Product Liability and Food in Washington State: What Constitutes Manufacturing?

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I. INTRODUCTION

Every year in the United States, an estimated 76 million instances of foodborne illness occur, resulting in 5,000 deaths.[1] In 2007 alone, the United States Department of Agriculture estimated that one foodborne bacterium, *Salmonella*, cost injured victims over $2.5 billion.[2] With America's ever-increasing reliance on pre-packaged and convenience food products, food manufacturers' liability for foodborne illness-related lawsuits continues to grow.

Perhaps because of the ubiquitous nature of food as a commodity, food-related lawsuits have, in recent years, garnered considerable media attention.[3] Among the first notable foodborne illness-related lawsuits to

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1. Centers for Disease Control and Prevention, Enteric Diseases Epidemiology and Laboratory Branches, http://www.cdc.gov/enterics (last visited Mar. 1, 2009).

2. USDA Economic Research Service, Foodborne Illness Cost Calculator: *Salmonella*, http://www.ers.usda.gov/Data/FoodborneIllness/salm_Intro.asp (last visited Mar. 1, 2009) ("The United States Department of Agriculture Economic Research Service estimates that the annual economic cost of salmonellosis—the illness caused by the *Salmonella* bacterium—is $2,544,394,334 (2007 dollars). This estimate is for all cases of salmonellosis, not just foodborne cases. The estimate includes medical costs due to illness, the cost (value) of time lost from work due to nonfatal illness, and the cost (value) of premature death. It excludes a number of other potential costs, such as those associated with chronic complications, disutility for nonfatal illness, pain and suffering, travel, childcare, etc.").

3. *See, e.g.*, Lawrence K. Altman, *153 Hepatitis Cases Are Traced to Frozen Imported Strawberries*, N.Y. TIMES, Apr. 3, 1997, at A1; Annys Shin & Mary Otto, *3 Children in Md. Sick with E. coli from Spinach, Hagerstown Woman's Death Is Investigated*, WASH. POST, Sept. 23, 3006, at A1; Peter Sigal, *Montco Processor Issues Largest Recall: The Plant in Franconia Twp. Was Contaminated with Listeria*, PHILA. INQUIRER, Oct. 14, 2002, at B1; Elizabeth Weise & Julie Schmit, *Health*

attract national media attention were those stemming from a 1993 *E. coli*[4] outbreak associated with the Jack in the Box restaurant chain.[5] Affecting mostly consumers in Washington, the Jack in the Box *E. coli* outbreak left more than 600 victims sick and four children dead.[6] The source of the outbreak was eventually traced to tainted hamburger meat manufactured and sold to the restaurant chain by one of its suppliers.[7]

In the ensuing years, notable foodborne illness cases ranged from a 1996 *E. coli* outbreak resulting from unpasteurized Odwalla brand fruit juice[8] to a 2006 *E. coli* outbreak resulting from tainted spinach.[9] The latter outbreak, caused by fresh spinach and spinach-containing products processed by Natural Selections Foods,[10] left 205 consumers ill and three dead.[11] The Food and Drug Administration traced the source of the contaminated spinach to four fields located in central California.[12] Although the source was identified, consumers felt defenseless against the continuing threat of contaminated food products.[13] In the words of a husband whose wife suffered kidney damage after consuming the tainted spinach,

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Risks May Reach Far Beyond Reported Victims: More Than 20,000 Could Be Affected, the CDC Says, USA TODAY, Feb. 10, 2009, at 1A (describing salmonella contamination in peanut butter).

4. *See* Ctrs. for Disease Control & Prevention, Dep't of Health & Human Servs., Escherichia coli, http://www.cdc.gov/nczved/dfbmd/disease_listing/stec_gi.html (last visited Mar. 1, 2009). The CDC summarizes information on the *E. coli* bacterium as follows:

> *Escherichia coli* (abbreviated as *E. coli*) are a large and diverse group of bacteria. Although most strains of *E. coli* are harmless, others can make you sick. Some kinds of *E. coli* can cause diarrhea, while others cause urinary tract infections, respiratory illness and pneumonia, and other illnesses. Still other kinds of *E. coli* are used as markers for water contamination—so you might hear about *E. coli* being found in drinking water, which are not themselves harmful, but indicate the water is contaminated. It does get a bit confusing—even to microbiologists.

Id.

5. *See* Bob Van Voris, *Jack in the Box Ends E. coli Suits*, NAT'L L.J., Nov. 17, 1997, at A8.

6. *Id.*

7. *See Jack in the Box's Worst Nightmare*, N.Y. TIMES, Feb. 6, 1993, § 1, at 35, *available at* http://query.nytimes.com/gst/fullpage.html?res=9F0CE7DB153CF935A35751C0A965958260&sec=&spon=.

8. John Henkel, *Juice Maker Fined Record Amount for E. Coli-Tainted Product*, 33 FDA CONSUMER 34, 34–35 (1999), *available at* http://www.fda.gov/fdac/departs/1999/199_irs.html.

9. Press Release, U.S. Food & Drug Admin., FDA Finalizes Report on 2006 Spinach Outbreak (Mar. 23, 2007), *available at* http://www.fda.gov/bbs/topics/NEWS/2007/NEW01593.html [hereinafter FDA Spinach Report].

10. Ctrs. for Disease Control & Prevention, Dep't of Health & Human Servs., Questions and Answers about E. coli O157:H7 Outbreak from Fresh Spinach (Oct. 12, 2006), http://www.cdc.gov/ecoli/2006/september/qa.htm.

11. FDA Spinach Report, *supra* note 9.

12. Press Release, U.S. Food & Drug Admin., FDA Statement on Foodborne E. coli O157:H7 Outbreak in Spinach (Oct. 12, 2006), *available at* http://www.fda.gov/bbs/topics/NEWS/2006/NEW01489.html.

13. *See* Herb Weisbaum, *E. coli Aftermath: Where is the Accountability?*, MSNBC, Oct. 31, 2006, http://www.msnbc.msn.com/id/15378334/.

"I'm just so terribly angry that a contaminated product like this could be put out on the open market and affect so many people. There has to be some responsibility here."[14]

Public demands for corporate responsibility for injuries caused by merchantable goods, such as consumer food products, are at the root of modern product liability law.[15] In contrast to the traditional manufacturer defenses of *caveat emptor* and privity of contract available in the nineteenth century, manufacturers of defective products in the twentieth and twenty-first centuries have been held strictly liable for the injuries caused by their products.[16]

Washington, the jurisdiction of primary focus in this Comment, follows the modern approach of holding product manufacturers strictly liable for injuries to consumers caused by defective products.[17] Unfortunately for consumers injured by unsafe food in Washington, the state's courts have inconsistently interpreted the definition of "manufacturer" contained in the Washington Product Liability Act (WPLA).[18] Because a non-manufacturing seller can be held liable only for negligence, whether the seller of an unsafe food product is a manufacturer under the WPLA critically impacts the seller's liability. Thus, without consistent statutory interpretations, both food producers and consumers face unpredictable trial outcomes and costly litigation.

To address the courts' inconsistent interpretations of the WPLA's manufacturer definition, this Comment proposes applying a test that assesses manufacturer liability not only by the apparent physical changes an entity makes to a product, but also by the increased monetary value the entity adds to the product. This approach comports with the intent of the WPLA and Washington common law standards, and leads to highly predictable trial results.

Part II of this Comment provides a brief history of Washington's product liability law, from early twentieth century theories of implied warranty to the mid-twentieth century adoption of the pro-consumer strict liability standards of section 402A of the Restatement (Second) of Torts. Part III examines manufacturer liability in Washington after the 1981 adoption of the WPLA. Part IV analyzes the various approaches Washington courts currently use to determine manufacturer liability, spe-

14. *Id.*

15. *See* David G. Owen, *The Evolution of Products Liability Law*, 26 REV. LITIG. 955, 956–57 (2007).

16. *Id.* at 968.

17. *See* WASH. REV. CODE § 7.72.030 (2008); Garza v. McCain Foods, Inc., 124 Wash. App. 908, 916, 103 P.3d 848, 852 (2004) ("The [Washington product liability] act imposes strict liability on any manufacturer of a defective product for resulting injuries.").

18. *See* discussion *infra* Part IV.

cifically focusing on the contradictory outcomes of *Almquist v. Finley School Dist. No. 53*[19] and *Hadley v. Spokane Produce, Inc.*[20] Part V examines an alternative approach for determining manufacturer liability found in *Washburn v. Beatt Equipment Co.*,[21] which uses the "relevant product" framework already present in the WPLA. Part VI proposes a workable test that resolves the inconsistencies in the approach used by the *Almquist* and *Hadley* courts by using the *Washburn* approach as a reference point. This proposed test, named the "value-added" test, will provide Washington courts with a consistent standard to apply when defining manufacturer liability under the WPLA. Part VII concludes by addressing potential concerns about the value-added test and its conformity with the WPLA.

II. PRODUCT LIABILITY LAW IN WASHINGTON

Beginning in the early nineteenth century, U.S. law adhered to the principles of *caveat emptor* and privity of contract.[22] The rule of *caveat emptor*, literally meaning "let the buyer beware," holds the buyer of a product responsible for both obvious and hidden defects in the product.[23] Privity of contract restricts those injured by defective products to bringing actions against only those persons with whom the injured party had a direct contractual relationship.[24] These two principles, rooted in seventeenth century English law,[25] reflected the early U.S. court system's commitment to individualism and free enterprise.[26]

Prior to the early twentieth century, Washington courts also followed the rules of *caveat emptor* and privity of contract. As the Washington Supreme Court explained in *Mazetti v. Armour & Co.*,[27]

> [i]t has been accepted as a general rule that a manufacturer is not liable to any person other than his immediate vendee; that the action is necessarily one upon an implied or express warranty, and that without privity of contract no suit can be maintained; that each purchaser must resort to his immediate vendor.[28]

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19. 114 Wash. App. 395, 57 P.3d 1191 (2002).

20. No. 03-2-01520-7 (Spokane County Super. Ct. Nov. 8, 2004) (on file with author).

21. 120 Wash. 2d 246, 840 P.2d 860 (1992).

22. Owen, *supra* note 15, at 961. This development coincided with the start of the Industrial Age in the United States.

23. *Id.* at 958.

24. *Id.* at 963.

25. *Id.* at 958–59.

26. *Id.* at 961; *see also* Winterbottom v. Wright, (1842) 152 Eng. Rep. 402, 405 (holding that privity of contract must be upheld as a matter of public policy to limit manufacturer liability).

27. 75 Wash. 622, 135 P. 633 (1913).

28. *Id.* at 624, 135 P. at 634.

The *Mazetti* Court, however, also recognized an important emerging trend in the modern American manufacturer/consumer relationship: consumers in the early twentieth century were increasingly relying on the safety of canned and already-prepared food products.[29] The Court stipulated that a consumer, relying on a company that adverts itself as a manufacturer and seller of pure food articles, cannot be expected to detect impurities in food from a seemingly flawless can.[30] In other words, there was no way for the buyer to beware; buyers had to trust in the quality of the food.

The focus in *Mazetti* on packaged food products logically flowed from a long-standing exception to the privity of contract rule that allowed direct consumer actions against manufacturers of medicines.[31] The court explained: "Direct actions are allowed in [medicine manufacture] cases because the manufacturer of medicines is generally shrouded in mystery, and sometimes, if not generally, [medicines] contain poisons which may produce injurious results."[32] Recognizing that food-product consumers, like medicine consumers, cannot "chemically analyze" a prepackaged food product before buying or consuming it, the *Mazetti* Court held that "the original act of delivering the [defective] article is wrongful, and that every one is responsible for the natural consequences of his wrongful acts."[33] Thus, *Mazetti* ushered in the new standard of liability for food-product manufacturers: "A manufacturer of food products under modern conditions impliedly warrants his goods when dispensed in the original packages."[34] This implied warranty was available to all consumers who acquired the packaged food product through legitimate channels of trade, including resellers and the ultimate consumers.[35]

For fifty-six years following *Mazetti*, Washington courts recognized an implied warranty of fitness for human consumption in food products.[36] The premise of this implied warranty theory was that the law imposes a special warranty (or promise) that food sold is wholesome and fit for human consumption.[37] The warranty attaches to the food product

29. *See id.*

30. *Id.* at 627–29, 135 P. at 635–36.

31. *Id.* at 624, 135 P. at 634; *see also* Blood Balm Co. v. Cooper, 10 S.E. 118 (Ga. 1889); Thomas v. Winchester, 6 N.Y. 397 (1852); Weiser v. Holzman, 33 Wash. 87, 73 P. 797 (1903).

32. *Mazetti*, 75 Wash. at 624, 135 P. at 634.

33. *Id.* at 625, 135 P. at 634 (quoting *Weiser*, 33 Wash. at 90–91, 73 P. at 798–99).

34. *Id.* at 630, 135 P. at 636.

35. *Id.*

36. *See* Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 531–32, 452 P.2d 729, 734–35 (1969) (abandoning the implied warranty terminology following the adoption of the language detailing strict liability for manufacturers in section 402A of the Restatement (Second) of Torts).

37. *See* Pulley v. Pac. Coca-Cola Bottling Co., 68 Wash. 2d 778, 783, 415 P.2d 636, 640 (1966); Nelson v. W. Coast Dairy Co., 5 Wash. 2d 284, 289–90, 105 P.2d 76, 79 (1940); Flessher v.

and, therefore, is available to anyone injured by its breach. Although analogous to the common law standard of implied warranty in contract, this implied warranty theory arose under tort,[38] reflecting a common law trend not just particular to Washington but also to the early twentieth-century American judicial system as whole.[39] As the century progressed, pro-consumer court holdings gained significant momentum.

III. THE DEVELOPMENT OF THE WASHINGTON PRODUCT LIABILITY ACT

By the middle of the twentieth century, the modern American judicial path toward strict product liability in tort was in full swing.[40] As the distance between the manufacturer and buyer grew, and the ability of consumers to detect defects lessened, the need for a legal remedy became more apparent. Courts in cases like *McPherson v. Buick Motor Co.*[41] and *Henningsen v. Bloomfield Motors*[42] recognized that products other than poisons and explosives create an "imminent danger" to consumers and accordingly, imposed a duty upon manufacturers to ensure the safety of all products.[43]

In 1963, the Supreme Court of California, in *Greenman v. Yuba Power Products, Inc.*,[44] held that manufacturers are strictly liable in tort when (1) the manufacturer places a product on the market (2) knowing that a consumer will use the product without inspecting it for defects, and (3) a defect in the product in fact causes injury to a consumer.[45] By 1965, the American Law Institute officially adopted the rule of strict product liability in tort, codified under section 402A of the Restatement (Second) of Torts.[46] Four years later, in *Ulmer v. Ford Motor, Co.*,[47]

Carstens Packing Co., 93 Wash. 48, 52, 160 P. 14, 15 (1916); *Mazetti*, 75 Wash. at 624–25, 135 P. at 634.

38. Gates v. Standard Brands Inc., 43 Wash. App. 520, 523, 719 P.2d 130, 132 (1986).

39. *See* William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1099 (1960).

40. *See id.* at 1100; RESTATEMENT (SECOND) OF TORTS § 402A (1965).

41. 111 N.E. 1050 (N.Y. 1916).

42. 161 A.2d 69 (N.J. 1960).

43. *See* Owen, *supra* note 15, at 965–67.

44. 377 P.2d 897 (Cal. 1963).

45. *Id.* at 900.

46. RESTATEMENT (SECOND) OF TORTS § 402A (1965). The Restatement provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

Washington courts adopted the theory of strict liability outlined in section 402A. The *Ulmer* Court abandoned the label "implied warranty," reasoning that it was "illogical to create an implied warranty but refuse to attach to it any of the customary incidents of a [contractual] warranty."[48] Subsequently, Washington courts designated the remedy for injuries caused by defective products in tort, no longer discussing the doctrine in contractual terms.

As the rapid and widespread adoption of strict liability made it easier for consumers to recover damages for product-related injuries, a backlash developed. In 1979, the United States Department of Commerce introduced the Model Uniform Product Liability Act (MUPLA),[49] with the intention of protecting retailers from lawsuits.[50] The authors of the MUPLA, recognizing the potential for inconsistencies when developing product liability law on a case-by-case basis,[51] designed the MUPLA to create a uniform and stable standard of product liability law in all fifty states.[52] Two years later, in 1981, the Washington legislature enacted the WPLA, adopting definitions similar to those used in the MUPLA.[53]

A. Manufacturer Liability under the WPLA

Following the approach prescribed in the MUPLA, the WPLA holds manufacturers strictly liable[54] for injuries resulting from products that are (1) unreasonably safe in construction, (2) non-conforming with the manufacturer's express warranties, or (3) non-conforming with statutorily implied warranties.[55] The WPLA defines the three categories of liability:

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47. 75 Wash. 2d 522, 452 P.2d 729 (1969).

48. *Id.* at 529, 452 P.2d at 733.

49. Model Uniform Product Liability Act, 44 Fed. Reg. 62,714 (Oct. 31, 1979).

50. The MUPLA's introductory section states: "A product seller should not, through the medium of tort law, be asked to pay merely because its product caused an injury." *Id.* at 62,715. The introduction further states a vague concern expressed by insurance companies that, under then-existing laws (presumably the standards expressed in the Restatement (Second) of Torts), plaintiffs could potentially recover damages if they "merely proved that they were injured by a product." *Id.* at 62,714.

51. *Id.* at 62,714.

52. *Id.*

53. *Compare* WASH. REV. CODE § 7.72.010 (2008), *with* Model Uniform Product Liability Act, 44 Fed. Reg. at 62,717–18.

54. In contrast, non-manufacturing sellers are held liable only for negligence unless they fall within certain exceptions. *See* discussion *infra* Part II.B.2.

55. *See* WASH. REV. CODE § 7.72.030(2) ("A product manufacturer is subject to strict liability to a claimant if the claimant's harm was proximately caused by the fact that the product was not reasonably safe in construction or not reasonably safe because it did not conform to the manufacturer's express warranty or to the implied warranties under Title 62A RCW.").

Washington Revised Code § 7.72.030(1) provides that manufacturers are liable "to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the

> (a) A product is not *reasonably safe in construction* if, when the product left the control of the manufacturer, the product deviated in some material way from the design specifications or performance standards of the manufacturer, or deviated in some material way from otherwise identical units of the same product line.
>
> (b) A product does not conform to the *express warranty of the manufacturer* if it is made part of the basis of the bargain and relates to a material fact or facts concerning the product and the express warranty proved to be untrue.
>
> (c) Whether or not a product conforms to an *implied warranty* created under Title 62A RCW shall be determined under that title.[56]

To hold a manufacturer strictly liable for injuries to a claimant, the product must not only fit into one of the foregoing categories; it must also be considered unsafe by the ordinary consumer.[57] For example, some products, such as knives, are inherently dangerous, but such danger is to be expected by the ordinary consumer.

B. Defining the Manufacturer Liability Terms

The key modification that the WPLA made to the common law was limiting the strict liability standard to manufacturers, thereby exculpating retailers from such claims.[58] Applying the strict liability standard outlined in the WPLA requires special attention to the definitions of key terms in Washington Revised Code § 7.72.010, including (a) "product," (b) "product seller," and (c) "manufacturer."[59] These terms provide a roadmap that Washington courts follow to determine the scope and degree of liability defendants face under the WPLA.

1. Product

The first step in establishing an entity's liability under the WPLA is to determine whether the plaintiff's injury was caused by a "product." The WPLA defines a product as "any object possessing intrinsic value,

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product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided." However, the unreasonable design and failure to warn cases to which this provision applies are outside the scope of this Comment and are not discussed. All references in this Comment to manufacturer liability apply strictly to the "not reasonably safe in construction" and "non-conformity to express or implied warranty" provisions of section 7.72.030(2).

56. *Id.* § 7.72.030(2) (emphasis added). "Title 62A RCW" refers to Washington's incorporation of the Uniform Commercial Code (UCC). *See id.* § 62A.1–.101 (2008).

57. *See id.* § 7.72.030(3).

58. *Compare id.* § 7.72.030(2)(a), *with* Seattle-First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 542 P.2d 774 (1975).

59. *See* WASH. REV. CODE § 7.72.010.

capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce."[60] Although rarely examined by Washington courts in cases of food product liability, one Washington court has held that school lunches sold by a school district were "products" within meaning of the WPLA.[61]

2. Product Seller

The second step in establishing an entity's liability under the WPLA is to determine whether the defendant was a "product seller." The WPLA defines a product seller as "any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption."[62] The term "product seller" includes manufacturers, wholesalers, distributors, or retailers of the *relevant product*—the product or its component part or parts that gave rise to the product liability claim.[63] The term "product seller" also includes a party who is in the business of leasing or bailing such products.[64] The term, however, specifically *excludes* (1) sellers of real property, (2) providers of professional services, (3) commercial sellers of used products, provided the used product is in essentially the same condition as when it was acquired for resale, (4) "finance lessors,"[65] and (5) licensed pharmacists who dispense prescriptions manufactured by a commercial manufacturer.[66]

The WPLA further enumerates instances when courts may or may not find that a passive *product seller* is a manufacturer. The WPLA states that a passive product seller *is* a manufacturer if (1) the seller (or entity not otherwise a manufacturer) holds itself out as a manufacturer[67]

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60. *Id.* § 7.72.010(3).

61. *See* Almquist v. Finley Sch. Dist. No. 53, 114 Wash. App. 395, 403, 57 P.3d 1191, 1196 (2002).

62. WASH. REV. CODE § 7.72.010(1).

63. *See id.* § 7.72.010(3).

64. *Id.* § 7.72.010(1).

65. The WPLA defines a finance lessor as "one who acts in a financial capacity, who is not a manufacturer, wholesaler, distributor, or retailer, and who leases a product without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor." *Id.* § 7.72.010(1)(d).

66. *See id.* § 7.72.010(1)(a)–(e).

67. *See* Cadwell Indus., Inc. v. Chenbro Am., Inc., 119 F. Supp. 2d 1110, 1116 (E.D. Wash. 2000). The Restatement (Second) of Torts section 400 states: "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." RESTATEMENT (SECOND) OF TORTS § 400 (1965). Under the WPLA, an entity holds itself out to the public as the manufacturer of a product if its advertising would lead a reasonable purchaser to believe that the entity, rather than some other party, was the actual manufacturer. *See Cadwell*, 119 F. Supp. 2d at 1116. This can be accomplished by, for example, an entity putting its own name on a product that it did not otherwise manufacture. *See id.* at 1115.

or (2) the seller acts as a wholesaler, distributor, or retailer of a product *only to the extent* that it designs, produces, makes, fabricates, constructs, or remanufactures the product for its sale.[68]

The WPLA states that a passive product seller *is not* a manufacturer if (1) the seller only performs minor assembly of a product in accordance with the instructions of the manufacturer, or (2) the seller did not participate in the design of a product *and* constructed the product in accordance with the design specifications of the claimant or another product seller.[69]

With this last distinction, the WPLA distinguishes between product sellers who have some control over production and those who act as "mere conduits" in the chain of distribution.[70] The purpose of this provision is to exclude non-manufacturing retailers from strict liability claims.[71]

3. Manufacturer

The final step in establishing liability under the WPLA is to determine whether the defendant was the manufacturer of the relevant product. The WPLA defines a product manufacturer as "a product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer."[72]

By utilizing these three terms, Washington courts distinguish those least culpable in the supply chain (passive retailers) from those most culpable (manufacturing product sellers). This, in turn, assigns liability thresholds, limiting passive product sellers to a negligence standard while holding manufacturers strictly liable for harm caused by defective products. Washington courts, however, have applied these definitions inconsistently, especially in foodborne illness cases.[73]

IV. A STUDY IN CONTRADICTORY RESULTS: APPLICATIONS OF THE WASHINGTON PRODUCT LIABILITY ACT IN FOODBORNE ILLNESS CASES

Foodborne illness cases often do not present circumstances that fall under the traditional means of assessing manufacturer liability. In these cases, courts find one question perennially important: What constitutes a

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68. *See* WASH. REV. CODE § 7.72.010 (emphasis added).

69. *Id.*

70. Butello v. S.A. Woods-Yates Am. Mach. Co., 72 Wash. App. 397, 404, 864 P.2d 948, 952 (1993).

71. *Id.*

72. *See* WASH. REV. CODE § 7.72.010 (also defining "product seller" by exclusion, "manufacturer," "product," "relevant product," "product liability claim," "claimant," and "harm").

73. *See* discussion *infra* Part IV.

material change to a food product that creates manufacturer liability? For example, which steps in the production of one food product—ready-to-eat lettuce—constitute manufacturing? Does a lettuce farmer manufacture a product when the farmer plants the lettuce and harvests it? Does a lettuce distributor manufacture a product when it washes and packages the lettuce for distribution to restaurants? Does a restaurant manufacture a product when the restaurant slices the lettuce, adds croutons and dressing, and sells the product as a salad to consumers?

Washington courts have utilized varying approaches to answer these questions, resulting in an unclear standard of liability and unpredictable results in any given case. The following two cases illustrate the unpredictability of the current test to assess manufacturer liability.

A. Almquist v. Finley School Dist. No. 53

In 2002, a group of parents in Kennewick, Washington, filed suit against the Finley School District to recover damages for injuries incurred by eleven children who became infected with *E. coli* O157:H7 bacteria in October 1998.[74] Ten of the children attended Finley Elementary; the eleventh child was a two-year old playmate of two of the infected students.[75] An investigation, headed by the Washington State Department of Health, concluded that the infected school children engaged in no common school activity other than eating at the school cafeteria.[76] The investigative team concluded that the most probable source of the *E. coli* O157:H7 bacteria was ground beef served in Finley school cafeteria tacos.[77]

The parents of the ill children sued the Finely School District and Northern States Beef,[78] alleging that both defendants were manufacturers of a product (taco filling) that was not reasonably safe.[79] Northern States Beef was dismissed from the suit after settling out of court.[80] The plaintiffs then moved for summary judgment against the District on the issue of liability.[81] Addressing the plaintiffs' motion, the trial court ruled, first, that the taco filling, as opposed to the frozen meat, was a defective

74. Almquist v. Finley Sch. Dist. No. 53, 114 Wash. App. 395, 399, 57 P.3d 1191, 1194 (2002).

75. *Id.* at 399, 57 P.3d at 1193.

76. *Id.* at 399, 57 P.3d at 1193–94.

77. *Id.* at 399, 57 P.3d at 1194.

78. Northern States Beef supplied the meat used by the Finley School District. *See Jury Awards $4.75 Million to Washington State Students Sickened by E. coli in School Lunch*, BUS. WIRE, Feb. 20, 2001, *available at* http://findarticles.com/p/articles/mi_m0EIN/is_2001_Feb_20/ai_70702016.

79. *Almquist*, 114 Wash. App. at 399, 57 P.3d at 1194.

80. *Id.* at 400, 57 P.3d at 1194.

81. *Id.*

"product" for purposes of the WPLA and, second, that the District's processing of frozen ground beef into cooked taco filling created manufacturer liability under the WPLA.[82] As a result, the District could be strictly liable for the injuries resulting from the taco filling if the jury concluded that the taco meals caused the *E. coli* outbreak.[83] After a three-week trial, the jury found in favor of the plaintiffs: the taco meals contained *E. coli* O157:H7; the meals were the cause of the plaintiffs' injuries;[84] and the District was 100% at fault.[85]

On appeal, the District argued, *inter alia*, that it was not a "manufacturer" as defined by the WPLA.[86] According to the District, the determination of whether a defendant is a manufacturer was a question of fact for the jury and, therefore, should not have been resolved by the trial court on summary judgment.[87] The Washington Court of Appeals was not convinced, noting that the material facts regarding manufacturer liability were undisputed. Because the District conceded that it had stored, thawed, cooked, drained, rinsed, seasoned, and mixed the frozen ground beef, the court reasoned that the consequences of these activities—that is, whether the District's activities constituted manufacturing—could be decided as a matter of law.[88]

The court then reviewed the trial court's decision that the District was a manufacturer. To determine whether the District's activities amounted to manufacturing, the appellate court turned to the definition of "manufacturer" under the WPLA: "[The term] 'manufacturer' includes a product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer."[89] Because the WPLA provides no definition for these terms,[90] the court assigned dictionary

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* The jury found that Northern States Beef was not at fault. *Id.* For purposes of apportioning fault in product liability cases in Washington, the jury considers the actions of all defendant-manufacturers, even if (as was the case with Northern States Beef) a defendant has settled out of court.

86. *See id.* at 401, 57 P.3d at 1195. The District specifically argued that, as a "professional provider of education services," it fell within the "professional services" exception to the product seller clause. *Id.* at 401, 57 P.3d at 1195 (referencing WASH. REV. CODE § 7.72.010(1)(b) (2000)). In response, the appellate court noted that the trial court had already rejected the District's contention that it was a mere "product seller." *Id.*

87. *Id.* at 404, 57 P.3d at 1196.

88. *Id.*

89. *Id.* at 404–05, 57 P.3d at 1196 (citing WASH. REV. CODE § 7.72.010(2) (2000)).

90. *See* discussion *supra* Part III.B. The specific WPLA terms that describe manufacturing duties are "designs, produces, makes, fabricates, constructs, or remanufactures." *See* WASH. REV. CODE § 7.72.010(2).

definitions to the terms "design," "produce," "make," "fabricate," and "construct."[91] After applying these definitions to the District's conceded actions, the court of appeals reached the same conclusion as the trial court: the District was liable as a manufacturer of tacos.[92]

The analysis undertaken by both the trial court and the court of appeals in *Almquist* provides insight into what this Comment calls the "physical alteration" approach to determining manufacturer liability. The physical alteration approach focuses on whether a seller has physically changed the product enough to make the seller a manufacturer. In *Almquist*, both the trial court and the court of appeals relied on three key elements to hold that the defendant was a manufacturer: (1) the defendant's admission of activities undertaken involving the "product" in controversy; (2) dictionary definitions of the terms used to describe manufacturing activities in the WPLA; and (3) the court's subjective interpretation whether the defendant's admitted activities constituted a sufficient physical alteration to the product to comport with the dictionary definitions of the WPLA terms.

Although the appellate court's use of the physical alteration approach in *Almquist* subjected the defendant to manufacturer liability, the same approach can yield a drastically different outcome if a court subjectively concludes that an entity has not sufficiently altered the physical appearance of a product, despite engaging in similar production processes to the processes in *Almquist*. One such differing outcome came just one year later in *Hadley v. Spokane Produce, Inc.*[93]

B. Hadley v. Spokane Produce, Inc.

In 2003, a group of families and individuals from northeastern Washington and north Idaho filed suit against Spokane Produce, a romaine lettuce distributor, alleging that Spokane Produce was liable for injuries resulting from a 2002 *E. coli* O157:H7 outbreak.[94] A report issued by the Spokane Regional Health District indicated a strong association between a salad offered at an Eastern Washington University dance camp and culture-confirmed gastroenteritis.[95] *E. coli* O157:H7

91. *Almquist*, 114 Wash. App. at 405, 57 P.3d at 1196–97; *see also infra* note 144.

92. *Almquist*, 114 Wash. App. at 405–06, 57 P.3d at 1197.

93. No. 03-2-01520-7 (Spokane County Super. Ct. Nov. 8, 2004) (on file with author).

94. *See* Press Release, U.S. Food & Drug Admin., FDA Issues Nationwide Alert to Consumers About Spokane Produce Brand Romaine Lettuce Due to Possible Health Risk (July 29, 2002), *available at* http://www.fda.gov/bbs/topics/NEWS/2002/NEW00824.html.

95. *See* Marler Clark, Spokane Produce E. Coli Outbreak, http://www.marlerclark.com/produce-outbreaks/spokane.pdf (last visited Mar. 1, 2009). Regarding gastroenteritis, the Merck Manual states:

infections were also reported by consumers of salads purchased from a small number of Spokane and Walla Walla restaurants.[96] The source of the lettuce used in the salads from both the dance camp and the outlying restaurants was eventually traced to Spokane Produce.[97]

The plaintiffs claimed that, under the WPLA, Spokane Produce was strictly liable as the "manufacturer" of a product (ready-to-eat lettuce) that was not reasonably safe.[98] On September 13, 2004, Spokane Produce filed for summary judgment, asking the trial court to dismiss all claims against the company.[99] After hearing oral arguments on the motion and allowing supplemental briefing from the plaintiffs regarding an additional claim of "holding-out" liability,[100] the court granted Spokane Produce's summary judgment motion.[101]

Significantly, when rejecting the plaintiffs' arguments, the *Hadley* court used the physical alteration standard, following steps virtually identical to those used in *Almquist*; however, the court reached an opposite result. Like the defendant in *Almquist*,[102] the defendant in *Hadley* admitted to engaging in a certain set of activities: acquiring raw lettuce, rinsing it, cutting it, packaging it, and selling it.[103] Like the *Almquist* court, the *Hadley* court recognized that the packaged lettuce was a product, stating that "the facts in this particular case are that [Spokane Produce was not] a manufacturer of that *product*."[104] But, unlike the *Almquist* court, the *Hadley* court ruled that Spokane Produce's admitted activities *did not* constitute designing, producing, making, fabricating, constructing, or remanufacturing the relevant product—the packaged romaine lettuce. In contrast with the reasoning of the *Almquist* court, the *Hadley* court reasoned: "What Spokane Produce did is they got material, the lettuce, they rinsed it, they cut it up, and put it in a bag and

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> Gastroenteritis is inflammation of the lining of the stomach and small and large intestines. Most cases are infectious, although gastroenteritis may follow ingestion of drugs and chemical toxins (*e.g.*, metals, plant substances). Symptoms include anorexia, nausea, vomiting, diarrhea, and abdominal discomfort. Diagnosis is clinical or by stool culture, although immunoassays are increasingly used.

Merck Manuals Online Medical Library, Gastroenteritis, http://www.merck.com/mmpe/sec02/ch016/ch016a.html (last visited Mar. 1, 2009).

96. Marler Clark, *supra* note 95, at 2.

97. *Id.*

98. *See* Brief in Support of the Plaintiffs' Motion for Reconsideration at 2–3, *Hadley*, No. 03-2-01520-7 (on file with author).

99. *Id.* at 4.

100. *See* discussion *supra* note 67.

101. Brief in Support of the Plaintiffs' Motion for Reconsideration, *supra* note 98, at 5–6.

102. *See* discussion *supra* Part IV.A.

103. *See* Transcript of Oral Ruling at 5, *Hadley*, No. 03-2-01520-7 (on file with author).

104. *Id.* at 5–6 (emphasis added).

sold it. The lettuce was still lettuce when it went out, and it was the same lettuce except cleaned and cut that came in."[105]

C. An Unworkable Test

Synthesizing the summary judgment rulings in *Hadley* and *Almquist* reveals that Washington courts have been applying an unworkable test to determine manufacturer liability in foodborne illness cases. Under the reasoning of these cases, a seller of a food product *is* a manufacturer when the seller stores, thaws, cooks, drains, rinses, and seasons the product. But the seller *is not* a manufacturer when the seller receives, washes, cuts up, packages, and sells the food product.

The inconsistency between the two rulings illustrates the primary pitfall of the physical alteration approach. By generating a list of activities promulgated by a defendant and contrasting those activities with the WPLA "manufacturing" terms,[106] Washington courts have created a test that premises manufacturer liability on semantics rather than on whether an entity created the *relevant product* that caused the injury. Unpredictable and inconsistent trial outcomes are the result of this unclear standard: the *Almquist* case went to trial because the school district did not believe it was a manufacturer, while in *Hadley*, the plaintiffs were shocked to find a court ruling that Spokane Produce was *not* a manufacturer. In both cases, the court's differing summary judgment rulings stymied the attempts of the parties to reasonably predict a likely outcome.

This result is contrary to the original MUPLA statutory goals of creating a stable standard of product liability law and avoiding case-by-case changes to the law.[107] To prevent unpredictable trial outcomes, Washington courts must apply an objective, bright-line test to determine manufacturer liability under the WPLA.

V. THE VALUE-ADDED STANDARD: LOOKING TO THE PAST TO CREATE A WORKABLE TEST

By failing to consider the value that a seller adds to a product, Washington courts have created an arbitrary, malleable dividing line between who is and who is not a manufacturer under the WPLA. As illustrated in both *Almquist* and *Hadley*, Washington courts have looked solely to the physical appearance of a product to discern a measurable and tangible change onto which the courts can anchor terms like

105. *Id.* at 5.

106. *See* WASH. REV. CODE § 7.72.010(2) (2008).

107. Model Uniform Product Liability Act, 44 Fed. Reg. 62,714, 62,718–19 (Oct. 31, 1979).

"designs, produces, makes, fabricates, constructs, or remanufactures."[108] Under the rulings in both cases, if the product's appearance does not match the court's interpretation of those listed terms, an entity will not be deemed a manufacturer.[109] By not considering the apparent economic changes a seller makes to a product, a seven-step taco meat production process may constitute manufacturing, whereas a five-step lettuce production process may not. A succinct statement by the *Hadley* court illustrates how oversimplified a legal analysis can become when the court relies on physical appearance to decide an issue of law: "The lettuce was still lettuce when it went out."[110]

An approach that turns solely on physical changes to a product is problematic because the WPLA applies to a wide variety of products—ranging from food products to children's toys to industrial pipe systems. For any given consumer good, multiple entities may alter and refine the product before it enters its relevant market. Whereas one entity, such as an automobile maker, may engage in a production process in which physical alterations to a product are readily apparent, another entity, such as a romaine lettuce distributor, may add a proportional amount of value to a product while making few if any physical alterations.

In *Washburn v. Beatt Equipment Co.*,[111] the Washington Supreme Court avoided the inconsistencies of the physical alteration approach by focusing on the relevant product the plaintiff purchased: a pipeline system.[112] Putting the product in its relevant context allowed the Court to determine whether the defendant had contracted to manufacture that specific, relevant product.[113] This "relevant product" analysis suggests that the wording of the WPLA already contains a value-added concept of manufacturing that will help courts produce the predictable outcomes that were sorely lacking in *Almquist* and *Hadley*.

A. Washburn v. Beatt Equipment Co.

In October 1986, plaintiff Norman Washburn and a fellow Boeing company employee were attempting to test a standby propane fuel heating system that had been in Boeing's facility in Kent, Washington, since 1969.[114] Upon activating the system, the plaintiff noted that there was no

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108. WASH. REV. CODE § 7.72.010(2).

109. *See* discussion *supra* Part IV.B.

110. Transcript of Oral Ruling, *supra* note 103, at 5.

111. 120 Wash. 2d 246, 840 P.2d 860 (1992).

112. *See id.* at 259, 840 P.2d at 868.

113. *See id.* ("Defendant was not merely selling *pieces* of pipe, it was to make, fabricate and construct a pipeline *system*.").

114. *Id.* at 252, 840 P.2d at 864.

gas pressure showing on the system's pressure gauge.[115] Moments later, the system exploded.[116] The building caught fire.[117] The automobiles parked in a nearby parking lot caught fire.[118] Both the plaintiff and his co-worker caught fire.[119] Within ten hours, the co-worker was dead, and the plaintiff had burns on over 70% of his body.[120]

Seventeen years before the explosion, the defendant, Beatt Equipment Company, had been subcontracted to construct the propane fuel heating system, including supplying the piping material, performing various finishing processes on the piping, and burying the finished pipeline.[121] Substantial evidence introduced at trial indicated that the defendant had failed to comply with either the contractual specifications or industry standards during installation.[122] Specifically, the piping was not properly prepared; the defendant failed to apply a special coal tar enamel coating and instead opted for a cheaper and less durable asphalt coating.[123] Because of this improper coating, the piping system corroded, leading to its eventual failure and the resulting catastrophe.[124]

The jury found the Beatt Equipment Company liable for $8 million in damages for the plaintiff's injuries.[125] After the trial judge reduced the damages to $5.67 million, both the plaintiff and defendant appealed to the Washington Supreme Court.[126]

On appeal, the defendant argued that a statute of repose[127] barred the plaintiff's action.[128] Rejecting the defendant's argument, the Washington Supreme Court noted that the state's statute of repose did not protect product manufacturers.[129] Additionally, because the *defendant* had offered the jury instruction defining "manufacturer" and had not objected to a jury instruction defining when a product is unreasonably

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 252–53, 840 P.2d at 864.

122. *Id.*

123. *Id.* at 253, 840 P.2d at 864–65.

124. *Id.*

125. *See id.* at 251, 840 P.2d at 864. The jury awarded $6 million to the plaintiff and $2 million to the plaintiff's wife. *Id.*

126. *Id.*

127. A statute of repose is a "statute barring any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury." BLACK'S LAW DICTIONARY (8th ed. 2004).

128. *Washburn*, 120 Wash. 2d at 251, 840 P.2d at 864.

129. *Id.* at 254, 840 P.2d at 865 (citing WASH. REV. CODE § 4.16.300 (1988)). The Washington legislature added the provision that the statute "shall not apply to claims or causes of action against manufacturers" in 1986 but deleted it in 2004. *See* WASH. REV. CODE § 4.16.300 (2008).

safe, the defendant was bound by its own proposed definition of manufacturer on appeal.[130]

It is important to note that the defendant's "manufacturer" definition in *Washburn* is identical to the definition of "manufacturer" in the WPLA.[131] Thus, although *Washburn* is only persuasive authority in WPLA cases, the Washington Supreme Court's analysis of what constitutes a "manufacturer" provides a useful framework for resolving the inconsistencies associated with the "physical alteration" test.

The *Washburn* Court began by noting that the defendant's "manufacturer" definition, like the WPLA definition, did not require that the product be mass-produced.[132] Under both definitions, making, producing, fabricating, or constructing "a single product or even a single component part of a single product" can render a defendant a manufacturer.[133] The court then identified the key terms that define the term "manufacturer": a manufacturer (1) produces, (2) makes, (3) fabricates, (4) constructs, or (5) remanufactures the relevant product.[134] After identifying these terms, the court referenced the dictionary to provide their definitions,[135] just as lower courts had done when using the physical alteration approach.[136]

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130. *See Washburn*, 120 Wash. 2d at 251, 840 P.2d at 864.

131. *Id.* at 256, 840 P.2d at 867. The defendant's jury instruction provided:

> A product seller is any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use and consumption. The term includes a manufacturer, wholesaler, distributor or retailer of the relevant product.
>
> Manufacturer includes a product seller who designs, produces, makes, fabricates, constructs or remanufactures the relevant product or component part of a product before its sale to a user or consumer.
>
> A product seller who performs minor assembly of a product in accordance with manufacturer's instructions shall not be deemed a manufacturer.

Id. at 255 n.4, 840 P.2d at 866. Section 7.72.010 similarly provides, in relevant part:

> "Product seller" means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product.
>
> . . . .
>
> "Manufacturer" includes a product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer. . . .
>
> A product seller who performs minor assembly of a product in accordance with the instructions of the manufacturer shall not be deemed a manufacturer.

WASH. REV. CODE. § 7.72.010(1)–(2) (2008).

132. *Washburn*, 120 Wash. 2d at 259, 840 P.2d at 868.

133. *Id.*

134. *Id.*; *see also* WASH. REV. CODE § 7.72.010(2).

135. *See Washburn*, 120 Wash. 2d at 259, 840 P.2d at 868. The *Washburn* court defined these terms as follows:

> "Produce" includes "to give being, form, or shape to" and "*to make economically valuable*". (Italics ours.) WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1810 (1981). To "make" includes "to bring (a material thing) into being by forming, shaping,

The court's next analytical step, however, was the crucial part of the manufacturer analysis overlooked by the *Almquist* and *Hadley* courts. Rather than considering the product (pipes) in the abstract, the court considered the product that the consumer purchased—the "relevant product."[137] The court explained: "The prime contract for which defendant was a subcontractor was not for individual parts, but for a *system.* Defendant was paid a lump sum. Defendant was not merely selling *pieces* of pipe, it was to make, fabricate and construct a pipeline *system.*"[138]

Having established the relevant product as a baseline, the *Washburn* Court applied the defined terms from the defendant's proposed jury instruction to determine the steps the defendant had taken to add economic value to the specific product that the Boeing Company had purchased:[139]

> Defendant took an unfinished and unusable product, and by use of its labor and materials made it economically valuable. That is one of the definitions of "*produce*". Defendant altered the unfinished material and put together components to make a finished product. That is one of the definitions of "*make*". Defendant formed a whole by uniting parts. That is a definition of "*fabricate*". Defendant put together constituent parts, after completing their manufacture, so as to make or create something, *i.e.*, a usable pipeline system. That is a definition of "*construct*".[140]

Thus, under its own definition and the definition of the WPLA, Beatt Equipment Company was a manufacturer.[141]

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or *altering material*"; "*to lay out and construct*", and "*to put together from components or ingredients*". (Italics ours.) [*Id.*] at 1363. To "fabricate" means "*to form into a whole by uniting parts*" and "*to build up into a whole by uniting interchangeable standardized parts*". (Italics ours.) [*Id.*] at 811. To "construct" includes "to form, make, or create by combining parts or elements". [*Id.*] at 489.

Washburn, 120 Wash. 2d at 259, 840 P.2d at 868.

136. For example, the court of appeals in *Almquist* similarly defined the same terms:

To "produce" means "to give being, form, or shape to: make often from raw materials." [WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY] 1818 [(1993)]. "Make" includes "to bring (a material thing) into being by forming, shaping, or altering material." [*Id.*] at 1363. "Fabricate" includes "to form into a whole by uniting parts." [*Id.*] at 811. "Construct" includes "to form, make, or create by combining parts or elements." [*Id.*] at 489.

Almquist v. Finley Sch. Dist. No. 53, 114 Wash. App. 395, 405, 57 P.3d 1191, 1196–97 (2002).

137. *See* WASH. REV. CODE § 7.72.010(2).

138. *Washburn*, 120 Wash. 2d at 259, 840 P.2d at 868.

139. *See id.* at 259–61, 840 P.2d at 868–69.

140. *Id.* at 261, 840 P.2d at 869.

141. *Id.*

B. A Workable Test

The *Almquist*, *Hadley*, and *Washburn* courts have each applied the manufacturer definition from the WPLA with varying results.[142] Under the WPLA, "[a manufacturer] includes a product seller who designs, produces, makes, fabricates, constructs, or remanufactures the *relevant product* or component part of a product before its sale to a user or consumer.[143] The *Almquist*, *Hadley*, and *Washburn* courts all referred to these terms; all defined them using the same source; and all used the terms as the guideline to assess whether the defendant was liable as a manufacturer. Nonetheless, the cases produced differing results on an issue of law that should have been predictable. Without a unified approach to applying the terms of the WPLA, future outcomes in cases like these will remain unpredictable. The need for a unified approach is not to resolve ambiguities inherent in the statue itself but to address the problems the courts have had with interpreting the WPLA.

Of the *Almquist*, *Hadley*, and *Washburn* courts, only the *Washburn* Court applied the crucial "relevant product" language from the WPLA.[144] Determining the relevant product that the consumer purchased allows a court to examine which entity in the chain of manufacturing has caused the product's dangerous aspect. For example, in *Washburn*, Beatt Equipment Company was not paid merely to assemble some pipes; it was paid to produce the product that Boeing desired: a pipeline for a heating system.[145] And it was Beatt Equipment Company's failure to apply the special enamel coating that caused the pipeline in the heating system to corrode,[146] not the entity that had produced the metal or the entity that had welded metal into pipes. Determining when the defect occurred in the chain of manufacturing is critical to apportioning liability among manufacturers. Apportioning liability is especially important because in any given product liability lawsuit, there can be multiple manufacturers.[147]

Even more importantly, by focusing on the relevant product instead of on the product's physical alteration, courts do not become distracted

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142. Even though the *Washburn* court actually analyzed the defendant's proposed jury instruction, this Comment will hereafter refer to the court's analysis as if it had directly analyzed the WPLA. As the court noted, the text of the two definitions is nearly identical. *See id.* at 256, 840 P.2d at 867 ("[T]he definition of manufacturer in instruction 17 is identical to the definition in the product liability act, RCW 7.72.010(2)."); *see also supra* note 131.

143. WASH. REV. CODE § 7.72.010(2) (2008) (emphasis added).

144. *See id.* § 7.72.010(3).

145. *Washburn*, 120 Wash. 2d at 259, 840 P.2d at 868.

146. *Id.* at 253, 840 P.2d at 864–65.

147. For example, in *Almquist*, both the school district and the meat company were deemed manufacturers for liability purposes. *See* discussion *supra* Part IV.A.

by the question of how much alteration is enough to constitute manufacturing—under the Supreme Court's value analysis in *Washburn*, *any* alteration to the relevant product is enough.

As the diametrically opposed results of *Almquist* and *Hadley* show, the physical alteration approach currently employed by Washington courts erroneously emphasizes the manufacturing process over the end-product that the consumer purchases. The ramification of this approach is inconsistent trial outcomes. At best, these outcomes result in excessive monetary expenditures, and, at worst, they render the service of justice a virtual impossibility. Courts should instead consolidate the methods used by the *Almquist*, *Hadley*, and *Washburn* courts and apply the unified approach that this Comment calls the value-added test.

VI. CONSOLIDATING THE COMPONENTS TO CREATE THE "VALUE-ADDED" TEST

The value-added test for manufacturer liability consists of a three-step analysis. First, the court identifies the relevant product for the purpose of a consumer's claim against a given entity. Second, the court determines whether the entity was at least a "mere conduit" and thus a seller of the product. Finally, if the entity is at least a product seller, the court determines what economic value the entity added to the relevant product and determines whether the steps the entity undertook to add economic value amounted to designing, producing, making, fabricating, constructing, or remanufacturing the relevant product.

An illustration of how courts would apply the value-added test shows how the approach will make trial outcomes more predictable. For example, if the *Hadley* court had applied the value-added test, the court would have first determined the relevant product that gave rise to the consumer's claim. In *Hadley*, the relevant product was ready-to-eat lettuce. The court would have next determined whether the defendant, Spokane Produce, was at least a conduit for the product and thus a seller. Spokane Product did indeed sell the product (ready-to-eat lettuce) to a willing purchaser, and thus, it was a product seller under the WPLA.[148] Finally, the court would have determined the economic value Spokane Produce added to the ready-to-eat lettuce and whether the steps it took to add that value amounted to designing, producing, making, fabricating, constructing, or remanufacturing the ready-to-eat product. In *Hadley*, Spokane Produce took a raw head of lettuce and added value to it by transforming it into ready-to-eat lettuce—the *relevant* product that the

148. As discussed in Part III.B.2, a "product seller" must merely be engaged in the "business of selling products." Whether the product seller sells the product to a retailer or the end consumer is irrelevant for purposes of the WPLA. *See* WASH. REV. CODE § 7.72.010(1).

consumer purchased and the product that gave rise to the product liability claim. To add value to the raw head of lettuce, Spokane Produce "designed" a ready-to-eat product; they "produced" and "made" the relevant product by cutting up and washing the raw head of lettuce. They also "fabricated" and "constructed" the relevant product by packaging the washed and cut lettuce as the ready-to-eat final product. Under this analysis, Spokane Produce would have clearly faced manufacturer liability.

The importance of starting with the relevant product baseline is rooted in the foundations of modern product liability law.[149] During the industrialization of America, product liability law developed as the link between a consumer and a product producer became more attenuated.[150] Any given product must pass through a number of hands in the production and distribution chain before it reaches the end consumer. Therein lies the importance of the term "relevant product": the term works as a check to differentiate between various levels of production.

As defined in the WPLA, the "relevant product" is "that product or its component part or parts, which gave rise to the product liability claim."[151] At any level of the production chain, different products are exchanged. For example, in *Washburn*, the Court recognized that, although the defendant had purchased metal piping, the relevant product the defendant sold to Boeing was an underground *system* of piping; the defendant *added economic value* to the piping by applying special coatings and welding the pipes in to a single unit, transforming it into a product.

Similarly, in *Mazetti v. Armour & Co.*,[152] the court implicitly recognized, nearly 100 years ago, that a consumer relies on the safety of the relevant product when he or she purchases it.[153] In *Mazetti*, the relevant product was canned meat, "prepared and ready to be used for food without further cooking or labor"[154]—not a cow, not a carcass, not a slab of raw beef, nor any of the other incarnations of the product along the production chain. Like the court in *Washburn*,[155] the *Mazetti* Court recognized that the consumer had no use for the product in the production chain, which would eventually result in the canned meat: the cow, the carcass, or the slab of raw beef.[156] Rather, the consumer was inter-

149. *See* discussion *supra* Part II.
150. *See* discussion *supra* Part II.
151. WASH. REV. CODE § 7.72.010(3).
152. 75 Wash. 622, 135 P. 633 (1913).
153. *See id.* at 624, 135 P. at 634.
154. *See id.* at 623, 135 P. at 633.
155. *See* discussion *supra* Part V.A.
156. *See Mazetti*, 75 Wash. at 629, 135 P. at 636.

ested only in the canning process that transformed the raw product into the relevant product, that which was "prepared and ready to be used for food without further cooking or labor."[157] The Washington Supreme Court, thus, emphasized the importance of the injured consumer in determining what the relevant product was and the "location" of the defect that caused injury.

The WPLA did not abandon this consumer-oriented approach.[158] The relevant product language exists, as the MUPLA stated, to delineate the product that actually gave rise to the product liability claim—the product the consumer purchased.[159] Courts, however, have effectively disregarded the purpose a product serves to the consumer by analyzing the statute solely in terms of what physical alterations entities make. Instead, after determining whether the seller passed the threshold of at least acting as more than a passive conduit for the product, courts should look to the economic value the seller added to the product.

If a consumer purchases a bag of lettuce with the expectation that it was washed and ready to consume, then the company that rinsed, cut up, and bagged the lettuce created a product with different economic value than the product had as a mere raw head of lettuce. After all, the company that rinsed, cut up, and bagged the lettuce based their entire business model on adding value to raw lettuce to sell it to consumers at a premium. By analyzing this product under the physical alteration framework, however, courts have reached an unsound conclusion to the detriment of the consumer: the "lettuce was still lettuce when it went out."[160]

The value-added test is constructed with the goal of consistent trial outcomes, unlike those in *Almquist* and *Hadley*. This test narrows the scope of the court's discretion to objective considerations of the relevant product and the change in its economic value, thus making it more of a bright-line test than the subjective physical alteration approach. Because the value-added test is a bright-line test, it is unlikely to achieve inconsistent results.

VII. ADDRESSING COUNTERARGUMENTS TO THE "VALUE-ADDED" APPROACH

Although the courts' application of the value-added test would likely bring a needed bright-line standard to manufacturer liability under the WPLA, counterarguments to the test merit discussion and resolution.

157. *Id.* at 623, 135 P. at 633.

158. *See* WASH. REV. CODE § 7.72.010(2) (2008).

159. Model Uniform Product Liability Act, 44 Fed. Reg. 62,714, 62,719 (Oct. 31, 1979).

160. Transcript of Oral Ruling, *supra* note 103, at 5.

This Part addresses these counterarguments by first examining overbreadth concerns and then addressing underbreadth concerns.

A. Overbreadth Concerns

At first glance, a "value-added" approach to determining manufacturer liability could seem overly inclusive. After all, one might ask, do not all entities in the production chain of a product add at least some value to the product? This assumption makes intuitive sense given that, at each level of the production chain, a product is normally in some way altered and sold to the next producer for a marked-up price. The WPLA's existing guidelines, however, ameliorate this and most other potential pitfalls associated with a value-added approach. These guidelines narrow the application of manufacturer liability to only entities that, through their *own efforts and design*, add economic value to a product.

1. Minor Assembly Provision

Some retailers receive boxed products that they in turn assemble according to instructions provided by the manufacturer. Under the value-added test, it would seem that these retailers are "constructing" the relevant product and adding economic value to it by providing the assembly labor. The WPLA, however, provides an exception to manufacturer liability for a product seller that "performs minor assembly of a product in accordance with the instructions of the manufacturer."[161] For example, if a retail store receives finished bicycle parts from a manufacturer *as well as* instructions from the manufacturer indicating steps store employees must follow to assemble the finished parts into a bicycle, the retail store will not be deemed a manufacturer under the WPLA. Although an entity that assembles a product according to manufacturer instructions may have added some value to that product, the WPLA recognizes that such an entity was merely a passive actor in a production scheme controlled by the original manufacturer that both fabricated the parts and authored the instructions.

The "minor assembly" exception necessarily depends upon product parts that are accompanied by instructions from the manufacturer. This distinction is crucial to manufacturer liability in food litigation, particularly in cases relating to restaurant services. A restaurant that receives food products from a distributor but assembles those food products *without* explicit instructions from the manufacturer *will not* be exempted from manufacturer liability under the "minor assembly" exception.

161. WASH. REV. CODE § 7.72.010(2).

Policy-wise, this exception comports with the original MUPLA goal of placing "the incentive for loss prevention on the party or parties who are best able to accomplish that goal."[162] Liability is placed strictly upon the shoulders of the manufacturer who designed the product and designed the assembly process detailed in the instructions.

2. Suppliers of Professional Services

Certain types of entities, such as construction firms, add value to products by engaging in building or modifying services. Under the value-added test, a consumer might argue that the construction firm transformed raw materials into a building, thus creating something with a value greater than the sum of its parts. For example, the defendant in *Washburn*, warned that, by utilizing a value-added approach to manufacturer liability, the court would subject every subcontractor to manufacturer liability, whether the subcontractor was a carpenter, electrician, or gas pipeline layer.[163] The Court rejected the defendant's argument for multiple reasons, the most significant of which was that, under the defendant's manufacturer definition,[164] the defendant was required to be a product seller in order to be subjected to manufacturer liability.[165] As stated by the court, "[an] electrician does not produce, make, fabricate, or construct any of the parts."[166]

The WPLA explicitly states that the term "product seller" does not include providers of professional services who utilize or sell products within the legally authorized scope of the professional practice of the provider.[167] The distinction drawn by both the *Washburn* court and the WPLA illustrates the difference between a product seller and a seller of services. The drafters of the MUPLA, the act upon which the WPLA was based, detailed the distinction between suppliers of professional services and product sellers.[168] As stated in the MUPLA, under existing common law doctrine in "the absence of any product preparation or modification, of any representation by service providers that the products are their own, or of warranty, the courts have generally not applied product

162. Model Uniform Product Liability Act, 44 Fed. Reg. at 62,715.

163. Washburn v. Beatt Equip. Co., 120 Wash. 2d 246, 262, 840 P.2d 860 (1992).

164. The wording used in the defendant's definition was identical to the wording used in the Washington statute, which also requires that a manufacturer under that definition be a product seller. WASH. REV. CODE § 7.72.010(2) (2008).

165. *Washburn*, 120 Wash. 2d at 262, 840 P.2d at 869.

166. *Id.*

167. WASH. REV. CODE § 7.72.010(1)(b) (2008).

168. Model Uniform Product Liability Act, 44 Fed. Reg. 62,714, 62,718 (Oct. 31, 1979).

liability doctrines where the provider is called upon to exercise such professional judgment."[169]

Given the clear exception for providers of professional services established by the WPLA and Washington common law, confusion over the value-added test's application to these entities is not a likely possibility.

B. Underbreadth Concerns

Another potential criticism of the "value-added" approach is that it will not reach all the parties that should be held liable when a product is defective. Judicial doctrine, however, already addresses this concern.

1. Branding Issue

In some circumstances, most commonly in those involving large retailers, a product may be manufactured and distributed by one entity but labeled with the retailer's brand or logo. In such a case, the retailer has not actively participated in the manufacturing process; however, the retailer has added some value to a generic product through its branding.

Courts have long recognized that consumers may rely on package branding to assume that the company portrayed on the packaging is the same company that manufactured the product.[170] In recognition of this general principle, defendants represented on the packaging of a product may be liable under a "holding out" theory of liability, even if the defendant was not actively involved in the manufacturing process. Although the value imputed on a product by a company's logo or branding *does not* subject a company to manufacturer liability, the "holding out" liability created by such branding is at least an implicit recognition of the value an entity adds to a product by attaching its own logo.[171]

2. Comparative Fault

As recognized in *Almquist*, more than one manufacturer can exist in any given case.[172] Such a scenario was possible under the physical alteration approach and would remain possible under the value-added test. Given that manufacturers under the WPLA are subject to a strict

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169. *Id.*

170. *See* Mazetti v. Armour & Co., 75 Wash. 622, 630, 135 P. 633, 636 (1913).

171. In this case, "value" may not necessarily relate to monetary value, so much as to the economic concept of "goodwill" that a consumer seeks when the consumer relies on the assumption that the company printed on the packaging of a product is the same company that manufactured the product.

172. *See* Almquist v. Finley Sch. Dist. No. 53, 114 Wash. App. 395, 399, 57 P.3d 1191, 1194 (2002).

liability standard, the concept that multiple parties could be held to 100% liability for injuries caused by a defective product may seem counterintuitive. Because Washington is a comparative fault state,[173] however, concerns associated with holding one manufacturer completely liable for a relatively small contribution in the chain of manufacture are alleviated. Instead, fault is apportioned according to each defendant manufacturer's relative contribution. If a party settles before trial, as was the case with Northern States Beef in *Almquist*, the former defendant is still represented by an "empty chair" at trial. For purposes of a final judgment, the jury still apportions fault among all former and present defendants. Accordingly, even with multiple manufacturers in a single case, liability will shift to the entity for which harm from a defective product was most foreseeable, holding those entities with the greatest ability to prevent the harm accountable.

VIII. CONCLUSION: THE OUTCOME OF A VALUE-ADDED APPROACH

Liability for food manufacturers in Washington began with a simple premise: "A company which advertises itself as a manufacturer and seller of pure articles of food must be deemed to have knowledge of the contents of the articles offered for sale."[174] Throughout the twentieth century and into the twenty-first century, the central theme of holding manufacturers of food products strictly liable for harm caused by defective goods has not changed. What has wavered, however, is the means by which Washington courts determine whether an entity is a manufacturer. By focusing solely on the physical changes a given entity makes to a product, the courts have created an inconsistent standard resulting in unpredictable trial outcomes.

The value-added test creates a bright-line standard to alleviate the woes associated with Washington's inconsistent manufacturer analysis. The solution to the inconsistencies, however, has existed within the framework of the WPLA since its inception. At the heart of this solution are the two words contained within the manufacturer definition: "relevant product." By beginning the manufacturer analysis with a

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173. *See* WASH. REV. CODE § 4.22.005 (2008).

> In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

Id.

174. *Mazetti*, 75 Wash. at 626, 135 P. 634 (quoting Neiman v. Channellene Oil & Mfg. Co., 127 N.W. 394, 394 (Minn. 1910)).

determination of the product that gave rise to the liability claim, the court's focus begins squarely with the consumer. The consumer is the correct starting point because each manufacturer creates a product that is more than simply the sum of its parts; the manufacturer creates a specific product that is designed deliberately to fulfill a unique consumer need. From there, the test logically flows into determinations of whether the entity sold the product and, if so, whether the entity added economic value to the relevant product under the terms in the WPLA.

The value-added test does not alter Washington product liability standards, nor does it derive its utility from standards not previously mentioned in Washington case law. It does, however, make use of preexisting standards and thereby create a means by which Washington courts can effectively deal with the problem of assigning manufacturer liability under the WPLA. At the end of the day, a more consistent standard benefits both consumers and producers by allowing swift, just compensation from the entity in the best position to prevent the defect in the specific product that the consumer purchased.