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## A Continuing Whimsical Search for the True Meaning of the Term Products Liability Litigation.

Charles E. Cantu

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## A CONTINUING WHIMSICAL SEARCH FOR THE TRUE MEANING OF THE TERM “PRODUCT” IN PRODUCTS LIABILITY LITIGATION

CHARLES E. CANTU\*

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### I. INTRODUCTION

More than a decade has elapsed since an initial attempt was made to discern the true meaning of the term *product* in products liability litigation.<sup>1</sup> At the time, a brief history of events leading up to the adoption of Section 402A of the Restatement (Second) of Torts was outlined,<sup>2</sup> and it was emphasized that what had at first

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1. See generally Charles E. Cantu, *The Illusive Meaning of the Term “Product” Under Section 402A of the Restatement (Second) of Torts*, 44 OKLA. L. REV. 635, 638 (1991) (reflecting on the nature of the word “product” as it pertains to Section 402A of the Restatement (Second) of Torts).

2. See *Putman v. Erie City Mfg. Co.*, 338 F.2d 911, 917-18 (5th Cir. 1964) (noting the progress and development of the application of strict liability prior to and contemporaneous with the revision of the original Restatement of Torts). The original Restatement of Torts did not provide for application of strict liability based on the implied warranty of the seller. *Id.* at 918. In April of 1961, Tentative Draft No. 6 of the Restatement (Second) of Torts recommended the adoption of Section 402A, recognizing the seller's strict liability, but limiting the application to claims arising from ingestion of “food for human consumption.” *Id.* By 1962, the singular category of “food for human consumption” was clearly too narrow, and protection under strict liability was expanded to cover “products intended for

seemed so simple subsequently proved to be somewhat complex.<sup>3</sup> The American Law Institute in its promulgation had been adamant: "One who sells any *product* in a defective condition"<sup>4</sup> would be held strictly liable. An examination, however, of cases involving

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intimate bodily use . . . whether or not [they] ha[ve] any nutritional value." *Id.* This categorization of strict liability application was quickly obsolete. *Id.* at 919. In May 1964, the American Law Institute approved the final draft of Section 402A, which states:

- (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.

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

3. Courts have come to various conclusions with regard to some of the language within the Restatement (Second) of Torts Section 402A. For example, courts have attempted to distinguish between who is or is not a "seller." *See, e.g.,* Price v. Shell Oil Co., 466 P.2d 722, 726 (Cal. 1970) (finding the lessor of defective equipment strictly liable, and thus, holding that no sale of the product is required); Stein v. S. Cal. Edison Co., 8 Cal. Rptr. 2d 907, 910 (Cal. Ct. App. 1992) (stating that a sale is not required, but merely placing the product on the market gives rise to strict liability); *see also* Tabieros v. Clark Equip. Co., 944 P.2d 1279, 1310 (Haw. 1997) (restating that a seller or lessor will be strictly liable in tort for the injury). *But see* Kaplan v. C Lazy U Ranch, 615 F. Supp. 234, 237 (D. Colo. 1985) (applying Colorado Revised Statute Section 13-21-402(1) to preclude strict tort liability against most lessors). Courts have also struggled with the concept of what is and what is not a "product." *See, e.g.,* Charles E. Cantu, *The Illusive Meaning of the Term "Product" Under Section 402A of the Restatement (Second) of Torts*, 44 OKLA. L. REV. 635, 639 (1991) (observing that the threshold question of the application of products liability is whether an injury was caused by a product). Courts have further struggled over what characteristics make a product "defective," but have settled on three determinative factors. Charles E. Cantu, *Reflections on Section 402A of the Restatement (Second) of Torts: A Mirror Crack'd*, 25 GONZ. L. REV. 205, 218-19 (1990). The test for determining whether a defective product is mis-manufactured is whether the product "meets the reasonable expectations of the ordinary user-consumer." *Id.* at 219. A product that is defective as a result of mis-design should be subjected to a risk-benefit analysis, where a court will weigh the risk involved against the burden of reducing the risk. *Id.* at 220-21. In this scenario, the focus is on an alternate, safer design. *Id.* at 221-22. A product challenged as defective on grounds of mis-marketing is subject to the same risk-benefit analysis, but instead of focusing on design, the focus is on the instructions and documentation that accompany the product. *Id.* at 224.

4. RESTATEMENT (SECOND) OF TORTS § 402A (1965) (emphasis added).

the sales/service transaction,<sup>5</sup> as well as those involving real estate,<sup>6</sup> blood,<sup>7</sup> electricity,<sup>8</sup> component parts,<sup>9</sup> water,<sup>10</sup> computer

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5. See *Garcia v. Edgewater Hosp.*, 613 N.E.2d 1243, 1249 (Ill. App. Ct. 1993) (finding that a hospital's supplying of a mitral valve constituted a sale so that a patient could bring suit for breach of implied warranty); *Riffe v. Black*, 548 S.W.2d 175, 177 (Ky. Ct. App. 1977) (holding that a contract to purchase and install an above-ground pool is a contract for the sale of goods); see also *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 742 (2d Cir. 1979) (asserting that "[a] contract is for a 'service' rather than 'sale' when 'service predominates,' and the sale of items is 'incidental'"); *Valley Farmers' Elevator v. Lindsay Bros.*, 380 N.W.2d 874, 878 (Minn. Ct. App. 1986) (stating that the test is whether a contract's predominant purpose is the rendition of a service with incidental goods or a purchase of goods with incidental service). But see *Menendez v. Paddock Pool Constr. Co.*, 836 P.2d 968, 977 (Ariz. Ct. App. 1992) (stating that an in-ground pool is not a product for purposes of imposing strict liability, therefore the contract was for a service); *Brandt v. Sarah Bush Lincoln Health Ctr.*, 771 N.E.2d 470, 473-74 (Ill. App. Ct. 2002) (finding a hospital not strictly liable for a faulty medical implant because the patient's primary objective is medical service); cf. *Anthony Pools v. Sheehan*, 455 A.2d 434, 440-41 (Md. 1983) (stating that the "predominant factor" test is too mechanically rigid and should be modified to a "gravamen of the action" test, where the essence of the complaint is evaluated; if the complaint involves goods, the U.C.C. will apply, but if it involves the service associated with the goods, the U.C.C. will not apply). Typically, American courts have employed three analytical approaches to determining whether a hybrid transaction is one of sales or services. David W. Lannetti, *Toward a Revised Definition of "Product" Under the Restatement (Third) of Torts: Product Liability*, 35 TORT INS. L.J. 845, 866-67 (2000). First, courts may apply a professional/commercial standard: if the transaction involves a recognized professional rendering a professional skill, strict liability will not apply. *Id.* at 866. Second, courts may ascertain whether the essence of the transaction is the providing of a service or a good. *Id.* at 867. Lastly, at least one court has adopted a case-by-case approach based on the underlying policy considerations. *Id.* at 867-68.

6. See *Blagg v. Fred Hunt Co.*, 612 S.W.2d 321, 324 (Ark. 1981) (finding the word "product" as applicable to a house as to an automobile); *Salka v. Dean Homes of Beverly Hills, Inc.*, 22 Cal. Rptr. 2d 902, 907 (Cal. Ct. App. 1993) (establishing that the doctrine of strict liability applies to home builders); *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314, 321 (N.J. 1965) (finding a builder/vendor of a home strictly liable to the lessee of the original vendee for a manufacturing defect in the marketed product—the home). But see *McClanahan v. Am. Gilsonite Co.*, 494 F. Supp. 1334, 1348 (D. Colo. 1980) (stressing that a refinery is not a "product" within the meaning of Section 402A); *Calloway v. City of Reno*, 993 P.2d 1259, 1270 (Nev. 2000) (determining that townhouses are not products for purposes of strict liability); *Bd. of Educ. v. W.R. Grace Corp.*, 609 A.2d 92, 104 (N.J. Super. Ct. Law Div. 1992) (stating that when a general contractor performs its contract with the owner and has no discretion, the general contractor is rendering a service); *Ass'n of Unit Owners of Bridgeview Condos v. Dunning*, 69 P.3d 788, 800 (Or. Ct. App. 2003) (asserting that condominiums are not products within the meaning of Oregon Revised Statute Section 30.920).

7. Most states have enacted "Blood Shield Statutes" which explicitly state that blood is not a product. See, e.g., ALA. CODE § 7-2-314(4) (2002) (stating that the providing of blood is a service, not a sale); ALASKA STAT. § 45.02.316(e) (Michie 2002) (providing that in receiving blood from either a blood bank or a hospital, blood is not a product); ARIZ. REV. STAT. § 36-1115 (2003) (recognizing that distributing blood for the purpose of injecting it into a human body is a service); ARK. CODE ANN. § 4-2-316(3)(d)(i) (Michie 2001)

(finding that supplying blood from a blood bank is a service); ARK. CODE ANN. § 20-9-802 (Michie 2000) (limiting the liability of an individual, hospital, blood or tissue bank that transfers or supplies blood); CAL. HEALTH & SAFETY CODE § 1606 (Deering 1990) (acknowledging that procuring and distributing of blood is a rendition of a service by every entity participating); COLO. REV. STAT. § 13-22-104 (2001) (stating that legal liability without fault may not be imposed on individuals dealing with blood transactions); CONN. GEN. STAT. ANN. § 19a-280 (West 1997) (agreeing that selling blood from a blood bank or reservoir is considered a medical service); DEL. CODE ANN. tit. 6, § 2-316(5) (2000) (expressing that providing blood from a blood bank is a service); FLA. STAT. ANN. § 672.316(5) (West 2002) (finding that procuring, processing, or distributing blood is considered a service); GA. CODE ANN. § 11-2-316(5) (2002) (explaining that providing blood is a service for all participants involved in the procurement or distribution process); HAW. REV. STAT. ANN. § 325-91 (Michie 2002) (declaring that there will be no implied warranty that blood is pure in the absence of scientific technology to detect possible impurities); IDAHO CODE § 39-3702 (Michie 2002) (stating that providing blood is a service unless the provider of blood operates the blood bank for profit); 745 ILL. COMP. STAT. ANN. 40/1 (West 2003) (indicating that imposing liability without fault without regard to those engaged in transactions with blood products is against public policy); IND. CODE ANN. § 16-41-12-11 (Michie 2002) (outlining that the procurement, processing, distributing and injecting of blood is a service); IOWA CODE ANN. § 142C.12 (West 1997) (describing that strict liability shall not apply to the rendition of blood services); KAN. STAT. ANN. § 65-3701 (2003) (providing that no person rendering blood-related services shall be liable unless negligence is proved); KY. REV. STAT. ANN. § 139.125 (Michie 2002) (stating that the procurement, distribution, or transfusion of blood is a service); LA. CIV. CODE ANN. art. 2322.1 (West 2003) (explaining that strict liability is not applicable to nonprofit blood banks); ME. REV. STAT. ANN. tit. 11, § 2-108 (West 2002) (stating that providing blood is a service); MD. CODE ANN., CTS. & JUD. PROC. § 5-630 (2002) (outlining that an obtainer, processor, or distributor of blood products is not subject to strict liability); MASS. GEN. LAWS ANN. ch. 106, § 2-316(5) (West 2003) (recognizing that providing blood and blood-related products are considered services); MICH. COMP. LAWS ANN. § 333.9121(2) (West 2003) (noting that providing blood is a service whether remuneration is paid or not); MINN. STAT. ANN. § 525.9221 (West 2002) (explaining that the provision or use of blood is a service); MISS. CODE ANN. § 41-41-1 (2002) (establishing that the procurement, processing, distribution, or transfusion of blood is a service); MO. ANN. STAT. § 431.069 (West 2003) (describing the procurement of blood for a transfusion as a service); MONT. CODE ANN. § 50-33-102 (2001) (echoing that furnishing of or injecting of blood products is a service, provided that the providing hospital or doctor has no financial interest in the source of the blood); NEB. REV. STAT. § 71-4001 (2002) (advancing that procuring, processing, and the injection of blood is a service regardless of remuneration paid); NEV. REV. STAT. ANN. 460.010 (Michie 2002) (assuring that liability for providing blood does not arise in the absence of negligence or willful misconduct); N.H. REV. STAT. ANN. § 507:8-b (2002) (stating that strict liability does not attach to the procurement, distribution, or processing of blood); N.M. STAT. ANN. § 24-10-5 (Michie 2002) (explaining that liability for blood products only exists in the presence of negligent or willful misconduct); N.Y. PUB. HEALTH LAW § 580(4) (McKinney 2003) (describing that the collection, processing, and distributing of blood is a public health service); N.C. GEN. STAT. § 130A-410 (2003) (stating that providing blood is a service); N.D. CENT. CODE § 41-02-33 (2001) (emphasizing that providing blood is a service, not the sale of goods); N.D. CENT. CODE § 43-17-40 (2001) (stating that a physician, blood bank, or other entity is not liable except for negligence or willful misconduct); OHIO REV. CODE ANN. § 2108.11 (West 1992) (indicating that providing blood is a service in all aspects); OKLA. STAT. ANN. tit. 63,

§ 2151 (West 2002) (distinguishing that providing blood is a transaction and not a sale); OR. REV. STAT. § 97.968 (2000) (indicating that procuring or distributing blood is not a sales transaction covered by implied warranty); 42 PA. CONS. STAT. ANN. § 8333(a) (West 1998) (declaring that no person shall be liable except for negligent conduct from the transfusion of blood); R.I. GEN. LAWS § 23-17-30 (2002) (stating that all aspects of providing blood are a service); S.C. CODE ANN. § 44-43-10 (Law. Co-op. 2002) (indicating that all implied warranties of merchantability and fitness do not apply to a sale of blood); S.D. CODIFIED LAWS § 57A-2-315.1 (Michie 2002) (providing that distributing blood is a service); TENN. CODE ANN. § 47-2-316(5) (2002) (reiterating that procuring, processing, and distributing blood is a service not subject to the implied warranties of merchantability or fitness for a particular purpose); TEX. CIV. PRAC. & REM. CODE ANN. § 77.003 (Vernon 2001) (declaring that any person who prepares, donates, processes, or injects blood is not liable except for negligence, gross negligence, or an intentional tort); UTAH CODE ANN. § 26-31-1 (2003) (noting that providing blood is a medical service and not a sale); VA. CODE ANN. § 32.1-297 (Michie 2002) (stating that "[n]o action for implied warranty shall lie" for the procurement of blood or a transfusion of same); WASH. REV. CODE ANN. § 70.54.120 (West 2003) (limiting liability for a blood supplier to negligent or willful conduct); W.VA. CODE ANN. § 16-23-1 (Michie 2003) (emphasizing that providing blood constitutes a service by every entity in the process); WIS. STAT. ANN. § 146.31 (West 2002) (recognizing that procuring blood for a medical transfusion is a service and not a sale); WYO. STAT. ANN. § 34.1-2-316(c)(iv) (Michie 2001) (stating that implied warranties shall not attach to the sale of blood, as the transaction is one of service). A comparable statute could not be located for the states of New Jersey or Vermont or the District of Columbia. However, case law in the District of Columbia and New Jersey has held that injuries resulting from blood transfusion are not subject to strict liability. *See Fisher v. Sibley Mem'l Hosp.*, 403 A.2d 1130, 1134 (D.C. App. 1979) (holding that "characterizing blood plasma as a product governed by strict tort liability is as unnatural as forcing a blood transfusion into the commercial sales mode"); *Jackson v. Muhlenberg Hosp.*, 232 A.2d 879, 884-86 (N.J. Super. Ct. Law Div. 1967) (holding that, while "[i]t makes no difference whether the transaction was a sale or a service if the basic policy considerations which lead to strict liability are applicable," blood tainted with hepatitis is not defective or unreasonably dangerous for the purposes of 402A strict liability), *rev'd on other grounds*, 249 A.2d 65 (N.J. 1969). Some states have held that the doctrine of strict liability is applicable in certain situations. *See, e.g., JKB v. Armour Pharm. Co.*, 660 N.E.2d 602, 605 (Ind. Ct. App. 1996) (holding that a pharmaceutical company is not protected by the blood shield statute when production is for commercial use); *Rogers v. Miles Lab., Inc.*, 802 P.2d 1346, 1349 (Wash. 1991) (recognizing that the statute provides that where a donor is compensated, statutory immunity from liability does not apply to the transaction).

8. *See Ransome v. Wis. Elec. Power Co.*, 275 N.W.2d 641, 648-49 (Wis. 1979) (pointing to the possibility that strict liability may be imposed if the electricity was unreasonably dangerous when it left the seller's hands). The foundation of the *Ransome* decision appears to be the court's perception that "[electricity] is a form of energy that can be made or produced by men, confined, controlled, transmitted and distributed to be used as an energy source for heat, power, and light and is distributed in the stream of commerce." *Id.* at 643; *see also Bryant v. Tri-County Elec. Membership Corp.*, 844 F. Supp. 347, 352 (W.D. Ky. 1994) (stating that electricity is a product); *Stein*, 8 Cal. Rptr. 2d at 910 (restating that the selling of electricity is not required; merely placing the product on the market is sufficient); *Smith v. Home Light & Power Co.*, 734 P.2d 1051, 1057 (Colo. 1987) (defining electricity as a product only when it reaches the point where it is made available for consumer use); *Monroe v. Savannah Elec. & Power Co.*, 471 S.E.2d 854, 855 (Ga. 1996) (stating that elec-

software,<sup>11</sup> and ideas,<sup>12</sup> sometimes held that what was involved was

tricity is a product within the meaning of the Georgia Code Section 51-1-11(b)(1)); *Aversa v. Pub. Serv. Elec. & Gas Co.*, 451 A.2d 976, 979 (N.J. Super. Ct. Law Div. 1982) (noting that where electricity has been introduced into the stream of commerce by a sale, liability may be based on product liability unrelated to fault); *Schriner v. Pa. Power & Light Co.*, 501 A.2d 1128, 1133 (Pa. Super. Ct. 1985) (stating that electricity can be a "product" within the meaning of the Restatement (Second) of Torts Section 402A); *Houston Lighting & Power Co. v. Reynolds*, 765 S.W.2d 784, 785 (Tex. 1988) (announcing that electricity is a commodity, which, like other goods, can be manufactured, transported, and sold). *But see* *Bowen v. Niagara Mohawk Power Corp.*, 590 N.Y.S.2d 628, 629 (N.Y. 1992) (writing that electricity is not a product for purposes of strict liability); *Otte v. Dayton Power & Light Co.*, 523 N.E.2d 835, 838 (Ohio 1988) (holding that electricity falls outside the definition of "product" because it is not made by human industry or art); *Wyrulec Co. v. Schutt*, 866 P.2d 756, 761 (Wyo. 1993) (decategorizing electricity as a product within the definition of the Restatement (Second) of Torts Section 402A).

9. *See* *Loos v. Am. Energy Savers, Inc.*, 522 N.E.2d 841, 845 (Ill. App. Ct. 1988) (indicating that a component part manufacturer is not strictly liable when the manufacturer has no control over its use by an assembly purchaser); *Ettinger v. Triangle-Pac. Corp.*, 799 A.2d 95, 104-05 (Pa. Super. Ct. 2002) (noting that the manufacturer of a kit consisting of component parts to be constructed by the purchaser may be subject to strict liability, but the uncompleted product does not subject the maker to strict liability when it is not built by the end purchaser). *But see* *Carey v. Hy-Temp Mfg., Inc.*, 702 F. Supp. 666, 671 (N.D. Ill. 1988) (determining that a component maker can be held liable if its product is defective for a known use); *Hausmann v. Inland Truck Parts*, 819 F. Supp. 802, 809 (E.D. Wis. 1993) (proclaiming that "[w]hen a component is incorporated into a larger product, contributing to the dangerousness of the product, the seller of the component is liable for injury caused . . . unless the component was made dangerous through 'further processing or substantial change'"); *Jimenez v. Superior Court*, 58 P.3d 450, 481 (Cal. 2002) (noting that the manufacturer of windows for mass-produced houses may be held strictly liable for defects).

10. *Compare* *Loyd v. ECO Res., Inc.*, 956 S.W.2d 110, 133 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (stating that water is not a product subject to strict liability when it contains injurious contaminants in its natural state), *with* *Moody v. City of Galveston*, 524 S.W.2d 583, 589 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) (emphasizing that water contaminated with flammable gas is a defective product).

11. *See* Restatement (Third) of Torts: Prod. Liab. § 19 reporter's note, cmt. d (1998) (stating that "[w]hen a court will have to decide whether to extend strict liability to computer software, it may draw an analogy between the treatment of software under the Uniform Commercial Code and under products liability law"). *Compare* *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 675 (3d Cir. 1991) (noting that "once in the form of a floppy disc the program is tangible, moveable and available in the marketplace"). *with* *RRX Indus. v. Lab-Con, Inc.*, 772 F.2d 543, 546 (9th Cir. 1985) (holding that the purchase of a software system is a purchase of goods, in spite of incidental training which accompanied the purchase), *and* *System Design & Mgmt. Info., Inc. v. Kansas City Post Office Employees Credit Union*, 788 P.2d 878, 881-82 (Kan. Ct. App. 1990) (holding that computer software constitutes a good under Uniform Commercial Code Section 2-105(1), and not a service), *with* *Data Processing Serv. v. L.H. Smith Oil Corp.*, 492 N.E.2d 314, 318 (Ind. Ct. App. 1986) (finding that the design, development and implementation of "an electronic data processing system" is a service, not a sale of goods), *overruled on other grounds by* *Insul-Mark Midwest, Inc. v. Modern Materials, Inc.*, 612 N.E.2d 550, 554 (Ind. 1993), *and* *Micro-Managers, Inc. v. Gregory*, 434 N.W.2d 97, 98, 100 (Wis. Ct. App. 1988) (concluding

a *product*.<sup>13</sup> This would at first glance appear to be contrary to the ordinary meaning of the term.<sup>14</sup> But what became clear was that

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that a contract for the development of a new programmable controller was a service contract and not a contract for the purchase of goods).

12. See *Fluor Corp. v. Jeppesen & Co.*, 216 Cal. Rptr. 68, 71 (Cal. Ct. App. 1985) (stating that aeronautical charts qualify as products under strict products liability). *But see* *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991) (declining to extend products liability "to embrace the ideas and expressions in a book"); *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1218 (D. Md. 1988) (mem.) (choosing not to "hold [defendant] strictly liable as publisher for the content of books that it publishes"); *Way v. Boy Scouts of Am.*, 856 S.W.2d 230, 239 (Tex. App.—Dallas 1993, writ denied) (determining that "ideas, thoughts, words, and information conveyed . . . are not *products* within the meaning of the Restatement (Second) of Torts"). Imposition of strict liability toward "ideas" or written expression appears to be limited to items in which the purchaser of the item must, at the time of the use of the item, rely on the item absolutely. See *Fluor Corp.*, 216 Cal. Rptr. at 70 (applying strict liability to respondent, the maker of an instrument approach chart, after the pilot relied on an inaccurate chart and crashed into a hill). The cases that have imposed strict liability against the manufacturers of aeronautical charts seem to exemplify this. *Id.* at 71 (holding that a navigational chart was a product). A pilot using an aeronautical chart has no option but to use the chart; his reliance is virtually absolute. *Id.* at 70. However, a person experimenting with presumably edible mushrooms is not placed in the same necessity of reliance on the content of the book. See *Winter*, 938 F.2d at 1033 (considering injury to mushroom enthusiasts resulting from reliance on information in a mushroom book).

13. Many state statutes define what a "product" is. See, e.g., Idaho Code § 6-1302(3) (Michie 1998) (stating that a product "means any object possessing intrinsic value . . . produced for introduction into trade or commerce"); Md. Code Ann., Cts. & Jud. Proc. § 5-115(a)(4) (2002) (classifying a product as "a tangible article, including attachments, accessories, and component parts, and accompanying labels, warnings, instructions, and packaging"); OHIO REV. CODE ANN. § 2307.71(L)(1) (West 1992) (noting that a product is "any object, substance, mixture, or raw material that constitutes tangible personal property . . . [that] is capable of delivery, . . . produced, manufactured, or supplied for introduction into trade or commerce, [and] intended for sale or lease to persons for commercial or personal use"); TENN. CODE ANN. § 29-28-102(5) (2000) (stating that "any tangible object or goods produced" is a product); WASH. REV. CODE ANN. § 7.72.010(3) (West 1992) (stating that a product includes "any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts"). Some courts have also defined the term "product." See, e.g., *Pierson v. Sharp Mem'l Hosp., Inc.*, 264 Cal. Rptr. 673, 676 (Cal. Ct. App. 1989) (stating that "[a] product is a physical article which results from a manufacturing process and is ultimately delivered to a consumer"); *Wyrulec Co. v. Schutt*, 866 P.2d 756, 770 (Wyo. 1993) (holding that "[a] 'product' is anything made by human industry or art" (quoting *Otte v. Dayton Power & Light Co.*, 523 N.E.2d 835, 838 (Ohio 1998))).

14. See BLACK'S LAW DICTIONARY 1225 (7th ed. 1999) (defining product as "[s]omething that is distributed commercially for use or consumption and that is usu[ally] (1) tangible personal property, (2) the result of fabrication or processing, and (3) an item that has passed through a chain of commercial distribution before ultimate use or consumption"); WEBSTER'S DELUXE UNABRIDGED DICTIONARY 1436 (2d ed. 1983) (defining a product as "1. that which is produced by nature or made by industry or art . . . 2. result;



courts had generally rejected a primary dictionary definition, and instead adopted a policy-based technique to determine whether the transaction before them deserved Section 402A protection.<sup>15</sup> In short, the courts had employed a backdoor approach. They did not start with the issue of whether a product was involved. Instead, they determined whether the transaction was one which should come under the umbrella of strict products liability, and then concluded if necessary that they were dealing with goods.<sup>16</sup> As was

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[or] outgrowth"). As provided in the RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 19 (1998):

- (a) A product is tangible personal property distributed commercially for use or consumption. Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in this Restatement.
- (b) Services, even when provided commercially, are not products.
- (c) Human blood and human tissue, even when provided commercially, are not subject to the rules of this Restatement.

15. *See* *Rossetti v. Busch Entm't Corp.*, 87 F. Supp. 2d 415, 419 (E.D. Pa. 2000) (mem.) (recognizing that when the policy is not served, strict liability does not apply); *Kaneko v. Hilo Coast Processing*, 654 P.2d 343, 347 (Haw. 1982) (stating that safety requires the greatest amount of protection available by law, and by placing goods on the market, a maker represents that the product is suitable for use, and that the burden of accidental injuries should be borne by those in the distribution chain as a consequential cost of doing business); *Trent v. Brasch Mfg. Co.*, 477 N.E.2d 1312, 1315 (Ill. App. Ct. 1985) (explaining that "'the social policy justifications' underlying the adoption of strict liability, rather than a dictionary definition of the term 'product,' should be determinative"); *Heller v. Cadral Corp.*, 406 N.E.2d 88, 89 (Ill. App. Ct. 1980) (stating that the determination of what is a product should be based on the policy reasons underlying strict products liability instead of dictionary definitions); *Jackson v. City of Franklin*, 554 N.E.2d 932, 938 (Ohio Ct. App. 1988) (explaining that policy reasons underlying strict products liability should be considered to determine whether a thing is a product).

16. *See, e.g., King v. Damiron Corp.*, 113 F.3d 93, 95 (7th Cir. 1997) (declining to hold a dealer of used goods strictly liable); *Condos v. Musculoskeletal Transplant Found.*, 208 F. Supp. 2d 1226, 1230 (D. Utah 2002) (determining that whether strict products liability should be extended to the distribution of human tissue for medical procedures is a policy-driven inquiry); *Pippin v. Potomac Elec. Power Co.*, 78 F. Supp. 2d 487, 491 (D. Md. 1999) (indicating that before strict liability may attach, the transaction must include either a manufacturer or seller); *Tauber-Arons Auctioneers Co. v. Superior Court*, 161 Cal. Rptr. 789, 798 (Cal. Ct. App. 1980) (finding that the imposition of strict liability on an auctioneer will not further the policy consideration of risk reduction or encourage the safer manufacture of products); *Perez v. Fid. Container Corp.*, 682 N.E.2d 1150, 1154 (Ill. App. Ct. 1997) (recognizing that raw material packaged in an intermediate state is not a "product," and therefore strict liability does not apply); *Sprung v. MTR Ravensburg Inc.*, 788 N.E.2d 620, 622-23 (N.Y. 2003) (holding that generally, where the sale of a product is casual or occasional, there is no strict liability; however, when bargaining disparity between two parties is equal, strict liability may lie); *Beyer v. Aquarium Supply Co.*, 404 N.Y.S.2d 778, 779 (N.Y.

shown, this led to some unusual results. Subject matter that no one would have ever considered as such was deemed to be a *product*.<sup>17</sup>

In this Article, we will continue our search.<sup>18</sup> At times whimsical,<sup>19</sup> and at others sublime,<sup>20</sup> the cases continue their path of ex-

App. Div. 1977) (stating that the application of strict liability is not limited to complex manufactured parts, but the purpose of the doctrine is to distribute fairly "the inevitable consequences of commercial enterprise and to promote the marketing of safe products"); *Tillman v. Vance Equip. Co.*, 596 P.2d 1299, 1304 (Or. 1979) (concluding that policy considerations preclude applying strict liability to dealers selling used goods); *Spellmeyer v. Weyerhaeuser Corp.*, 544 P.2d 107, 109-10 (Wash. Ct. App. 1975) (holding that "policy considerations which support imposition of strict liability in other contexts are too severely diluted"); see also David W. Lannetti, *Toward a Revised Definition of "Product" Under the Restatement (Third) of Torts: Products Liability*, 35 TORT & INS. L.J. 845, 873 (2000) (stating that the extensions of the definition of a product can be supported by the underlying strict liability policy reasoning).

17. See *Bryant v. Tri-County Elec. Membership Corp.*, 844 F. Supp. 347, 352 (W.D. Ky. 1994) (recognizing that electricity is a product, but stray voltage is not); *Blagg v. Fred Hunt Co.*, 612 S.W.2d 321, 324 (Ark. 1981) (indicating that a house is a product); *Gem Developers v. Hallcraft Homes of San Diego*, 261 Cal. Rptr. 626, 634 (Cal. Ct. App. 1989) (indicating that graded lots which had subsided are "products"); *Stanton v. Carlson Sales, Inc.*, 728 A.2d 534, 538 (Conn. Super. Ct. 1998) (extending strict products liability to used products); *Worrell v. Sachs*, 563 A.2d 1387, 1388 (Conn. Super. Ct. 1989) (defining a diseased, parasite-carrying puppy as a product); *Shaffer v. Victoria Station, Inc.*, 588 P.2d 233, 236 (Wash. 1978) (holding a restaurant strictly liable for injuries incurred by breaking a wine glass, notwithstanding the consumable wine in the glass); see also David W. Lannetti, *Toward a Revised Definition of "Product" Under the Restatement (Third) of Torts: Product Liability*, 35 TORT & INS. L. J. 845, 873 (2000) (asserting that the broadening of the interpretation of what constitutes a product was supported by the underlying strict liability policy reasoning).

18. See generally Charles E. Cantu, *The Illusive Meaning of the Term "Product" Under Section 402A of the Restatement (Second) of Torts*, 44 OKLA. L. REV. 635, 638 (1991) (stating that ingenious plaintiff's attorneys and the willingness of courts to protect plaintiffs will expand the search for the definition of "product"). Furthermore, the trend has already greatly been extended beyond what was originally intended by the American Law Institute at the promulgation of Section 402A. *Id.*; see also RESTATEMENT (THIRD) TORTS: PROD. LIAB. § 19 cmt. A (1997) (explaining that the American Law Institute has provided a definition for the term product because of its importance in the application of strict liability).

19. See, e.g., *Brumley v. Pfizer, Inc.*, 149 F. Supp. 2d 305, 313 (S.D. Tex. 2001) (stating that liability did not arise from the failure to warn the patient of increased libido, which resulted in a heart attack during intercourse); *CEF Enters., Inc. v. Betts*, 838 So. 2d 999, 1007 (Miss. Ct. App. 2003) (deciding that a negligence and breach of warranty standard is appropriate in a case where a complaining customer consumed a bug hidden in a restaurant biscuit).

20. See *Ransome v. Wis. Elec. Power Co.*, 275 N.W.2d 641, 648-49 (Wis. 1979) (proposing that an electric company could be strictly liable if the electricity "was in a condition not contemplated by the ultimate consumer and unreasonably dangerous to him" when it left the seller's hands); *O'Malley v. Am. LaFrance, Inc.*, No. 00-CV-1421, 2002 WL 32068354, at \*9 (E.D.N.Y. Dec. 30, 2002) (determining that an unfinished fire truck can be a product); see also Allen Michel et al., *Protecting Future Product Liability Claimants*, 18

ploration. The results, however, appear to be the same. Courts continue to employ a line of reasoning that disregards any initial attempt at defining the item in controversy.<sup>21</sup> Instead, they continue to determine at the outset whether the dispute is one that should receive the advantages of Section 402A of the Restatement,<sup>22</sup> and then conclude by necessity that the controversy does in fact involve a *product*.<sup>23</sup> The following discussion will make this

AM. BANKR. INST. J. 24, 1999 ABI JNL LEXIS 205, at \*8-9 (1999) (examining how a court allocated resources of an insolvent aircraft manufacturer to defend and compensate victims of future accidents that result from the product defect).

21. See *Rossetti v. Busch Entm't Corp.*, 87 F. Supp. 2d 415, 419 (E.D. Pa. 2000) (suggesting that the basis for imposing strict liability is speculative); *Trent v. Brasch Mfg. Co.*, 477 N.E.2d 1312, 1317 (Ill. App. Ct. 1985) (declining to decide whether a ventilation system is a product); *Heller v. Cadral Corp.*, 406 N.E.2d 88, 90 (Ill. App. Ct. 1980) (refusing to hold that a condominium is a product); *Jackson v. City of Franklin*, 554 N.E.2d 932, 938 (Ohio Ct. App. 1988) (examining the policy justifications for strict liability to determine whether a product is involved, and ultimately holding that the contractor who built the pool provided a service rather than a product); see also *Leong v. Sears Roebuck & Co.*, 970 P.2d 972, 975 (Haw. 1998) (declining to establish a firm definition of a product, but evaluating public policy considerations to determine if strict liability should apply).

22. See *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 513 N.E.2d 387, 395 (Ill. 1987) (holding that strict liability does not apply to X-radiation). The *Kirk* court exemplifies this approach by stating:

In cases involving goods and other tangible physical materials, which are in some way bad, imposition of liability unquestionably enhances the public interest in human life and health. However, in cases which deal with the conduct of individuals or institutions which themselves are pledged to protect human life and health, precautions must be taken to avoid an ultimate diminution of protection. For the reasons stated we conclude that public policy dictates against the imposition of strict liability in tort for injuries resulting from the administration of X-radiation treatments by a hospital.

*Id.* (quoting *Greenberg v. Michael Reese Hosp.*, 415 N.E.2d 390, 390 (Ill. 1980)); see also *Trent v. Brasch Mfg. Co.*, 477 N.E.2d 1312, 1315 (Ill. Ct. App. 1985) (evaluating policy considerations that support the imposition of strict liability, prior to determining if a component part of a building is a product subject to strict liability).

23. See *Papp v. Rocky Mountain Oil & Mineral Inc.*, 769 P.2d 1249, 1256 (Mont. 1989) (stating that buildings are not typically products, but mass production of a item for sale renders the item for sale subject to Section 402A); see also William C. Powers Jr., *Distinguishing Between Products and Services in Strict Liability*, 62 N.C. L. REV. 415, 430 (1984) (suggesting that courts could use the ability to prove negligence as the test of whether strict liability could apply); Dana Shelhimer, Comment, *Sales-Service Hybrid Transactions and the Strict Liability Dilemma*, 43 Sw. L.J. 785, 813 (1989) (suggesting a policy-based approach to decide the sales-service hybrid transaction and balancing the justifications for strict liability against the need of the public to have access to the product or service). Professor Powers argues that whether in a service or hybrid transaction, where proving a case under a negligence theory would be difficult, strict liability could be applied. William C. Powers Jr., *Distinguishing Between Products and Services in Strict Liability*, 62 N.C. L. REV. 415, 430 (1984). However, in a case where proving negligence is possible, the plaintiff would not be able to proceed under a strict liability theory. *Id.* Perhaps the best example

clear, but nowhere is it better exemplified than with the cases involving food.

## II. CASES INVOLVING FOOD

Anglo-American jurisprudence has always held the purveyor of foodstuff responsible for any injuries resulting from a defective condition.<sup>24</sup> Prior to the rise of strict products liability, food sellers

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involves transactions in which blood is sold or exchanged. *Id.* at 426. Blood could clearly be categorized as a product, however, the policy justifications for considering blood a product under Section 402A do not comport with public needs, and therefore blood, even prior to the legislative enactments of the "blood shield" statutes discussed previously, was not considered a "product" to which strict products liability would apply. *Id.* Conversely, real property arguably is not a "product." Real property lacks most, if not all of the attributes that courts and legislatures require a "product" to possess. *See supra* note 13 (discussing state statutes which define "product"). However, applying strict liability to homebuilders furthers the policy justifications supporting strict liability. *See supra* note 6 and *infra* notes 63-64 (citing cases that determine whether or not the term "product" applies to homes). Thus, courts have held that in certain situations, real property may be a product under Section 402A.

24. *See* Herbert W. Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 735 (1970) (stating that at early English common law, rules against the selling of unwholesome food were confined to sales of food for immediate consumption). The source of liability was criminal in nature as stated by the court. *Id.* "If a man sells victuals which is [sic] corrupt, without warranty, an action lies, because it is against the commonwealth." *Id.* (quoting *Roswell v. Vaughn*, 79 Eng. Rep. 171 (K.B. 1606)). Professor Titus continues by citing an unnamed early English case, Y.B. 9 Hen. VI, f.53b, which addresses the existence of a warranty for food meant for consumption by quoting the judge in the case.

The warranty . . . is not material: For if I came into a tavern to eat and the taverner gives and sells me beer or food which is corrupt, by which I am put to great suffering, I shall clearly have an action against the taverner on the case even though he makes no warranty to me.

*Id.* American cases, as early as 1815, suggested that special warranties were implied in the sales of food for immediate consumption. *Id.* at 736. The courts further came to the early conclusion that the justification for the food warranties was not based in contract, but rather on policy. *Id.*

The law in relation to the sale of provisions stands upon an entirely different footing; there, out of regard to the health and lives of men, the law always implies the article sold to be sound and whole some, and fit for food. . . . This implied warranty must prevail in all cases in the sale of provisions; the party having an opportunity to examine the article, does not exempt the vendor from liability, unless the defect in the article be so palpable that the most unskillful and inexperienced, can from examination or from inspection, easily detect it, or the purchaser at the time be informed of the defect, or the vendor informed that the article is wanted for other purposes than for food for man.

*Id.* at 736-37 (quoting *Wright v. Hart*, 18 Wend. 449, 456 (N.Y. 1837)); *see also* RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (1965) ("stating that [a]s long ago as 1266 there

had been liable under the theory of actionable negligence,<sup>25</sup> and then under the concept of an implied warranty of fitness.<sup>26</sup> After the introduction of strict products liability in the 1960s, the trend continued.<sup>27</sup> *Theoretically*, the initial question in this type of scenario should be whether the transaction involves the rendering of a service, or the selling of a product. For example, a bowl of spinach

were enacted special criminal statutes imposing penalties upon . . . brewers, butchers, cooks, and other persons who supplied 'corrupt' food and drink").

25. See *Kyle v. Swift & Co.*, 229 F.2d 887, 889 (4th Cir. 1956) (stating that a manufacturer of hot dog wieners may be held liable for harm under the theory of actionable negligence); *Gramex Corp. v. Green Supply, Inc.*, 89 S.W.3d 432, 438 (Mo. 2002) (discussing that Missouri tort law originally hinged on whether the defendant exercised reasonable care); *Rosenbusch v. Ambrosia Milk Corp.*, 168 N.Y.S. 505, 508 (N.Y. App. Div. 1917) (holding that it was reasonable to charge the manufacturer of a powdered milk product with negligence when it knew that the product was liable to deteriorate by time, temperature, or climate); *Turner v. Wilson*, 86 S.E.2d 867, 870 (S.C. 1955) (showing that a retailer of deviled egg sandwiches may be held liable under a negligence theory if the customer becomes ill).

26. See, e.g., *Martel v. Duffy-Mott Corp.*, 166 N.W.2d 541, 548 (Mich. Ct. App. 1968) (holding that recovery for unwholesome applesauce may be allowed on the basis of breach of implied warranty of merchantability); *Metty v. Shurfine Cent. Corp.*, 736 S.W.2d 527, 530 (Mo. Ct. App. 1987) (per curiam) (adhering to the rule that food for immediate consumption is impliedly warranted to be wholesome and fit for consumption); *Welch v. Schielbelhuth*, 169 N.Y.S.2d 309, 314 (N.Y. Sup. Ct. 1957) (stating that an implied warranty of quality and wholesomeness of food offered for sale imposes an obligation by law upon one who causes the wrong); *Ayala v. Bartolome*, 940 S.W.2d 727, 729 (Tex. App.—Eastland 1997, no pet.) (showing that a retailer who sells unwholesome food is liable under an implied warranty as a matter of public policy (citing *Griggs Canning Co. v. Josey*, 164 S.W.2d 835, 840 (1942))); *Walters v. United Grocery Co.*, 172 P. 473, 474 (Utah 1918) (holding a retailer of potato salad liable under breach of implied warranty of merchantability).

27. See *Scheller v. Wilson Certified Foods, Inc.*, 559 P.2d 1074, 1076 (Ariz. Ct. App. 1976) (discussing how the theory of liability under breach of implied warranty has merged into strict liability); *O'Brien v. Comstock Foods, Inc.*, 212 A.2d 69, 72 (Vt. 1965) (abolishing the requirement of privity for recovery on the theory of breach of implied warranty with regard to food products); *Gates v. Standard Brands Inc.*, 719 P.2d 130, 134 (Wash. Ct. App. 1986) (holding that a cause of action for breach of implied warranty has been succeeded by the consumer expectation test); see also RESTATEMENT (SECOND) OF TORTS § 402A (Prelim. Draft No. 6. 1958) (showing that as initially prepared, and unanimously approved, the section applied only to foodstuffs); William L. Prosser, *Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 801 (1966) (discussing the predominant use of breach of implied warranty).

Until 1962 [breach of implied] warranty had held the field, and no court proceeded on any other basis, although a good many of them had realized that this was a new and different kind of 'warranty,' not arising out of or dependent upon any contract, but imposed by law, in tort, as a matter of policy.

William L. Prosser, *Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 801 (1966).

purchased in a cafeteria would be considered a service when contrasted to a can of spinach, which, if obtained in a grocery store, would be considered a product.<sup>28</sup> The sales/service transaction discussed earlier,<sup>29</sup> which delved into the so-called predominant factor of the sale,<sup>30</sup> made this clear. In other words, if the reason for entering into the agreement is the knowledge, skill, or expertise of the provider, then we are confronted with a service.<sup>31</sup> If, however, the subject matter is what induced the purchase, we have a prod-

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28. The author would like to reflect that the bowl of spinach/cafeteria portion analogy is a pedagogical example used by Dean Keeton to provide an example of the difference between food products which may be a service (cafeteria spinach) and those which are a product (can of spinach). This differential view was traditionally a minority view prevalent in only a few jurisdictions. See, for example *Nisky v. Childs Co.*, 135 A. 805, 806 (N.J. 1927), which stated that "[t]he service of food at eating houses has never been and cannot be regarded as a sale at common law." Although presently this view is virtually non-existent, the demise of this view highlights this Article's function: analyzing what is and what is not a product under Section 402A and the ability of courts to modify the scope of what is a product or may become a product.

29. See *Anthony Pools v. Sheehan*, 455 A.2d 434, 437 (Md. Ct. App. 1983) (deciding whether a diving board, when installed with a pool, was a sale of goods or a service); see also *supra* note 6 (citing cases that discuss whether certain home-building activities are products or services).

30. See *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974) (stating that the test to determine whether a contract was for a sale or service is "whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of a service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved"). *Bonebrake* appears to be the first court to consolidate the previously used professional/commercial and essence tests into a newly labeled test, which assimilated portions of both previously used tests. *Accord* *Rassa v. Rollins Protective Serv. Co.*, 30 F. Supp. 2d 538, 542 (D. Md. 1998) (stating that in a hybrid contract, U.C.C. protections still apply to the "goods" component of a contract). There further appears to be a split of authority over whether the application of the "predominant factor" test in the classification of a hybrid contract as one for goods or services is a matter of law or fact. *Compare* *Keitzer v. Land O'Lakes*, No. C800488, 2002 WL 233746, at \*2 (Minn. Ct. App. Feb. 19, 2002) (discussing that whether a contract is for goods or services is a matter of law), *with* *Home Ins. Co v. Detroit Fire Extinguisher Co.*, 538 N.W.2d 424, 427 (Mich. Ct. App. 1995) (asserting that there exists a material issue of fact regarding whether the contract was for sale of goods or rendition of a service).

31. See *AKA Distrib. Co. v. Whirlpool Corp.*, 137 F.3d 1083, 1085 (8th Cir. 1998) (holding that a contract for vacuum cleaner sales in conjunction with design input by the vendee is a contract for the sale of goods); *Condos v. Musculoskeletal Transplant Found.*, 208 F. Supp. 2d 1226, 1230 (D. Utah 2002) (finding that supplying a patient with bone tissue is not the sale of a product because the patient's intention is seeking medical services); *Lake & Piepkow Farms v. Purina Mills, Inc.*, 955 F. Supp. 791, 794 (W.D. Mich. 1997) (determining that custom blended cattle feed is a sale of goods with incidental services).

uct.<sup>32</sup> The distinction is an important one because if confronted with a service, the only available remedy for an injured plaintiff is actionable negligence.<sup>33</sup> It is only when a product is at issue that the aggrieved party may select from actionable negligence,<sup>34</sup> warranty,<sup>35</sup> and strict products liability.<sup>36</sup>

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32. See *Almquist v. Finley Sch. Dist.* No. 53, 57 P.3d 1191, 1196 (Wash. Ct. App. 2002) (finding that school cafeteria lunches are products). The *Almquist* court further held that when an educational, medical, or research organization provides lunch for a fee, the sale of the lunch is not so intricately tied to the service to render the providing of the lunch exempt from the Washington Product Liability Act. *Id.*; see also U.C.C. § 2-314(1) (2002) (stating that “serving for value of food or drink to be consumed” is considered a sale under the U.C.C.).

33. See Charles E. Cantu, *The Illusive Meaning of the Term “Product” Under Section 402A of the Restatement (Second) of Torts*, 44 OKLA. L. REV. 635, 639-40 (1991) (discussing the application of strict liability in service and product cases). Negligence should be used instead of strict liability as a recovery vehicle in service transactions because: (1) individuals practice inexact sciences and should only be held to a reasonable person standard; (2) plaintiffs interact and do business “directly with the person responsible”; and (3) “services are not mass-produced,” thus, the policy reasons supporting strict liability are inapplicable. *Id.* at 639-40; see also *Altieri v. CVS Pharmacy, Inc.*, 2002 WL 31898323, at \*4 (Conn. Super. Ct. Dec. 13, 2002) (finding that a pharmacist provides a service and cannot be held to the products liability act); *Bruzga v. PMR Architects, P.C.*, 693 A.2d 401, 405-06 (N.H. 1997) (declining to extend strict liability to architects or builders because the transaction involves a service).

34. See *Kyle v. Swift & Co.*, 229 F.2d 887, 889 (4th Cir. 1956) (finding sufficient evidence to try both the manufacturer and retailer for negligence); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 439 (Cal. 1944) (discussing possible situations in which the defendant manufacturer may be found negligent); *Mushatt v. Page Milk Co.*, 262 So. 2d 520, 523 (La. Ct. App. 1972) (shifting the burden of proof from the plaintiff to the defendant to prove non-negligence once a prima facie case was made); *Gramex Corp. v. Green Supply, Inc.*, 89 S.W.3d 432, 438-39 (Mo. 2002) (en banc) (tracing the history of the determination of liability back to negligence).

35. See *Martel v. Duffy-Mott Corp.*, 166 N.W.2d 541, 545 (Mich. Ct. App. 1968) (allowing recovery for unwholesome applesauce on the basis of breach of implied warranty of merchantability); *Metty v. Shurfine Cent. Corp.*, 736 S.W.2d 527, 530 (Mo. Ct. App. 1987) (per curiam) (reiterating the court’s policy that food for immediate consumption is impliedly warranted to be wholesome and fit for consumption); *Welch v. Schiebelhuth*, 169 N.Y.S.2d 309, 314 (N.Y. Sup. Ct. 1957) (interpreting the implied warranty of quality and wholesomeness of food offered for sale as imposing a legal obligation upon the wrongdoer); *Ayala v. Bartolome*, 940 S.W.2d 727, 729 (Tex. App.—Eastland 1997, no pet.) (finding that a retailer who sells unwholesome food is liable under an implied warranty imposed by law as a matter of public policy); *Walters v. United Grocery Co.*, 172 P. 473, 474 (Utah 1918) (holding the retailer of potato salad liable under breach of implied warranty of merchantability).

36. See *McCroy ex rel. McCroy v. Coastal Mart, Inc.*, 207 F. Supp. 2d 1265, 1270 (D. Kan. 2002) (noting that Kansas products liability law merges legal theories of negligence, breach of implied warranty, and strict liability into a “products liability” claim); *Jackson v. Thomas*, 21 P.3d 1007, 1009 (Kan. Ct. App. 2001) (recognizing that the Kansas Products Liability Act includes action based on negligence, breach of warranty, or strict liability);

While the sales/service hybrid transaction analysis should, in theory, be the initial line of reasoning in determining whether food-stuff falls under the protection of Section 402A, courts appear to implicitly recognize food as a product.<sup>37</sup> Whether Section 402A provides relief for an injured plaintiff turns on whether the food product is defective,<sup>38</sup> or is so contaminated that it is in a corruptive state, or if there is merely an impurity which, while repugnant to some, prevents a finding of liability.<sup>39</sup> Originally, this was deter-

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Creach v. Sara Lee Corp., 502 S.E.2d 923, 923-24 (S.C. Ct. App. 1998) (allowing an injured plaintiff to recover under negligence, breach of warranty, or strict liability theories); Cobb v. Dallas Fort Worth Med. Ctr.—Grand Prairie, 48 S.W.3d 820, 826 (Tex. App.—Waco 2001, no pet.) (claiming a plaintiff may bring causes of action involving a product in negligence, strict liability, or breach of warranty); *see also* Conn. Gen. Stat ANN. § 52-572n (West 2003) (stating that a products liability claim against a product seller may be asserted either in negligence, strict liability, or breach of warranty); *cf.* Hitachi Const. Mach. Co. v. Amax Coal Co., 737 N.E.2d 460, 465 (Ind. Ct. App. 2000) (recognizing that an action based on the Indiana Products Liability Act may sound in negligence or strict liability, while the Uniform Commercial Code governs actions based on a breach of warranty).

37. *See* Wachtel v. Rosol, 271 A.2d 84, 86 (Conn. 1970) (extending Section 402A to food provided by a restaurant); Koster v. Scotch Assoc., 640 A.2d 1225, 1228 (N.J. Super. Ct. Law Div. 1993) (holding that by adopting the U.C.C., New Jersey had discarded the minority view that food served in a restaurant or cafeteria was the rendition of a service); England v. Sanford 561 N.Y.S.2d 228, 229 (N.Y. App. Div. 1990) (mem.) (stating that a caterer's relationship to guests is identical to a restaurant's relationship to guests such that both are subject to strict liability). The *Koster* court further states that it is an anachronism that food sold in a store is warranted, but food sold in a restaurant is not. *Koster*, 640 A.2d at 1128.

38. *See* Holowaty v. McDonald's Corp., 10 F. Supp. 2d 1078, 1084 (D. Minn. 1998) (mem.) (considering a food product defective "if the harm causing characteristics of the product would not have been expected by a reasonable consumer"); Campbell Soup Co. v. Gates, 889 S.W.2d 750, 753 (Ark. 1994) (requiring the plaintiff to prove that the injury-causing product in question was defective when it left the particular seller's possession); *see also* Safeway Stores, Inc. v. L.D. Schreiber Cheese Co., 326 F. Supp. 504, 508 (W.D. Mo. 1971) (referring to the trial court's decision that the bacteria-infested cheese was defective), *rev'd on other grounds*, 457 F.2d 962 (8th Cir. 1972); Chambley v. Apple Rests., Inc., 504 S.E.2d 551, 553 (Ga. Ct. App. 1998) (stating that it is a question of fact whether a condom found in a salad makes it defective); Bullara v. Checker's Drive-In Rest., 736 So. 2d 936, 938 (La. Ct. App. 1999) (permitting plaintiff's recovery after she ate part of a cockroach in her chilidog).

39. *See, e.g.*, Greif v. Anheuser-Busch Cos., 114 F. Supp. 2d 100, 103 (D. Conn. 2000) (stating that beer is not defective although it contains alcohol); Vuletich v. Alivotvodic, 392 N.E.2d 663, 667 (Ill. App. Ct. 1979) (noting that a consumer's consumption of beer and subsequent injury to the plaintiff were not sufficient to give rise to an inference of a defect in the beer); Phillips v. Rest. Mgmt. of Caroline, L.P., 552 S.E.2d 686, 696 (N.C. Ct. App. 2001) (stating that the restaurant corporation was not liable for breach of warranty where a restaurant employee spat in the food); Thompson v. East Pac. Enters., 115 Wash. App. 1042, 1054 (Wash. Ct. App. 2003) (explaining that food containing a peanut product which causes a severe allergic reaction is not defective); *see also* Jones v. Gen. Motors Corp., 911



mined under the so-called "foreign-natural test,"<sup>40</sup> which inquires into the nature of the substance. If the object in controversy is natural to the foodstuff, such as a fragment of shell in pecan pie,<sup>41</sup> there is no one to hold strictly liable. If, on the other hand, the substance is foreign, such as a piece of glass in a candy bar,<sup>42</sup> liabil-

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P.2d 1243, 1254 (Or. Ct. App. 1996) (explaining the idiosyncratic response defense as an eliminating factor of food's defectiveness). The *Jones* court expounded upon the elements of an "idiosyncratic allergic response" defense, which may remove liability from a manufacturer when the injury occurring to the plaintiff is unique and not experienced by a large population percentage. *Id.* To assert a defense, the defendant must first produce evidence that the plaintiff's injury results from an allergic reaction. *Id.* If this requirement is met, the burden of production shifts to the plaintiff to prove that the reaction "could be experienced by an identifiable class of consumers." *Id.*

40. See generally *Mix v. Ingersoll Candy Co.*, 59 P.2d 144 (Cal. 1936) (promulgating the foreign natural test), *overruled by Mexicali Rose v. Superior Court*, 4 Cal. Rptr. 2d 145, 155 (Cal. 1992). The "foreign-natural test" was first announced by the California Supreme Court, which stated:

[C]ertain cases present facts from which the court itself may say as a matter of law that the alleged defect does not fall within the terms of the statute [California Uniform Sales Act]. . . . [B]ones which are natural to the type of meat served cannot legitimately be called a foreign substance, and a consumer who eats meat dishes ought to anticipate and be on his guard against the presence of such bones.

*Id.* at 148; see also *Jane Massey Draper, Annotation, Liability for Injury or Death Allegedly Caused by Food Product Containing Object Related to, but Not Intended to Be, Present in Product*, 2 A.L.R. 5th 189 (1992) (highlighting the nature of the foreign-natural test).

[T]he court promulgated . . . the . . . test for determining liability for injuries caused by objects in food which are natural and related to the food but not intended to be in the food. [The] test creates liability, on the basis of breach of an implied warranty of wholesomeness and reasonable fitness for human consumption, for the vendor of food containing a foreign object which injures a consumer, but absolves the vendor where the object is natural to the food, since the presence of the natural object does not render the food unwholesome, nor, on the premise that a consumer is not entitled to expect perfect food, does it render the food not reasonably fit for human consumption. With regard to negligence, this test requires a consumer to act upon common knowledge that certain food products may contain natural parts of the ingredients, albeit not intended to be in the final product. . . .

*Id.* at 201.

41. *Jackson v. Nestle-Beich, Inc.*, 589 N.E.2d 547, 548-49 (Ill. 1992). See generally *Ford v. Miller Meat Co.*, 33 Cal. Rptr. 2d 899 (Cal. Ct. App. 1994) (concerning a bone fragment in ground beef); *Porteous v. St. Ann's Cafe & Deli*, 713 So. 2d 454 (La. 1998) (involving a pearl found in a raw oyster); *Mitchell v. T.G.I. Friday's*, 748 N.E.2d 89 (Ohio Ct. App. 2000) (involving a clam shell found in fried clam strip); *Williams v. Braum Ice Cream Stores, Inc.*, 534 P.2d 700 (Okla. Ct. App. 1974) (involving a cherry pit contained in cherry ice cream).

42. *Curtiss Candy Co. v. Johnson*, 141 So. 762, 763 (Miss. 1932). See generally *Hickman v. Wm. Wrigley, Jr. Co.*, 768 So. 2d 812 (La. Ct. App. 2000) (dealing with finding a metal screw in chewing gum); *CEF Enters. v. Betts*, 838 So. 2d 999 (Miss. Ct. App. 2003)

ity is sure to follow. While employed for many years, this test has been replaced by the more modern approach, which inquires into the reasonable expectations of a consumer.<sup>43</sup> The test has been applied in other areas of product litigation such as mis-manufacturing,<sup>44</sup> and is a test that asks: does the substance meet the

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(concerning insect-contaminated food); *Cohen v. Allendale Coca-Cola Bottling Co.*, 351 S.E.2d 897 (S.C. Ct. App. 1986) (involving a dead insect in a bottle of cola).

43. See generally Jane Massey Draper, Annotation, *Liability for Injury or Death Allegedly Caused by Food Product Containing Object Related to, but Not Intended to Be, Present in Product*, 2 A.L.R. 5th 189 (1992) (distinguishing between the foreign/natural test and the reasonable expectation test, and stating that the foreign-natural test focuses on the relationship between the foreign object and the location of its discovery, while the reasonable expectation test focuses on whether the consumer might reasonably expect to find such object in the particular type of dish or style of food served). In an action for breach of implied warranty, liability rests on whether the food is "reasonably fit," and whether the consumer should have anticipated the object. If so, the food was reasonably fit under the warranty. *Id.* at 202. If the customer ought to have reasonably anticipated such an object, then the vendor has breached no duty. *Id.* In an action based on recovery theories of negligence, "the query becomes the foreseeability of harm on the part of the vendor, and the duty imposed is one of ordinary care to remove from a food product such harmful objects as a consumer would not ordinarily anticipate and guard against." *Id.* See generally *Ex parte Morrison's Cafeteria of Montgomery, Inc.*, 431 So. 2d 975 (Ala. 1983) (providing that a consumer may reasonably expect fish bones in a fish fillet); *Johnson v. S. Pac. Canning Co.*, 580 So. 2d 556 (La. Ct. App. 1991) (stating that a fish eye lens in a can of tuna was not natural, and could not be reasonably expected by a consumer), *abrogated by* *Porteous v. St. Ann's Café & Deli*, 713 So. 2d 454, 456 n.3 (La. 1998); *Phillips v. Town of West Springfield*, 540 N.E.2d 1331 (Mass. 1989) (noting that a high school student may reasonably expect to find a turkey bone in a school-provided lunch). The *Phillips* court further stated that the reasonable expectation test is preferable to the foreign-natural test because the foreign-natural test "fails to focus the seller's attention on the consumer's reasonable beliefs and to recognize that sellers may fairly be held responsible in some instances for natural substances in food that cause injury." *Phillips*, 540 N.E.2d at 1333; see also *Langiulli v. Bumble Bee Seafood, Inc.*, 604 N.Y.S.2d 1020, 1021 (N.Y. Sup. Ct. 1993) (holding that the reasonable expectation test should be applied to determine whether the customer should reasonably expect to find a bone fragment in canned tuna); *Ruvolo v. Homovich*, 778 N.E.2d 661, 663 (Ohio Ct. App. 2002) (stating that a restaurant customer should reasonably expect to find a chicken bone in a chicken sandwich); *Jefferies v. Clark's Rest. Enters.*, 580 P.2d 1103, 1105 (Wash. Ct. App. 1978) (stating that whether a patron could reasonably expect to find crab shell in a crab sandwich is a question for the jury).

44. See *Gibson v. Wal-Mart Stores, Inc.*, 189 F. Supp. 2d 443, 447 (W.D. Va. 2002) (stating that a court may use consumers' reasonable expectation of marketing and packaging in determining what constitutes an unreasonably dangerous defect); *Pierce v. Pac. Gas & Elec. Co.*, 212 Cal. Rptr. 283, 287 n.1 (Cal. Ct. App. 1985) (declaring that determining whether electricity is defective depends on the reasonable expectation of the homeowner); *Van Wyk v. Norden Labs., Inc.*, 345 N.W.2d 81, 84 (Iowa 1984) (finding that the warranty of merchantability is based on the purchaser's reasonable expectation that goods purchased will be free from significant defects); *Gable v. Gates Mills*, 784 N.E.2d 739, 748 (Ohio Ct. App. 2003) (finding that complying with statutory regulation does not immunize a manufacturer from liability; such evidence should be considered by a jury when deter-

reasonable expectations of our user/consumer? This, by necessity, will almost always be a question of fact for the jury;<sup>45</sup> however, it does offer a reliable and easily applied benchmark for defective foodstuff. Whatever is found in the food will undergo the scrutiny of the jury, which determines whether consumers would reasonably expect to find the suspect substance in whatever they are eating. A hypodermic needle in a breakfast sandwich,<sup>46</sup> monosodium glutamate (MSG) in vegetable soup,<sup>47</sup> vibrio vulnificus bacteria in raw oysters,<sup>48</sup> a metal screw in a stick of chewing gum,<sup>49</sup> cinnamic aldehyde chemical in candy,<sup>50</sup> escherichia (E.) coli in a school lunch,<sup>51</sup> the addictive nature of a Big Mac,<sup>52</sup> or a defective wine glass;<sup>53</sup> these have all undergone the test. What is so noteworthy about these cases, however, is that as mentioned above, none of the courts initiated their inquiry by first determining whether a product

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mining what constitutes the reasonable expectation of the consumer); *Jackson v. Gen. Motors Corp.*, 60 S.W.3d 800, 806 (Tenn. 2001) (determining that consumers may form reasonable expectations of a vehicle safety restraint system).

45. *Yong Cha Hong v. Marriot Corp.*, 656 F. Supp. 445, 449 (D. Md. 1987) (stating that the "jury must determine whether a piece of fast food fried chicken is merchantable if it contains an inedible item of the chicken's anatomy"); *Cain v. Sheraton Perimeter Park S. Hotel*, 592 So. 2d 218, 221 (Ala. 1991) (stating that whether a patron should reasonably have expected that raw oysters may have been contaminated is a question of fact); *Zabner v. Howard Johnson's, Inc.*, 201 So. 2d 824, 828 (Fla. Dist. Ct. App. 1967) (stating that the jury should determine "what is reasonably expected by the consumer" in cases dealing with "the question of whether food is fit for the purpose intended"); *Goodman v. Wenco Foods, Inc.*, 423 S.E.2d 444, 451 (N.C. 1992) (stating that, under the reasonable expectation test, whether a bone fragment in a hamburger is to be reasonably expected is a jury question); *Williams v. Braum Ice Cream Stores, Inc.*, 534 P.2d 700, 702 (Okla. Ct. App. 1974) (stating that "[w]hat should be reasonably expected by the consumer is a jury question"); *Jim Dandy Fast Foods, Inc. v. Carpenter*, 535 S.W.2d 786, 791 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (deciding that whether a chicken bone is to be reasonably expected is a question for the jury).

46. *Civitello v. Burger King Corp.*, No.UWYCV990152575, 2002 WL 241491, at \*2 (Conn. Super. Ct. Feb. 5, 2002).

47. *Livingston v. Marie Callender's, Inc.*, 85 Cal. Rptr. 2d 528, 529-31 (Cal. Ct. App. 1999) (holding that actual or constructive knowledge of potential risk is required before imposing strict liability for failure to warn).

48. *Ayala v. Bartolome*, 940 S.W.2d 727, 731 (Tex. App.—Eastland 1997, no pet.) (declaring that raw oysters tainted with vibrio vulnificus bacteria are products subject to Section 402A).

49. *Hickman v. Wm. Wrigley, Jr. Co.*, 768 So. 2d 812, 814 (La. Ct. App. 2000).

50. *Knight v. Just Born, Inc.*, No. CV-99-606-ST, 2000 WL 924624, at \*3 (D. Or. Mar. 28, 2000).

51. *Almquist v. Finley Sch. Dist.* No. 53, 57 P.3d 1191, 1193 (Wash. Ct. App. 2002).

52. *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 542 (S.D.N.Y. 2003).

53. *Shaffer v. Victoria Station, Inc.*, 588 P.2d 233, 234 (Wash. 1978).

was the subject matter of the controversy. Instead, the courts followed the previously mentioned policy-based technique. This process has also been true in cases involving animals.

### III. CASES INVOLVING ANIMALS

Strict liability as applied to animals is not a new phenomenon.<sup>54</sup> The concept has been invoked in any one of three distinct scenarios. One centers upon animals that possess distinct barnyard characteristics and that trespass upon the land of another.<sup>55</sup> The second involves domesticated animals with known vicious tendencies,<sup>56</sup> and the third includes animals that are described as being *ferae naturae*, or those whose natural habitat is in the wild.<sup>57</sup> The law has

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54. See *May v. Burdett*, 115 Eng. Rep. 1213, 1217 (Q.B. 1846) (stating that "[a] person who keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is prima facie liable in an action on the case at the suit of any person attacked and injured by such animal, without any averment in the declaration of negligence or default in the securing or taking care of it"); see also *Heald v. Grier*, 12 Mo. App. 556, 557-58 (Mo. App. Ct. 1882) (citing that the owner of trespassing livestock was strictly liable for damage); Anita Bernstein, *How Can a Product Be Liable?*, 45 DUKE L.J. 1, 43 (1995) (citing Mosaic law which provided that the owner of an ox which gored a person would be liable if the owner knew of the ox's propensities).

55. See *Williams v. Goodwin*, 116 Cal. Rptr. 200, 201 (Cal. Ct. App. 1974) (holding the owner of a trespassing bull that inflicted personal injury to be strictly liable); *Campbell v. White*, 357 S.W.2d 849, 850 (Ky. 1962) (imposing liability against the owner of a boar hog that injured the plaintiff while on the plaintiff's porch); *Till v. Bennet*, 281 N.W.2d 276, 278 (S.D. 1979) (stating that an animal's owner is strictly liable for damages caused by trespassing animals). When a collision between an automobile and grazing animals occurs on a public highway, strict liability is usually not a means for recovery, and the injured motorist must proceed on a theory of actionable negligence. See *Vanderwater v. Hatch*, 835 F.2d 239, 242 (10th Cir. 1987) (upholding an Equal Protection Clause challenge of a Utah statute that imposes strict liability for animal trespass to private property, but does not provide for strict liability when the injury occurs on public property); *Byram v. Main*, 523 A.2d 1387, 1388-89 (Me. 1987) (stating that the owner of donkey involved with the collision of a vehicle on the highway is not strictly liable).

56. See *Poznanski ex rel. Poznanski v. Horvath*, 788 N.E.2d 1255, 1259 (Ind. 2003) (requiring knowledge of a dog's vicious propensities before imposing strict liability); *Doyle v. Monroe County Deputy Sheriff's Ass'n*, 758 N.Y.S.2d 791, 793 (N.Y. Sup. Ct. 2003) (holding that a horse is a domesticated animal, therefore the owner is only liable when vicious tendencies are known); *Jackson v. Mateus*, 70 P.3d 78, 83 (Utah 2003) (stating that a cat owner is not liable because the vicious propensities were unknown to the owner).

57. See *Burns v. Gleason*, 819 F.2d 555, 557 (5th Cir. 1987) (holding the owner of a jaguar strictly liable); *Gallick v. Barto*, 828 F. Supp. 1168, 1175 (M.D. Pa. 1993) (applying Pennsylvania law to hold an owner of a ferret liable); *Rosenbloom v. Hanour Corp.*, 78 Cal. Rptr. 2d 686, 689 (Cal. Ct. App. 1998) (stating that the keeper of a shark may be subject to strict liability); *Scorza v. Martinez*, 683 So. 2d 1115, 1116 (Fla. Dist. Ct. App. 1996) (holding the owner of monkey strictly liable for inflicted injuries); *Johnson v. Swain*,

never hesitated to impose strict liability in these cases. In fact, it is one of the seven areas of the law wherein strict liability has been traditionally applied.<sup>58</sup> The rationale or justification for so doing, however, varied slightly in each instance. For example, when trespassing livestock invaded another's land and destroyed their crops or other means of livelihood, the law imposed liability by reasoning that the individuals should control their animals, and if they failed to do so, should be held responsible.<sup>59</sup> In the case of animals with vicious tendencies, whether domesticated or those which were nor-

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787 S.W.2d 36, 37 (Tex. 1989) (holding the owner liable to a plaintiff gored by an elephant); *Hudson v. Janesville Conservation Club*, 484 N.W.2d 132, 133 (Wis. 1992) (holding the owner of a buck deer liable for injury caused by the animal). The *Scorza* court further states that once possession of the animal has changed, the plaintiff may not recover on a strict liability theory against the original owner. *Scorza*, 683 So. 2d at 1116.

58. Strict liability has traditionally been applied in seven different categories. The first is the category of trespassing and vicious animals. See *Lindsay v. Cobb*, 627 P.2d 349, 350 (Kan. Ct. App. 1981) (holding an owner strictly liable when an animal trespasses on an enclosed fence); *May v. Burdett*, 115 Eng. Rep. 1213, 1213 (Q.B. 1846) (holding that an owner of an animal with known propensities to attack mankind will be held liable for failing to secure such animal). Second is abnormally dangerous activities. See *Fletcher v. Rylands*, 159 Eng. Rep. 737, 740-41 (Q.B. 1865) (stating that "[a] person who collects on his land a dangerous element, be it fire or water, and allows it to escape and injure his neighbour's land, is liable for the consequences"). Third is libel. See *E. Hulston Co. & Jones*, [1910] A.C. 20, 23 (H.L. 1909) (appeal taken from Eng.) (explaining that a person charged with libel may not defend himself on the grounds that he intended not to defame the plaintiff . . . if in fact the statement was untrue, he has no defense however good his intentions were). The fourth category is trespass. See *Burns Philp Food, Inc. v. Cavalea Cont'l Freight, Inc.*, No. 99-2182, 1999 U.S. App. LEXIS 21583, at \*1 (7th Cir. Sept. 3, 1999) (stating that trespass is a strict liability tort and needs no further discussion). Fifth is vicarious liability. See *Oke Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768, 775 (9th Cir. 2002) (stating that vicarious liability is a form of strict liability because it is unjust to allow an employer to gain from the cooperation of others without being responsible for its mistakes). The sixth category is nuisance. See *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1354 (Fed. Cir. 2001) (stating that the instigator of nuisance, either public or private, may be held strictly liable for injury). Seventh is misrepresentation. See *Herzog v. Arthrocare Corp.*, No.-02-76-P-C, 2003 U.S. Dist. LEXIS 5224, at \*16 (D. Me. Mar. 21, 2003) (explaining that a strict liability misrepresentation claim could not require constructive or actual knowledge of the misrepresentation).

59. See *Byram v. Main*, 523 A.2d 1387, 1390 (Me. 1987) (explaining that strict liability for trespass of animals protects the rights of the possessor of land to maintain exclusive control); *Carver v. Ford*, 591 P.2d 305, 308-09 (Okla. 1979) (determining that when an owner allows an animal to run at large, the owner is responsible for damages done during trespass); Note, *Liability for Harm Caused by Livestock*, 34 IOWA L. REV. 318, 320 (1949) (explaining early English imposition of strict liability). The early English courts imposed strict liability on the owner of trespassing livestock on the premise that "a man [who] trespasses with his beasts is liable as though he committed the trespass personally." *Id.*

mally wild, knowledge of the animal's potential for harm could be expected, and therefore strict liability would be the result.<sup>60</sup>

Strict products liability, however, is different. In this instance, we require that liability be imposed because one has introduced a defective product,<sup>61</sup> which is unreasonably dangerous,<sup>62</sup> into the

60. See *Spring Co. v. Edgar*, 99 U.S. 645, 651-54 (1878) (stating that owners are liable, without knowledge of violent propensities, if an animal is inherently vicious; but if the animal is of a tame nature, the owner must have knowledge of violent propensities); *Burns v. Gleason*, 819 F.2d 555, 556 (5th Cir. 1987) (stating that "absolute liability applies to keepers of wild animals," while a lesser standard of strict liability or negligence applies to keepers of domesticated animals); *Hays v. Miller*, 43 So. 818, 819 (Ala. 1907) (explaining that the owner of a wild wolf is presumed to have conclusive knowledge of the animal's vicious propensities); *Rolen v. Maryland Cas. Co.*, 240 So. 2d 42, 44 (La. Ct. App. 1970) (holding that wild animals are "inherently dangerous and, therefore, anyone who owns one does so at his own peril and is absolutely liable for all injuries"). See generally 4 AM. JUR. 2D *Animals* § 93 (1995) (stating that a wild beast is presumed to be dangerous, and if the animal is not securely confined, security must be assured under all circumstances).

61. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1964) (ruling that a manufacturer is strictly liable in tort after placing a defective product in the stream of commerce); *Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385, 385-86 (Tex. 1991) (stating that there is no duty to warn of possible prolonged effects of alcohol consumption); *Sims v. Washex, Mach. Corp.*, 932 S.W.2d 559, 561-62 (Tex. App.—Houston [1st Dist.] 1995, no writ) (noting that a product may be defective if it is unreasonably dangerous as manufactured, designed, or contains inadequate warnings or instructions); RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965) (describing a defective product as defective if it "leaves the seller's hands, in a condition not contemplated by the ultimate consumer"); see also Charles E. Cantu, *Distinguishing the Concept of Strict Liability for Ultra-Hazardous Activities from Strict Products Liability Under Section 402A of the Restatement (Second) of Torts: Two Parallel Lines of Reasoning That Should Never Meet*, 35 ARKON L. REV. 31, 44-45 (2001) (discussing the scope of defects to generally include products which are mis-designed, mis-manufactured, or mis-marketed); David A. Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339, 342 (1974) (noting the introduction of a product).

62. See *Boerner v. Brown & Williamson Tobacco Corp.*, 260 F.3d 837, 841 (8th Cir. 2001) (citing Arkansas Code Section 4-68-102, stating that a product is unreasonably dangerous when it is dangerous to an extent beyond what was contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics); *Bergfield v. Unimin Corp.*, 226 F. Supp. 2d 970, 976-77 (N.D. Iowa 2002) (noting that an unreasonably dangerous product must cause injury when used in the way it was intended to be used or consumed); *Dillon v. Zeneca Corp.*, 42 P.3d 598, 603 (Ariz. Ct. App. 2002) (holding that a product may be unreasonably dangerous because of a manufacturing defect, design defect, or an informational defect (citing *Gosewisch v. Am. Honda Motor Co.* 737 P.2d 376, 379 (Ariz. 1987))); see also Robert F. Thompson, *The Arkansas Products Liability Statute: What Does "Unreasonably Dangerous" Mean in Arkansas?*, 50 ARK. L. REV. 663, 666-68 (1998) (defining unreasonably dangerous). The author states that with respect to design defects, courts have approached the question of whether a product is unreasonably dangerous from two directions. *Id.* First, courts and some state legislatures have adopted a "risk-utility" test, which requires a plaintiff to show

stream of commerce. This begs the question: how can an animal be considered a product? The problem can be illustrated by taking the typical household pet into consideration. Whether Rex the dog or Tabby the cat, each is endowed with its own personality; rarely if ever is there any uniformity. If we consider tales of the heinous puppy farms where cages are periodically moved, and breeding takes on the characteristics of a breeding assembly line, one could reason that we do in fact have a product. In fact, this line of reasoning was employed in early cases involving the construction of homes, where courts apparently have taken notice of this assembly line process.<sup>63</sup> One can drive into a new development, and in the first block find row after row of foundations. On the second, one will find foundations and sides. On the third, foundations, sides, and roofs. And on the fourth, foundations, sides, roofs, and interior work being finished out. During the 1960s, when strict products liability law was evolving, courts were quick to reason that in these cases an assembly line process was being utilized, and we should therefore consider the finished home as a product.<sup>64</sup>

As to animals, however, whether the subject matter is a pet puppy,<sup>65</sup> skunk,<sup>66</sup> hamster,<sup>67</sup> or a baby pig used for research,<sup>68</sup> the

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that a safer design existed that would have prevented the plaintiff's injury. *Id.* Second, some courts have adopted a "consumer expectation" standard, which compares the quality of the product to what a reasonable consumer would have expected. *Id.*

63. See *Kriegler v. Eichler Homes, Inc.*, 74 Cal. Rptr. 749, 752 (Cal. Ct. App. 1969) (seeing no meaningful distinction between mass production of homes, automobiles, and airplanes); *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314, 321 (N.J. 1965) (seeing no meaningful distinction between mass production of homes and mass production of automobiles).

64. See *Blass v. Fred Hunt Co.*, 612 S.W.2d 321, 323-24 (Ark. 1981) (noting that a home is a product); *Salka v. Dean Homes of Beverly Hills, Inc.*, 22 Cal. Rptr. 2d 902, 909 (Cal. Ct. App. 1993) (noting mass production of homes as a product); *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314, 323-24 (N.J. 1965) (classifying homes as products); see also *Bastian v. Wausau Homes, Inc.*, 620 F. Supp. 947, 950 (N.D. Ill. 1985) (holding that strict liability is a recovery theory for damages resulting from mass-produced homes); *Berman v. Watergate West, Inc.*, 391 A.2d 1351, 1357 (D.C. 1978) (ruling that mass-produced homes are considered products protected by strict liability); *Papp v. Rocky Mountain Oil & Mineral Co.*, 769 P.2d 1249, 1255 (Mont. 1989) (holding that buildings are not products, but strict liability is available for mass produced buildings).

65. *Worrell v. Sachs*, 563 A.2d 1387, 1387-89 (Conn. Super. Ct. 1989) (holding that a diseased animal is a product under Connecticut product liability laws). The *Worrell* court concluded that the existence of a disease at the time of purchase renders the live animal defective. *Id.* Had the disease been of the nature that the incubatory period may have given rise to the inference that the disease was not present in the animal at the time of the transaction, then the animal would still have been a product under Connecticut law, but at the time of the transaction the animal would not have been defective. *Id.*

courts have not invoked this assembly line reasoning. If the animal in question is in some way diseased or in any other way varies from the norm, the courts have in some cases reached the conclusion that those sustaining harm may proceed on the basis of strict products liability.<sup>69</sup> By necessity, we once again have ended with an odd result: animals, like food, can in some instances constitute a product.

This same conclusion has been reached in other cases wherein the subject matter in controversy is quite varied. Whether concerned with telephone poles,<sup>70</sup> balloons,<sup>71</sup> paving stones,<sup>72</sup> baptismal font heaters,<sup>73</sup> video games,<sup>74</sup> or ice,<sup>75</sup> the result has been the

66. See *Sease v. Taylor's Pets, Inc.*, 700 P.2d 1054, 1057-58 (Or. Ct. App. 1985) (disagreeing with the Illinois position that animals are not products because of their mutability).

67. See *Beyer v. Aquarium Supply Co.*, 404 N.Y.S.2d 778, 779 (N.Y. Gen. Term 1977) (holding that "there is no reason why a breeder, distributor or vendor who places a diseased animal in the stream of commerce should be less accountable for his actions than one who markets a defective manufactured product").

68. See *Anderson v. Farmers Hybrid Co.*, 408 N.E.2d 1194, 1199 (Ill. App. Ct. 1980) (holding that baby pigs sold for breeding purposes were not products under the Restatement (Second) of Torts Section 402A because of mutative ability).

69. See *Worrell*, 563 A.2d at 1388 (supporting the proposition that the sale of a diseased animal warrants recovery under a strict liability theory); *Beyer*, 404 N.Y.S.2d at 778-89 (allowing recovery in a cause of action in strict products liability against the distributor of hamsters to recover for illness suffered by the plaintiff after coming in contact with allegedly diseased hamsters distributed by the defendant); *Sease*, 700 P.2d at 1058 (holding that a live skunk was a product under the meaning of the state products liability statute). The *Worrell*, *Sease*, and *Beyer* opinions all focus on the condition of the animal at the time of purchase, not the ability of the animal to contract an illness subsequent to the purchase of the animal. In all three decisions, the diseased animal was infected at the time of the transaction, thus creating the defect in the animal. *But see Anderson*, 408 N.E.2d at 1199 (holding that natural immutability is essential to determining whether a product exists).

70. *Bell v. T.R. Miller Mill Co.*, 768 So. 2d 953, 957 (Ala. 2000) (holding that a telephone pole installed in the ground does not lose its characteristics as a product).

71. *Jaimes v. Fiesta Mart, Inc.*, 21 S.W.3d 301, 304-05 (Tex. App.—Houston [1st Dist] 1999, pet. denied) (hearing a claim alleging that a retailer was liable under a strict products liability theory for selling a defectively designed balloon to a minor). The *Jaimes* court affirmed the summary judgment for the retailer because the plaintiff could not establish the requisite elements of products liability. *Id.* at 306.

72. *Cecil v. T.M.E. Invs., Inc.*, 893 S.W.2d 38, 50 (Tex. App.—Corpus Christi 1994, no writ) (affirming the lower court's finding that a coping stone manufacturer was not liable under a marketing defect theory).

73. *Mount Olivet Tabernacle Church v. Edwin L. Weigand Div.*, 781 A.2d 1263, 1266 (Pa. Super. Ct. 2001) (affirming judgment for the plaintiff in a products liability case based on a defective heater in a church's baptismal font).

74. See *Roccaforte v. Nintendo of Am., Inc.*, 802 So. 2d 764, 766 (La. Ct. App. 2001) (implying that a video game is a product as the court's language proceeds under a typical



same. We are dealing with products, and as a consequence, the issue becomes readily apparent. If the courts are going to adopt a policy-based technique, what factors should they consider?

#### IV. FACTORS TO CONSIDER WHEN EMPLOYING STRICT PRODUCTS LIABILITY

One of the original justifications for adopting Section 402A of the Restatement (Second) of Torts was that it was consumer friendly.<sup>76</sup> Prior to its enactment, the plaintiff in products liability litigation was limited to a recovery based upon actionable negligence<sup>77</sup> or warranty,<sup>78</sup> and the hurdles that had to be overcome in

products liability analysis). *But see* James v. Meow Media, Inc., 300 F.3d 683, 701 (6th Cir. 2002) (extending a prior holding that board games were not products subject to strict products liability to current case that video games were also not products subject to the same scrutiny under Kentucky law); Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 173-74 (D. Conn. 2002) (holding that a video game is not a product); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1279 (D. Colo. 2002) (declaring that video games are not products under products liability litigation).

75. Hebert v. Loveless, 474 S.W.2d 732, 739 (Tex. App.—Beaumont 1971, writ ref'd n.r.e.) (addressing a products liability claim where the alleged defective product was ice).

76. *See* Brown v. Superior Court, 751 P.2d 470, 474 (Cal. 1988) (clarifying that strict liability focuses not on the conduct of the manufacturer, but on the product itself); Barker v. Lull Eng'g Co., 573 P.2d 443, 455 (Cal. 1978) (noting that strict liability is designed to relieve plaintiffs of the "onerous evidentiary burdens inherent in a negligence cause of action"); Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring) (suggesting that the doctrine of *res ipsa loquitur* should preclude a plaintiff from needing to prove negligence when the producer actively knows that the product the consumer purchases will not be inspected after manufacturing); Robertson v. Gulf South Beverages, Inc., 421 So. 2d 877, 880 (La. 1982) (identifying that the strict liability doctrine provided plaintiffs with a rebuttable presumption that the injury resulted from the defective design); *see also* Anita Bernstein & Paul Fanning, "Weightier Than a Mountain": *Duty, Hierarchy, and the Consumer in Japan*, 29 VAND. J. TRANSNAT'L L. 45, 60 (1996) (stating that ultimately, all products are alike, and that products liability based on strict liability places consumers on the same legal foundation as the manufacturers); James A. Henderson, Jr., *Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality*, 58 N.Y.U. L. REV. 765, 769 n.14 (1983) (commenting that it is easier for an injured plaintiff to prove that a product caused his injury than to prove that the manufacturer was negligent in the manufacturing process).

77. *See* Kyle v. Swift & Co., 229 F.2d 887, 889 (4th Cir. 1956) (asserting that a manufacturer can be held liable for negligence if the claim is supported by sufficient evidence); Mushatt v. Page Milk Co., 262 So. 2d 520, 523 (La. Ct. App. 1972) (addressing a claim for injuries resulting from a foreign substance in a can of milk under the negligence theory); Gramex Corp. v. Green Supply, Inc., 89 S.W.3d 432, 438 (Mo. 2002) (en banc) (noting that initially, liability hinged on negligence); *see also* Webster v. Pacesetter Inc., 259 F. Supp. 2d 27, 38 (D.D.C. 2003) (asserting that in order to succeed in a products liability claim based on negligence, the plaintiff must prove that the defendant did not act with due care); Con-

dos v. Musculoskeletal Transplant Found., 208 F. Supp. 2d 1226, 1230 (D. Utah 2002) (enforcing that the plaintiff could proceed on a negligence theory against a blood supplier); Hanus v. Tex. Utils. Co., 71 S.W.3d 874, 880 (Tex. App.—Fort Worth 2002, no pet.) (analyzing the plaintiff's case on a negligence basis). The following cases illustrate how a consumer's recovery for a defective product has shifted from a negligence-based claim to a cause of action under strict liability. *Compare* Tuttle v. U.S. Slicing Mach. Co., 335 F.2d 63, 64 (4th Cir. 1964) (agreeing that a plaintiff injured by a meat grinder may proceed under a negligence theory), and Gibbs v. Proctor & Gamble Mfg. Co., 201 N.E.2d 473, 478 (Ill. App. Ct. 1964) (holding that the manufacturer was not liable for injuries caused by washing solution in the absence of privity), and Terry v. Double Cola Bottling Co., 138 S.E.2d 753, 754 (N.C. 1964) (indicating that authorities hold that a plaintiff suing a manufacturer of food products intended for human consumption must proceed under the theory of negligence), and Lewis v. U.S. Rubber Co., 202 A.2d 20, 23 (Pa. 1964) (limiting the party injured in a tire blowout to a claim of negligence against the tire manufacturer), and Producers Chem. Co. v. Stamps, 380 S.W.2d 170, 173 (Tex. App.—Amarillo 1964, writ ref'd n.r.e.) (affirming that a plaintiff injured by an exploding air compressor may recover under negligence theory), with Henry v. Firestone/Bridgestone Inc., No. 02-3347, 2003 WL 2013051, at \*3-4 (7th Cir. Apr. 29, 2003) (permitting recovery for an injury resulting from a defective tire under strict products liability), and Messer v. Amway Corp., 210 F. Supp. 2d 1217, 1236 (D. Kan. 2002) (determining that an injury resulting from a floor stripper may allow recovery under strict liability theory), and Simeon v. Doe, 618 So. 2d 848, 850-51 (La. 1993) (noting that a manufacturer of food products was liable under a strict products liability theory), and Arnold v. Ingersoll-Rand Co., 908 S.W.2d 757, 761 (Mo. Ct. App. 1995) (contending that a plaintiff injured by an exploding air compressor may proceed under strict products liability), and Bleh v. Biro Mfg. Co., 756 N.E.2d 121, 124 (Ohio Ct. App. 2001) (per curiam) (allowing a plaintiff injured by a meat grinder to proceed under strict products liability).

78. *See* Martel v. Duffy-Mott Corp., 166 N.W.2d 541, 545 (Mich. Ct. App. 1968) (allowing the plaintiff to proceed on a breach of implied warranty theory against a food manufacturer); Metty v. Shurfine Cent. Corp., 736 S.W.2d 527, 530 (Mo. Ct. App. 1987) (per curiam) (noting that warranty exists even where there is no privity); Welch v. Schiebelhuth, 169 N.Y.S.2d 309, 314 (N.Y. Sup. Ct. 1957) (rejecting the privity requirement in a breach of warranty claim); Ayala v. Bartolome, 940 S.W.2d 727, 729 (Tex. App.—Eastland 1997, no pet.) (addressing Texas's view on public policy imposing implied warranty for unwholesome food not fit for human consumption). The following cases illustrate the shift from a claim under breach of warranty to a cause under strict liability theory. *Compare* Chairaluce v. Stanley Warner Mgmt. Co., 236 F. Supp. 385, 387 (D. Conn. 1965) (holding that a plaintiff may proceed against shoe manufacturer under breach of warranty theory), and Wagner v. Mars, Inc., 166 So. 2d 673, 675 (Fla. Dist. Ct. App. 1964) (upholding that a consumer injured by nails in a candy bar may recover under breach of warranty theory), and Hardman v. Helene Curtis Indus., Inc., 198 N.E.2d 681, 691 (Ill. App. Ct. 1964) (providing that a plaintiff burned by a fire fueled by hairspray may recover under the theory of breach of warranty), and Amarillo Coca-Cola Bottling Co. v. Hall, 384 S.W.2d 726, 728 (Tex. App.—Amarillo 1964, no pet.) (allowing a plaintiff injured from an exploding soda bottle to recover under the theory of breach of warranty), with Tucker v. Nike, Inc., 919 F. Supp. 1192, 1195 (N.D. Ind. 1995) (providing that an injured plaintiff may proceed against a shoe manufacturer on grounds of strict liability), and Nowak v. Faberge, U.S.A., Inc., 812 F. Supp. 492, 496 (M.D. Pa. 1992) (concluding that a plaintiff injured by a hairspray-fueled fire may recover under strict products liability), and Lia v. Domain Mumm, Inc., No. B157434, 2003 WL 21260710, at \*3 (Cal. Ct. App. June 2, 2003) (holding that a plaintiff

each are legendary. Negligence required proof of lack of ordinary care<sup>79</sup> and proximate cause,<sup>80</sup> both of which were questions of fact for the jury. The three main warranties given to us by the Uniform Commercial Code<sup>81</sup> were direct enough, but the downside was that they could in some instances be disclaimed,<sup>82</sup> and sellers could in-

injured from an exploding champagne bottle may recover under the theory of strict liability), *and* *Gates v. Standard Brands, Inc.*, 719 P.2d 130, 134 (Wash. Ct. App. 1986) (favoring the view that a consumer injured by snake vertebrae in a candy bar may proceed under strict products liability).

79. *See* *Garrett v. Hamilton Standard Controls, Inc.*, 850 F.2d 253, 257 (5th Cir. 1988) (noting that a negligence analysis looks at the acts of the manufacturer and determines if the manufacturer exercised ordinary care); *Jones v. Amazing Prods., Inc.*, 231 F. Supp. 2d 1228, 1238 (N.D. Ga. 2002) (affirming that in negligence cases, the defendant's actions are judged by the standards of reasonable care); *Cervelli v. Thompson/Center Arms, Inc.*, 183 F. Supp. 2d 1032, 1040 (S.D. Ohio 2002) (asserting that a manufacturer knew or should have known of risk by exercising ordinary care); *Davis v. Blockbuster, Inc.*, 575 S.E.2d 1, 2 (Ga. Ct. App. 2002) (confirming that a legal duty to exercise ordinary care arises in the presence of foreseeable risk); *Eldridge v. Eli Lilly & Co.*, 485 N.E.2d 551, 552 (Ill. App. Ct. 1985) (recognizing that a pharmacist owes duty of ordinary care in practicing his profession); *Ridgeway v. Ford Motor Co.*, 82 S.W.3d 26, 32 (Tex. App.—San Antonio 2002, pet. granted) (stating that in a negligent manufacturing claim, courts look at the acts of manufacturer to determine if it exercised ordinary care).

80. *See* *Timmons v. Ford Motor Co.*, 982 F. Supp. 1475, 1480 (S.D. Ga. 1997) (arguing that the design of the automobile was not the proximate cause of the crash where the driver was driving in excess of 100 miles per hour); *Winnet v. Winnet*, 310 N.E.2d 1, 4 (Ill. 1974) (stating that legal proximate cause extends only to those to whom injury from a defective product may be reasonably foreseen); *Skinner v. Square D Co.*, 516 N.W.2d 475, 479 (Mich. 1994) (explaining that proximate cause involves “examining the foreseeability of consequences, and whether defendant should be held legally [liable] for such consequences”); *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995) (explaining the difference between the proximate cause test of actionable negligence and the producing cause test of strict liability). Both tests employ causation in fact and both require the defendant's conduct or product to be a substantial factor in bringing about injury. *Union Pump Co.*, 898 S.W.2d at 775. However, proximate cause consists of an element of foreseeability as a limitation, whereas producing cause is “an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of.” *Id.*; *see also* *Skeie v. Mercer Trucking Co.*, 61 P.3d 1207, 1209 (Wash. Ct. App. 2003) (asserting that the determination of legal causation rests on policy considerations as to how far the legal consequences of a defendant's act should extend).

81. *See* U.C.C. § 2-312 (2002) (providing a warranty of legitimate title from seller to buyer with regards to goods purchased); *id.* § 2-314 (stating that a warranty that goods shall be merchantable is implied in the contract for goods if the seller is a merchant with respect to goods of that kind); *id.* § 2-315 (outlining a warranty that goods are fit for a particular purpose).

82. *See* *Hininger v. Case Corp.*, 23 F.3d 124, 128 (5th Cir. 1994) (stating that the Texas implied “warranty of merchantability may be disclaimed” if it is in writing, is conspicuous, and specifically mentions the word “merchantability”); *Rynders v. E.I. Du Pont, De Nemours & Co.*, 21 F.3d 835, 840 (8th Cir. 1994) (declaring that “South Dakota requires disclaimers to set out with particularity the characters of fitness being waived”); *Bowdoin*

sert a limitation as to their liability.<sup>83</sup> These factors, plus the cost of litigation, made recovery in many instances very difficult.<sup>84</sup> It was at this point that strict products liability entered the arena, and the basis for recovery was greatly simplified. The plaintiff was required to establish that the product was defective at the time it was

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v. Showell Growers, Inc., 817 F.2d 1543, 1545 (11th Cir. 1987) (holding that a post-sale disclaimer is not effective because it did not form part of the basis of the bargain between the parties to the sale); 2000 Watermark Ass'n Inc. v. Celotex Corp., 784 F.2d 1183, 1186 (4th Cir. 1986) (explaining that tort law assigns risk as a matter of law; therefore risk cannot be as easily disclaimed in a tort action); Williams v. Gradall Co., 990 F. Supp. 442, 445 (E.D. Va. 1998) (stating that Virginia law allows a seller to disclaim a warranty, but not upon delivery of goods, without an agreed modification of the contract); Richard O'Brien Co. v. Challenge-Cook Bros., 672 F. Supp. 466, 470 (D. Colo. 1987) (claiming that the Colorado implied warranty of merchantability may be disclaimed if it is in writing, is conspicuous, and uses the word merchantability); Lincoln Pulp & Paper Co. v. Dravo Corp., 445 F. Supp. 507, 516 (D. Me. 1977) (asserting that warranty disclaimer in larger type excludes all other warranties according to U.C.C. § 2-316(2)); Westfield Ins. Co. v. HULS Am., Inc., 714 N.E.2d 934, 949 (Ohio Ct. App. 1998) (arguing that a party may limit or disclaim an implied warranty provided the disclaimer is not unconscionable); E.L. Smith v. Radam, Inc., 51 S.W.3d 413, 416 (Tex. App.—Houston [1st Dist] 2001, no pet.) (determining that large, conspicuous "AS IS" effectively disclaimed all U.C.C. implied warranties).

83. See *Paramount Aviation Corp. v. Agusta*, 288 F.3d 67, 74 (3d Cir. 2002) (explaining that under New Jersey law, a seller can limit its liability to a third party beneficiary by disclaimers in its agreements with its immediate purchaser); *Sterner Aero AB v. Page Air-motive, Inc.*, 499 F. 2d 709, 710 (10th Cir. 1974) (stating that parties on equal bargaining footing may contractually disclaim implied warranties); *Schlenz v. John Deer Co.*, 511 F. Supp. 224, 229 (D. Mont. 1981) (ruling that parties are free to limit or exclude consequential damages "unless the limitation is unconscionable"); *Hauter v. Zogarts*, 120 Cal. Rptr. 681, 690 (Cal. 1975) (declaring that a warranty may not be modified or disclaimed unless a seller clearly limits his liability); *McCarty v. E.J. Korvette, Inc.*, 347 A.2d 253, 259 (Md. Ct. Spec. App. 1975) (limiting liability from a tire blowout to the replacement value and excluding consequential damages); *Avenell v. Westinghouse Elec. Corp.*, 324 N.E.2d 583, 587 (Ohio Ct. App. 1974) (arguing that a written contract may limit liability, but the limitation clause must be in writing and conspicuous); see also 15 U.S.C.A. § 2304(a)(2) (1982) (prohibiting a supplier from "impos[ing] any limitation on the duration of any implied warranty on the product").

84. See John G. Fleming, *Is There a Future for Tort?*, 44 LA. L. REV. 1193, 1207 (1984) (arguing that "[t]he most formidable criticism that can be levied against the tort system is its inordinate expense"); Marc Galanter, *Reading the Landscape of Dispute: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 15 (1983) (discussing the factors that prevent consumers from pursuing a claim, including high litigation costs); Keith N. Hylton, *Litigation Costs and the Economic Theory of Tort Law*, 46 U. MIAMI L. REV. 111, 113 (1991) (stating that many plaintiffs do not sue because recovery amounts will not exceed litigation costs); see also Keith N. Hylton, *The Influence of Litigation Costs on Deterrence Under Strict Liability and Under Negligence*, 10 INT'L REV. L. & ECON. 161, 164 (1990) (proposing that "the social cost generated by the injurer's failure to [exercise] care is the sum of the expected loss imposed on a victim and the litigation costs imposed on society").

introduced into the stream of commerce,<sup>85</sup> that this defect was attributable to the defendant,<sup>86</sup> and that the defect caused the injury

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85. *See* Ziliak v. AstraZeneca LP, 324 F.3d 518, 521 (7th Cir. 2003) (holding that “[u]nder Indiana law, manufacturers are strictly liable [for] injuries incurred as a result of placing defective product in stream of commerce”); Cantrell v. Weber-Stephen Prods. Co., No. 01-0145, 2002 WL 1370671, at \*2 (4th Cir. June 26, 2002) (affirming the lower court finding that circumstantial evidence alone is usually not enough to establish defect); Long v. Cottrell, Inc., 265 F.3d 663, 669 (8th Cir. 2001) (declaring that Missouri law requires an entity to place a product in the stream of commerce before it can be held strictly liable); Hittle v. Scripto-Tokai Corp., 166 F. Supp. 2d 159, 168 (M.D. Pa. 2001) (asserting that “strict products liability is premised on the concept of enterprise liability for casting a defective product into the stream of commerce”); Civitello v. Burger King Corp., No. UWYCV990152575, 2002 WL 241491, at \*3 (Conn. Super. Ct. Feb. 5, 2002) (concerning a patron of a fast food restaurant who was injured by foodstuff placed in the stream of commerce); Edwards v. Campbell Taggart Baking Cos., 466 S.E.2d 911, 912 (Ga. Ct. App. 1996) (stating that in the absence of direct evidence of the unwholesomeness of food, recovery could be supported by circumstantial evidence which eliminates every other possibility that could have caused the plaintiff’s illness); Weyerhaeuser Co. v. Thermogas Co., 620 N.W.2d 819, 826 (Iowa 2000) (concluding that an assembler who incorporates a defective component part into the final product is liable by placing the product in the stream of commerce); Durden v. Hydro Flame Corp., 983 P.2d 943, 948 (Mont. 1999) (explaining that the policy behind strict liability is imposition of liability to one who places a defective product in the stream of commerce); Becker v. Tessitore, 812 A.2d 369, 380 (N.J. Super. Ct. App. Div. 2002) (describing that placing a product in the stream of commerce requires relinquishing possession); Crane Carrier Co. v. Bostrom Seating, Inc., 89 S.W.3d 153, 157 (Tex. App.—Corpus Christi 2002, pet. filed) (concluding that a “defendant is held liable based on proof that it placed the product into the stream of commerce”); Kemp v. Miller, 453 N.W.2d 872, 879 (Wis. 1990) (applying strict products liability to lessors on the premise that the risk of loss should be borne by those who place a product in the stream of commerce).

86. *See* Riley v. De’Longhi Corp., No. 99-2305, 2000 U.S. App. LEXIS 27082, at \*4 (4th Cir. Oct. 30, 2000) (addressing Maryland law that requires the defect to be attributable to the defendant); Gebhart v. Mentor Corp., 191 F.R.D. 180, 184 (D. Ariz. 2003) (commenting that the plaintiff must prove that the defect existed at the time the product left the defendant’s possession); Levine v. Sears Roebuck & Co., 200 F. Supp. 2d 180, 191 (E.D.N.Y. 2002) (holding that the “seller’s liability is generally limited to defects attributable [at] the time of sale”); Rodriguez v. Nat’l Detroit, Inc., No. 3D02-1674, 2003 WL 21658249, at \*2 (Fla. Dist. Ct. App. July 16, 2003) (proclaiming that a plaintiff must show that his or her injuries were the result of a defective product); Holloway v. Gen. Motors Corp., 271 N.W.2d 777, 782 (Mich. 1978) (commenting that where failure is in an inaccessible part of the product, it is reasonable to infer that a defect is attributable to the manufacturer); Ellis v. Chicago Bridge & Iron Co., 545 A.2d 906, 909 (Pa. Super. Ct. 1988) (agreeing that to recover under the theory of strict liability, the plaintiff’s injury must be attributed to the defect in the product); *see also* AM. L. PROD. LIAB. 3D § 3:12 (Timothy E. Travers et al. eds., 1987) (recognizing that the product must have contained the defect while the defendant was in possession of the product); PROSSER & KEETON ON THE LAW OF TORTS § 41, at 263 (W. Page Keeton ed., 1984) (stating that a plaintiff must establish some connection between the defendant’s conduct and the plaintiff’s injury).

of which he was complaining.<sup>87</sup> It is easy to see why plaintiffs were eager to pursue their causes of action under this new theory. Once a defect was established, the rest could almost always be proved by circumstantial evidence.<sup>88</sup> Much has been written on the issue of defect and the various formulas<sup>89</sup> for establishing whether the

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87. See *Yakovich v. Smart & Final, Inc.*, No. 02-16212, 2003 WL 21480285, at \*1 (9th Cir. June 20, 2003) (reiterating that an inadequate warning label was not the proximate cause of the plaintiff's injury); *Miller v. Uniroyal Tech. Corp.*, No. 00-4559, 2002 WL 1042112, at \*3 (6th Cir. May 22, 2002) (noting that the injury must be proximately caused by the defect); *Ritchie v. Glidden Co.*, 242 F.3d 713, 717 (7th Cir. 2001) (claiming that the accident pump supplied by the defendant was defective and resulted in her finger being amputated); *Tavacs v. Minimed Techs.*, No. 98-3774, 1999 U.S. Dist. Lexis 16113, at \*7 (E.D. La. Oct. 15, 1999) (restating that the defective product must be the cause of the plaintiff's injury); *Smock Materials Handling Co. v. Kerr*, 719 N.E.2d 396, 403 (Ind. Ct. App. 1999) (concluding that strong evidence that non-movable parts had in fact moved led to the conclusion that a defect existed); *Mercer v. Pittway Corp.*, 616 N.W.2d 602, 610 (Iowa 2000) (stating that the fire alarm should have sounded when flames reached it, and thus caused the injuries in question); *Evans v. Mellott Mfg., Inc.*, No. 98CA838, 2000 Ohio App. LEXIS 2824, at \*25 (Ohio Ct. App. June 15, 2000) (concluding that whether the design was defective is a question of fact); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998) (restating the jury's finding that the defect in the tire was a proximate cause of the plaintiff's injury); *Crane Carrier Co. v. Bostrom Seating, Inc.*, 89 S.W.3d 153, 157 (Tex. App.—Corpus Christi 2002, no pet.) (explaining that the defendant is liable upon proof that the defective product was the cause of the claimant's damages).

88. See *McCoy v. Whirlpool Corp.*, No. Civ. A. 02-2064-KHV, 2003 WL 21554950, at \*7 (D. Kan. July 8, 2003) (allowing circumstantial evidence to prove defect); *Cansler v. Mills*, 765 N.E.2d 698, 706 (Ind. Ct. App. 2003) (stating that circumstantial evidence is sufficient to establish a defect); *Kenkel v. Stanley Works*, 665 N.W.2d 490, 498 (Mich. Ct. App. 2003) (declaring that both direct and circumstantial evidence may be used to prove that a defect existed); *Nelson v. Wilkens Dodge, Inc.*, 256 N.W.2d 472, 476 (Minn. 1977) (holding that a defective condition can be proved by circumstantial evidence); *Daniels v. Indiana Mills & Mfg., Inc.*, 103 S.W.3d 302, 309 (Mo. Ct. App. 2003) (noting that the existence of a defect may be inferred from circumstantial evidence); *Speller ex rel. Miller v. Sears, Roebuck & Co.*, 790 N.E.2d 252, 254 (N.Y. 2003) (stating that "a plaintiff 'is not required to prove the specific defect' and that '[p]roof of necessary facts may be circumstantial'" (quoting *Codling v. Paglia*, 298 N.E.2d 622, 625 (N.Y. 1973))); *DeWitt v. Eveready Battery Co.*, 565 S.E.2d 140, 151 (N.C. 2002) (explaining that genuine issues of fact exist if the plaintiff raises sufficient circumstantial evidence of a defect); *State Farm Cas. v. Black & Decker, Inc.*, No. 79573, 2002 WL 31398693, at \*2 (Ohio Ct. App. Oct. 24, 2002) (stating that circumstantial evidence is sufficient to prove defect); *Beatty v. Ford Motor Co.*, 574 S.E.2d 803, 807 (W. Va. 2002) (allowing the plaintiff to prove the defect circumstantially).

89. See *Epler v. Jansport, Inc.*, No. Civ. A. 00-CV-154, 2001 WL 179862, at \*2 (E.D. Pa. Feb. 22, 2001) (providing guidance for a risk/utility analysis). According to the *Epler* court, Pennsylvania considers seven factors in determining whether a product is in a defective condition:

1. [U]tility to the user and the public . . . ;
2. [L]ikelihood that it will cause injury and the probable seriousness of the injury;

product is in a defective condition because of mis-design,<sup>90</sup> mis-assembly,<sup>91</sup> or mis-marketing,<sup>92</sup> and the subject need not be ex-

3. [A]vailability of a [s]afer substitute;
4. [M]anufacturer's ability to [cost effectively] eliminate unsafe character of the product;
5. [U]ser's ability to avoid danger by the exercise of care [and] use . . . ;
6. [U]ser's anticipated awareness of the [inherent] dangers . . . ;
7. [F]easibility [of manufacturer] to sprea[d] the loss by . . . price . . . or carrying liability insurance.

*Id.*: see also *Merrill v. Navegar, Inc.*, 28 P.3d 116, 125 (Cal. 2001) (describing a product as defective if "the product has failed to perform as safely as an ordinary consumer would expect . . . or if . . . the benefits of the challenged design do not outweigh the [inherent] risk[s] of [the] . . . design"); *McCabe v. Am. Honda Motor Co.*, 123 Cal. Rptr. 2d 303, 309-12 (Cal. Ct. App. 2002) (explaining the California approach to determining if a design defect exists). The *McCabe* court speaks of a bifurcated test to determine the existence of a design defect. *McCabe*, 123 Cal. Rptr. 2d at 309-12. A product may be deemed defectively designed if it fails the consumer expectation test. *Id.* at 309-10. In addition, even though the product meets the consumer's expectation, it may still be deemed defective if it fails the risk-benefit test with a finding that the product poses an "excessive preventable danger." *Id.* at 309-10; see also Charles E. Cantu, *Twenty Five Years of Strict Products Liability Law: The Transformation and Present Meaning of Section 402A*, 25 ST. MARY'S L.J. 327, 334-36 (1993) (listing several of the various tests courts have employed to determine if product is defective: (1) reasonable expectation test; (2) reasonably prudent manufacturer test; (3) whether a product is unreasonably dangerous and; (4) the risk/utility balancing test).

90. See *Thompson v. Goetzmann*, 337 F.3d 489, 493 (5th Cir. 2003) (alleging that a hip prosthetic is defective because of its design); *Brizendine v. Visador Co.*, 437 F.2d 822, 825 (9th Cir. 1970) (claiming that a pane of glass was defective because it did not fall within the acceptable thickness range); *Tracy v. Finn Equip. Co.*, 310 F.2d 436, 437 (6th Cir. 1962) (claiming a mulcher machine was defective because it lacked a device to stop the blade while the maintenance door was open); *McCoy*, 2003 WL 21554950, at \*7 (emphasizing expert reports which stated the dishwasher door switch was defective, and was the cause of the resulting fire); *Porter v. United States Wheel & Wire Co.*, 436 F. Supp. 1376, 1381-82 (N.D. Iowa 1977) (recognizing that a shopping cart lacked stability when it fell on a child, and that the child's actions were reasonably foreseeable); *Austin v. Otis Elevator Co.*, 336 So. 2d 914, 918 (La. Ct. App. 1976) (holding that the failure to insulate leads on an elevator rendered it defective); *Blevins v. Cushman Motors*, 551 S.W.2d 602, 608 (Mo. 1977) (presenting evidence that the stability of a golf cart could be improved by altering several components on the cart); *Fritz v. White Consol. Indus.*, 762 N.Y.S.2d 711, 713 (N.Y. App. Div. 2003) (alleging that a dehumidifier was defective because the device failed to provide secondary protection against circuit overload); see also *McLaughlin v. Michelin Tire Corp.*, 778 P.2d 59, 80 (Wyo. 1989) (stating that the question of whether a product has been defectively designed can only be determined by examining the surrounding circumstances at the time the product was sold).

91. See *King v. Damiron Corp.*, 113 F.3d 93, 95 (7th Cir. 1997) (noting that the Connecticut Products Liability Act includes injury caused by the manufacturer's assembly of the product); *Foutch v. Joy Mfg. Co.*, No. 94-5777, 1995 U.S. App. LEXIS 32115, at \*10-11 (6th Cir. Sept. 25, 1995) (noting that the Kentucky Products Liability Act includes the manufacturer's assembly of the product); *Ford Motor Co. v. Massey*, 855 S.W.2d 897, 902

plored here. What is important, however, is that if we are confronted with non-conforming subject matter, why should strict products liability be invoked if it is not certain that a *product* is involved?

Perhaps, when faced with this dilemma, it would be best to revert to a line of reasoning that has been utilized not only in cases based upon actionable negligence, but strict products liability as well. That would be the risk/benefit analysis<sup>93</sup> attributable to Judge

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(Ark. 1993) (explaining that the use of a particular material in a repair may render the product defective as a result of mismanufacture); *Lewis v. Am. Hoist & Derrick Co.*, 97 Cal. Rptr. 798, 804 (Cal. Ct. App. 1971) (explaining that the manufacturer's failure to comply with its own design with regards to assembly constitutes a manufacturing defect); *Dean v. Toyota Indus. Equip. Mfg., Inc.*, 540 S.E.2d 233, 235 (Ga. Ct. App. 2000) (finding that a party assembling the parts of a third party is subject to strict liability as a manufacturer); see also Charles E. Cantu, *Distinguishing the Concept of Strict Liability for Ultra-Hazardous Activities from Strict Products Liability Under Section 402A of the Restatement (Second) of Torts: Two Parallel Lines of Reasoning That Should Never Meet*, 35 AKRON L. REV. 31, 45 (2001) (arriving at the conclusion that a mis-manufactured product stands alone; the defect may be the result of a missing screw, missing safety device, or an un-secured bolt).

92. See *Ruiz-Guzman v. Amvac Chem. Corp.*, 7 P.3d 795, 807 (Wash. 2000) (Talmade, J., concurring in part and dissenting in part) (stating that "[m]ost courts agree that, for the liability system to be fair and efficient, the balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution"); see also Ralph D. Davis, *Different Treatment of Marketing and Design Defects in Pure Risk-Utility Balancing: Who's the Villain?*, 27 AM. BUS. L.J. 41, 50 (1989) (writing, "Advertising, especially advertising portraying product use, creates representational attributes, and does so by design. Even if the advertising is only for the purpose of product name awareness or image with no product portrayal, such advertising contributes to overall familiarity with, and hence confidence in, a particular product."); George W. Flynn & John J. Lavaruso, *The Existence of a Duty to Warn: A Question for the Court or the Jury?*, 27 WM. MITCHELL L. REV. 633, 639-43 (2000) (highlighting cases involving failure to warn as a basis for liability in products liability litigation); James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1515 (1992) (stating that "if the design or marketing of a product is defective, every unit in the product line is defective").

93. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (creating the Hand test for determining negligence). In *U.S. v. Carroll*, Judge Hand promulgated what would become the "Learned Hand Test" for determining whether duty exists for an individual. *Id.* In the case of a ship owner whose barge broke away from the dock where it was fastened, the ship owner's duty arises as a function of three variables: first, the probability that the ship will break away; second, the gravity of the resulting injury if the ship does break away; and third the burden of adequate precautions. *Id.* In dictum, Judge Hand expressed the ability of the variables to change with regard to the factual surroundings of each element. *Id.* With regard to the first element, if a storm is present, the probability of the ship breaking away increases; likewise, if the ship is moored in a crowded harbor with much movement, the gravity of the resulting injury will also increase. *Id.*



Learned Hand.<sup>94</sup> It has proved over the years to be helpful when attempting to determine whether the defendant was negligent,<sup>95</sup> as well as in strict products liability cases where we are attempting to prove that the product at issue has been mis-designed<sup>96</sup> or mis-marketed.<sup>97</sup>

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Judge Hand also recognized that the ship must not be a prison for the ship owner; the burden of reducing the harm must be weighed against the probability of loss and the gravity of injury. *Id.* Thus according to Judge Hand's test, in a crowded harbor, in the presence of a storm, a ship owner on board attempting to secure the ship to prevent damage may not be liable, whereas the same ship owner who is absent for twenty-one hours during the storm and who offers no precautionary measures, may be liable. *Id.*

94. See generally GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994) (describing the life of Learned Hand). Billings Learned Hand was born on January 27, 1872. *Id.* at 3. Hand, a Harvard graduate, was sworn in as a federal district court judge in 1909. *Id.* at 133. He was then later sworn in as a judge for the Second Circuit on December 29, 1924. *Id.* at 276. After serving as a Senior Judge and Chief Judge, Hand retired in 1951. *Id.* at 639. Hand died August 18, 1961. *Id.* at 679.

95. See *Galarnyk v. Hostmark Mgmt., Inc.*, 2003 WL 137565, at \*2 (7th Cir. Jan. 16, 2003) (stating that the defendant's precautions were adequate based on the Hand formula); *Bhd. Shipping Co. v. St. Paul Fire & Marine Ins. Co.*, 985 F.2d 323, 327 (7th Cir. 1993) (applying the Hand formula to determine if the city port was negligent in damage to the plaintiff's vessel); *Merrill v. Navegar, Inc.*, 28 P.3d 116, 125 (Cal. 2001) (reciting that an action based on negligence in the design of a product involves balancing the likelihood of harm expected from a given design along with the gravity of harm if an accident occurs, against the burden of adopting necessary precautions, which would be required to avoid the harm); *Pinsonneault v. Merchs. & Farmers Bank & Trust Co.*, 738 So. 2d 172, 187 (La. Ct. App. 1999) (noting that "[i]f the product of the likelihood of injury multiplied times the seriousness of the injury exceeds the burden of the precautions, the risk is unreasonable and the failure to take precautions or sacrifice the interest is negligence"); *Mickle v. Blackmon*, 166 S.E.2d 173, 192 (S.C. 1969) (stating that the duty of care was to take precautions in light of known risks, balancing the likelihood of harm and gravity of potential harm); *Bodin v. City of Stanwood*, 927 P.2d 240, 251 (Wash. 1996) (holding that a party may not be found liable in negligence unless the burden of adequate precautions is outweighed by the gravity of the resulting injury multiplied by the probability of the injury).

96. See *Merrill v. Navegar, Inc.*, 28 P.3d 116, 125 (Cal. 2001) (stating that whether a product has been mis-designed involves balancing the likelihood of harm from injurious design and the gravity of harm, against the burden of the precaution which would prevent harm); *Goodlow v. City of Alexandria*, 407 So. 2d 1305, 1308 (La. Ct. App. 1981) (holding that probability and magnitude of the risk, balanced against the utility of the alleged defective product, determines whether risk is unreasonable); *Sanders v. W. Auto Supply Co.*, 183 S.E.2d 321, 324 (S.C. 1971) (applying risk/utility balancing test to determine whether the design was defective for lack of a blade guard on a lawnmower); *Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 258 (Tex. 1999) (explaining the use of risk-utility analysis in determining whether a defective product is unreasonably dangerous).

97. See *Shell Oil Co. v. Gutierrez*, 581 P.2d 271, 278 (Ariz. Ct. App. 1978) (indicating that whether a product is unreasonably dangerous because of failure to warn turns on foreseeability, seriousness, and cost of prevention); see also Charles E. Cantu, *Distinguishing the Concept of Strict Liability for Ultra-Hazardous Activities from Strict Products Liability Under Section 402A of the Restatement (Second) of Torts: Two Parallel Lines of*

In the area of actionable negligence, the formula is expressed as  $(PL)(G) > B = N$ .<sup>98</sup> In other words, we take the probability of loss (PL), and multiply this by the gravity of foreseeable harm (G). If we compare this to the burden (B) of reducing the risk, or at best, eliminating it, and it turns out to be less, then the defendant is deemed negligent (N).<sup>99</sup> On the other hand, if the burden is greater than the probability of loss times the gravity of such harm,  $(PL)(G) < B \neq N$ , the defendant is not liable.<sup>100</sup> The same formula has been used in strict products liability in the areas of design<sup>101</sup> and marketing.<sup>102</sup> In this instance, however, we take the probability of loss (PL), and multiply this by the gravity of the foreseeable harm (G). If this is more than the burden of reducing the

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*Reasoning That Should Never Meet*, 35 AKRON L. REV. 31, 45, 52-53 (2001) (stating that at first glance, under a risk-balancing test approach, the burden of placing an extra warning on a label would always be outweighed by the probability and magnitude of harm; however, a point of diminishing return precludes warnings for all possible dangers).

98. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

99. *Id.*

100. *Id.*

101. *See Jarvis v. Ford Motor Co.*, 283 F.3d 33, 44 (2d Cir. 2002) (stating that reasonable care in design is determined by balancing the gravity and likelihood of harm against the precautions of reducing harm (citing *Micallef v. Miehle Co.*, 348 N.E.2d 571, 577-78 (N.Y. 1976))); *Merrill v. Navegar, Inc.*, 28 P.3d 116, 125 (Cal. 2001) (stating that whether a product has been mis-designed involves balancing the likelihood of harm from injurious design and the gravity of harm if it occurs, against the burden of preventing the harm); *Goodlow v. Alexandria*, 407 So. 2d 1305, 1308 (La. Ct. App. 1981) (reasoning that probability and magnitude of risk balanced against the utility of the alleged defective product determines whether the risk is unreasonable); *Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 258 (Tex. 1999) (explaining the use of risk-utility analysis in determining whether a defective product is unreasonably dangerous).

102. *See Ruiz-Guzman v. Amvac Chem. Corp.*, 7 P.3d 795, 807 (Wash. 2000) (noting that "[m]ost courts agree that, for the liability system to be fair and efficient, the balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution"); *see also* Ralph D. Davis, *Different Treatment of Marketing and Design Defects in Pure Risk-Utility Balancing: Who's the Villain?*, 27 AM. BUS. L.J. 41, 50 (1989) (writing, "Advertising, especially advertising portraying product use, creates representational attributes, and does so by design. Even if the advertising is only for the purpose of product name awareness or image with no product portrayal, such advertising contributes to overall familiarity with, and hence confidence in, a particular product."); James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1515 (1992) (explaining that mis-marketing renders the entire product line defective); *cf.* *First Nat'l Bank v. Nor-Am Agric. Prods., Inc.*, 537 P.2d 682, 691 (N.M. Ct. App. 1975) (commenting that a general warning is insufficient; warnings must adequately indicate the scope of the danger).

risk through redesigning the product or issuing additional warnings or instructions, then the product is deemed to be defective (D).

This analysis, which has proved to be so useful and effective in these areas, could also be utilized when attempting to determine whether strict products liability should be applied. We would again take the probability of loss (PL) resulting from the use of the subject matter and multiply this by the gravity (G) of foreseeable harm. Obviously, the magnitude of the foreseeable harm is the most important issue to be considered.<sup>103</sup> One need only consider the comparison of a scenario involving a defective baby pig used for educational dissection purposes<sup>104</sup> with slaughtered hogs intended for mass consumption. The pig intended for dissection would result in some economic loss, while the hogs intended for consumption would inflict serious harm to a multitude of individuals. Liability should be imposed in both cases, but should strict products liability apply? Stated differently: should the defendant in this instance be held responsible if due care was employed?

An argument could be made for either side, but perhaps the more logical and equitable position would be to impose strict products liability in cases wherein it is not certain a *product* is at issue, but only in those instances where the foreseeable loss involves great harm. If we were to restate the risk benefit analysis to apply to this particular scenario, it would be: probability of loss (PL) times the gravity (G) of harm balanced against the burden (B) of reducing or eliminating such harm would result in invoking strict products liability only when the burden was less than the sum of the preceding factors. Or stated conversely, strict products liability is not applicable when there is no risk of great harm.<sup>105</sup> This position would save manufacturers or others engaged in the process of placing goods into the stream of commerce from the ramifications of strict liability when an injured plaintiff brought a superfluous

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103. See *Hohlenkamp v. Rheem Mfg. Co.*, 601 P.2d 298, 301 (Ariz. Ct. App. 1979) (reasoning that “[t]he greater the danger caused by the defect the greater the restraint upon the court to foreclose adjudication of culpability”); *Hunt v. City Stores, Inc.*, 387 So. 2d 585, 588 (La. 1980) (noting that “[i]n both negligence and strict liability cases, the probability and magnitude of the risk are to be balanced against the utility of the thing”).

104. See *Anderson v. Farmers Hybrid Co.*, 408 N.E.2d 1194, 1199-1200 (Ill. App. Ct. 1980) (addressing a products liability cause of action where the product at issue was a pig).

105. Cf. *supra* notes 6-12 (citing examples of cases and statutes of where strict products liability has been applied).

claim,<sup>106</sup> or one wherein there is no great resulting injury.<sup>107</sup> At the same time, it would not isolate these same individuals from liability if it was established that they failed to exercise ordinary care in a situation where a reasonable and prudent person would do so,<sup>108</sup> or the warranty provisions of the Uniform Commercial Code were held to apply.<sup>109</sup>

The time has come to limit an individual's liability.<sup>110</sup> We can no longer continue to impose strict products liability upon a seller in

106. *Tran v. Kemper Ins. Cos.*, No. 01-6140, 2003 WL 245337, at \*1 (6th Cir. Jan. 31, 2003) (concluding that the plaintiffs failed to consume any of the food products they alleged to be defective).

107. *See, e.g., LeBeau v. Dimig*, 446 N.W.2d 800, 801 (Iowa 1989) (explaining that the plaintiff suffered injuries which required less than \$200 worth of medical expenses); *City of Cincinnati v. Barretta U.S.A. Corp.*, 2000 Ohio App. LEXIS 3601, at \*8-9 (Ohio Ct. App. Aug. 11, 2000) (stating that the plaintiff city suffered no physical injury or economic loss); *see also* William K. Jones, *Product Defects Causing Commercial Loss: The Ascendancy of Contract Over Tort*, 44 U. MIAMI L. REV. 731, 799 (1990) (citing cases which denied recovery under strict liability absent an "accident-like injury").

108. *See McGonigal v. Gearhart Indus.*, 788 F.2d 321, 328 (5th Cir. 1986) (affirming the dismissal of the strict liability claim but reversing the directed verdict on the negligence claim); *Sumitomo Bank v. Taurus Developers, Inc.*, 229 Cal. Rptr. 719, 720 (Cal. Ct. App. 1986) (affirming the dismissal of the strict liability claim but remanding on the negligence claim); *Young v. Key Pharms.*, 922 P.2d 59, 60 (Wash. 1996) (affirming the dismissal of the strict liability claim and reinstating the jury verdict on the negligence claim); *Carlson v. Traylor Equip. & Supply, Inc.*, 600 N.W.2d 54, 54 (Wis. App. Ct. 1999) (affirming the trial court's decision to dismiss the strict liability claim and allow plaintiff to proceed under a negligence theory).

109. *See Henry Heide, Inc. v. WRH Prods. Co.*, 766 F.2d 105, 112-13 (3d Cir. 1985) (dismissing the plaintiff's strict liability claim but allowing the breach of implied warranty claim to proceed); *Mathieson v. Gen. Motors Corp.*, 529 So. 2d 761, 762 (Fla. Dist. Ct. App. 1988) (finding that dismissing the strict liability claim was proper, while dismissal of the breach of warranty claim was improper); *Wood v. Parke Davis & Co.*, 374 N.E.2d 683, 689 (Ill. App. Ct. 1978) (stating that the plaintiff failed to allege the essential elements of failure to warn or the elements of an unreasonably dangerous product, but could proceed under breach of implied warranty); *Richards v. Midland Brick Sales Co.*, 551 N.W.2d 649, 651-52 (Iowa Ct. App. 1996) (dismissing the plaintiff's strict liability case but allowing the breach of warranty claim); *Lower Lake Dock Co. v. Messenger Bearing Corp.*, 577 A.2d 631, 636 (Pa. Super. Ct. 1990) (dismissing the strict liability claim and granting the plaintiff summary judgment on breach of warranty); *Hofstee v. Dow*, 36 P.3d 1073, 1078 (Wash. App. 2001) (dismissing the recovery theory based on strict liability and negligence because only economic injury occurred, but allowing the warranty claim).

110. *See* Richard C. Ausness, *An Insurance-Based Compensation System for Product-Related Injuries*, 58 U. PITT. L. REV. 669, 672 (1997) (referring to the belief that the "steady expansion of liability has now reached the point where the entire system of products liability is in danger of collapsing under the weight of excessive producer liability"); Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193, 2222 (1989) (criticizing the explosion and growth of judicial regulation of product liability law); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J.

all situations. Strict products liability is a friend to consumers, but it should not also bring about the downfall of manufacturers who are not in a position to pass the cost of liability on to their customers<sup>111</sup> or to insure themselves against this type of loss.<sup>112</sup> The compromise offered is an equitable solution to this conundrum.

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1521, 1587 (1987) (discussing the insurance crisis and its effect on product and service markets); William E. Westerbeke, *The Sources of Controversy in the New Restatement of Products Liability: Strict Liability Versus Products Liability*, 8 KAN J.L. & PUB. POL'Y 1, 6 (1998) (stating that Section 402A was originally intended to deal with traditional recovery obstacles, but has become "an all-purpose and all-encompassing cause of action to deal with the whole field of products liability"). Professor Priest states that:

[many] state legislatures have enacted some form of tort reform legislation [which may] . . . (1) [place] monetary caps on non-economic damages, (2) [place] caps or other limitations on punitive damages, (3) [abrogate] joint and several liability. (4) [eliminate] the collateral source rule, and (5) [make] amendments to substantive liability standards for . . . municipal operations, dramshops, or non-profit organizations.

George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1587-88 (1987).

111. See *Ranalli v. Edro Motel Corp.*, 690 A.2d 137, 141 (N.J. Super. Ct. App. Div. 1997) (stating that a motel providing kitchen utensils for use in the kitchenette cannot pass the cost along the chain of commerce and will be punished, although innocent, if strict liability is applied); Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 596 (1980) (explaining that "[the] manufacturer can spread the risk through insurance and price adjustments, whereas the injured individual might suffer a crushing financial blow underwriting the loss himself"). The ability to pass along the cost of injury is one of the underlying foundations of strict products liability. Justice Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.* clearly outlines the underlying policy considerations for what would become strict products liability. See generally *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring). In his opinion, one of the bricks in the strict liability foundation is the fact that retailers and manufacturers can distribute the cost of injury to the consumers, where the injured consumer does not have this option. *Id.* at 441.

112. See *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1195 (Alaska 1992) (stating that the threat of strict product liability litigation may impair drug manufacturers' ability to obtain liability insurance); see also George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1521 (1987) (stating that certain "products, such as vaccines, general aircraft, and sports equipment" were faced with drastic insurance premiums). Furthermore, other service-oriented businesses such as wine tasting, day care, and products such as intrauterine devices were refused coverage at any premium, and were therefore forced or withdrawn from the market. *Id.* Twenty-five percent of large corporations whose size and self-insurance capability render them vulnerable to changes in the commercial insurance market have reported removing products or services from the market because of the cost or lack of insurance coverage. *Id.* at 1522. To compensate for increased insurance premiums, aircraft manufacturers are substantially increasing the cost of each aircraft sold (\$80,000 increase in the cost of every Beech aircraft that is sold, and \$75,000 for each Piper aircraft sold). Cessna, another aircraft manufacturer, elected to discontinue particular lines of small aircraft because the insurance requirements per aircraft sold exceeded \$75,000 per airplane. *Id.* at 1566-67. "When market insurers refuse coverage, a

## V. CONCLUSION

Our discussion has established that products liability litigation continues its exciting path of exploration. As was stated in the Introduction: what was at first considered to be so simple has in some cases proved to be slightly more complex. "One who sells any *product* in a defective condition" will be held responsible under the umbrella of strict products liability law. How or when do we consider the subject matter before us as a product? In those cases wherein the issue is not clear, the courts have continued to avoid a primary dictionary meaning approach and instead have continued to employ a policy-based technique. Hopefully, a logical guideline has been proposed for this method. The courts in all probability will continue their stated course. But now, perhaps they will do so only when the probability of great loss is foreseeable.

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provider is left with [two] choice[s],"—discontinue the product, or continue as a self-insurer. *Id.* at 1578.

