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Potential Liability of Non-Manufacturer Certifiers of Quality

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COMMENTS

POTENTIAL LIABILITY OF NON-MANUFACTURER CERTIFIERS OF QUALITY

As our society progresses and methods of production and distribution expand to proportions once considered impossible, the law must be adapted to deal adequately with new situations. Probably the most significant example of such judicial flexibility in keeping abreast of economic development is provided by the recent evolution of products liability as an almost generic concept. To market the superabundant products and services of the American economy, many innovations appear in mass-media advertising.

One significant development in the advertising world is the growth of independent testing agencies who convey information to the public about available products and services. The purpose of this comment is to examine the various theories which might be employed to impose liability, both in favor of consumers and competitors, upon non-manufacturer certifiers of quality. Primary attention will be directed toward the tort of negligent misrepresentation since that appears best designed to cope with the potential harms in this area. Remedies in warranty and under relevant legislation will be discussed briefly in the hope that such analysis will further particularize the problem at hand.[1]

I.

TRADITIONAL NOTIONS

It has been suggested that, "one area of potential liability which remains open is the possible liability of testing laboratories and other agencies certifying 'quality'."[2] Until recently such a proposition would have been severely criticized as a completely untenable legal theory. Today, however, with the expansion of liability in the areas of negligent misrepresentation and warranty, especially with regard to manufacturers' liability to ultimate consumers it cannot be disregarded. Traditionally in such actions, if no privity existed between the parties, no liability could be imposed.[3]

1. See generally, Note, *Liability Of A Testing Company To Third Parties,* 1964 WASH. U.L.Q. 77.
2. 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY 7 (1964).
3. There have been exceptions in specific types of cases:

1) *Abstracter cases* — although the majority rule requires privity as enunciated in the leading case, Savings Bank v. Ward, 100 U.S. 195 (1880), some cases have resulted in liability absent privity, where the abstracter has knowledge that the third party would rely on the abstract; *e.g.,* Brown v. Sims, 22 Ind. App. 317, 53 N.E. 779 (1899). Also, liability to third parties has been imposed under statutes in a number of jurisdictions. See Annot., 34 A.L.R. 67, 73–74.

2) *Notary Public cases* — generally public officers, such as notary publics, are liable for damage proximately caused to those relying on a certificate that the

The privity doctrine found its inception in the landmark case of *Winterbottom v. Wright*[4] where the defendant had contracted to keep certain coaches in safe condition. A coachman, who was injured when the defendant negligently permitted the coaches to fall into disrepair, was denied recovery on the basis of lack of privity. The court saw defendant's duty as contractual in nature and the plaintiff being a third party was not entitled to assert the contract obligation.

II.

BODILY AND PROPERTY DAMAGE VERSUS FINANCIAL LOSS

At the outset, a distinction must be made between physical harm on the one hand and commercial or financial loss on the other. The former was actionable long before the latter. An example is the case of *Van Winkle v. American Steam-Boiler Ins. Co.*,[5] in which an insurance company inspected certain boilers and furnished certificates as to the maximum load maintainable by the safety valve. Plaintiff, a third party, and not a third party beneficiary, recovered for injuries sustained as a result of the negligent inspection.[6]

Cases such as *Van Winkle* do, however, stress the danger inherent in the objects if improperly inspected, with such language as:

> . . . that in all cases in which any person undertakes the performance of an act, which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law, *ipso facto,* imposes, as a public duty, the obligation to exercise such care and skill.[7]

That courts are less reluctant to impose liability where physical injury occurs is understandable. The Restatement of Torts, in such cases, requires only foreseeable reliance and injury; "intent" that the injured party rely is not necessary here, as it is in the financial loss situation.[8] Furthermore, the tenor of recent opinions gives every indication that a testing company will not evade liability easily with a specious privity argument. As an abstract consideration, however, liability should require

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parties are known to them personally and that they appeared and acknowledged the instrument. See Annot., 34 A.L.R. 67, 74–76.

4. 10 M.&W. 109, 152 Eng. Rep. 402 [Ex. 1842].

5. 52 N.J.L. 240, 19 Atl. 472 (1890).

6. *See also* Dickerson v. Shephard Warner Elevator Co., 287 F.2d 255 (6th Cir. 1961); Dahms v. General Elevator Co., 214 Cal. 733, 7 P.2d 1013 (1932); Cowles v. Independent Elevator Co., 22 Cal. App. 2d 100, 70 P.2d 711 (1937).

7. 52 N.J.L. at 247, 19 Atl. at 475.

8. RESTATEMENT, TORTS § 311 (1934):

> (1) One a part of whose business or profession it is to give information upon which the bodily security of others depends and who in his business or professional capacity gives false information to another is subject to liability for bodily harm caused by the action taken in reliance upon such information by the recipient or by a third person to whom the actor should expect the information to be communicated if the actor, although believing the information to be accurate, has failed to exercise reasonable care
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> a) to ascertain its accuracy, or
>
> b) in his choice of language in which it is given.
>
> (2) The actor is subject to liability under the statement in Subsection (1) not only to the recipient or to a third person who expectably acts in reliance

no more in the financial loss situation than in the case of physical injury. So long as all the elements — representation, reliance, foreseeability and injury — are present, liability should accrue in either case. Practically, however, it seems unlikely that courts will repair an injured pocketbook as readily as they will compensate for physical injury.[9]

III.

THE PRIVITY DOCTRINE IN NEGLIGENT MISREPRESENTATION

In the early case of *Derry v. Peek*,[10] the court refused to apply the concept of negligent misrepresentation to a financial loss situation. A tramway company represented in its prospectus that it had the right to use steam power in its operations. Only after the plaintiff had purchased stock in reliance on this representation did the defendant company apply for permission to use steam power. The application was rejected, defendant went out of business and plaintiff sought damages resultant from the misrepresentation. The court, speaking in terms of deceit, rejected plaintiffs contentions, stating that a misrepresentation must be fraudulent and not merely negligent before such liability would be imposed. English, and also many American, courts have relied on this case as precluding recovery for financial loss in such situations.[11] The doctrine was rejected, however, in some American jurisdictions. In the leading United States case of *Glanzer v. Shepherd*,[12] the seller hired the defendant, a public weigher, to certify the weight of beans purchased by the plaintiff. The plaintiff prevailed in a suit against the weigher. The court found a duty owing to the buyer even though no contractual relationship existed. The defendant had certified[13] the weight and delivered a copy

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upon it but also to such third person as the actor should expect to be put in peril by the action taken.

This has been expanded in RESTATEMENT (SECOND), TORTS § 311 (1965) to include all physical harm, not just bodily harm and it eliminates the necessity for business or professional relation between the parties—it extends even to gratuitous representations:

> (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
> a) to the other, or
> b) to such third persons as the actor should expect to be put in peril by the action taken
> (2) Such negligence may consist of failure to exercise reasonable care,
> a) in ascertaining the accuracy of the information, or
> b) in the manner in which it is communicated.

9. See Note, 62 MICH. L. REV. 145, 149 (1963), which discusses among other things the distinction between physical injury and financial loss:

> Because personal injury and property damage are usually caused by physical forces, there is often a rough correlation between the magnitude of the force negligently released and the extent of the resulting injury. When words are the cause of tortious injury there is frequently no such correlation.

10. 14 App. Cas. 337 (1889).

11. This has been subsequently disapproved in the case of Hedley Byrne & Co. v. Heller & Partners (H.L. 1963); See, 77 HARV. L. REV. 773 (1964).

12. 233 N.Y. 236, 135 N.E. 275 (1922).

13. See Note, 36 NOTRE DAME LAW. 176, 182 (1961), where it is said that the court in International Products Co. v. Erie R.R. Co., 244 N.Y. 231, 155 N.E. 662 (1927)

> interpreted Glanzer to have held not that there had been any negligence in the act of weighing but that the negligent act was the issuance of the false certificate,

of the certification to the plaintiff, in accordance with the sellers instructions. "The defendants held themselves out to the public as skilled and careful in their calling. They knew that the beans had been sold; and that on the faith of their certificate payment would be made."[14] The rule to be adduced from the opinion is that if one assumes an obligation he may owe a duty of care; if a duty is found, he may be liable even in the absence of privity and liability will be dependent upon the character of the reliance and the "proximity . . . in the thought or purpose of the actor"[15] of the harm caused by such reliance.

However, in *Ultramares Corp. v. Touche*,[16] a subsequent New York case, the court refused to extend recovery in negligent misrepresentation to third parties who relied on an accountant's certificate in negotiating a loan to the certified company. Recovery was denied since the plaintiff was among an "indeterminate class of persons who, presently or in the future, might deal with the Sterm Company in reliance on the audit."[17] The certification in *Glanzer* was primarily for the benefit of the plaintiff, while in *Ultramares* it was primarily for the company whose balance sheet was certified.

The important distinction between these cases seems to be the extent of possible liability. Traditional foreseeability is not the problem, since the accountant could reasonably foresee any number of uses of the certified balance sheet in *Ultramares* especially use for credit purposes. But since these foreseeable uses would create risks[18] of myriad and burdensome liabilities[19] the court refused further extension of the rule.[20]

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an act which the *International* court clearly did not think distinguishable from the act of orally giving a false representation as to the location of goods.

14. 233 N.Y. at 239, 135 N.E. at 276; it is also stated in the opinion that,

> One who follows a common calling may come under a duty to another whom he serves, though a third may give the order or make the payment.

and,

> It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all

Id. at 241, 135 N.E. at 277; the court suggests that other routes less direct than "duty" could be followed, *e.g.*, under the doctrine of third party beneficiaries.

15. *Id.* at 240, 135 N.E. at 276.

16. 255 N.Y. 170, 174 N.E. 441 (1931).

17. *Id.* at 183, 174 N.E. at 446.

18. *Id.* at 188, 174 N.E. at 448, an indication of this is the court's statement that:

> . . . public accountants are public only in the sense that their services are offered to any one who chooses to employ them. This is far from saying that those who do not employ them are in the same position as those that do.

19. *But see,* Duro Sportswear, Inc. v. Cogen, 131 N.Y.S.2d 20, *aff'd without opinion,* 137 N.Y.S.2d 829, 285 App. Div. 864 (1954), where an accountant was held liable to a third party, not in fraud, but in gross negligence. Of course, the facts are not analogous to Ultramares; in Duro the plaintiff was one of two stockholders of the corporation, which hired the defendant to do the audit. He later relied thereon to his disadvantage in negotiating to buy out the other stockholder. See, Hawkins, *A Symposium On Professional Negligence: Professional Negligence Liability Of Public Accountants,* 12 VAND. L. REV. 797, 817 (1959), which criticizes the gross negligence basis and says that Ultramares is based on scope of liability not on the degree of fault, and that scope of liability should be the determining factor. "[T]he problem is not solved by floundering about in the distinction between negligence and gross negligence."

20. See Note, 62 MICH. L. REV. 145 (1963), which discusses Ultramares. The author agrees with the court that disproportionate liability in accountant cases should

IV.

MODERN NOTIONS OF EXPANDED LIABILITY IN NEGLIGENT MISREPRESENTATION

With rare exception in particular cases,[21] the distinction between *Glanzer* and *Ultramares* has been retained in those jurisdictions which have allowed an action in negligent misrepresentation. Courts have not escaped their fear of extensive liability. Only in recent years has any break in this tendency appeared. However, the American Law Institute has been on record for years in Section 552 of the Restatement of Torts[22] expressing its opinion on expanded liability for negligent misrepresentation.[23] Its position can be interpreted as concurring in the *Ultramares* view of liability,[24] as seen in comment (a) to that section, where it is said that:

> It is not enough to subject the person supplying the information to liability that he, as a reasonable man, should realize the probability that the information will be communicated to persons for whose guidance he does not supply it or that it will be relied upon in transactions other than those in which it is intended to influence the conduct of the recipient.[25]

Some would propose that the accountant's certificate is meant only for the certified company's purposes, or for a particular named purpose (for example, a specific loan). But such an assertion ignores reality. Surely it is not solely a check on its internal accounting procedure; rather, it is desired for any number of other reasons including use in bank credit, and by purchasers, sellers and stockholders. Unless certified for

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relieve from liability, but doesn't think the privity rule, as such, is good. He believes that the extent of liability should be the criterion.

21. See, note 3 *supra*.

22. RESTATEMENT, TORTS § 552 (1938) provides:
One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if

a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and

b) the harm is suffered
   (i) by the person or one of the class of persons for whose guidance the information was supplied, and
   (ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith.

23. See also, PROSSER, TORTS, 168 (2d ed. 1955):
No better general statement can be made than that the courts will find a duty where, in general, reasonable men would recognize it and agree that it exists.

24. Hawkins, *supra* note 19, at 818–19.

25. See also, RESTATEMENT, TORTS, § 552, comment (h) (1938).

a particular named purpose, such as a line of credit, an ordinary certification comes within the rule expressed by comment (g) to Section 552, where it is stated that third parties who reasonably rely on the certificate can be considered persons "for whose guidance it is supplied," since the supplier of information need not "have any particular person in mind,"[26] so long as, "the information is supplied for repetition to a particular class of persons and that the person relying on it is one of that class." "[T]he nature and extent of the transaction in which it is to be used" are the essential limiting factors. Such limitation clearly does not exclude normal use of a certified balance sheet.

However, even if recovery would be denied in the *Ultramares* situation under section 552, it would seem that liability could still be imposed in the testing area. The representation, although distributed to a vast number of people, is designed to induce reliance by those to whom it is communicated and if they rely to their detriment, liability should ensue.

A few jurisdictions have imposed liability for negligent misrepresentation in fact situations that go beyond *Glanzer*. Such expansion is evoked by the influence of the Restatement of Torts [27] and a generally more liberal judicial attitude. In these more progressive jurisdictions, if the certification or representation has been made negligently, and one for whom the information is supplied relies on it to his detriment, recovery will be allowed even though no privity exists.

The case of *Biakanja v. Irving*[28] has caused the greatest amount of speculation. Disapproving contrary precedent,[29] the California court held a non-lawyer notary public liable in negligence for drafting decedent's will without the requisite attestation. Under the will, plaintiff would have received the entire estate; however, because of the notary's negligence, he received only a one-eighth share upon intestacy. The court granted recovery to the plaintiff, in the absence of privity, through a balancing of a number of factors . . .

> . . . among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.[30]

26. RESTATEMENT, TORTS, § 552, comment (g) (1938). In that comment it is stated that as to those persons to whom the negligent supplier of misinformation may be liable, he "is subject to the same restriction as that of the maker of a fraudulent misrepresentation." The Ultramares opinion would not go so far. In that case the court refused to expand liability so as to be "coterminous with that of liability for fraud."

27. *E.g.*, Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958).

28. *Ibid.*

29. Buckley v. Gray, 110 Cal. 339, 42 Pac. 900 (1895); Michel v. Murphy, 147 Cal. App. 2d 718, 305 P.2d 993 (1957).

30. 49 Cal. 2d at 653, 320 P.2d at 19.

Applying this test to other fact situations, it appears the result may not favor recovery in *Ultramares*. An accountant who negligently certifies an incorrect balance sheet might avoid liability as the court itself suggests in saying that such is a "collateral consideration of the transaction."[31] However, in testing company situations the transaction is certainly intended to affect the plaintiffs; the sole reason for making such a representation is to induce reliance and thereby facilitate sales of products and services. Though certainty of injury will be a matter of proof, the harm is readily foreseeable. Moreover, the reliance evoked seems to create a sufficiently close connection between the defendant's conduct and the injury suffered. And considerations of moral blame and prevention of future harm are certainly weighted in favor of the injured party. The only factor not articulated in *Biakanja* and one which admittedly could be controlling is the scope of liability. Would that court impose liability where the incurrence of injury could be multiple and the resulting cost tremendous?[32]

In another California case, which relies on *Biakanja, M. Miller Co. v. Central Contra Costa Sanitary Dist.,*[33] the court imposed liability on soil engineers who negligently performed their work to the detriment of the plaintiffs. Their soil testing report failed to show unstable peat material in the soil which greatly increased the cost of installing a sewer line. The court imposed liability in the absence of privity because (1) the transaction between defendant and the sanitary district was intended to affect plaintiff (*as one of the bidders* for whom the soil test was made), (2) the harm was foreseeable, and (3) plaintiff's injury resulted directly from defendant's negligence. The case seems to extend *Biakanja* because in *Miller* the third party could have been any one of a number of unknown bidders, whereas in *Biakanja* the plaintiff was a single-named party in the will.

In a very similar situation, the sixth circuit refused to impose liability on an engineering firm for a negligent omission from a boring-log drawing.[34] Several factors might serve to distinguish the latter case. A disclaimer was submitted with the drawing, although admittedly such disclaimers are generally ignored in the trade; the plaintiff was a subcontractor, thus one step further removed than in *Miller;* and the information could have been acquired by the plaintiff if he had merely asked. Though none of these facts, in itself, seems sufficient to change the problem, their concurrence in one case understandably caused the court to term this case an improper one for expansion.

31. *Ibid.*
32. Other California cases have cited Biakanja for authority including, Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685 (1961), which agreed with Biakanja in principle but denied recovery because the attorney made a mistake of law in a complex area. (Rule Against Perpetuities and restraint against alienation). An attorney will not be held liable for every mistake. Also, De Zemplen v. Federal Sav. and Loan Ass'n, 34 Cal. App. 334 (Dist. Ct. App. 1963).
33. 198 Cal. App. 2d 305, 18 Cal. Rptr. 13 (1962).
34. Texas Tunneling Co. v. City of Chattanooga, 329 F.2d 402 (6th Cir. 1964).

With only sporadic instances of judicial expansion of liability in negligent misrepresentation, it would be unfair to say that a real trend is evidenced (with the possible exception of manufacturer's liability to ultimate consumers).[35] The great weight of authority remains to the contrary. The leading case against such liability is *National Iron & Steel Co. v. Hunt*.[36] The defendant was hired by the seller to inspect rails which the Foster Company purchased subject to the condition of such inspection. The defendant's certificate was transferred with the rails to the plaintiff upon resale by the Foster Company. When the rails failed to conform to the certification, the plaintiff sued the inspection company in negligence. At trial, the judgment for the plaintiff was based on reliance upon the certificate of experts, generally recognized as fixing the character and value of the materials. The defendants had assumed a duty (inspection) which regulated plaintiff's conduct (purchase). The decision was reversed in the state supreme court. The court determined that, absent privity, no duty existed, thus rendering negligence and reliance immaterial. Distinguishing *Glanzer,* the court observed that here the defendant did not deliver the certificate of inspection to the plaintiff, nor was the defendant advised by the plaintiff that it was going to rely upon defendant's inspection. The distinguishing factors are makeweights, at best, since delivery of the certificates to the plaintiff was apparently made with the defendant's knowledge. Under such circumstances the plaintiff would naturally rely on the certificate even though the defendant was not so informed. Many courts continue to use these and other factors to restrict imposition of liability.

An example of such other criteria can be found in *Howell v. Betts*,[37] where the court, conceding that liability in negligence without privity is actionable, denied that an error made by a surveyor in 1934 could be asserted twenty-four years later. Thus, time serves to limit the scope of the certifier's duty.[38]

The *Biakanja* rule of California has been expressly rejected by the Supreme Court in New York in the case of *Maneri v. Amodeo*.[39] There, a lawyer who negligently failed to include a residuary clause in a will, as directed by decedent, was not liable to those harmed. New York holds a lawyer liable to a third party only for fraud, collusion or malicious or tortious act. Although this lower court opinion might not withstand appellate court scrutiny, nevertheless, it shows a more conservative attitude in New York not consonant with extension of liability.

Although little authority in negligent misrepresentation can be gathered to support liability of testing companies to purchasers and consumers at

35. There are specific exceptions; *e.g.*, for notary publics. See cases cited note 3 *supra*.
36. 192 Ill. App. 215 (1915), *rev'd* 312 Ill. 245, 143 N.E. 833 (1924).
37. 211 Tenn. 134, 362 S.W.2d 924 (1962).
38. See also, Hawkins v. Oakland Title Ins. & Guar. Co., 331 P.2d 742 (Cal. Dist. Ct. App. 1958).
39. 38 Misc. 2d 190, 238 N.Y.S.2d 302 (S.Ct. 1963).

large, reason, at least, seems to support such liability. No case has gone far enough to impose such liability but all the elements elicited in the *Biakanja* case, *excluding the unenunciated scope of liability factor,* seem to be met. But should "extent of liability" free the tester from liability altogether? Since his certificate of quality is intended to reach those who rely why should the courts remove all obligation in every instance? Why should his burden be less than that of a manufacturer who ordinarily would be liable? Though such liability could ruin a manufacturer if imposed without limits, the judge-made "floodgates" of proximate cause can be closed to prevent such ruin. Why overlook an analagous limitation on the *extent* (not the existence) of the certifier's liability. If the certifier's error causes extensive harm, why should those harmed be held to bear the brunt of the injury?

A few homely examples point up the specious nature of the foreseeability argument. Consider a bodily injury case where a testing company certifies the quality of a certain toothpaste and ten thousand persons' teeth dissolve because the toothpaste is really an acid; certainly the tester can foresee that such a blunder will cause widespread injury. Or in a financial loss case where the tester certifies seed as 99.7% pure, when its actual content is 60.0% weed seed, ruined crops as a result of such an error are obviously foreseeable. In less severe situations, the foreseeability doctrine could properly serve to withhold liability.

Even the scope of liability argument lacks conviction since the certification is meant to guide the whole menage of purchasers who do rely. Moreover, *Ultramares* is not authority to the contrary; that case can be distinguished because there "the service was primarily for the benefit of the Stern Company, . . . and only incidentally or collaterally for the use of" third parties. But here the service, as in *Glanzer* on a smaller scale, is for those third parties who do in fact rely thereon.

Understandably, courts would approach imposition of such widescale liability with trepidation. And in fact, judicial approval will probably not come, at least in any significant amount, without prior legislative approval.

V.

MODERN NOTIONS OF LIABILITY IN EXPRESS WARRANTY

Another possible basis for imposing liability on testing companies, that of express warranty, presents even more difficult problems. Though the privity relationship which was traditionally essential for maintaining a warranty action[40] has been emasculated by time, the economic position of the testing company would pose a serious problem in such

40. This also evolved from Winterbottom v. Wright, 10 M & W 109, 152 Eng. Rep. 402 [Ex. 1842].

an action. Perhaps comparison of the status of the manufacturer with that of the testing company will elucidate the problem.

The manufacturer provides products to consumers through a direct flow of commerce. Though middle-men intervene, other factors, such as brand names,[41] and mass advertising programs[42] serve to link producer to ultimate consumer. This link confers standing upon the consumer to maintain the suit. If a breach of warranty exists, no fault on the manufacturer's part need be shown. Yet, such harm does result from a failure of sorts, *though not a "legal fault"* by the manufacturer. This failure, whether in the materials used or the mode of manufacture provides, at least, some basis for the imposition of absolute liability.

The certifier's economic position is vastly different. He is a party collateral to the flow of commerce and in no way involved in the process of manufacture. Though he undertakes the role of representing quality, not even non-legal fault can be attributed to him unless some negligence on his part can be shown.[43] The exception to this rule would arise when the defect in the product is so patent as to render any certification clearly erroneous.[44] Though a recent trend appears, extending warranty *protection* to parties outside the distributive chain in certain situations,[45] vastly different considerations are involved in expanding warranty *liability* to include collateral parties.

Thus, though good reason may exist to burden the testing company with liability in negligent misrepresentation, it is submitted that liability in warranty could be justified only in a most severe situation.

VI.

SPECIAL CIRCUMSTANCES

Whether the action sounds in negligent misrepresentation or in warranty, can the certifier escape liability on the grounds that the representation was gratuitiously made? In fact, certification without compensation probably never occurs and, even if it did, such altruism would invariably be coupled with judgment-proof finances. But assume that as a special service the certifier represents the quality of a product, or, more realistically, that it sells the service directly to the public in the form of a magazine which evaluates the products of various manu-

41. *Cf.* Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 226 N.Y.S.2d 363 (1962).

42. *Cf.* Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932), *aff'd* 179 Wash. 123, 35 P.2d 1090 (1934).

43. This appears a dominant factor underlying the decision in the one testing company case sounding in warranty, Albin v. Illinois Crop Improvement Ass'n, Inc., 30 Ill. App. 2d 283, 174 N.E.2d 697 (1961).

44. When the product is of very high quality, but one unit is seriously defective — Query?

45. *Cf.* UNIFORM COMMERCIAL CODE, § 2-318 (1962); and see generally Note, 10 VILL. L. REV. 607 (1965).

facturers. If the harmed consumer purchased the publication, substantial basis for imposing liability would exist since this would establish at least a semblance of privity between the certifier and the injured party. The more difficult situation would arise when the consumer purchased goods in reliance on the representation, but had not purchased the magazine. The certifier's contention that the service was intended only for those who purchased it would be countered with the argument that its representations were designed for widespread general publication. Whether the absence of compensation between the manufacturer and the certifier would provide a channel for evading liability is conjectural at best.

An additional factor must be considered — will the testing service ever certify quality? If, instead, it only provides its *"opinion"* no action will lie.[46] Again, of course, except for the case where a true certification is made and sold as a service to a purchaser in a privity relationship, there is little hope for judicial recognition of liability.

Disclaimers will present further problems. If in proper form they probably will excuse liability in warranty.[47] However, negligent misrepresentation is a distinct problem — can you free yourself from liability in negligence by merely renouncing any responsibility in advance? Perhaps so, because the plaintiff will thereby be on notice that he should not rely on the representation. At any rate, the problem will not materialize unless and until liability is accepted in this area.

VII.

UNFAIR COMPETITION — LIABILITY TO COMPETITORS

What about competitors who lose business as a result of false representations that increase the sales of the misrepresented products? It appears established under current common law that no action in their favor exists even against a manufacturer who misrepresents his product much less against a testing company once removed from the manufacturer. The leading case is *American Washboard Co. v. Saginaw Manufacturing Co.*[48] Although the plaintiff had a monopoly over such aluminum products neither an action for damages nor for an injunction was allowed against a competitor who falsely represented his washboards as aluminum. No violation of property rights will be recognized unless "passing off" occurs (in one way or another passing your product off as that of the plaintiff). Judicial approval of an action for damages appears highly unlikely because of the difficult task of proving the amount of damages.

46. Opinion is distinguished from the statement of a fact in: Wedding v. Duncan, 310 Ky. 374, 220 S.W.2d 564 (1949); Warren v. Walter Automobile Co., 99 N.Y.S. 396, 50 Misc. 605 (App. T., 1906); Oneal v. Weisman, 39 Tex. Civ. App. 592, 88 S.W. 290 (1905).
47. *But see* Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960).
48. 103 Fed. 281 (6th Cir. 1900).

However, a possibility for recovery exists under relevant federal legislation,[49] which provides that, in reference to goods sold in interstate commerce,

> any person who shall affix, apply, or annex . . . any false description or representation, including words or other symbols tending falsely to describe or represent the same . . . shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

Two obstacles of statutory interpretation must be overcome before liability could be imposed on a testing company under this statute. First, does the statute refer exclusively to a defendant manufacturer or could "any person" extend to testing companies? Since used without qualification, the term would appear to be designed for broad interpretation, thus including a testing company. Such an interpretation becomes more palatable in light of the privity relation that exists between the testing company and the manufacturer that employed it.

The other problem concerns itself with whether the statute refers to false representations which are not "passing off." The issue remains unsettled, with authority existing on both sides of the question. *Gold Seal Co. v. Weeks*[50] interprets the section broadly:

> In this respect Section 43(a) does create a federal statutory tort, *sui generis,* and to this extent Johnson [the plaintiff] need not show that any false description or representation was willful or intentional, need not prove actual diversion of trade (palming off, so to speak), need not establish a veritable monopoly position in the industry. It means that wrongful diversion of trade resulting from false description of one's products invades that interest which an honest competitor has in fair business dealings. . . .[51]

However, the court neither held the defendant manufacturer liable in damages nor enjoined further like advertising because plaintiff failed to prove its claim.[52]

Other cases have indicated that courts believe the statute should be limited to "passing off" or be "of the same general character even

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49. 15 U.S.C. 1125 (1946) (Section 43(a) of the Lanham Act).

50. 129 F. Supp. 928 (D. D.C. 1955), *aff'd. sub nom.* S.C. Johnson & Son v. Gold Seal Co., 230 F.2d 832 (D.C. Cir. 1956), *cert. denied* 352 U.S. 829 (1956).

51. 129 F. Supp. at 940.

52. *Ibid.*

> It has not shown damage or likelihood of damage due to the fact that any substantial number of reasonable customers were misled or likely to be misled as to the nature of the product, they having understood the mark to designate the ingredients, buying the product for its wax content rather than for its effectiveness as a cleaner; or that if they had known the true facts, they most likely would have purchased a different product, whether that of Johnson or some other competitor. The evidence fails to show that Gold Seal Glass Wax is inferior to any similar product marketed by a competitor, or that it has rested or needs to rest upon the borrowed good will of the wax industry generally to maintain commercial success.

though they do not involve any use of what technically can be called a trade-mark."[53] How liberally the statute will be construed is conjectural at present, and in any case the problem of proving damages will remain difficult. Nevertheless, it does provide at least some chance of expanded liability.

VIII.

CONCLUSION

In these days of enlightened principles of social justice, long-standing legal rules of artifically reasoned immunity lose much of their previous efficacy. A remedy, albeit a legislative one, should be fashioned to protect the interests of innocent parties injured by reliance on the representations of those who make it their business to produce such representations.

Christopher J. Clark

53. Federal-Mogul-Bower Bearings, Inc. v. Azoff, 313 F.2d 405 (6th Cir. 1963); Samson Crane Co. v. Union Nat. Sales, Inc., 87 F. Supp. 218, 222 (D. Mass. 1949), *aff'd per curiam* 180 F.2d 896 (1st Cir. 1950).