App. 2d at 251-52, 71 Cal. Rptr. at 329-30 (de-
fendant tire company sold tires to a dealer through a national fleet account; defendant
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Just as Traynor further observed in *Vandermark* that "[s]trict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendant, for they can adjust the costs of such protection between them in the course of their continuing business relationship." *Thus, retailers, who may be the only defendant available to the injured consumer, can adjust their prices upwards and pass the costs of protection to their customers.

Justice Traynor noted, finally, that "the retailer himself may play a substantial part in ensuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves an added incentive to safety." *Retailers and wholesalers do have some choice as to their source of supply. Consequently, the imposition of strict liability might act as a check upon those retailers and wholesalers who would otherwise be willing to deal with manufacturers known to produce defective products. To this degree, the imposition of strict liability would arguably act as a deterrent.*

The imposition of strict liability on non-manufacturers is also based on the rationale that the retailer and wholesaler, who did not create the defective condition in the product, are authorized to seek indemnity from the manufacturer responsible for creating the defect. *Fairness dictates that the manufacturer should not be able to escape liability due to this fortuitous selection of a non-manufacturing defendant by the plaintiff. Indemnification may be sought under either an im-

42. *Vandermark*, 61 Cal. 2d at 259-60, 391 P.2d at 171-72, 37 Cal. Rptr. at 899. 43. Id. 44. See, e.g., *Halin v. Monroe*, 544 F.2d 331, 332 (8th Cir. 1976) (applying Missouri law); *Liston Systems, Inc. v. Shaw's Sales & Services, Ltd.*, 119 Ariz. 10, 56, 570 P.2d 48, 50 (1977); *Texas v. McGrew Lumber Co.*, 117 Ill. App. 2d 35, 254 N.E. 2d 584, 588 (Ct. App. 1969); *Fairbairn v. Montgomery Ward & Co.*, 349 So. 2d 1280, 1282 (La. Ct. App. 1977); *Andersson v. Somberg*, 158 N.J. Super. 384, 390-91, 386 A.2d 413, 419-20 (App. Div. 1978); *Kelly v. Hasselbrock Bros., Inc.*, 231 Ill. App. 197, 215 Ill. App. 2d 372, 740 (1974) (*"It is not unusual for liability to more transactionally up the chain of distribution until the manufacturer ultimately pays."* *Duncan v. Cessna Aircraft Corp.*, 665 S.W.2d 414, 418 (Tex. 1984) (*"Comparative causation does not affect the right of a retailer or other member of the marketing chain to recover indemnity from the manufacturer of the defective product when the retailer or other member of the marketing chain is merely a conduit for the defective product and is not independently culpable."* Id.); Data show that, in fact, product sellers account for less than 5% of product liability payments (though they are successful in shifting the cost of liability to manufacturers). *INSURANCE SERVICES OFFICE PRODUCT LIABILITY CLOUD: A TECHNOLOGICAL ANALYSIS OF SURVEY RESULTS 35 (1977)."

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plied warranty theory or an implied or express agreement to indemnify."

The difficulty of the problem of retailer and wholesaler liability also has been lessened in some jurisdictions by changes in the rules governing apportionment of damages among joint tortfeasors. Under a formulation adopted in many jurisdictions, damages are apportioned among joint tortfeasors in accordance with the degree of fault of each. *This concept has been applied in strict liability to relieve a retailer of the burden of damages.*

E. Limitations on the Vandermark Doctrine

Despite Justice Traynor's concurrence in *Escola*, which may be construed as imposing absolute liability on sellers of products which cause injury, *Greenman* firmly established the predicate of finding a "defect" for the imposition of strict liability. Accordingly, retailers do not occupy the status of insurers that their goods will not cause injury; the product must be established to be defective before strict liability will be imposed. *Comment f to Section 402A* and case law* clearly indicate,


50. *See, e.g., Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 250-51, 71 Cal. Rptr. 306, 328-29 (Ct. App. 1968) (the only person exonerated from strict liability is the occasional seller who is not engaged in that activity as part of his or her business); *Balido v. Improved Machinery Co.*, 29 Cal. App. 3d 633, 639-40, 105 Cal. Rptr. 137-39 (1971).
Justice Traynor further observed in Vandemark that "[s]trict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship." Thus, retailers, who may be the only defendant available to the injured consumers, can adjust their prices upwards and pass the costs of protection to their customers.

Justice Traynor noted, finally, that "the retailer himself may play a substantial part in ensuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves an added incentive to safety." Retailers and wholesalers do have some choice as to their source of supply. Consequently, the imposition of strict liability might act as a check upon those retailers and wholesalers who would otherwise be willing to deal with manufacturers known to produce defective products. To this degree, the imposition of strict liability would arguably act as a deterrent.

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49. Under Comment f, the doctrine of strict liability does not:
apply to the occasional seller . . . who is not engaged in that activity as a part of his business. Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam or a pound of sugar. Nor does it apply to the owner of an automobile who, on one occasion, sells it to his neighbor, or even sells it to a dealer of used cars, and this even though he is fully aware that the dealer plans to resell it . . . [T]he ordinary individual who makes the isolated sale . . . is not liable to a third person, or even to his buyer, in the absence of negligence.
50. See, e.g., Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 250-51, 71 Cal. Rptr. 306, 328-29 (Cl. App. 1968) (the only person exempted from strict liability is the occasional seller who is not engaged in that activity as part of his or her business); Balido v. Improved Machinery Co., 29 Cal. App. 3d 633, 639-40, 105 Cal.

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moreover, that strict liability applies to persons engaged in the business of selling products; the rule does not apply to “occasional” sellers.

A major limitation on the Vandermark rule arises if the retailer is a pharmacy selling defective drugs. Some decisions hold that a retail pharmacist is not strictly liable for failure to warn of adverse reactions unless the retailer has or should have knowledge of any risks attending the use of the drug.48 A recent California case, Murphy v. E.R. Squib & Sons, Inc.,49 by characterizing the pharmacist’s role as the performance of a service, held that a retail pharmacy was not strictly liable for the sale of a defective drug.48 The decision is particularly noteworthy for the powerful dissent of Former Chief Justice Bird stressing the policy factors underlying strict liability and how each is fully applicable to the sale of prescription drugs by retail druggists.48

There is, finally, some limited case authority stating that retailers should not be strictly liable for property loss,49 economic damages,50 or when a retailer sells the product in a sealed container without a reason-

Rptr. 890, 896-97 (Ct. App. 1973) (previous owner of plastic molding press was not liable in strict tort when it sold machine containing defective safety design; court held that one time occasional seller is not liable under strict tort doctrine).


52. Id. at 680, 710 P.2d at 252, 221 Cal. Rptr. at 455.

53. The Chief Justice noted that the “[s]ale aspect predominates over any incidental service provided to the consumer.” Id. at 689, 710 P.2d at 258, 221 Cal. Rptr. at 458. The Chief Justice also noted that:

several major policies are served by the doctrine of strict liability: (1) providing maximum compensation to helpless victims for often catastrophic costs of injuries caused by defective products; (2) providing an incentive for better design, manufacture, and testing procedures by placing those costs on the parties responsible for defective products reaching the market, thereby reducing injuries; (3) spreading the costs of injuries that do occur among those who benefit from the marketing and use of the product. . . . [E]ach is fully applicable to the sale of prescription drugs by retail druggists.

54. Id. at 692, 710 P.2d at 260, 221 Cal. Rptr. at 460.

55. Walter v. Decora, Inc., 225 Tenn. 504, 514, 471 S.W.2d 778, 783 (Tenn. 1971) (seller who installed a floor product not strictly liable for property loss due to an offensive odor given off by the floor, distributor also not liable).

56. Price v. Gatlin, 241 Or. 315, 316, 405 P.2d 502, 503 (1965) (purchaser of tractor could not recover against wholesaler, who was not alleged to be at fault, for economic losses caused by the manufacturer’s defective product).

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able opportunity to inspect.97

F. Florida Law

The issue of a product reseller’s strict tort liability was first addressed in the seminal case of West v. Caterpillar Tractor Co.,98 which imposed strict tort liability on the manufacturer of a defective product.98 The supreme court, by relying on the language of Section 402A,99 and by noting that “[s]trict liability does not make the manufacturer or seller an insurer,”100 in essence extended the strict tort doctrine to resellers. Two district court of appeal cases, decided shortly after West, indirectly imposed strict tort liability on retailers in the context of resolving procedural issues.101

The issue as to the scope of reseller liability was not definitively addressed in Florida until 1981 in the significant case of Adobe Building Centers, Inc. v. L.D. Reynolds.102 The fourth district court of appeal case, which involves a distributor of defective construction materials, is noteworthy not only for the precise holding imposing strict tort liability on retailers and wholesalers,103 encompassing liability for property damage,104 but also for the discussion of the rationale for the court’s conclusion. The court noted that the supreme court “relied heavily on . . . Section 402A, which specifically refers to a seller as being subject to strict liability”105 and quoted Justice Traynor’s “enterprise liability” ra-

57. Walker v. Decora, Inc., 225 Tenn. 504, 509, 471 S.W.2d 778, 783 (Tenn. 1971) (court refused to extend strict tort liability to a “merchant who sells the product in a sealed container and who is afforded no reasonable opportunity to inspect.”)

58. 336 So. 2d 80 (Fla. 1976).

59. Id. at 86-87.

60. Id. at 87.

61. Id. at 90 (emphasis added).

62. Rice v. Walker, 359 So. 2d 891 (Fla. 3d Dist. Ct. App. 1978) (allowing amendment of complaint which failed to state cause of action in strict liability against retailer because it lacked allegations showing how components were defective), cert. denied, 367 So. 2d 1127 (Fla. 1979); Knipp v. Weinbaum, 351 So. 2d 1081 (Fla. 3d Dist. Ct. App. 1977) (allowing amendment of complaint to include cause of action in strict liability against retailer), cert. denied, 357 So. 2d 188 (Fla. 1978).

63. 403 So. 2d 1033 (Fla. 4th Dist. Ct. App.), pet. for review dismissed, 411 So. 2d 380 (Fla. 1981).

64. Id. at 1034.

65. Id.

66. Id.
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tionale from Vandermark. The Adobe principle has since been followed in the third district, in Perry v. Luby Chevrolet, Inc., and Mobely v. South Florida Beverage Corp., and in the second district in Visnals v. J.C. Penny Co. The recent fifth district case of E-Mart Corp. v. Chairs, Inc. also reaffirms the Adobe rule. The case is particularly instructive, however, in expressly granting a strictly liable retailer a right of indemnity against the manufacturer.

Florida case law, therefore, adheres rigidly to the traditional Vandermark rule and rationale.

III. Non-Applicability of Strict Tort Liability

A. Retailers, Wholesalers, and Distributors

Not all courts have followed the lead of California and the Restatement in holding non-manufacturing sellers to the same standard of liability as manufacturers. There does exist some minority authority to the effect that retailers and wholesalers will not be held strictly liable in tort where they do not participate in the manufacturing process, nor contribute to bringing about the defect, and where the product, having a latent defect, was in exactly the same condition when sold as it had been when it left the hands of the manufacturer.

67. Id. at 1037 (Hurley, J., specially concurring).
68. 446 So. 2d 1150, 1151 (Fla. Dist. Ct. App. 1984) (issue of defect in auto precluded summary judgment under strict liability theory, despite evidence that auto retailer did not perform any service or repairs on car).
69. 500 So. 2d 292, 293 (Fla. Dist. Ct. App. 1987) (retailer strictly liable for defective product even though no control over defects; distributor not liable in absence of evidence that defect in product existed prior to arrival at retail store).
71. 506 So. 2d 7, 9 (Fla. 5th Dv. Ct. App. 1987).
72. Id. at 9-10.
73. Dildine v. Clark Equip. Co., 282 Ark. 130, 666 S.W.2d 462, 465 (1984); Ellis v. Rich's, Inc., 213 Ga. 573, 576, 212 S.E.2d 373, 376 (1975) (Georgia statutory law mandates that strict tort liability apply only to manufacturers, not importer, distributor, or retailer herein); Lodge v. Champion Home Builders Co., 170 Ga. App. 21, 22, 315 S.E.2d 912, 913 (Ga. Ct. App. 1984) (authorized dealer of manufacturer; Hudson v. Interstate Battery System of America, Inc., 393 So. 2d 940, 943 (La. Ct. App. 1981) (non-manufacturing seller of defective product not responsible for damages in tort, absent a showing that seller knew or should have known that the product was defective); Parker v. Ford Motor Co., 311 So. 2d 923, 925 (Miss. 1976) (distributor without knowledge of defects; Sam Shainberg Co. v. Barlow, 258 So. 2d 242, 244-45 (La. 1972) (plaintiff injured when she fell down steps while wearing a pair of shoes).
The paramount problem with the minority view, of course, is that by limiting a non-manufacturer’s liability (to knowledge or constructive knowledge of a defect), the minority overlooks the possible undesirable social consequences of leaving injured consumers uncompensated if the plaintiff cannot obtain jurisdiction or recovery from the manufacturer.

B. Policy Reasons for the Minority View

Arguments in favor of liability for non-manufacturers have been met by counter-arguments of some persuasive force. The application of strict liability to the non-negligent retailer and wholesaler has been criticized by one judge as “heavy-handed to the point of injustice.”

Even though retailers and wholesalers are sellers of goods within the literal meaning of the Restatement, they ordinarily have no control over the quality of the goods sold. These non-manufacturers, in fact, usually act merely as conduits of the product between the manufacturer and consumer. In the typical transaction, the retailer and wholesaler receive the goods in a sealed package and do nothing to contribute to the danger the goods may present to the consumer. Although retailers and wholesalers do benefit from their participation in the “stream of commerce,” they usually cannot be accused of creating defects in manufacture, design, or warning. Not only did the retailer and wholesales purchased shoes; heel had come off left shoe; court stressed the fact that the shoes were never out of their cardboard box until the retailer placed them on a rack in the store, and that if the shoes were indeed defective, the defect was latent and not readily discoverable by the retailer; court stated that wholesaler or retailer is under no duty to inspect product for latent defects); Ross v. Spiegel, Inc., 53 Ohio App. 2d 297, 304, 373 N.E. 2d 1288, 1295 (Cl. App. 1977) (retailer sold defective product in original container without knowledge of defect); Price v. Gatlin, 241 Or. 315, 316, 403 P.2d 502, 503 (1965) (economic loss not recoverable against wholesaler).

47. In Sam Shainberg Co., 258 So. 2d at 245, the manufacturer of the shoes was initially sued. Later, however, the manufacturer was dismissed from the action because the plaintiff could not obtain service of process. Seemingly then, the consumer had to bear the costs of her injury.


saler not create the defect in the product, which is the very basis for
strict tort liability, but also the retailer and wholesaler are ill-equipped
to defend a product which they neither designed nor manufactured.47
The result of the *Vandermark* rule, according to one court, "would
make each retail merchant an insurer or guarantor of every one of the
thousands of items he handles merely as a sales conduit."48 The strict
tort liability application to non-manufacturers has ultimately
produced a product liability system which is badly out of balance,
and utterly lacking in equity and common sense. It no longer fairly
adjudicates claims based on responsibility. Rather it has become a
convenient mechanism to pay damages whenever someone is in-
jured. Unfortunately, the uncertainty created by this revolutionary
change in the law has produced a virtual "lottery" for businesses
which sell products.49

The deterrence rationale underlying the *Vandermark* rule has also
been questioned. First, this rationale fails to realize that manufacturers
will sense the same, if not greater, pressure to make safe products if the
manufacturers are sued directly for injuries caused by their own pro-
duct defects.50 It is becoming increasingly easy for a product liability
plaintiff to secure *in personam* jurisdiction over a nonresident product
manufacturer.51 Second,

...此后，McComas认为，《产品责任的性质和原因》(June 26, Sept. 27, and Oct. 16, 1979); Epstein, *Modern Products Liability Law*
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77. Keeler testimony, supra note 76, at 319.
78. Sam Shainberg Co., 258 So. 2d at 246.
79. McComas testimony, supra note 76, at 353-54.
80. Epstein, supra note 76, at 62.
sion of "minimum contacts" required); *Owens v. Serpa*, 616 F.2d 191 (5th Cir. 1980) (applicability of Texas "Long Arm" statute); *Hollenbeck & Conway, An Overview*
to Draw the Line?, 7 Forum 150, 1256-57 (1982).*
83. Id.; Epstein, supra note 76, at 62.
84. According to the Insurance Services Office Product Liability Closed Claim
Insurance Services Office Survey)*, data show that, in fact, product sellers account for
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(1944); see also, Epstein, supra note 76, at 62.
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Center for the Public Interest, 99; A. Frenker & Freedman, *Product Liability
§ 4402(b) (1987).*

https://herszynow.com/products/defects
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Retailers and wholesalers, finally, are not really in any position to bring pressure on manufacturers, considering the relatively small size of non-manufacturers compared to manufacturers. The imposition of strict tort liability upon non-manufacturers is based on the significant rationale that retailers and wholesalers are entitled to indemnity from the manufacturer. Even when indemnity is permitted by statute and case law and even though indemnity is successful in fairly shifting the cost of liability to the manufacturer, the system is criticized as wasteful and inefficient. Justice Traynor, in Escola, in speaking of a seller's ability to recoup losses from a wholesaler or manufacturer in warranty cases, aptly pointed out that such a procedure is needlessly circuitous and engenders wasteful litigation. Product retailers, wholesalers, and distributors, routinely sued in product liability cases, are forced to incur substantial legal costs to achieve this "shifting" process. Once made a defendant, the non-manufacturer becomes involved in two lawsuits: one to defend against the plaintiff's claim which involves the manufacturer's product; the other to obtain indemnity from the responsible manufacturer. As one court recognized, a non-manufacturer is not really "held harmless" by indemnification if the non-manufacturer is compelled to "expend large funds to defend a products liability action merely because of a defective product, what the defect of which may be attributable solely to the manu-


[The administrative case for strict liability has no application to intermedialities that act purely as conduits. Strict liability of the manufacturer is useful as a means of eliminating complicated issues of negligence: it is hardly needed when there is no exposure in negligence to begin with.

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facturer’s conduct, passed through [its] hands."

Finally, indemnity is not automatic. The non-manufacturer must establish that the defect existed at the time the product left the possession or control of the manufacturer, which may be a difficult showing in a "flow" case. Indemnity, of course, would be markedly more accessible in a design defect case since the design of a product is attributable to the original manufacturer absence evidence of substantial alterations.

One of the classic justifications for the adoption of strict tort liability is the ability of the product seller to insure against this expanded liability and distribute the cost among the consumer public. This rationale, however, has been challenged in recent years by the onset of the products liability "insurance crisis." The impact of this "crisis" has been felt in several related major areas: increased costs for insurance, unavailability or partial unavailability of insurance, uncertainty and instability in the product liability tort and insurance system, and an insurance information problem.

Products liability insurance, as a mechanism for shifting a risk from the product seller to the insurer and distributing that risk among the other policyholders and ultimately the consumer, is extremely important in the product liability field. What an insurer does in the nature of rate-making or underwriting decisions necessarily impacts both product sellers and product liability claimants. If a product seller has insurance, that fact will influence the decision of a plaintiff to settle or sue; if the product seller has no insurance, a plaintiff may be precluded from recovery if the product seller has inadequate resources to pay the judgment.

The traditional insurance justification, therefore, is hardly valid for the product seller who, not because of unacceptable business conduct, cannot procure insurance or procure it at a cost which can be passed on to product buyers in a way that will keep the cost of the product competitive.

Data indicates that product liability insurance premiums have sharply risen in recent years, with small businesses, characteristically wholesalers and retailers, being affected in a greater degree than large manufacturing firms. Escalating premiums not only may increase the cost of consumer goods but may also make it difficult for product retailers to obtain or afford insurance. Yet, "because of the nature of the product liability field, it is possible that such a business could be financially ruined as the result of a product liability judgment where the seller may not even had possession of the product."

89. The essential nature of this requirement is illustrated in Coca-Cola Bottling Co. v. Hobart, 423 S.W.2d 118 (Tex. Ct. App. 1967), where plaintiff was injured when bottle exploded in her hands. The trial court awarded retailer indemnity against the bottler. Id. at 120. The appellate court reversed, however, citing that the absence of sufficient evidence that the bottle, although defective when sold to plaintiff, was not established to be in the same defective condition when it left the bottler’s control. Id. at 125.
90. See, e.g., Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979) (duty to design habitual; winnowing”; designer granted indemnity from manufacturer); id. at 861 (dicta) (defective product; habitual; winnowing”; designer granted indemnity from manufacturer); id. at 861 (dicta) (duty to design habitual; winnowing”; designer granted indemnity from manufacturer).
92. See, e.g., Task Force, supra note 94, at 231.
facturer's conduct, passed through [its] hands." Finally, indemnity is not automatic. The non-manufacturer must establish that the defect existed at the time the product left the possession or control of the manufacturer, which may be a difficult showing in a "law" case. Indemnity, of course, would be markedly more accessible in a design defect case since the design of a product is attributable to the original manufacturer absence evidence of substantial alterations.

One of the classic justifications for the adoption of strict tort liability is the ability of the product seller to insure against this expanded liability and distribute the cost among the consumer public. This rationale, however, has been challenged in recent years by the onset of the products liability "insurance crisis."** The impact of this "crisis" has been felt in several related major areas: increased costs for insurance, unavailability or partial unavailability of insurance, uncertainty and instability in the product liability tort and insurance system, and an insurance information problem.**

Products liability insurance, as a mechanism for shifting a risk from the product seller to the insurer and distributing that risk among the other policyholders and ultimately the consumer, is extremely important in the product liability field. What an insurer does in the nature of rate-making or underwriting decisions necessarily impacts both product sellers and product liability claimants. If a product seller has insurance, that fact will influence the decision of a plaintiff to settle or sue if the product seller has no insurance, a plaintiff may be precluded from recovery if the product seller has inadequate resources to pay the judgment.**

The traditional insurance justification, therefore, is hardly valid for the product seller who, not because of unacceptable business conduct, cannot procure insurance or procure it at a cost which can be passed on to product buyers in a way that will keep the cost of the product competitive.

Data indicates that product liability insurance premiums have sharply risen in recent years,** with small businesses, characteristically wholesalers and retailers, being affected in a greater degree than large manufacturing firms.** Escalating premiums not only may increase the cost of consumer goods but may also make it difficult for product resellers to obtain or afford insurance.** Yet, "because of the nature of the product liability field, it is possible that such a business could be financially ruined as the result of a product liability judgment where the seller may not even had possession of the product."**

The products liability tort and insurance system is also plagued by

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89. The essential nature of this requirement is illustrated in Coca-Cola Bottling Co. v. Hohor, 423 S.W.2d 118 (Tex. Ct. App. 1967), where plaintiff was injured when bottle exploded in her hands. The trial court awarded retailer indemnity against the bottler, Id. at 120. The appellate court reversed, however, stating that the absence of sufficient evidence that the bottle, although defective when sold to plaintiff, was not established to be in the same defective condition when it left the bottler's control. Id. at 125.

90. See, e.g., Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979) (defectively designed, auto retailer granted indemnity from manufacturer's, rev'd on other grounds, General Motors Corp. v. Turner, 567 S.W.2d 812, 815 (1978).


92. See Reed & Watkins, supra note 91, at 429.

93. Id. at 423-24.

94. The U.S. Department of Commerce, Interagency Task Force on Products Liability, Final Report, V-17 (1977) [hereinafter Task Force], concluded the cost of product liability insurance had increased substantially. Specifically, the average percentage premium increases were 280% for the 1971-76 period and 210% for the 1975-76 period. Id. at III-2. Some companies were faced with increases of more than 1000% during the 1974-76 period. Id. at VI-32. See also, Products Liability Insurance: Hearings Before the Subcommittee on Capital, Investment, and Business Opportunities of the House Comm. on Small Business, 95th Cong., 1st Sess., Part I, at 15 (1977). The results of a questionnaire survey of small manufacturers in five congressional districts revealed that the average increase in product liability insurance premiums from 1970-76 was 944.6%. During the same period, the average increase of sales was 162.1%.

95. Task Force, supra note 94, at VI-18-19, found the average premium increased 384% for small firms. The National Association of Wholesalers and Distributors estimates that its members have experienced, on the average, a 300-500% increase in the cost of product liability coverage. (McCaman testimony, supra note 76, at 361).

96. The insurance problem is particularly acute for wholesalers and retailers due to their relatively small size and low profit margin as a percentage of sales (McCaman testimony, supra note 76, at 352; Lente, supra note 82, at 1255-56).

97. According to the Task Force, supra note 94, at 408, 21.6% of the companies stated they wanted to purchase product liability insurance, but either they could not afford it or they could not obtain coverage from an insurance carrier. According to the Task Force, supra note 94, at VI-2-5, 14% of the companies surveyed did not carry product liability insurance.

98. Lente, supra note 82, at 1251.
uncertainty and instability, which unnecessarily increase the costs of resolving products claims. Uncertainty stems from two interrelated factors: First, liability rates are too heavily dependent upon an underwriter's judgment due to insufficient data and experience to determine the risk, particularly since the borderline of products liability has been greatly broadened in the past few years; and secondly, the products liability laws of the several states vary significantly, which makes planning, prediction, and precise calculation of loss even more difficult. Due to the combination of judgmental considerations and wide variations in the law,

extreme cases have a disproportionate influence on rate-making and underwriting decisions. Since products are marketed on a national basis and rates are set on the basis of national experience, the influence of the so-called 'worst case' is limited not to the most extreme case in one jurisdiction but to the most extreme case in any jurisdiction. Thus, the conservative judicial decision of one jurisdiction will have little effect on the product liability rates and premiums charged within that jurisdiction. Rather, these changes will be influenced by changing judicial interpretations in the 'most liberal' jurisdiction.

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\textsuperscript{99} Task Force, supra note 94, at 9-5, 6, 12; Lente, supra note 82, at 1226.
\textsuperscript{100} Reed & Watkins, supra note 91, at 428. Because of the way product liability insurance is marketed and policy information maintained, it is very difficult to get accurate information on all product liability policies. There is evidence that steps are now being taken to develop more complete and reliable data to allow greater accuracy in the rate-making process. The importance of gathering insurance information has led several states to adopt some form of insurance reporting statutes. See, e.g., Fla. Stat. $ 46.051, 27.913 (Supp. 1987).
\textsuperscript{101} Ghiai, Products Liability, Where is the Borderline Now?, 13 Forcon 206, 210 (1978) (Ghiai) points out that the boundaries of product liability have been greatly broadened. Accordingly, the insurance picture is in a state of change. Underwriters are thus unable to measure risks and to tell whether a liability episode is covered or not.
\textsuperscript{103} Reed & Watkins, supra note 91, at 428.
2. Provisions of the Act

While a detailed analysis of the entire Act is beyond the scope of this article, this paper will briefly examine the purposes of the Act, the exclusive feature of its remedy, the liability of manufacturers, and then, in detail, examine the liability of non-manufacturing product sellers.

The Act attempts to balance the competing values of ensuring injured consumers adequate compensation while maintaining a suitable business setting. The Preamble of the Act states its two significant purposes: First, to ensure that persons injured by unreasonably unsafe products receive reasonable compensation for their injuries; second, to ensure the availability of affordable and adequate product liability insurance coverage by stabilizing product liability insurance rates.

Through the enactment of uniform state laws, insurance companies will be better able to predict their customers' potential exposure to product liability claims and set their insurance rates accordingly. Given the complex national economy, the interstate nature of product distribution, and the consequent interstate nature of a products liability tort, it is argued that a uniform law is essential to provide certainty and predictability in the law and thus stabilize insurance rates.

The Act creates one unified products liability action for injuries to persons and damage to property caused by products, thereby preempting the Uniform Commercial Code theories. This is to achieve uni-

110. Id. at 62716.
111. Id.

Products liability essentially is an interstate tort because products seldom are manufactured, sold at wholesale, and resold in the same state. Products liability, therefore, has become an area in which uniform state treatment of tort law is desirable. . . . [Wholesaler's] insurance company . . . will consider the product liability laws of the 50 states when computing [wholesaler's] insurance problem. Because wholesaler's potential liability may lie in one of 50 states, wholesaler's insurance company determines wholesaler's premium on a nationwide basis. . . . The necessary computation of product liability premiums on a nationwide basis has a startling consequence on wholesaler's customers because some customers will pay for protection they do not receive while other customers will receive protection they do not pay for.


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formity in the law and eliminate conflicting rules and remedies. Under the Act's cause of action, four different claims can be raised: construction defect, design defect, failure to warn, and breach of express warranty. The Act imposes strict liability on manufacturers in construction defect and express warranty cases, but reverts to a fault standard for manufacturers in design and warning cases. The Act defines "manufacturers" as product sellers who design, fabricate, construct, produce, make, or remanufacture a product or component part of a product; retailers, wholesalers, and distributors are excluded from the definition unless they engage in the enumerated processes.

The most important section of the Act for non-manufacturers emerges as Section 105. Section 105(A), which returns the liability of the non-manufacturer to a fault basis, provides in part: "A product seller, other than a manufacturer, is subject to liability . . . by such product seller's failure to use reasonable care with respect to the product." As a general rule, "product sellers shall not be subject to liability in circumstances in which they did not have a reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, reveal the existence of the defective condition." The limitation of liability provided non-manufacturers through the negligence standard is subject to certain exceptions. Section 105(B) holds a non-manufacturer strictly liable for any express warranties given. Section 105(C) holds the non-manufacturing product seller to the same standards as a manufacturer if the manufacturer is (1) not subject to service of process in the plaintiff's domicile, (2) judicially declared "insolvent" (defined as inability to pay bills as become due in ordinary course of business), or (3) the court determines that it is highly probable that the plaintiff would be unable to enforce a judgment against the manufacturer.

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With respect to non-manufacturer product sellers, Section 105 attempts to achieve a balance between protecting such product sellers, except from their own negligent conduct or specific guarantees, and protecting an innocent consumer's right to recover. In particular, the provisions obviating liability if there is no opportunity to inspect should address the serious fairness questions raised in such cases as Canifax v. Hercules Powder Co. 122 in which the wholesaler was held strictly liable even though the defective product was never in the actual possession of the wholesaler.

Section 105(C), however, addresses the justifiable concern of Justice Traynor in Vandemark that “[i]n some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff.” 123 One recalls that one of the controlling policy factors that prompted imposing strict tort liability on non-manufacturers was the concern that the plaintiff be able to receive adequate compensation. Sub-section (C) ensures that the negligence standard will protect the non-manufacturer only if the manufacturer is available and solvent. A problem may develop, however, if a court makes a determination that a plaintiff could enforce a judgment against a manufacturer pursuant to Section 105(C)(3) and then dismiss the product seller or supplier. 124 Subsequently, by the time the claimant receives a judgment, possibly years later, the manufacturer may no longer be financially solvent. The plaintiff is then left with no remedy. 125

Another potential problem concerns the fact that non-manufacturers will be treated as a party for purposes of discovery, thereby perpetuating and sanctioning possible frivolous claims. 126

The Model Act, despite its problems, is a balanced attempt to solve the products liability problem. The Act, however, is only a proposal offered to the states. It remains to be seen to what extent the states have adopted the provisions of the Act.

B. State Statutory "Reforms"

1. Introduction

In response to the problems in the products liability field, and with the Model Act serving as model and incentive, state legislatures struggled to determine the proper standards and limits for products liability. By the end of the 1970s, a majority of states had enacted product liability reform statutes, and many of these statutes have provisions dealing with the liability of non-manufacturers. While it is beyond the scope of this paper to examine in detail the many state statutes, four general types of state statutes treating non-manufacturers will be reviewed: those dealing with indemnification, "sealed container" defenses, absolute bars to strict tort liability, and partial bars.

2. Indemnification Statutes

Some state statutes merely codify basic common law indemnification principles. Arizona, for example, permits an injured plaintiff to recover against a non-manufacturer product seller on a strict liability in tort theory, but then requires the manufacturer to indemnify the seller. 127 If the seller, however, had knowledge of the defect of the product, or if the seller altered or modified the product in a way that gave rise to the injury, indemnification is denied. 128 Where the seller is granted indemnity, the plaintiff must first attempt to enforce a judgment against the manufacturer. 129 If this judgment cannot be enforced, however, the plaintiff can recover from the non-manufacturer seller. 130

Non-manufacturer liability is thus based on lack of satisfaction of a judgment rather than a definition of insolvency.

The Arkansas Product Liability Act also contains an indemnification provision. 131

121. Section 103A, 44 Fed. Reg. 62720 (1979) (note the exception for product-related economic harm which would still be governed by the U.C.C.).
123. Vandemark, 61 Cal. 2d at 259, 391 P.2d at 171, 37 Cal. Rptr. at 899.
125. Dissenting analysis by Senator Ernest Hollings in a similar provision in section 8 of the “Kasten” products liability bill, S.44, 546 Commerce Clearinghouse Products Liability Reports, June 8, 1984.
126. Id. at 62727 (1979).
128. Id.
129. Id. at § 12-684B.
130. Id.
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The Arkansas Product Liability Act also contains an indemnification provision.131

128. Id.
129. Id. at § 12-684B.
130. Id.
3. "Sealed Container" Statutes

Some states have codified the common law "sealed container" defense. The Tennessee statute, for example, provides that a non-manufacturing product seller will not be strictly liable in tort if the defective product was sold in a sealed container or the seller had no reasonable opportunity to inspect the product and become aware of the defect. This protection, however, is not afforded to a seller who is sued for breach of warranty or if the manufacturer is not subject to service of process in the state or is judicially declared insolvent. The statute does not define a judicial declaration of insolvency. In Tennessee, the U.C.C.'s warranty theories remain viable alternatives. The North Carolina statute is similar to the one in Tennessee.

Under the Kentucky Products Liability Act, a non-manufacturing seller is not liable for a product defect if the manufacturer is identified and subject to the jurisdiction of the court, the product was sold in its original condition or package, no express warranties were made, and the seller did not have knowledge that the product was defective or unreasonably dangerous. The statute does not contain a provision for non-manufacturer liability in the event of manufacturer insolvency. The statute does extend, however, protection to non-manufacturers from actions based on implied warranty.

4. Absolute Bars

At one extreme in the statutory scheme is the Nebraska statute which absolutely exempts the non-manufacturer from strict tort product liability. No provision is made for the manufacturer's unavailability or insolvency. In those cases, the plaintiff must bring suit against the non-manufacturer in negligence or express or implied warranty (which appear to be allowed by the statute) or travel to a jurisdiction where the manufacturer can be found. One can readily see that the Nebraska approach may leave an injured consumer without compensation.

5. Partial Bars

Several state statutes have assumed a more moderate approach. Even within this middle ground variations exist.

In Illinois, a non-manufacturing seller is exempt from strict tort liability if the seller identifies the manufacturer, who is in existence, within the jurisdiction, subject to service of process, and able to satisfy the judgment. Note that the statute does not specifically exclude implied warranty actions against the non-manufacturer, and, of course, traditional negligence principles apply. Note also that the focus is on the inability to satisfy a judgment, rather than an inquiry into the manufacturer's insolvency. The Minnesota statute is very similar to the Illinois one.

Under the Washington Product Liability Act, a product seller, other than a manufacturer, as a general rule, is liable only for negligence, express warranty, and intentional misrepresentation. However, a product seller will be held to a manufacturer's standard if certain circumstances arise, principally the lack of a solvent manufacturer subject to service of process within the state, or a court determination that the plaintiff is not likely to be able to enforce a judgment against the manufacturer.

The Colorado statute does not permit a strict tort liability suit against a product seller unless the seller is also the manufacturer. The term, "manufacturer," however, is given a very broad definition which encompasses, for example, sellers with knowledge of the defect. Moreover, if jurisdiction cannot be obtained over the manufacturer, then the principal distributor within the state shall be deemed the "manufacturer." The Colorado statute presents some potential problems. The broad definition of "manufacturer" may lead to long de-

133. Id. at (a)(1), (2), and (3).
134. Id. at (a)(1).
137. Id.
140. ILL. ANN. STAT. ch. 110, para. 2-621 (Smith-Hurd 1987).
141. MINN. STAT. ANN. § 544.41 (West 1987).
143. Id. at § 7.72.040(2).
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131. MICH. STAT. ANN. § 564.41 (West 1987).
133. Id. at § 7.72.040(2).
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136. Id. at 402(2).

The South Dakota statute is very similar to the Nebraska approach — strict tort is barred, regardless of the manufacturer’s status; the plaintiff must use negligence or warranty.\(^ {129}\)

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bates over semantics and may encourage form over substance. The statute, moreover, does not contain a provision for non-manufacturer liability in the event the manufacturer is insolvent. Finally, the statute only protects the non-manufacturer from strict tort liability; no mention is made of alternative theories such as U.C.C. implied warranties.

In order to be exempt from strict tort liability in Ohio, the non-manufacturing seller must meet several conditions, for example, that the manufacturer was subject to process within the state, and that the manufacturer or seller has provided the buyer with written notice of applicable insurance coverage, or that the manufacturer has neither filed for bankruptcy or been declared judicially insolvent. The statute, moreover, expressly states that its provisions only apply to strict tort cases of action, thereby maintaining traditional negligence principles and U.C.C. warranties.

The Idaho Product Liability Reform Act contains a comprehensive section dealing with the liability of non-manufacturers. The section is essentially a combination of the Model Act and most of the provisions addressed individually by the other states. For example, Idaho has indemnification provisions, a "sealed container" defense, no liability without an opportunity to inspect (absent an express warranty), and the standard exceptions of an unavailable or judicially declared insolvent manufacturer, or a court determination of the unlikelihood of enforcing a judgment.

6. Analysis of State Statutes

While the state statutes are certainly not precisely uniform, an examination thereof discloses a general uniformity in those provisions treating the product liability of a non-manufacturing seller. The states have clearly followed the Model Act's lead in generally holding the non-manufacturer liable only when the non-manufacturer is at fault. Liability status of a manufacturer, however, may be imposed in most states if the manufacturer is unavailable or insolvent. As with the Model Act, liability under such circumstances is an attempt to balance the policy of compensating injured consumers with the policy of holding non-manufacturers liable for their blameworthy conduct. The placing of primary responsibility on manufacturers of defective products and secondary liability on non-manufacturers emerges as a fair and logical compromise.

In reviewing the Model Act and the state enactments, though, one discerns two areas where precise uniformity has not yet been attained: the exclusiveness of the statutory remedy in products liability suits and the provision which eliminates non-manufacturer protection when the manufacturer is insolvent. Some states, like the Model Act, make the statutory remedy exclusive; others do not, and some do not address the issue at all. The states also vary as to the treatment of insolvency of the manufacturer. Some hold that insolvency, or judicially declared insolvency, or inability to pay a judgment triggers non-manufacturer liability; others offer no relief at all. Accordingly, some commentators, in viewing the statutory law of non-manufacturer liability, have concluded that "[t]he movement toward uniformity in product liability actions, which the Uniform Act was designed to spearhead, has not materialized," others find the law even more unsettled now due to the legislative enactments, while others doubt that the Model Act will ever gain wide acceptance.

It is in this climate of partial state reform, doubts as to the efficacy of the Model Act, and a perceived need for uniformity in the products liability field, that the push for federal reform is occurring.

C. Federal "Reform" Propositions

As there is a possibility that change in products liability law may be imposed by the federal government, the proposed federal legislation merits some attention. For the purpose of this paper, the author will focus on the Senate "Kasten" bill as this bill has traveled furthest

148. Id. at § 2305.33(A)(1)(b).
149. TRIAL LAW GUIDE 1, 3 (1983).
152. Id. at 1010.
bates over semantics and may encourage form over substance. The statute, moreover, does not contain a provision for non-manufacturer liability in the event the manufacturer is insolvent. Finally, the statute only protects the non-manufacturer from strict tort liability; no mention is made of alternative theories such as U.C.C. implied warranties.

In order to be exempt from strict tort liability in Ohio, the non-manufacturing seller must meet several conditions, for example, that the manufacturer was subject to process within the state, and that the manufacturer or seller has provided the buyer with written notice of applicable insurance coverage, or that the manufacturer has neither filed for bankruptcy or been declared judicially insolvent. The statute, moreover, expressly states that its provisions only apply to strict tort cases of action, thereby maintaining traditional negligence principles and U.C.C. warranties.

The Idaho Product Liability Reform Act contains a comprehensive section dealing with the liability of non-manufacturers. The section is essentially a combination of the Model Act and most of the provisions addressed individually by the other states. For example, Idaho has indemnification provisions, a "sealed container" defense, no liability without an opportunity to inspect (absent an express warranty), and the standard exceptions of an unavailable or judicially declared insolvent manufacturer, or a court determination of the unlikelihood of enforcing a judgment.

6. Analysis of State Statutes

While the state statutes are certainly not precisely uniform, as examination thereof discloses a general uniformity in those provisions treating the product liability of a non-manufacturing seller. The states have clearly followed the Model Act's lead in generally holding the non-manufacturer liable only when the non-manufacturer is at fault. Liability status of a manufacturer, however, may be imposed in most states if the manufacturer is unavailable or insolvent. As with the Model Act, liability under such circumstances is an attempt to balance the policy of compensating injured consumers with the policy of holding non-manufacturers liable for their blameworthy conduct. The place

148. Id. at § 2305.33(D)(2).
150. Id.
down the road to enactment, and since the House proposal, the “Shumway” bill was amended to make it similar to the Senate bill. An examination of the entire Kasten bill is, of course, beyond the scope of this paper; rather, the focus herein will be primarily on the liability of non-manufacturer sellers.

The proposed legislation is unique in that it would generally preempt the entire field of common law products liability law (not just inconsistent state law) and substitute a federal code of products liability law. Application of the new law would be left to the state courts, however, and products cases would not be federal question cases.

As with the Model Act, the federal proposal would replace product liability theories of recovery with a single unified cause of action. The standard for manufacturer liability is the same as under the Model Act, strict liability for construction defects and express warranty and traditional “fault” for design defects and failure to warn cases.

Section 8 of the Kasten bill, which defines the liability of product sellers other than manufacturers, is also very similar to the Model Act. Such a product seller is liable for failure to exercise reasonable care with respect to the product and for breach of an express warranty. A product seller, in addition, will be treated as a manufacturer if the manufacturer is not subject to service of process under the laws of the state in which the action is brought or the court determines that the claimant would be unable to enforce a judgment against the manufacturer.

The Kasten bill also indicates that a product seller other than a manufacturer can be liable with respect to the “construction” or “condition” of a product if it can be established that the product flaw was caused by the reseller’s negligence. Note that a manufacturer is strictly liable for a product flaw which occurred while the manufacturer has possession of the product. The difference in treatment may be attributed to the relative ease of proving “flaw” negligence against a reseller as opposed to a manufacturer with the usual elaborate quality control procedures.

The bill also focuses on the inspection by the reseller as an area of potential negligence. Resellers sometimes have a pre-delivery inspection function, and the bill recognizes that this function may rise to the level of an affirmative duty. At the same time, the bill recognizes, as a general rule, that under ordinary circumstances, one would not expect a reseller to open a prepackaged or sealed product to inspect it. Another area of possible negligence, the failure of the reseller to transmit adequate warnings, is also expressly mentioned in the bill. A breakdown in the warnings transmission process at the reseller level is a probable area for a claim of reseller negligence to arise.

Finally, as with the Model Act the bill, in certain circumstances, ensures the injured consumer of a viable defendant by reposing the manufacturer’s responsibility on the reseller. Again, this provision represents a logical and fair compromise and a moderation in the return to a more fault-based system.

The debate raging over the proposed federal legislation lies not so much in its contents but rather over the necessity and wisdom of a federal solution.

Critics of the present system stress that the conflicting rules and theories result in an uncertain, unpredictable, burdensome, and expensive system which only a certain, clearly drafted, federal statute can cure. Federal proponents assert that the Model Act will fail to accomplish its purpose. No state has fully adopted the Act and the ad hoc approach further increases uncertainty. Not only is the uniform law not uniformly adopted, but it is also variously interpreted by the states. The individual states, moreover, have little incentive to act

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164. Id. at § 8(b)(1).
165. Id. at § 8(b)(1).
166. Id. at § 8(c).
167. See, e.g., Leete, supra note 112, at 1024; Reed & Watkins, supra note 91, at 461, 449 (1984); Herrman, supra note 153; at 51-52; Coccia, supra note 98, at 104; Dworin, supra note 154, at 618.
168. See, e.g., Leete, supra note 112, at 1023-24; Herrman, supra note 153, at 51-52.
169. See, e.g., Leete, supra note 112, at 1024; Coccia, supra note 167, at 117.
170. See, e.g., Reed & Watkins, supra note 91, at 450; Leete, supra note 112, at 1024; Coccia, supra note 98, at 117.
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The debate raging over the proposed federal legislation lies not so much in its contents but rather over the necessity and wisdom of a federal solution.

Critics of the present system stress that the conflicting rules and theories result in an uncertain, unpredictable, burdensome, and expensive system. The system is often called a “shambles” and the courts are often left to guess what the law is. The federal code would, hopefully, provide a uniform and predictable system.

164. Id. at § 8(b)(1).
165. Id. at § 8(b)(1).
166. Id. at § 8(c).
167. See, e.g., Leete, supra note 112, at 1024; Reed & Watkins, supra note 91, at 461, 449 (1984); Herrman, supra note 153, at 51-52; Coccia, supra note 98, at 104; Dworkin, supra note 154, at 618.
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170. See, e.g., Reed & Watkins, supra note 91, at 450; Leete, supra note 112, at 1024; Coccia, supra note 98, at 117.
unilaterally as national uniformity is needed to reduce uncertainty. The national economy, with a nationwide distribution of goods ultimately affecting interstate commerce, demands a national solution. Advocates of a federal solution note that the federal government is already involved in tort law (for example, the Federal Employers' Liability Act), and that Congress' power under the "Commerce clause" is certainly sufficient to preempt the field. Flexibility in a federal law could be maintained by the amendment process and a Board of Review.

A federal solution, however, does present several drawbacks. Opponents contend that the federal approach would further centralize federal authority, increase federal control over the states, and encourage greater federal intervention. They assert that the federal bills show a lack of faith and impatience with the states and point to the U.C.C. as a significant contribution to uniform law made independently of the federal government. Other critics stress the "laboratory of ideas" concept by which the common law, on a state-by-state basis, experiments with different approaches, changes with the times, gradually accommodates social needs and scientific advances, and ultimately does justice. A federal code would destroy the flexibility of the common law and stagnate innovation and development by "freezing" the law.

Viewing the problem from the focal point of this paper, the strict tort liability of non-manufacturer product sellers, there certainly appear to be sufficient reasons for modifying the Vandermark principle. The fairly recent Model Act, moreover, whose non-manufacture provisions have essentially been already adopted by several states, offers a


172. See, e.g., Cocca, supra note 98, at 119; Comment, supra note 171, at 765, 778-79; Reed & Watkins, supra note 91, at 461; Leete, supra note 112, at 1034.

173. See, e.g., Cocca, supra note 98, at 111.

174. Id.; Reed & Watkins, supra note 91, at 468.

175. See, e.g., Cocca, supra note 98, at 119; Reed & Watkins, supra note 91, at 465; Comment, supra note 171, at 767.


177. See, e.g., Cooke, supra note 176 at 7-8; Walters, supra note 52, at 986.

178. See, e.g., Reed & Watkins, supra note 91, at 461, 464; Cocca, supra note 98, at 115; Dworkin, supra note 154, at 460-42; Comment, supra note 171, at 758.

fair and logical compromise solution to this one aspect of the products liability "crisis." Considering the great impact a federal code would have on federal-state relations and traditional tort common law, there does not appear to be any compelling reason to alter the gradual Model Act approach. This author would counsel a "wait and see" attitude in order to more fully discern the states' response to the Model Act before turning over a major part of tort law to the federal government.

V. Conclusion

The examination of the tort liability of product resellers has provided several varying principles which address the risk of loss issue in the particular context herein. Generally speaking, at one extreme is the principle which imposes strict liability on all product sellers in the marketing chain, including product resellers; at the other extreme is the principle which protects product resellers from strict liability (but not from their own negligence); in the middle is a principle which may protect a reseller from strict liability depending on the situation of the manufacturer. These principles reflect various goals of tort law and various methods of allocating the risk of loss.

A proper principle to govern the liability of product resellers, in the author's opinion, must first recognize the disparate interests of product manufacturers, resellers, and consumers. A proposal must then attempt to balance fairly these interests and treat the consuming public, product manufacturer, product reseller, and product liability insurer in an equitable manner. The right of the consumer, the least likely participant to be insured, to recover for injuries sustained as a result of a defective product, must not be unduly impaired. The societal interest in protecting its members harmed by defective products must also be recognized. Product sellers, however, also possess rights, principally to be protected from substantially increasing product liability insurance costs and unwarranted and burdensome exposure to litigation and legal costs. Society also possesses an interest in the effective use of judicial resources and in lower product prices. A proper principle, therefore, must reconcile these conflicting interests of the consumer, who desires compensation, and product resellers, who wish to avoid absolute, unlimited liability.

This author has examined several principles herein which treat the tort liability of product resellers, from United States common law to statutory approaches. This author believes that if one was to attempt to devise a reasonable and fair principle to govern the liability of product
unilaterally as national uniformity is needed to reduce uncertainty.\textsuperscript{171} The national economy, with a nationwide distribution of goods intimately affecting interstate commerce, demands a national solution.\textsuperscript{172} Advocates of a federal solution note that the federal government is already involved in tort law (for example, the Federal Employers’ Liability Act),\textsuperscript{173} and that Congress’ power under the “Commerce clause” is certainly sufficient to preempt the field.\textsuperscript{174} Flexibility in a federal law could be maintained by the amendment process and a Board of Review.\textsuperscript{175}

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Premises Liability in Florida in Light of Walt Disney World Co. v. Goode: Confusing Legal Remedies with Good Samaritan Impulses

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I. Introduction

On August 11, 1977, Joel Goode, age four, visited Disney World for the first time with his mother, Mrs. Marietta Goode, and his aunt and cousins. All had agreed to meet at approximately 11:30 p.m. at an

1. 501 So. 2d 622 (Fla. 5th Dist. Ct. App. 1986).
2. Initial Brief of Appellant at 1, Walt Disney World Co. v. Goode, 501 So. 2d 622 (Fla. 5th Dist. Ct. App. 1986) (No. 85-680) [hereinafter Initial Brief of Appellant].