

12-1-1983

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Recommended Citation

William T. Jebb II, *The EEC's Proposed Directive on Products Liability: A Call for Reappraisal in Light of the Model Uniform Product Liability Act*, 6 B.C. Int'l & Comp. L. Rev. 315 (1983), <http://lawdigitalcommons.bc.edu/iclr/vol6/iss1/10>

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RECENT DEVELOPMENT

The EEC's Proposed Directive on Products Liability: A Call for Reappraisal in Light of the Model Uniform Product Liability Act

I. INTRODUCTION

European products liability law¹ is following an emerging trend,² which makes both foreign and domestic manufacturers more strictly accountable for product-related injuries.³ This trend is spearheaded by the European Economic Community (EEC),⁴ which has recently proposed a comprehensive products liability law, Amendment of the Proposal for a Council Directive Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products (EEC Directive).⁵ This EEC

1. Products liability law is the name of the area of case law involving the liability of sellers of manufactured goods to third persons with whom they are not in privity who sustain injuries caused by products that are defective. W. PROSSER, *LAW OF TORTS* 641 (4th ed. 1971) [hereinafter cited as PROSSER]; D. NOEL & J. PHILLIPS, *PRODUCTS LIABILITY IN A NUTSHELL* (1981) [hereinafter cited as NOEL & PHILLIPS].

2. *Changes in Overseas Products Liability*, Wall St. J., Aug. 4, 1980, at 5, col. 1 [hereinafter cited as *Changes*]; INSURANCE COMPANY OF NORTH AMERICA, *INSURANCE DECISIONS: CHANGES IN OVERSEAS PRODUCT LIABILITY I* (1979) [hereinafter cited as INA]; REYMONT ASSOCIATES, *IMPACT OF PRODUCT LIABILITY ON INTERNATIONAL TRADE I* (1980) [hereinafter cited as REYMONT]; Bodine, *Industry May Face Product Suits Abroad*, Nat'l L.J., Mar. 16, 1981, at 3, col. 1 [hereinafter cited as Bodine].

3. INA, *supra* note 2, at 1; REYMONT, *supra* note 2, at 5; *Changes, supra* note 2, at 5, col. 1. Currently Belgium, France, Luxembourg and West Germany have laws which, in effect, hold manufacturers liable for product-related injuries without regard to fault in certain situations. For example, in West Germany pharmaceutical manufacturers are liable, regardless of fault, for non-negligible damage arising from death or personal injury caused by the use of their products. Gesetz zur Neuordnung des Arzneimittelrechtes, Aug. 4, 1976 BGBI I 2445 (W. Ger.). This approach contrasts directly with the negligence standard which is still applicable in most European and other industrialized nations. REYMONT, *supra* note 2, at 2-3; Hollenshead & Conway, *An Overview: International Products Liability*, 16 TRIAL 50, 52-53 (Nov. 1980) [hereinafter cited as Hollenshead & Conway]; Young, *Product Liability: Making Guinea Pigs of the British*, The Times (London), Nov. 4, 1980, at 19, cols. 3-7 [hereinafter cited as Young].

4. For a description of the European Economic Community, see note 28 *infra*.

5. 22 O.J. EUR. COMM. (No. C 271) 3 (1979). This document is an amendment of an earlier proposal concerning liability for defective products, 19 O.J. EUR. COMM. (No. C 241) 9 (1976). The EEC Directive has fifteen Articles focusing on various aspects of products liability law.

Directive would apply strict liability⁶ to all manufacturers for all product-related injuries.⁷ In taking this approach, the Directive would impose standards on manufacturers which are more stringent than those imposed by U.S. courts.⁸ Consequently, U.S. manufacturers that export products to Europe would face greater potential liability for injuries related to their products in Europe than they would at home.⁹

If the present trend continues, manufacturers selling products in Europe will soon be subjected to the most stringent products liability law in the world.¹⁰ This trend in Europe toward the adoption of a strict products liability standard is of major concern to U.S. corporations.¹¹ This concern stems from two major developments: (1) the dramatic rise in international trade in manufactured goods during the past decade,¹² which increases the possibility that defective products claims will involve goods manufactured in the United States;¹³ and (2) the liberal European laws granting European courts jurisdiction over foreign manufacturers in transnational products liability suits.¹⁴ Manufacturers are concerned that these two developments, coupled with the trend toward application of a strict products liability standard, will increase the likelihood that U.S. manufacturers will be primarily liable if product injury occurs in Europe.¹⁵

The current U.S. products liability situation differs greatly from the European situation. Originally, negligence was the sole theory of recovery in products liability actions.¹⁶ Over the past two decades, state courts have applied strict

6. Often described as "strict tort liability" because of its basis in tort and not contract, this theory of liability states that instead of proving negligence, the claimant must prove that (1) the product was in a defective condition when it left the seller's control and (2) the defect caused the claimant's injury while the product was being used as intended by the manufacturer. Orban, *Product Liability: A Comparative Legal Restatement — Foreign National Law and the EEC Directive*, 8 GA. J. INT'L & COMP. L. 342, 345 (1978) [hereinafter cited as Orban]; see also PROSSER, *supra* note 1, at 656-58; NOEL & PHILLIPS, *supra* note 1, at 31-38.

7. Orban, *supra* note 6, at 376-77; 22 O.J. EUR. COMM. (No. C 271) 4 (1979); *A Liability Law's Bite Has Business Quaking*, BUSINESS WEEK, Nov. 10, 1980, at 52, col. 2 [hereinafter cited as *Liability Law's Bite*]; COMMISSION OF EUROPEAN COMMUNITIES, BULLETIN OF THE EUROPEAN COMMUNITIES — PRODUCT LIABILITY SUPPLEMENT 11/76, at 13-14 [hereinafter cited as BULLETIN]. See also note 26 *infra*.

8. REYMONT, *supra* note 2, at 1.

9. Bodine, *supra* note 1, at 3, col. 1.

10. REYMONT, *supra* note 2, at 1.

11. See INA, *supra* note 2, at 7; *Changes*, *supra* note 2, at 5, cols. 3-4.

12. Lewis, *Nationalism Is Straining Market's Economy*, N.Y. Times, Mar. 23, 1982 at A8, cols. 1-6 [hereinafter cited as Lewis].

13. Hollenshead & Conway, *supra* note 3, at 50. The authors note that it is now the rule rather than the exception that a manufactured product will cross national boundaries. *Id.*

14. REYMONT, *supra* note 2, at 6; Bodine, *supra* note 2, at 3, col. 1. The study reveals that "foreign courts will have little difficulty asserting personal jurisdiction over appropriate defendants in a product liability case." REYMONT, *supra* note 2, at 6. For example, French courts can now assert jurisdiction over a U.S. company — once it contracts to sell manufactured goods to a French company. *Id.* at 14. Germany and Austria can similarly assert jurisdiction over a U.S. corporation if any corporate asset is located within their borders. Bodine, *supra* note 2, at 3, col. 1.

15. REYMONT, *supra* note 2, at 1.

16. The first American case to apply the tort of negligence to a defective product was *MacPherson v.*

liability, as enunciated in Section 402A¹⁷ of the Restatement (Second) of Torts,¹⁸ to cases involving defective products with increasing frequency.¹⁹ However, differences have arisen among states over when to apply strict liability and when to apply negligence in products liability cases.²⁰ Thus, today American products liability law is grounded in both strict liability and negligence.²¹

Influenced by the inconsistencies in state law among states as a result of the varying use of strict liability in products liability claims, the U.S. Department of Commerce drafted the Model Uniform Product Liability Act (UPLA).²² Like the

Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). For in-depth analysis of the case, see R. PECK, DECISION AT LAW 38-69 (1969). For a history of the development of products liability in the United States based on negligence, see, e.g., Freezer, *Tort Liability of Manufacturers and Vendors*, 10 MINN. L. REV. 1 (1925); Russell, *Manufacturers' Liability to the Ultimate Consumer*, 21 KY. L.J. 388 (1933); James, *Products Liability*, 34 TEX. L. REV. 192 (1955); Wilson, *Products Liability*, 43 CALIF. L. REV. 614, 809 (1955); Gillam, *Products Liability in a Nutshell*, 37 OR. L. REV. 119, 128-30 n. 39 and articles cited therein.

17. One commentator believes that U.S. courts rely almost exclusively on § 402A in all defective products cases. Corrigan, *Products Liability in the U.S.A. The Fairness Doctrine*, 9 INT'L BUS. LAW. 115 (Mar. 1981) [hereinafter cited as Corrigan].

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

Special Liability of Seller of Product for Physical Harm to User or Consumer.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

- (a) the seller has exercised all possible care in the preparation and sale of his product, and
- (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

19. Phillips, *Products Liability Synopsis*, 28 DRAKE L. REV. 318, 318 (1978-1979) [hereinafter cited as Phillips]. For a history of the gradual expansion of strict liability recovery against product sellers in the United States, see Noel, *Manufacturers of Products — The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) [hereinafter cited as Prosser, *Assault*]; Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Keeton, *Products Liability — Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855 (1963); Wade, *Strict Tort Liability for Manufacturers*, 19 SW. L.J. 5 (1965) [hereinafter cited as Wade, *Strict Tort*]; Corrigan, *supra* note 17, at 115.

20. Bodine, *Product Liability Bill Gaining Support*, Nat'l L.J., Sept. 22, 1980, at 6, col. 1 [hereinafter cited as Bodine, *Bill*]. While court opinions in nearly all states use strict liability language in products liability cases only ten states actually apply a strict liability standard consistently. Another fifteen to twenty states apply a "risk distribution" theory by which the product seller distributes the cost of all product related risks through liability insurance. The remaining states apply a mixture of negligence and other theories. *Id.* For a detailed view of state products liability law, see Gerber & Conway, *A Survey of State Products Liability Legislation*, 17 TRIAL 92-97 (Nov. 1981) [hereinafter cited as Gerber & Conway].

21. PROSSER, *supra* note 1, at 641; Phillips, *supra* note 19, at 320.

22. MODEL UNIFORM PRODUCT LIABILITY ACT, 44 Fed. Reg. 62,714 (1979) [hereinafter cited as UPLA]. See generally Rodman, *The Changing Philosophy of Products Liability and the Proposed Model Uniform Product Liability Act*, 19 AM. BUS. L.J. 267 (Fall 1981). The thirty-six page Act includes sixteen separate sections, each dealing with a particular aspect of products liability law. An analysis follows each section to provide additional insight into the process by which the drafters arrived at the recommendation. The Department of Commerce under the direction of Victor Schwartz drafted the UPLA for voluntary use by the States.

EEC Directive,²³ the UPLA seeks to provide a uniform approach to products liability law²⁴ by applying either negligence or strict liability to products liability claims, depending on whether the defect is a manufacturing defect, a design defect, a failure to adequately warn or a breach of express warranty.²⁵ This approach differs from that of the EEC Directive which imposes strict liability on product manufacturers under all circumstances.²⁶ Therefore, if the EEC adopts the Directive, it will be applying a fundamentally different approach to products liability law than the United States.

Because the EEC Directive could affect all manufacturers marketing goods in Western Europe, a careful appraisal of its contents is necessary. This Comment compares the manufacturer's standard of liability in the Directive with its counterpart in the UPLA. In the process of this comparison, this Comment reveals manufacturers' fears about the possible consequences of ratification of the Directive. Before making this comparison, the author outlines the history and current status of these two pieces of legislation. He then analyzes the basic responsibility of manufacturers and sellers to consumers under both the Directive and the UPLA. The author proceeds with this analysis by first discussing the general standard of liability applied by the Directive to manufacturers and sellers and then examining the component parts of that standard. This discussion includes an analysis of the definitions of the terms "producer," "article" and "defect." After the discussion of the Directive, the author describes the UPLA's approach to the basic standard of liability for manufacturers and sellers and examines the component parts of that standard, including the definitions of "manufacturer," "product" and "defect." Finally, the author recommends that the EEC adopt an approach based on the UPLA if the EEC wishes to provide a comprehensive products liability standard that protects the interests of both manufacturers and consumers.

II. BACKGROUND

A. EEC Proposed Directive

As part of a European movement to create uniformity in products liability law,²⁷ the Commission of the European Economic Community²⁸ began to exam-

23. 22 O.J. EUR. COMM. (No. C 271) 3 (1979).

[T]he approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his product is necessary, because the divergencies may distort competition in the common market; whereas rules on liability which vary in severity lead to differing costs for industry in the various Member States and in particular for producers in different Member States who are in competition with one another. . . .

Id.

24. UPLA, *supra* note 22, at 62,714 (Introduction). "The Model Law, if enacted by the states, would introduce uniformity and stability into the law of product liability." *Id.*

25. UPLA, *supra* note 22, at 62,722 (§ 104 Analysis).

26. 22 O.J. EUR. COMM. (No. C 271) 4 (1979). "[A]n equal and adequate protection of the consumer

can be achieved only through the introduction of liability irrespective of fault on the part of the producer of the article which was defective and caused the damage. . . ." *Id.*

27. Hanotiau, *The Council of Europe Convention on Product Liability*, 8 GA. J. INT'L & COMP. L. 325, 325 (1978) [hereinafter cited as Hanotiau]. The Hague Conference on Private International Law, established in 1893, initiated the European movement to coordinate the law of products liability on a transnational scale. This Conference, comprised of representatives from twenty-eight member states, deals with private international law issues. The Conference holds discussion sessions during which it adopts conventions on different topics. The member nations are Argentina, Australia, Belgium, Brazil, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Arab Republic, United Kingdom, United States (which joined in 1964) and Yugoslavia. Reese, *Further Comments on the Hague Convention on the Law Applicable to Products Liability*, 8 GA. J. INT'L & COMP. L. 311, 311 n.2 (1978) [hereinafter cited as Reese].

In 1967 the United States suggested to the Conference that it clarify the troublesome conflict of laws questions that frequently arise in transnational products liability suits. For examples of such problems, see generally Reese, *Choice of Law in Torts and Contracts and Directions for the Future*, 16 COL. J. OF TRANSNAT'L L. 1 (1977); J. CAVERS, *THE CHOICE OF LAW PROCESS* (1965); Kuhne, *Choice of Law in Products Liability*, 60 CALIF. L. REV. 1 (1972); Note, *Products Liability and the Choice of Law*, 78 HARV. L. REV. 1452 (1965); Nadelman, *International Developments in Choice of Law Governing Torts*, 19 AM. J. COMP. L. 1 (1971); Hanotiau, *American Conflicts Revolution and European Tort Choice-of-Law Thinking*, 30 AM. J. COMP. L. 73 (1982). A strong desire existed among member nations for an agreement because certainty, predictability and uniformity of result are of greater importance in products liability law than in many other areas of tort law. Moreover, a convention could best achieve these goals in the international arena. A Special Committee of the Conference proposed a convention in 1972, delineating choice of law rules to govern international products liability cases involving member nations. For a more detailed analysis of the convention, see Reese, *The Hague Convention on the Law Applicable to Products Liability*, 8 INT'L LAW. 606 (1972); Reese, *Products Liability and Choice of Law: The United States Proposal to The Hague Conference*, 25 VAND. L. REV. 29 (1972). The Conference later approved the Convention, Conférence de la Haye de Droit International Privé, actes et documents de la douzième session du 2 au 21 Octobre 1972, Tome III, Responsabilité du Fait des Produits, Acte final 246-50 (1972); English translation reprinted in 11 INT'L LEGAL MAT'LS 1283 (1972); Reese, *supra* note 27, at 319-24 (Appendix). It has recently entered into force after ratification by France, Norway and Yugoslavia.

In addition, the Council of Europe decided to study the product liability question in 1970. The Council was formed in 1949 to "work for greater European unity . . . and to uphold the principles of parliamentary democracy, the rule of law and human rights," Statute of Council of Europe, May 5, 1949. 87 U.N.T.S. (1951). The Council now has twenty members, including all non-Communist European countries. Beginning in 1972, a subcommittee appointed by the Committee on Legal Cooperation convened to prepare a draft convention of products liability. It completed the draft two years later, and after careful consideration, the Committee approved it. European Convention on Products Liability in regard to Personal Injury and Death, done January 27, 1977, 1977 Europ. T.S. No. 92; reprinted in 16 INT'L LEGAL MAT'LS 7 (1977). Generally, the Convention recognizes and legitimizes the expanding concept of strict liability for defective products which has evolved in the United States over the two past decades. After Austria, Belgium and France signed the Convention, now known as the Strasbourg Convention, the Council held the document in abeyance, pending the outcome of the EEC Directive on products liability. See generally Hanotiau, *supra* note 27; Fallon & Cousy, *Developpements recents de la responsabilité du fait des produits: les projets européens face au droit belge*, 1976 R. DR. INT. DR. COMP. 53; Note, *Draft Convention on Products Liability*, 23 AM. J. COMP. L. 729 (1975); Lorenz, *Some Comparative Aspects of European Unification of the Law of Products Liability*, 60 CORNELL L. REV. 1005 (1975); INA, *supra* note 2, at 4-5; REYMONT, *supra* note 2, at 16.

28. The European Economic Community consists of ten member nations: Belgium, Denmark, France, Germany, Greece, Italy, Ireland, Luxembourg, the Netherlands and the United Kingdom. Vinocur, *In Common Market at 25, Uncertainty Over Future*, N.Y. Times, Mar. 21, 1982, at A16, col. 4-5. [hereinafter cited as Vinocur]; Eder, *European Legislators move to Increase Authority*, N.Y. Times, Mar. 22, 1982, at A21, col. 3 [hereinafter cited as Eder]. For a general discussion of the historical development of the EEC, see D. COLLINS, *THE EUROPEAN COMMUNITIES* (1975); A. WALSH & J. PAXTON, *INTO EUROPE: THE STRUCTURE AND DEVELOPMENT OF THE COMMON MARKET* (1968); H. MASON, *THE EUROPEAN COAL AND STEEL COMMUNITY* (1955). The governing body of the EEC consists primarily of four institutions,

ine various products liability issues in 1972.²⁹ The EEC's objective was to prepare a document which would harmonize national approaches to products liability law and promote the free movement of goods while at the same time protecting consumers.³⁰ Four years later, in 1976, the EEC Commission first submitted a proposed directive to the Council of Ministers.³¹ After receiving opinions from the European Parliament³² and the Economic and Social Committee,³³ the

the European Parliament, the Council of Ministers, the Commission and the Court of Justice. E. NOEL, *WORKING TOGETHER: THE INSTITUTIONS OF THE EUROPEAN COMMUNITY* 3 (1974) [hereinafter cited as NOEL]. See generally A. ROBERTSON, *EUROPEAN INSTITUTIONS* (3d ed. 1973); C. SASSE, E. POULLET, D. COOMBES & G. DEPREZ, *DECISION MAKING IN THE EUROPEAN COMMUNITY* (1977).

The Council, the EEC's chief legislative body, consists of representatives from each government of the ten member states. *Id.* The EEC regards the Foreign Minister as each country's principal representative to the Council; however, various ministers, usually experts on the issue in discussion, attend the meetings. *Id.* The Commission, the main administrative body of the EEC, consists of fourteen members, selected by mutual agreement among the member nations. *Id.* at 5. Throughout their term of office, the commissioners must remain independent of their governments and of the Council. *Id.*

The Commission initiates the legislative process. *Id.* at 9. It proposes regulations, directives, decisions, recommendations and opinions for the Council's consideration. COMMON MKT. REP. (CCH) ¶ 4900 (1978). Regulations are of general application and are binding in every respect, having direct force of law in every member state. *Id.* Directives are binding on the member states with regard to achieving a result. *Id.* The national authorities have discretion as to the mode and means of achieving that result. *Id.* The Council may address these decisions either to a government or to an enterprise or private individual; they are binding in every respect on the party or parties named. *Id.* Recommendations and opinions are not binding. *Id.* Once a proposal has been introduced, a dialogue between the Council of Ministers and the Commission begins. NOEL, *supra* note 28, at 17. The ministers present their respective national viewpoints while the Commission focuses on the interest of the community as a whole. *Id.* Often a proposal must undergo several drafts before receiving the Council's approval. See *id.* at 18-19.

That the Council can only deliberate on the basis of the Commission's proposal greatly increases the Commission's leverage in the discussion. *Id.* at 18-19. The ministers in the Council, upon a unanimous vote, can alter the Commission's proposal in any manner they choose. *Id.* at 19. With only majority approval, the Council can solely accept the proposal in toto; they cannot alter it. *Id.* If less than a majority vote results, the Council has, in effect, failed to take action, and it must rework the proposal. *Id.* In essence, then, the Commission has the bargaining power and controls the dialogue with the Council. *Id.* See generally S. LIPSTEIN, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY* (1974).

29. Orban, *supra* note 6, at 375. Major reasons for this examination were the rise of consumerism and concern for independent and separate development in products liability law in almost every European country. *Id.*

30. Hollenshead & Conway, *supra* note 3, at 52.

31. Orban, *supra* note 6, at 375-76. See 19 O.J. EUR. COMM. (No. C 241) 9 (1976).

32. The European Parliament is composed of 434 members who are representatives of their peoples rather than their governments. Eder, *supra* note 28, at A21, col. 4; Vinocur, *supra* note 28, at A16, col. 5; NOEL, *supra* note 28, at 3. They are chosen directly by the citizens of the member states and are seated and act according to political rather than national origin. Eder, *supra* note 28, at A21, col. 4. The Parliament's functions are primarily advisory and supervisory. COMMON MKT. REP. (CCH) ¶ 4300 (1977). It fulfills this role by consulting with the Council and Commission on proposed actions. See NOEL, *supra* note 28, at 22. Often the Parliament submits questions to these bodies regarding regulations and proposals. *Id.* at 24. After receiving a reply, the Parliament often submits written opinions on these proposals to the two groups. *Id.* The Parliament's ultimate power to supervise the actions of the Council lies in the requirement that the Council consult it before enacting legislation. Eder, *supra* note 28, at A21, col. 5; NOEL, *supra* note 28, at 22. Until the Parliament submits an opinion, any draft approved by the Council lacks validity. *Id.* Its power over the Commission results from its ability to compel the Commission to resign as a body by passing a motion of censure. COMMON MKT. REP. (CCH) ¶ 4300 (1977).

33. The Economic and Social Committee, a permanent part of the EEC appointed by the Council,

Commission modified the initial proposal.³⁴ The Commission then submitted its amended proposal³⁵ to the Council on October 1, 1979.³⁶ The Commission chose to standardize products liability law through two approaches.³⁷ First, it created general obligations relative to all manufacturers and suppliers of defective products.³⁸ Second, it based these general obligations on a liability irrespective of fault theory in hope of facilitating recovery of damages for consumers.³⁹ The effect of these two approaches is to introduce strict liability to the EEC.⁴⁰ If the Directive is adopted, victims would no longer need to prove fault or negligence on the part of the producer contrary to existing law in many EEC countries.⁴¹

Although originally submitted to the Council in 1974, the Commission's proposed Directive continues to be debated by consumers and manufacturers.⁴²

consists of 156 representatives of various sectors of economic and social life (e.g., trade associations, unions, farmers). COMMON MKT. REP. (CCH) ¶ 4942.01 (1981); ¶ 4946.01 (1981); ¶ 4945 (1981). The Council or the Commissioner must consult the Committee whenever required by the law of the EEC. COMMON MKT. REP. (CCH) ¶ 4942.05 (1981). It is also free to submit opinions on its own initiative. NOEL, *supra* note 28, at 5. An opinion offered by the Committee is not binding on the institution requesting it. COMMON MKT. REP. (CCH) ¶ 4942.05 (1981).

34. *Defective Products: Progress Towards EEC Directive on Manufacturer's Liability, But Some Basic Questions Still Open*, 3205 EUROPE 13-14 (Sept. 10, 1981) [hereinafter cited as *Progress*].

35. 22 O.J. EUR. COMM. (No. C 271) 3 (1979).

36. *Progress*, *supra* note 34, at 13. The Commission did not follow all of the recommendations which it received from the Parliament. *Id.* For example, it retained the principle of manufacturer liability for risks of harm not foreseeable at the time of production ("development risks"). *Id.* On the other hand, it did follow Parliament's suggestion regarding the Directive's scope to exclude farm and artistic products from the definition of defective product. *Id.*

37. Orban, *supra* note 6, at 376-77.

38. *Id.*

39. *Id.* 22 O.J. EUR. COMM. (No. C 271) 4 (1979). Part of the introduction to the Directive declares:

[A]n equal and adequate protection of the consumer can be achieved only through the introduction of liability irrespective of fault on the part of the producer of the article which was defective and caused the damage; whereas any other type of liability imposes almost insurmountable difficulties of proof or does not cover the important causes of damage. *Id.*

40. *Liability Law's Bite*, *supra* note 7, at 52, col. 2.

41. *Id.* See generally Orban, *supra* note 6. For example, both the United Kingdom and Italy still place heavy emphasis on proof of actual negligence by the manufacturer. See, e.g., *Donoghue v. Stevenson*, 1932 A.C. 562 (Scot.) (creating a duty on the part of the manufacturer to act reasonably toward persons who may come into contact with or may be foreseeably injured by the defective goods); C.c. art. 2043 (Italy) (defining tort as "[a]ny intentional or negligent act causing wrongful damage to another [which] makes the person who committed the act liable to make good such damage" (*translated in* Orban, *supra* note 6, at 355)).

42. See *Products Liability: European Industry Still Firmly Opposed to Some Aspects of EEC's Directive on Product Liability*, 2840 EUROPE 15 (Feb. 2, 1980) [hereinafter cited as *European Industry*] for recent criticism of the Directive by the Union of Industries of the European Economic Community (UNCIE). The Federation of German Chambers of Commerce rejected the proposal as unacceptable to medium and small size business. Lukomski, *EC Product Liability Plan Hit*, J. of Com., Feb. 13, 1980, at 8, col. 7 [hereinafter cited as *Lukomski*]. Specifically, the federation criticizes the proposal for wholly ignoring the distribution as opposed to production function of retailers and importers by making them adhere to the same standards of liability as producers and suppliers of component parts. *Id.* It contends that such an approach would necessitate a significant increase in retail prices because many firms would have to take insurance against risks for which they have never before been held liable. *Id.* at cols. 7-8.

The European Centre of Public Enterprises (CEEP) has criticized the proposal's definition of fault

Much of this debate has focused on the proposal's no-fault liability approach which holds the manufacturer liable for all injuries resulting from a defect in the product.⁴³ The Directive imposes liability regardless of whether tests would have revealed the defect at the time of marketing.⁴⁴ As recently as May 1980, the European Parliament called on the Commission to completely withdraw its proposal because of the overly strict standards to which it holds manufacturers.⁴⁵ Although consumer organizations are generally pleased with the proposal,⁴⁶ they are nonetheless still actively lobbying the Commission to resist pressure from industry⁴⁷ and to strengthen the Directive's pro-consumer stance.⁴⁸ On the other hand, manufacturers, specifically drug producers and automakers, are solidly opposed to the Act's strict liability approach.⁴⁹ They assert that the no-fault approach will drastically increase the cost of insuring products.⁵⁰ Due to lack of accord among the European Parliament, manufacturers and consumers,

and its shifting of the burden of proof to the manufacturer once a consumer is injured. *Product Liability: Public Enterprises Take Their Turn at Criticizing the European Commission's Proposals*, 2852 EUROPE 14 (Feb. 20, 1980) [hereinafter cited as *Public Enterprises*]. CEEP believes that the effect of the Directive is to place a guarantee obligation on the manufacturer, entailing an almost automatic payment of damages. *Id.* Consequently, CEEP estimates that an application of such an obligation on manufacturers would mean an increase of some 20% in production costs. *Id.* The British House of Commons has already debated the Directive and introduced a special defense for development risks. This special defense would allow manufacturers to plead that everything possible was done to make the product safe and that only subsequent use and technology revealed previously hidden dangers. Young, *Product Liability: Making Guinea Pigs of the British*, *The Times* (London), Nov. 4, 1980, at 19, col. 1 [hereinafter cited as Young].

The European Bureau of Consumers' Unions (BEUC) is deeply concerned about various pressures from industry aimed at seriously limiting and destroying the consumer protection purpose of the EEC Directives. *Product Liability: Consumers Support Current Plans*, 2871 EUROPE 16 (Mar. 17-18, 1980) [hereinafter cited as *Consumers Support*]. The BEUC interprets the Commission's proposal as a test case for the priority given to consumer protection by the EEC. *Id.* The BEUC believes that if the Commission succumbs to the wishes of industry, the interests of consumers in the EEC will be adversely affected. *Id.* In response to industry's criticism of the Directive, the BEUC believes that equitably and logically the producer should be responsible for damage. *Id.* It contends that experience reveals the difficulty consumers have in proving fault on the part of the manufacturer. *Id.* Therefore, to ensure proper redress for injury or damage by swift, effective and inexpensive procedures, which is one of the basic tenets of the BEUC's program, is difficult. *Id.* The BEUC adds that the liability standard should not include development risks. *Id.* It argues that for the consumer alone to bear the risks of undiscoverable defects is not fair. *Id.* The BEUC argues for encouragement of industry to search for safer products through the imposition of liability for development risks. *Id.* Moreover, the BEUC contends that the inclusion of these risks into a standard of liability will have no significant effect on insurance costs. *Id.* Finally, it feels that the Directive should represent a minimum standard allowing member states to protect the consumer by imposing stricter standards if they so desire. *Id.*

43. *Id.*

44. See text accompanying note 64 *infra*.

45. Hollenshead & Conway, *supra* note 3, at 57; *Product Liability: The Parliament Asks EEC Commission to Withdraw Its Proposal*, 2914 EUROPE 11 (May 24, 1980).

46. *Progress*, *supra* note 34, at 13. The Directive also treats other areas of consumer protection in products liability law. See generally *id.*

47. See note 42 *supra*.

48. *Progress*, *supra* note 34, at 13.

49. *Liability Law's Bite*, *supra* note 7, at 52, cols. 2-3.

50. *Id.*

the status of the proposed Directive remains uncertain.⁵¹ The importance of the Proposed Directive continues, however, due to the likelihood that the EEC will adopt a similar, if not identical, proposal soon.⁵²

B. UPLA

Throughout American legal history, the federal government has generally not been involved in the specific details of the U.S. tort system.⁵³ Instead, the state courts are the creators of U.S. tort law.⁵⁴ In the mid-1970's, however, legislators, manufacturers and legal commentators began to fear that products liability insurance would become either unaffordable or completely unavailable unless lawmakers drastically revised the current system.⁵⁵ This fear was the result of rapidly escalating products liability insurance rates and manifest inequities which occurred when different states applied different liability standards to national manufacturers.⁵⁶ Some manufacturers feared that the inability to obtain insur-

51. The Commission is presently reworking the Directive. *Progress, supra* note 34, at 13. For more information on the procedure by which a proposal proceeds from the Commission to the Council, see note 28 *supra*. Since January, 1980, governmental experts from all EEC member nations have been studying the amended draft. *Progress, supra* note 34, at 13. Since that time they have held eleven meetings in order to draw up a revised text for the Commission and Council; this text is, of course, still subject to amendment. *Id.* Recently, this group of experts has asked the Commission and Council for guidelines to resolve disputed aspects of the Directive. *Id.* Specifically they wish to learn member nations' views on: (1) development risks — whether the manufacturer of a defective product should be liable even if the state of scientific and technological knowledge at the time the product is put into circulation would not have enabled him to detect the existence of the defect; (2) eventual liability ceiling — whether total manufacturer liability should be limited by a ceiling; (3) material injury — whether the manufacturer should be liable only for bodily injury or also for material injury; (4) maximum or minimum harmonization — whether the Directive should provide for strict harmonization of national laws or whether it should create a minimum beyond which the EEC members would be free to establish tougher additional standards. *Id.*

52. Despite the seemingly unresolvable conflict of interests between consumers and manufacturers, Rudy Portario, vice-president in International and European Affairs for the Johnson & Higgins Co., insists that the debates are over and that the European Commission proposal is virtually assured of ratification by the EEC, probably by 1983. *Europe's Product Liability Climate Changing*, J. of Com., Oct. 5, 1981, at 2C, cols. 5-6 [hereinafter cited as *Europe's Climate*]. British industry and consumers agree that the EEC will adopt the Directive by the end of 1983. Churchill, *EEC Liability Proposals Debated*, Financial Times, Nov. 4, 1980, at 10, col. 1.

53. Schwartz, *Administration Initiatives to Address the Product Liability Remedies that Meet the Problems Causes*, 16 FORUM 711, 711 [hereinafter cited as Schwartz, *Initiatives*]. While from time to time the federal government has conducted studies concerning specific aspects of our tort system, the government's involvement in tort law has been rare and has never produced enacted legislation. *Id.*

54. *Id.*

55. Davis, *Product Liability Under Section 402A of Restatement (Second) of Torts & Model Uniform Product Liability Act*, 16 WAKE FOREST L. REV. 513, 514 (1980) [hereinafter cited as Davis]; Schwartz, *Introduction to Student Forum on Model Uniform Product Liability Act*, 49 U. CIN. L. REV. 113, 114 (1980); Schwartz, *The Federal Government and the Product Liability Problem: From Task Force Investigation to Decision by the Administration*, 47 U. CIN. L. REV. 573, 574 (1978); Schwartz, *The Uniform Product Liability Act — A Brief Overview*, 33 VAND. L. REV. 579, 579 (1980) [hereinafter cited as Schwartz, *Overview*]. Professor Schwartz was the principal author of the UPLA. See note 22 *supra*.

56. Davis, *supra* note 55, at 539.

ance coverage would force companies out of business.⁵⁷ In addition, they argued that this inability would cause manufacturers to hesitate to produce products which, despite their potential social utility, possessed more than the normally anticipated amount of risk.⁵⁸ Finally, they argued that without adequate insurance manufacturers would be unable to compensate injured parties who were granted judgments in products liability suits.⁵⁹

In 1976, in response to this unstable products liability insurance situation, the White House established the Federal Interagency Task Force on Product Liability chaired by the Commerce Department.⁶⁰ After extensively studying the products liability insurance problem, the Task Force revealed through a comprehensive Final Report⁶¹ the unprecedented increase in products liability insurance rates since 1976.⁶² This Final Report chronicled how manufacturers' concerns over potential products liability claims had discouraged the introduction of new products.⁶³ The Final Report concluded that although insurance industry sources had grossly exaggerated the number of products liability claims,⁶⁴ inconsistencies in the application of products liability standards con-

57. Schwartz, *Initiatives*, *supra* note 53, at 712.

58. Schwartz, *Overview*, *supra* note 55, at 579.

59. *Id.*

60. Schwartz, *Initiatives*, *supra* note 53, at 712. Originally President Ford's Economic Policy Board (EPB) instructed the Task Force to prepare a report on or before December 15, 1976. Gingerich, *The Interagency Task Force, Blueprint For Reforming Product Liability Tort Law in the United States*, 8 GA. J. INT'L & COMP. L. 279, 279 n. 1 (1978) [hereinafter cited as Gingerich]. The Task Force commissioned an insurance, an industry and a legal contractor to gather the basic data. *Id.* The EPB asked the Task Force to prepare an initial report indicating the scope and dimension of the potential product liability insurance crisis and suggest solutions. *Id.* The Task Force filed a preliminary report on December 15, 1976. *Id.* The EPB then issued a modified version of this report on January 4, 1977. INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, BRIEFING REPORT (1977).

On the basis of this report, the EPB mandated the publication of the Task Force's contractor studies. See THE RESEARCH GROUP, INC., PRODUCT LIABILITY: LEGAL STUDY, Accession No. PB 263 601 (1977) (7 vols.) [hereinafter cited as LEGAL STUDY]; GORDON ASSOCIATES, INC., PRODUCT LIABILITY: INDUSTRY STUDY, Accession No. PB 265 542 (1977) (7 vols.); and MCKINSEY, INC., PRODUCT LIABILITY: INSURANCE STUDY, Accession No. PB 263 600 (1977). For a condensed version of all three contractor studies, see THE INTERAGENCY TASK FORCE ON PRODUCT LIABILITY: FINAL REPORT, Accession No. PB 272 220 (1977) [hereinafter cited as FINAL REPORT]; Gingerich, *supra* note 60, at 279 n. 1.

61. FINAL REPORT, *supra* note 60. One commentator has called the Final Report "the most comprehensive research document currently available on the product liability situation in the United States." Gingerich, *supra* note 60, at 281.

62. Schwartz, *Initiatives*, *supra* note 55, at 712.

63. *Id.* While the Final Report noted that this problem had not directly caused large numbers of business closings, enough circumstantial evidence existed to intimate that skyrocketing insurance rates had severely affected many smaller business producing higher risk products. Schwartz, *Overview*, *supra* note 55, at 580. In both its Briefing Report and Final Report, the Task Force refused to declare the present product liability situation a "crisis." It did recognize, however, that "product liability problems present a potentially disruptive effect on the economy. More importantly, the problem is not amenable to simple remedies. It is a subtle problem in which the interests of consumers, workers, manufacturers, distributors, retailers and insurers have to be balanced." FINAL REPORT, *supra* note 60, at I-2.

64. For example, the Insurance Information Institute reported that there were approximately a

tinued to adversely affect the insurance system.⁶⁵

In 1978, less than one year after the Task Force issued its Final Report, the Department of Commerce produced an options paper⁶⁶ which recommended that the government prepare a uniform products liability law.⁶⁷ In response to the support from manufacturers and consumers which this report generated, the Commerce Department issued the Draft Uniform Product Liability Law.⁶⁸ Public comment to the Draft was greater than anticipated.⁶⁹ In 1979, after analyzing these responses,⁷⁰ the Commerce Department formulated an amended version of the Draft, the Model Uniform Product Liability Act.⁷¹ Since

million claims filed in 1976. After more thorough investigation, insurance industry sources reduced the estimate to between 60,000 and 70,000 claims. *Product Liability Insurance Hearings (Part 2) Before the House Subcomm. on Capital Investment and Business Opportunities of the House Comm. on Small Business*, 95th Cong., 1st Sess. 547 (1977) (statement of Mavis A. Walters, Vice President, Insurance Services Office). The Task Force also discovered that in the overwhelming majority of cases, insurance companies did not rely on data to support their premium increases in the 1974-1976 period; rather, circumstantial evidence suggested that some insurers engaged in "panic pricing." *Id.* at 552 (statement of Phillip H. Dutter, Director of McKinsey & Co.).

65. FINAL REPORT, *supra* note 60, at 47, I-27.

66. Options Paper on Product Liability and Accident Compensation Issues, 43 Fed. Reg. 14,612 (1978). Released on April 6, 1978 for public comment, this Options Paper had been sent to the White House on February 24, 1978, with suggestions for the Administration on how it might respond to the product liability issue. It contained both long and short term suggestions for rectifying problems such as ambiguous insurer ratemaking procedures and unsafe manufacturing practices. For a discussion of these long and short term recommendations, see Gingerich, *supra* note 60, at 280-81 n. 4.

67. UPLA, *supra* note 22, at 62,714 (Introduction). As consumer, manufacturer, and insurer response ensued, the Department of Commerce realized the large degree of support for such an idea, *id.* The Department of Commerce published a report containing responses to the Options Paper. Options Paper on Product Liability and Accident Compensation Issues — Synthesis of Public Comment, 43 Fed. Reg. 40,438 (1978).

68. Draft Uniform Product Liability Law, 44 Fed. Reg. 2,996 (1979) [hereinafter cited as Draft].

69. The Department of Commerce received approximately 240 responses totaling 1500 pages. UPLA, *supra* note 22, at 62,714 (Introduction). The Department of Commerce took special steps to bring the Draft to the attention of consumers. *Id.* Working with its Director of Consumer Affairs and the Office of the Special Assistant to the President for Consumer Affairs, the Commerce Department conducted consumer discussions in Atlanta, Detroit, Los Angeles and Washington, D.C. *Id.* In addition to these forums, the drafters met with representatives of manufacturer and consumer groups who expressed interest in the proposal. *Id.* The Draft was also reviewed at hearings before the Subcommittee on Oversight and Minority Enterprises of the House Committee on Small Business and before the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce. *Id.* Interested government agencies also provided comments on the Draft. *Id.*

70. Schwartz, *Overview*, *supra* note 55, at 714. Because the Act would serve as a model for states, the Commerce Department gave careful attention to existing state, congressional and private studies of product liability proposals. *Id.* In particular, the drafters paid close attention to the Product Liability Closed Claim Survey conducted by the Insurance Services Office in 1966-77. *Id.* This document, INSURANCE SERVICES OFFICE, PRODUCT LIABILITY CLOSED CLAIMS SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS (1977) [hereinafter cited as CLOSED CLAIMS SURVEY], provides a survey of over 23,000 product liability claims. The Department also reviewed all major insurance proposals introduced in state legislatures in the preceding two years. See generally UPLA, App. A, 44 Fed. Reg. at 62,750 (1979).

71. UPLA, *supra* note 22, at 62,714 (Introduction). Along with the public comment and the Closed Claims Survey, the Act is based on the work of the Federal Interagency Task Force and its contractor studies. The Department of Commerce also conducted a thorough review of earlier case law and law review literature published since the time of the initial Task Force reports. *Id.*

that time Colorado,⁷² Connecticut,⁷³ Georgia,⁷⁴ Idaho,⁷⁵ Kansas,⁷⁶ North Carolina,⁷⁷ Rhode Island⁷⁸ and Washington⁷⁹ have adopted various portions of the UPLA. In addition, both the U.S. Senate⁸⁰ and the House of Representatives⁸¹ are considering national products liability legislation similar to the UPLA.⁸² Thus, the UPLA has already inspired a movement in state legislatures and the federal government to unify products liability law.⁸³ Consistent with the original goals of the Interagency Task Force, the UPLA focuses on ways to introduce uniformity and stability into products liability law. Specifically, the drafters sought to achieve six basic goals:

- (1) to insure that persons injured by unreasonably unsafe products receive reasonable compensation for their injuries; (2) to insure the availability of affordable product liability insurance with adequate coverage for producers that engage in reasonably safe manufactur-

72. COL. REV. STAT. § 13-21-401 (1973 Supp.) (Definitions).

73. CONN. GEN. STAT. § 52-57m (Rev. 1958) (Definitions).

74. GA. CODE ANN. § 105 (Rev. 1933) (Statute of Repose).

75. IDAHO CODE § 6-1402-03 (1981 Supp.) (Definitions and length of Time Product Sellers Subject to Liability).

76. 2 PROD. LIAB. REP. (CCH) ¶ 91,711-714 (1982) (Definitions).

77. N.C. GEN. STAT. § 99B-1 (1979) (Definitions).

78. R.I. GEN. LAWS § 9-1-13 (1956) (Statute of Repose).

79. 2 PROD. LIAB. REP. (CCH) ¶ 94, 910-015 (1982) (Definitions).

80. Young, *Shumway Seeks Reform of Product Liability*, J. of Com., Mar. 30, 1982, at 9A, col. 2 [hereinafter cited as Young, *Reform*]; Geisel, *Tort Reform Bills Open Strategy Debate*, Business Insurance, Mar. 8, 1982, at 3, col. 3 [hereinafter cited as Geisel]. Senator Robert W. Kasten Jr. recently introduced a comprehensive products liability bill which was referred to the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation in June 1982. See S. 2631, 97th Cong., 2d Sess., 122 Cong. Rec. S6878 (daily ed., June 16, 1982). See also Lewin, *If a Product is Defective*, N.Y. Times, April 20, 1982, at D2, col. 2 [hereinafter cited as Lewin]. The Subcommittee concluded its hearings on the bill on July 1, 1982, and the bill is currently awaiting markup by the Senate Commerce Committee. Telephone interview with Wendy Morphew, Legislative Staff Assistant to Senator Kasten, September 10, 1982. Like the UPLA, this bill would provide uniform standards of liability for manufacturers of defective products based on both strict liability and negligence theories. For a complete text of the bill, see S. 2631 97th Cong., 2d Sess. 122 Cong. Rec. S. 6847-51 (daily ed. June 16, 1982). See also Brophy, *Who and Where do I sue?*, FORBES, April 12, 1982, at 64-65.

81. Young, *Reform*, *supra* note 80, at 41, col. 1; Geisel, *supra* note 80, at 3, col. 1. California Representative Norman Shumway introduced the "Products Liability Act of 1982" to the House of Representatives in December 1981. H.R. 5214, 97th Cong., 2nd Sess. (1982). The Health and Environment Subcommittee of the House Energy and Commerce Committee is presently considering the bill. COMMITTEE ON ENERGY AND COMMERCE, LEGISLATIVE CALENDAR, 97th Cong., 2d Sess., at 14, 272 (July, 9, 1982); see Geisel, *supra* note 80, at 3, col. 1. The major difference between the Shumway and Kasten bills is that the Shumway Bill sets a ten year statute of limitations for all goods whereas the Kasten bill proposes a twenty-five year statute of limitations for business capital goods but none for consumer durables, pharmaceuticals or other products. See Geisel, *supra* note 80, at 9A, cols. 1-2.

82. For a general discussion of the recent spate of national products liability proposals, see generally Lewin, *supra* note 80, at D2, cols. 1-3; Fisher, *Product Law Victim of Federalism*, Nat'l Underwriter, Mar. 19, 1982, at 1, cols. 1-4; Mayer, *Liability Standards Split Administration*, Washington Post, Mar. 13, 1982, at 1, cols. 1-2; PRODUCT LIABILITY ALLIANCE, BACKGROUND PAPER ON PRODUCT LIABILITY INSURANCE (1982).

83. Bodine, *Bill*, *supra* note 20, at 6, col. 1.

ing practices; (3) to place the incentive for loss prevention on the party or parties who are best able to accomplish that goal; (4) to expedite the reparations process from the time of injury to the time the claim is paid; (5) to minimize the sum of accident costs, prevention costs, and transaction costs; and (6) to use language that is comparatively clear and concise.⁸⁴

The Commerce Department realized, when it drafted UPLA, that these six factors would often conflict.⁸⁵ In creating the UPLA, the Commerce Department attempted to balance the various goals and interests in a way that would "stabilize product liability law and benefit product sellers and users alike."⁸⁶

The notion that products liability law is a branch of the law of torts pervades the UPLA.⁸⁷ Underlying American tort law is the premise that the party which is culpable should bear the cost of an accident.⁸⁸ Following this principle, the UPLA will not ask a manufacturer to pay damages merely because its product caused an injury.⁸⁹ The injured party must establish fault on the part of the manufacturer through the offer of specific proof that the manufacturer was responsible for the injury.⁹⁰ While the injured party may still receive full compensation, the UPLA requires a showing of clear and convincing evidence of fault before it will impose liability.⁹¹ The UPLA uses both strict liability and negligence theories to determine liability.⁹²

III. BASIC RESPONSIBILITY OF MANUFACTURER OR SELLER

A. EEC Proposed Directive

Perhaps the most crucial and controversial issue with respect to any products liability standard is the clear definition of the manufacturer's or seller's responsibility toward the consumer for harm caused by its product.⁹³ Article 1 of the EEC Proposed Directive succinctly outlines the standard imposed on a manufacturer:

84. UPLA, *supra* note 22, at 62,714-15 (Criteria for the Act).

85. UPLA, *supra* note 22, at 62,715 (Criteria for the Act).

86. *Id.*

87. *Id.*

88. PROSSER, *supra* note 1, at 495.

89. UPLA, *supra* note 22, at 62,715 (Criteria for the Act). "The responsibility should be defined in terms that everyone can understand. Product liability law should indicate why a particular individual product seller was sufficiently blame-worthy that it should bear the cost of injury." *Id.*

90. *Id.*

91. *Id.* at 62,720 (§ 103 Analysis).

92. *Id.*

93. *Id.* at 62,721 (§ 104 Analysis). "No single product liability issue has generated more controversy than the question of defining the basic standards of responsibility to which product manufacturers are held." *Id.* See also Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643 (1973); Vetri, *Products Liability: The Developing Framework for Analysis*, 54 OR. L. REV. 293, 310 (1975) [hereinafter cited as Vetri]; Henderson, *Judicial Review of Manufacturers' Conscious Design Choice: The Limits of Adjudication*, 73 COL. L. REV. 1531 (1973) [hereinafter cited as Henderson].

"[t]he producer of an article shall be liable for damage caused by a defect in the article, whether or not he knew or could have known of the defect . . . [t]he producer shall be liable even if the article could not have been regarded as defective in light of the scientific and technological development at the time when he put the article into circulation."⁹⁴ Thus, Article 1 creates a standard which imposes liability without regard to either fault⁹⁵ or current scientific knowledge.⁹⁶ All the injured party must prove is that a defect existed at the time of injury and that the defective product caused the injury.⁹⁷ When the injured party meets these two criteria, the law presumes the manufacturer to be liable.⁹⁸ The burden then shifts to the manufacturer to rebut the presumption of liability.⁹⁹

The drafters' purpose in enunciating a standard which imposes liability without regard to fault or current scientific knowledge was to ensure adequate protection of the consumer.¹⁰⁰ Since injury, not fault, triggers the inquiry under this standard, the consumer need not fear that he will have to bear the cost of his injuries if the producer proves it was not at fault.¹⁰¹ The Commission asserts that this standard will not unjustifiably burden the producer.¹⁰² The Commission reasons that the producer can lessen the impact of a liability without fault standard by passing the costs of damages and insurance payments to consumers through higher product costs.¹⁰³ One can best understand the EEC standard itself through an analysis of the basic terms which are components of the standard "producer," "article" and "defect." These terms, in effect, determine the application of the standard.¹⁰⁴

1. Producer

According to Article 2 of the Directive, the term "producer" encompasses all persons who manufacture finished goods or component parts as well as those who represent themselves as manufacturers of the goods by placing their name, trademark or other distinguishing features on the article.¹⁰⁵ The Directive

94. 22 O.J. EUR. COMM. (No. C 271) 7-8 (1979).

95. Orban, *supra* note 6, at 377.

96. Corrigan, *supra* note 17, at 118.

97. *Progress*, *supra* note 34, at 13.

98. Orban, *supra* note 6, at 388.

99. *Id.*

100. BULLETIN, *supra* note 7, at 13-14.

101. *Id.*

102. *Id.*

103. 22 O.J. EUR. COMM. (No. C 271) 4 (1979).

Liability on the part of the producer irrespective of fault ensures an appropriate solution to this problem in an age of increasing technicality, because he can include the expenditure which he incurs to cover this liability in his production costs when calculating the price and therefore divide it among all consumers of products which are of the same type but free from defects.

Id.

104. *Cf.* Orban, *supra* note 6, at 376-92 (analyzing the effect of the Directive through its terms).

105. 22 O.J. EUR. COMM. (No. C 271) 8 (1979).

explicitly includes within the scope of the term "producer" any importer of goods into EEC countries for resale or similar purposes.¹⁰⁶ In addition, Article 2 focuses on the problem of identifying the producer. This Article provides that in cases where the specific producer's identity is unknown to the consumer, the court should treat each supplier of the goods as the producer.¹⁰⁷ The court will infer a presumption that the supplier is the producer unless the supplier informs the claimant of the identity of the manufacturer within a reasonable time.¹⁰⁸

While Article 2 appears to include any product manufacturer within its definition of producer, certain limitations on this term do exist. Article 5 states that a producer shall not be liable if he can prove one of the following three elements: (1) "that he did not put the article into circulation;"¹⁰⁹ (2) "that, having regard to all the circumstances, the article was not defective when he put it into circulation;"¹¹⁰ or (3) "that the article was neither produced for sale, hire or any other kind of distribution for the commercial purposes of the producer nor produced within the course of his business activities."¹¹¹ The Preamble to the EEC Directive adds, however, that the presumption is to the contrary.¹¹² The Directive authorizes the court to presume that the producer placed the article in circulation, that the article was defective when he put it into circulation and that he produced the article for sale, hire or other distribution.¹¹³ Hence, the claimant, once having shown injury from the defective product, i.e. causation, would have the benefit of an evidentiary shift of burden.¹¹⁴ The producer, in order to insulate himself from liability, would have the affirmative obligation to show that he did not create the defect,¹¹⁵ that the product was put into circulation against his will or that he did not produce the product for commercial purposes or within the course of his business activities.¹¹⁶

106. *Id.* "Any person who imports into the European community an article for resale or similar purpose shall be treated as its producer." *Id.*

107. 22 O.J. EUR. COMM. (No. C 271) preamble, at 8 (1979). "Where the producer of the article cannot be identified, each supplier of the article shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the articles." *Id.*

108. *Id.* "Reasonable time" is an undefined term in the Directive.

109. *Id.* at 8-9.

110. *Id.*

111. *Id.*

112. *Id.*, preamble, at 5.

The producer is not liable where the defective product was put into circulation against his will or where it became defective only after he had put it into circulation and accordingly the defect did not originate in the production process; the presumption nevertheless is to the contrary unless he furnishes proof as to the exonerating circumstances.

Id.

113. *Id.*

114. Orban, *supra* note 6, at 388.

115. *Id.*

116. 22 O.J. EUR. COMM. (No. C 271) 5 (1979). See note 112 *supra* for the language used in the Directive.

The drafters chose the definition of "producer," which includes all persons involved in the process of producing a manufactured good, to protect the consumer.¹¹⁷ They believed that to adequately protect the consumer all those involved in the production process must be subject to liability.¹¹⁸ Those involved in the production process, according to the Directive, include any person who, even if he did not himself manufacture the defective article, represents himself as its producer by putting his distinguishing feature on the article.¹¹⁹ The Directive includes suppliers of products among those involved in the production process when the consumer cannot identify the manufacturer.¹²⁰ This inclusion of suppliers under the term "producer" protects the consumer by substituting the liability of each supplier for the producer.¹²¹ In order to escape liability, the supplier must reveal the identity of the producer. Consequently, the consumer would be able to recover from either the supplier or manufacturer when injured by an anonymous product.¹²²

Importers also fall within the Directive's interpretation of those involved in the production process.¹²³ Although judicial proceedings in any non-EEC nation usually present the injured person with insurmountable difficulties, this approach aids consumer protection because the consumer would not have to go outside the EEC to obtain jurisdiction over the producer.¹²⁴ The consumer would also receive inadequate protection if the importer could avoid liability by merely stating that he did not know the producer's identity or by providing the name of a producer who later proved to be insolvent.¹²⁵ Hence, the liability of the importer does not lapse when the consumer knows the producer's identity and can sue him, in contrast to the situation with suppliers under the Directive.¹²⁶ By including most of those involved in both the production and distribution processes, the Directive ensures that the consumer will have a party from whom he can recover in all instances. Therefore, the expansive definition of "producer" and the limited defenses to liability which manufacturers can raise, serve to provide the injured consumer with a party from whom he can easily recover.

Manufacturers assert that this expansive definition with narrow limitations on

117. BULLETIN, *supra* note 7, at 14.

118. *Id.*

119. *Id.*, "[T]his provision is intended to cover primarily those undertakings, such as mail order firms, which have products, especially articles for mass consumption made by unspecified undertakings in accordance with precise instructions and sell them under their own name." *Id.* at 15.

120. *See* note 107 *supra*.

121. BULLETIN, *supra* note 7, at 15. This approach of including suppliers within the term producer should also provide an incentive for suppliers to require the marking of products with the producer's name before the product is put on the market. *Id.*

122. *Id.* at 15.

123. *See* note 106 *supra*.

124. BULLETIN, *supra* note 7, at 15.

125. *Id.*

126. *Id.*

liability may be overly harsh on them.¹²⁷ They claim that this definition could, in certain instances, result in increased potential liability for those not involved in producing the final product.¹²⁸ For example, chemical producers would be subject to liability even though chemicals which they produce have become only components of a final product.¹²⁹ Industry sources complain that retailers and importers whose sole function is to distribute products manufactured by others will be held to the same standard of care as producers.¹³⁰ Manufacturers assert that this increase in potential liability for "producers" could generate a significant rise in retail prices since many non-manufacturers would have to take insurance against risks to which they have not yet been exposed.¹³¹

2. Article

In contrast to the drafter's expansive use of the term "producer," the term "article," the terminology used to describe a manufacturer's product, is defined only in general terms and not in one specific section of the Directive. For example, the Preamble provides that liability extends "only to moveables which have been industrially produced."¹³² Article 1 adds that liability will also attach if the article is a component of an immovable piece of property.¹³³ The only products which the Directive specifically excludes from this term are agricultural, craft and artistic products.¹³⁴ Thus, only movable articles and those incorporated in immovable property fall within the scope of "article."¹³⁵ Beyond this brief outline, the Directive adds little to one's understanding of this term.

Because special rules exist in all Member States to cover defective, immovable property, such as buildings, the drafters decided to limit the scope of the term "article" only to movable property.¹³⁶ Accordingly, they decided to include under the term "article" any movable objects used in the erection of buildings or

127. See *Liability Law's Bite*, *supra* note 7, at 52, col. 2.

128. *Id.*

129. *Id.*

130. See Lukomski, *supra* note 42, at 8, cols. 7-8.

131. *Id.*

132. 22 O.J. EUR. COMM. (No. C 271) 4 (1979).

[L]iability should extend only to moveables which have been industrially produced; that as a result it is appropriate to exclude liability for agricultural craft and artistic products; that the liability provided for by this Directive should also apply to moveables which are used in the construction of buildings or are installed in buildings.

Id.

133. *Id.*

134. 22 O.J. EUR. COMM. (No. C 271) 8 (1979). "The producer is not liable under the provisions of this Directive if the defective article is a primary agricultural product, a craft or an artistic product when it is clear that it is not industrially produced." *Id.*

135. BULLETIN, *supra* note 7, at 14. Because special rules exist in all EEC nations to cover defective, immovable property, such as buildings, the drafters felt no need to bring such property within the Directive's scope. *Id.*

136. *Id.*

installed in buildings.¹³⁷ The drafters have excluded artistic products and crafts from the Directive's coverage because they believed these products have a lower incidence of defects.¹³⁸ Since less risk of harm exists for the consumer, he requires little protection from these products.¹³⁹ In addition, the drafters excluded agricultural products from the scope of the term "article" because these products are either consumed in their natural state or subject to strict international and national processing requirements.¹⁴⁰ Thus, the Directive's coverage only applies to those goods which are mass produced on a commercial basis.

Manufacturers contend that the Directive's general definition of "article" could cause inconsistencies in application of the standard due to a lack of a specific definition of "article."¹⁴¹ They argue that courts will have difficulty enunciating the distinction between industrially produced and other types of goods since the Directive provides no guidelines for defining this term.¹⁴² Consequently, each EEC country is free initially to define the term as it wishes.¹⁴³ However, no reason exists to believe that the national courts and ultimately the European Court of Justice¹⁴⁴ will be better equipped than the Commission to develop a definition of the term "article."¹⁴⁵ In fact, the Commission has spent more time developing this products liability standard than any court and should be able to give both manufacturers and consumers the succinct description of this standard which they need.¹⁴⁶ Without a clear definition of "article," manufacturers argue that inconsistent application of the term "article" could result due to the Directive's general definition of this term.¹⁴⁷

Manufacturers also believe that unfair treatment of manufacturers of component parts may result from the Directive's inclusion of movables incorporated into immovable property.¹⁴⁸ They argue that some manufacturers will not know how the final producer will use the parts and therefore should not be responsible for the finished product.¹⁴⁹ They also claim that liability should not exist if the

137. *Id.* "Where, however, moveable objects are used in the erection of buildings or installed in buildings, the producer is liable in respect to these objects to the extent provided for in this directive." *Id.*

138. *See id.* at 14. This is true because these products are subject to continuous supervision by the craftsmen during the production process. *Id.*

139. *Id.*

140. *See id.* at 14.

141. *See Consumers Support, supra* note 42, at 16.

142. *See id.*

143. *See Orban, supra* note 6, at 388.

144. One of the four principal institutions of the EEC, the European Court of Justice (ECJ) consists of nine judges appointed for terms of six years by common consent of the governments of the EEC nations. The ECJ is responsible for interpreting and enforcing measures approved by the EEC. NOEL, *supra* note 28, at 2.

145. Orban, *supra* note 6, at 388.

146. *Id.*

147. *See id.* at 387.

148. *European Industry, supra* note 42, at 15.

149. *Id.*

components were perfectly constructed but not suited to the use made of them by the final producer.¹⁵⁰ This situation arises when the final producer requests a component part manufacturer to produce a part according to specifications which carry a defect in design.¹⁵¹ Since component part manufacturers have little direct control over the final product, they believe liability should not extend to them if they have produced a part which does not deviate from the specifications of the contractor or final producer.¹⁵² Consequently, manufacturers foresee two major problems with the general definition of "article." First, the lack of explicit guidelines for the use of this term could cause inconsistencies of application of the standard. Second, the inclusion of component parts under the term "article" could result in the unfair treatment of component manufacturers.

3. Defect

Before the Directive authorizes the court to impose the strict liability standard on a producer, the claimant must first prove that the defendant's property was defective and caused his injury.¹⁵³ Article 4 defines a defective article as an article which "when being used for the purpose for which it is apparently intended . . . does not provide for persons or property the safety which a person is entitled to expect, taking into account all the circumstances, including its presentation and the time at which it was put into circulation."¹⁵⁴ The major factor in this definition is the legitimate safety expectations of the consumer.¹⁵⁵ The Commission desired to protect the consumer and his property by using this type of a definition of "defect."¹⁵⁶ In fact, the Directive's concept of "defect" coincides with the "consumer expectations" standard.¹⁵⁷ Under this standard, the Directive authorizes the court to impose liability on the manufacturer when the product injures the consumer in violation of his expectations of safety regarding the product.¹⁵⁸ The Directive's approach does not consider the rea-

150. *Id.*

151. *Id.*

152. *Id.*

153. Orban, *supra* note 6, at 388.

154. 22 O.J. EUR. COMM. (No. C 271) 8 (1979).

155. Hanotiau, *supra* note 27, at 330. The Commission has declared that this section of the Directive means that "nobody can legitimately expect from a product which by its very nature carries a risk and which has been presented as such (instructions for use, labelling, publicity, etc.), a degree of safety which this product does and cannot possess, with the result that this product would not therefore be defective." Commission of the European Communities, Written Question No. 233/80 (June 27, 1980) (available by writing to Delegation of the Commission of the European Communities to the United Nations, 1 Dag Hammarskjöld Plaza, 245 East 47th Street, New York, NY 10017). Why this section of the Directive does not provide for state of the art defense remains unclear to this author.

156. 22 O.J. EUR. COMM. (No. C 271) 5 (1979). "Whereas to protect the person and property of the consumer it is necessary, in determining the defectiveness of a product, to concentrate not on the fact that it is unfit for use but on the fact that it is unsafe; whereas this can only be a question of safety which objectively one is entitled to expect."

157. Orban, *supra* note 6, at 387.

158. *Id.* at 387.

sonableness of the manufacturer in producing the article.¹⁵⁹ It uses objective criteria according to the circumstances in each case.¹⁶⁰ Thus, the Commission, in keeping with its goal of protecting the consumer, has chosen to define the term "defect" by reference to the consumer's expectations about the safety of a product.¹⁶¹

The Directive's adoption of the consumer expectations approach may create serious difficulties for manufacturers and courts. By following such an approach, the Directive eliminates the ability of a manufacturer to escape liability by claiming that he acted reasonably by demonstrating that the product in question met all scientific and legal requirements at the time of its development and causes injury thereafter.¹⁶² This approach also focuses exclusively on the consumer who may have little idea of what level of safety a manufacturer can reasonably achieve in producing a new product.¹⁶³ The task lies with the courts to interpret the term "defect" based on the degree of safety the plaintiff was entitled to expect under the circumstances.¹⁶⁴ With the Directive furnishing no specific guidelines for a definition of defect, the potential for inconsistent decisions exists.¹⁶⁵ In fact, the drafters have stated that since this term is so difficult to define, they will leave its definition to the courts.¹⁶⁶ Finally, the consumer expectations approach ignores differences among various types of defects, such as those resulting from faulty design and construction.¹⁶⁷ Therefore, manufacturers believe that the consumer expectations standard of the term "defect," which focuses solely on the consumer and his safety expectations, may cause more problems than it solves as courts attempt to apply and manufacturers attempt to adhere to this standard.

B. UPLA

In the opening statement of Section 104 (Basic Standards of Responsibility for Manufacturers) the UPLA provides that a product manufacturer will be subject

159. *Id.* at 384.

160. *Id.* at 387.

161. See BULLETIN, *supra* note 7, at 15-16.

162. *Liability Law's Bite*, *supra* note 7, at 52, col. 2. This approach will adversely affect drug producers and auto makers since all the risks inherent in a new product cannot be known until after years of testing, and even then without certainty. *Id.*

163. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973) [hereinafter cited as Wade, *Nature of Strict Tort*]. Professor Wade argues that the consumer expectation test alone is inadequate. "In many situations, particularly involving design matters, the consumer would not know what to expect, because he would have no idea how safe the product could be made." *Id.* at 829. Accord, Fischer, *Product Liability — The Meaning of Defect*, 39 Mo. L. REV. 339, 349-50 (1974); Vetri, *supra* note 93, at 296-97 (1975).

164. Orban, *supra* note 6, at 387.

165. *Id.*

166. *Id.*

167. *Id.* at 385. See also § III. B. 3 *infra*.

to liability when the injured party proves that a defect in the manufacturer's product proximately caused the harm suffered.¹⁶⁸ At first, the UPLA approach to manufacturer liability appears similar to that taken by the EEC, i.e. the application of strict liability in all products liability cases.¹⁶⁹ In reality, however, the UPLA illustrates a movement in the opposite direction. Instead of applying a single standard of strict liability based on Section 402A of the Restatement (Second) of Torts,¹⁷⁰ the UPLA combines the common law theories of negligence and strict liability into one single product liability claim.¹⁷¹

The drafters of the UPLA did not believe that strict liability should apply in all product defect cases.¹⁷² Their belief stemmed from the fact that the drafters of Section 402A, the most widely applied strict liability standard,¹⁷³ focused principally on the problem of faulty manufacturing of products and failed to consider other types of defects.¹⁷⁴ Specifically, the drafters of the UPLA noted that since the publication of Section 402A, courts have struggled to apply strict liability to cases involving defective design and a failure to adequately warn.¹⁷⁵ Therefore, after considering recent products liability claims based on theories of defective construction, defective design, failure to adequately warn or instruct and breach of express warranty, the drafters concluded that strict liability should apply in two situations.¹⁷⁶ First, it should apply when a defect results from the manufacturing process itself.¹⁷⁷ Second, it also should apply when the plaintiff proves that the manufacturer has breached an express warranty.¹⁷⁸ In cases involving

168. UPLA, *supra* note 22, at 62,721 (§ 104 Code). "A product manufacturer is subject to liability to a claimant who proves by a preponderance of the evidence that the claimant's harm was proximately caused because the product was defective." *Id.*

169. *See* § III. A *infra*.

170. *See* note 18 *supra*. Since it was drafted in 1965, § 402A has become the single most important element of state product liability law in the United States. *See* Gerber & Conway, *supra* note 20, at 92-97.

171. Dworkin, *Product Liability Reform and The Model Uniform Product Liability Act*, 60 NEB. L. REV. 50, 51 (1981) [hereinafter cited as Dworkin].

172. UPLA, *supra* note 22, at 62,722 (§ 104 Analysis).

173. Davis, *supra* note 55, at 514; Orban, *supra* note 6, at 383. *See also* note 170 *supra*.

174. UPLA, *supra* note 22, at 62,722 (§ 104 Analysis). *See also* RESTATEMENT (SECOND) OF TORTS § 402A, Appendix (1965) (most cases cited deal with defects in construction).

175. UPLA, *supra* note 22, at 62,722 (§ 104 Analysis). *See, e.g.,* Barker v. Lull Engineering Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); Cepeda v. Cumberland Engineering Co., 76 N.J. 152, 386 A.2d 816 (1978); Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974). Jury instructions present a special problem when several theories of liability are used. *See, e.g.,* Jorae v. Clinton Corp. Serv., 465 F. Supp. 952, 954-55 (E.D. Mich. 1979); Wade, *On Product Liability: Design Defects and Their Actionability*, 33 VAND. L. REV. 551, 577 (1980).

176. UPLA, *supra* note 22, at 62,722 (§ 104 Analysis).

177. *Id.*

178. *Id.* This Comment focuses on strict liability in instances of defective construction. It does not discuss the application of strict liability in breach of warranty cases. Historically, U.S. courts have almost unanimously imposed strict liability on product sellers whose representations about their products prove to be untrue and are relied upon by the purchaser to his detriment. *See, e.g.,* Baxter v. Ford Motor Co., 179 Wash. 123, 35 P.2d 1090 (1934); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958); RESTATEMENT (SECOND) OF TORTS § 402B (1965). The reasoning behind this imposition of strict liability was originally based on principles of deceit. NOEL & PHILLIPS, *supra* note 1, at

design defects and a failure to warn, the UPLA provides that courts should apply a negligence rather than a strict liability standard.¹⁷⁹ The drafters intended to protect the interests of both manufacturers and consumers by dividing a products liability standard into four separate situations.¹⁸⁰

As discussed in regard to the EEC Directive, a full understanding of any products liability standard requires an examination of the component terms of that standard. Through such an examination, the application of the standard emerges. The ensuing discussion of the relevant terms of the UPLA reveals the application of the UPLA standard.¹⁸¹

1. Manufacturer

Section 102 of the UPLA (Definitions) defines "product seller" as "any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption."¹⁸² This definition expressly includes manufacturers, wholesalers, distributors and retailers.¹⁸³ Specifically excluded from this definition and thus from liability are sellers of real property, commercial sellers of used, unrehabilitated products and any other party who leases a product without having an opportunity to inspect and discover defects in the product.¹⁸⁴ The UPLA then defines "manufacturers" as those product sellers

18. Liability is now grounded in the fact that once a seller uses specific statements about a product's quality to induce the buyer to purchase the product, he should be held to that representation. *Id.* at 21. The seller is liable regardless of whether any defect caused the injury so long as the purchaser relies on the representation and the reliance results in his injury. *See, e.g., Huebert v. Federal Pac. Elec. Co.*, 208 Kan. 720, 494 P.2d 1210 (1972) (court held door manufacturer liable to repairman despite plaintiff's failure to prove existence of defect); *Collins v. Uniroyal Inc.*, 126 N.J. Super. 401, 315 A.2d 30 (1973) (court held tire manufacturer liable for claims that tire would survive extraordinary road hazards; no defect was shown — only a failure to perform as warranted). It is important to note that the product seller may create an express warranty orally or in writing, as well as through any other action intended as a communication. *See, e.g., Alan Wood Steel Co. v. Capital Equip. Enterprises*, 39 Ill. App. 3d 48, 349 N.E.2d 627 (1976); *Larutan Corp. v. Magnolia Homes Mfg. Co.*, 190 Neb. 425, 209 N.W.2d 177 (1973).

The UPLA follows this general approach to express warranties. UPLA, *supra* note 22, at 62,721.

In order to determine that the product was unreasonably unsafe because it did not conform to an express warranty, the trier of fact must find that the claimant, or one acting on the claimant's behalf, relied on an express warranty made by the manufacturer or its agent about a material fact or facts concerning the product and this express warranty proved to be untrue.

Id.

Cases involving express warranties usually arise in a commercial setting. Phillips, *supra* note 19, at 326. Therefore, § 2-313 of the Uniform Commercial Code which specifically treats express warranties is usually the law that controls. *See id.* However, the UPLA explicitly preempts all existing law governing matters within its coverage including the U.C.C. UPLA, *supra* note 22, at 62,720 (§ 103 Analysis). The Act does not really alter § 2-313 of the Code. *Compare* UPLA, *supra* note 22, at 62,725 with U.C.C. § 2-313 (1962 version).

179. UPLA, *supra* note 22, at 62,722 (§ 104 Analysis). *See generally* Davis, *supra* note 55, at 540.

180. UPLA, *supra* note 22, at 62,722 (§ 104 Analysis).

181. *See* Orban, *supra* note 6, at 376-92.

182. UPLA, *supra* note 22, at 62,717 (§ 102 Code).

183. *Id.*

184. *Id.* at 62,718-19 (§ 102 Analysis). The definition of "manufacturer" found its inspiration in ARIZ.

who originate and carry to fruition the production process, including makers of component parts, private producers who represent themselves as manufacturers and those who refurbish used products for resale.¹⁸⁵ Thus, for a "product seller" to be a "manufacturer," he must have participated in some aspect of the manufacturing process.¹⁸⁶ Parties who are only tangentially related to the production process, such as shippers and importers, would not be subject to liability for merely handling the product.¹⁸⁷ They must do more than just serve as conduits for movement of the product through alteration or claim of participation in the manufacturing process to fall within the scope of the term "manufacturer."¹⁸⁸

By basing a definition on participation in the manufacturing process, the drafters have considered the interests of both consumers and manufacturers. The inclusion of all parties who participate in the manufacturing process protects the consumer's desire for recovery.¹⁸⁹ The UPLA also considers the interests of the manufacturers, retailers and wholesalers by limiting liability to only those who actively participate in the production process and by succinctly defining those parties which it considers to be "manufacturers."¹⁹⁰

2. Product

The drafters of the UPLA have focused on three separate factors in defining "product."¹⁹¹ The UPLA defines "product" as "any object possessing intrinsic value, capable of delivery either as an assembled whole or a component part or parts, and produced for introduction into trade or commerce. Human tissues and organs, including human blood and its components, are excluded from this term."¹⁹² The UPLA thus focuses on three specific elements within this definition: intrinsic value, movability and production for commercial purposes.¹⁹³

REV. STAT. ANN. § 12-681(1) (Supp. 1978). "Manufacturer includes product seller who designs, produces, makes, fabricates, constructs or remanufactures the relevant product of component part of a product before its sale to a user or customer. It includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer." *Id.*

185. UPLA, *supra* note 22, at 62,718 (§ 102 Analysis). It is unclear whether this definition would include some of the genetic engineering products. *See* RESTATEMENT (SECOND) OF TORTS, § 402A comment f (1965).

186. *See*, UPLA, *supra* note 22, at 62,717 (§ 102 Code).

187. *See*, *id.* at 62,718 (§ 102 Analysis).

188. *Id.*

189. *Cf. id.* at 62,714 (Introduction). One of the major goals of the Act was to insure the protection of consumers' rights and reasonable compensation for their injuries. *Id.*

190. *Cf. id.* at 62,714 (Criteria For the Act). (The drafters wished to provide a uniform set of product liability rules so that each party will know the rules judging them. In addition, the drafters wished to shift the cost of an accident from a claimant to a defendant only when the latter has been responsible for the injury.)

191. *See* Hanotiau, *supra* note 27, at 331.

192. UPLA, *supra* note 22, at 62,717 (§ 102 Code).

193. *Cf. id.* at 62,719 (§ 102 Analysis). ("Therefore included are all goods, wares, merchandise and their components, as well as articles and commodities capable of delivery for introduction into trade or commerce.")

When all three of these elements exist, an object is a “product” under the UPLA.¹⁹⁴ Because the UPLA clarifies the scope of the term “product” through the use of these three specific elements in the definition, inconsistent court interpretations should be infrequent.¹⁹⁵

3. Defect

The UPLA, in its most striking departure from traditional products liability theory,¹⁹⁶ does not attempt to define the scope of the term “defect” by a single standard.¹⁹⁷ It defines the term “defect” by reference to four separate circumstances and applies negligence or strict liability depending on the situation.¹⁹⁸

A product may be proven defective if, and only if:

- (1) It was unreasonably unsafe in construction . . . ;
- (2) It was unreasonably unsafe in design . . . ;
- (3) It was unreasonably unsafe because adequate warnings or instructions were not provided . . . ; or
- (4) It was unreasonably unsafe because it did not conform to the product seller’s express warranty. . . .¹⁹⁹

The Act utilizes the word “defective” as a general term including four types of unreasonably unsafe products.²⁰⁰ A product does not become defective until the claimant proves that it was unreasonably safe under one or more of the four tests.²⁰¹ Thus, a product may possess a defect, e.g. loose screw, but is not defective until the claimant proves that this defect renders the product unreasonably unsafe.²⁰²

The definition of unreasonably unsafe varies according to the claim alleged.²⁰³ The drafters have used two distinct means of defining unreasonably unsafe.²⁰⁴ First, they have focused exclusively on the condition of the product itself, an approach based on the strict liability theory in Section 402A.²⁰⁵ Second, they have focused on both the condition of the product and the reasonableness of the manufacturer’s actions under the circumstances, essentially an approach based on a negligence theory.²⁰⁶ The following discussion illustrates specifically how

194. *Id.*

195. *See* Orban, *supra* note 6, at 387-88.

196. *See* notes 17 and 170 *supra*. For the complete text of § 402A, *see also* note 18 *supra*.

197. Note, *Standards of Product Seller Responsibility Under the Uniform Product Liability Act*, 49 U. CIN. L. REV. 119, 120 (1980) [hereinafter cited as Note, *Standards*].

198. *See* text accompanying note 171 *supra*.

199. UPLA, *supra* note 22, at 62,721. For an explanation of strict liability as it applies to a breach of warranty claim, *see* note 178 *supra*.

200. UPLA, *supra* note 22, at 62,722 (§ 104 Analysis).

201. *Id.*

202. *See id.*

203. *See id.* at 62,721-24 (§ 104 Analysis).

204. *Id.*

205. *Id.* at 62,721-22 and 62,725-26 (§ 104 Analysis).

206. *Id.* at 62,723-25 (§ 104 Analysis).

these two approaches relate to the four circumstances which render products unreasonably unsafe.

a. *The Product Was Unreasonably Unsafe in Construction*

A defect in a product's construction occurs when a failure during the manufacturing process produces a structural flaw in a particular item of a product line.²⁰⁷ If no one responsible for the manufacture of the product discovers the flaw during quality control or before purchase, the product reaches the consumer in a "defective" condition.²⁰⁸ Often these manufacturing errors are latent and therefore undiscoverable by mere observation.²⁰⁹ When an injury occurs as the result of a manufacturing defect, the question, according to the UPLA, is whether the product was unreasonably unsafe.²¹⁰

Section 104(a) of the UPLA provides that a product is "unreasonably unsafe in construction if the fact-finder determines that, at the time the product left the manufacturer's control it deviated in some material way from the manufacturer's design specifications or performance standards, or from otherwise identical units of the same product."²¹¹ Thus, the standard is, by definition, dependent on the manufacturer's own design and production specifications for the product.²¹² Consequently, the standard focuses exclusively on a comparison among the product as designed, the allegedly defective product, and other similar products created by the same manufacturing process.²¹³

The drafters justify the imposition of strict liability for construction defects on four grounds.²¹⁴ First, historically, American courts as far back as 1913²¹⁵ have imposed strict liability for construction defects.²¹⁶ Second, both the Restatement

207. Note, *Standards*, *supra* note 197, at 120.

208. *Id.*

209. See Henderson, *supra* note 93, at 1543; Phillips, *supra* note 19, at 344-45.

210. See UPLA, *supra* note 22, at 62,722 (§ 104 Analysis).

211. *Id.* at 62,721 (§ 104 Code).

212. One should note that the definition does not include issues concerning the manufacturer's quality control systems. Quality control was the focus of inquiry when construction defect cases were adjudicated under the negligence standard. The courts imposed liability if the manufacturer failed to use reasonable care in inspecting or testing his products to discover latent defects. See, 1 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 6.01(1) (1979) [hereinafter cited as FRUMER & FRIEDMAN]. Under the UPLA, this is still an important factor when the defendant is a product seller other than a manufacturer. See UPLA, *supra* note 22, at 62,727 (§ 105 Analysis).

213. UPLA, *supra* note 22, at 62,729 (§ 104 Analysis). For the drafters' rebuttal to criticism of a manufacturer defined standard, see, e.g., Twerski & Weinstein, *A Critique of the Uniform Product Liability Law — A Rush to Judgment*, 28 *DRAKE L. REV.* 221, 225 (1979) [hereinafter cited as Twerski & Weinstein]. They believe that the manufacturer's self-imposition of a higher standard will function as a shield against claims alleging liability in the more costly area of defective design. UPLA, *supra* note 22, at 62,723-24 (§ 104 Analysis). Under this higher standard, a manufacturer may be liable for misdesign but does not place its whole product line at risk of being unreasonably unsafe in design. *Id.* at 62,723.

214. *Id.* at 62,722.

215. See, e.g., *Mazzetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913).

216. Prosser, *Assault*, *supra* note 19, at 1106.

(Second) of Torts²¹⁷ and the trend of American tort law follow this approach.²¹⁸ Third, most product sellers are able to absorb the financial impact of strict liability for products which are defective in construction.²¹⁹ Finally, the drafters believe that such a standard is necessary to protect the product user.²²⁰ If negligence were the standard, the consumer would have a difficult time proving that the manufacturer should reasonably have known about a latent defect in one of many mass produced products.²²¹ Taking all these factors into consideration, the drafters determined strict liability to be the appropriate standard.²²² The drafters took a different approach to injuries caused by defects in design.

b. *The Product Was Unreasonably Unsafe in Design*

The UPLA applies a negligence standard to claims of design defect.²²³ This standard enunciates specific criteria for the trier of fact to evaluate in determining liability.²²⁴ Hence, the drafters avoided the problem²²⁵ of deciding between the "consumer expectations" test,²²⁶ followed by the Directive, and the conven-

217. Dean Wade, who participated in the drafting of § 402A, has observed that the Restatement authors were focusing on products liability cases dealing with defective construction rather than defective design or the failure to warn. Wade, *Nature of Strict Tort*, *supra* note 163, at 830.

218. See Phillips, *supra* note 19, at 344-45 (citing cases).

219. See FINAL REPORT, *supra* note 60, at VII-17.

220. UPLA, *supra* note 22, at 62,723 (§ 104 Analysis). One commentator has added that strict liability is appropriate because society expects mass produced products to be identical and possess no latent defects. Thus, courts should impose the strictest form of responsibility. Phillips, *The Standard for Determining Defectiveness in Products Liability*, 46 U. CIN. L. REV. 101, 104-05 (1977).

221. UPLA, *supra* note 22, at 62,723 (§ 104 Analysis).

222. *Id.* at 62,722 (§ 104 Analysis). For a criticism of this approach to construction defects, see Owen, *Rethinking the Policies of Strict Liability*, 33 VAND. L. REV. 681, 691-94 (1980).

223. See UPLA, *supra* note 22, at 62,722 (§ 104 Analysis).

224. *Id.* See note 215 *supra*.

225. The problem originally arose because the language of the RESTATEMENT (SECOND) OF TORTS § 402A predicated liability on a product being "in a defective condition unreasonably dangerous to the user or consumer." Twerski & Weinstein, *supra* note 213, at 223 n.6. The term "defect" was meaningful within the context of a production defect case since the defect was identifiable by comparing the questionable product with the manufacturer's internal production standard. *Id.* In a design defect or failure to warn case, the term "defect" would not identify the standard against which the courts should judge a product. *Id.* The term "unreasonably dangerous" was appropriate for these cases since the concept of reasonableness required a balancing of risk-utility considerations. *Id.* Dean Wade in several influential articles identified those factors which the court should evaluate in setting the "reasonable-ness" standard of product quality:

- (1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

Wade, *Strict Tort*, *supra* note 19, at 17. For a slightly revised list of factors, see Wade, *Nature of Strict Tort*, *supra* note 163, at 837.

226. Recently courts have expressed considerable support for a threshold test which does not require

tional "risk-utility" test,²²⁷ often advocated by some U.S. courts.²²⁸ Specifically, this negligence standard requires that the fact-finder balance two separate issues.²²⁹ According to the UPLA standard, the fact-finder first must consider both the likelihood that the product could cause the claimant's injury or a similar one and the gravity of the injury should that likelihood materialize.²³⁰ The

that every design defect case undertake the complexities of risk-utility analysis. *See, e.g.,* Welch v. Outboard Marine Corp., 481 F.2d 252, 254 (5th Cir. 1973); Barker v. Lull Engineering Co., 20 Cal. 3d 413, 434-35, 573 P.2d 443, 457, 143 Cal. Rptr. 225, 239 (1978); Henderson v. Ford Motor Co., 519 S.W.2d 87, 92 (Tex. 1975). The thrust of the consumer expectation test is that when the manufacturer leads consumers to believe that a product will perform at a certain level and then disappoints those expectations, liability should ensue. *See, e.g.,* Barker v. Lull Engineering Co., 20 Cal. 3d at 429-30, 573 P.2d at 454, 143 Cal. Rptr. at 236. The most vociferous advocate of consumer expectations as the crucial liability factor in product liability law is Professor Shapo. *See* Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974). *See also,* Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803, 845-46 (1976); Twerski, *From Defect to Cause to Comparative Fault — Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 312-15 (1977).

227. The risk-utility test, commonly called the Wade-Keeton test of strict liability, applies the standard without reference to the scienter of the defendant. Professor Keeton has expressed the following formulation of the risk-utility test:

[A] product ought to be regarded as "unreasonably dangerous" at the time of sale if a reasonable man with knowledge of the product's condition, and an appreciation of all the risks found to exist by the jury at the time of trial, would not now market the product, or if he did market it, would at least market it pursuant to a different set of warnings and instructions as to its use Since the test is not one of negligence, it is not based upon the risks and dangers that the maker should have, in the exercise of ordinary care, known about. It is, rather, danger in fact, as that danger is found to be at the time of the trial that controls.

Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 568 (1969).

At the outset some confusion existed about the utilization of risk-utility analysis in design defect legislation. Some courts believed that it merely re-introduced negligence into product liability actions. *See, e.g.,* Butaud v. Suburban Marine & Sporting Goods, 543 P.2d 209 (Alaska 1975); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Glass v. Ford Motor Co., 123 N.J. Super. 599, 304 A.2d 562 (1973).

This confusion was short-lived. The overwhelming majority of courts have applied risk-utility analysis in establishing design defect and failure to warn cases. *See* Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974); Borel v. Fireboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973); Welch v. Outboard Marine Corp., 481 F.2d 252 (5th Cir. 1973); Rogers v. Unimac Co., 115 Ariz. 304, 565 P.2d 181 (1977); Barker v. Lull Engineering Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); Rivera v. Rockford Mach. & Tool Co., 1 Ill. App. 3d 641, 274 N.E.2d 828 (1971); Moning v. Alfano, 400 Mich. 425, 254 N.W.2d 759 (1977); Johnson v. Chrysler Corp., 74 Mich. App. 532, 254 N.W.2d 569 (1977); Blevins v. Cushman Motor, 551 S.W.2d 602 (Mo. 1977); Ferry v. Luther Mfg. Co., 56 A.D.2d 703, 392 N.Y.S. 2d 521 (1977); Micallef v. Miehle Co., 39 N.Y.2d 376, 248 N.E.2d 571, 384 N.Y.S. 2d 115 (1976); Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974); Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974); Metal Window Prods. Co. v. Magnusen, 485 S.W.2d 355 (Tex. Civ. App. 1972).

The significant outpouring of academic commentary aided the courts in recognizing the need to utilize the risk-utility theory. Although there may be occasional decisions which demonstrate confusion, *see, e.g.,* Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020 (1978), there is considerable agreement as to which standard to apply.

228. *See* Phillips, *supra* note 19, at 322-25; UPLA, *supra* note 22, at 62,723-24 (§ 104 Analysis).

229. UPLA, *supra* note 22, at 62,722 (§ 104 Analysis).

230. *Id.*

fact-finder must then balance against these considerations the difficulty that a manufacturer might experience in improving the safety of the product and any adverse effect that the alternative design might have on the usefulness of the product.²³¹ The UPLA also suggests particularly probative elements which courts should consider when applying this standard. These include:

- (1) [a]ny warnings and instructions provided with the product;
- (2) [t]he technological and practical feasibility of a product designed and manufactured so as to have prevented claimant's harm while substantially serving the likely user's expected needs;
- (3) [t]he effect of any proposed alternative design on the usefulness of the product;
- (4) [t]he comparative costs of producing, selling, using and maintaining the product as designed;
- (5) [t]he new or additional harms that might have resulted if the product had been so alternatively designed.²³²

Thus, claimants have to show that the reasonable manufacturer knew or should have known of the risks inherent in the design.²³³ They must also show that the manufacturer knew or should have known of the available practical alternatives.²³⁴

The primary reason for the application of a negligence standard in design defect cases is that U.S. courts have rarely, if ever, imposed strict liability on manufacturers for products which are unreasonably unsafe in design.²³⁵ Where courts have applied a standard other than negligence, they usually have been unable to articulate a clear test to determine whether to impose liability.²³⁶ In addition, a manufacturer can almost always design a product more safely.²³⁷ Therefore, the drafters believed a balancing of several specific factors as op-

231. *Id.* The basis of this general negligence standard is the famous "Learned Hand Formula" for negligence cases espoused by Judge Learned Hand in *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947). Judge Hand stated that a person's duty to prevent injuries from an accident "is a function of three variables: (1) the probability that the accident will occur; (2) the gravity of the resulting injury, if it does; (3) the burden of adequate precautions." *Id.*

232. UPLA, *supra* note 22, at 62,721 (§ 104 Code).

233. Dworkin, *supra* note 171, at 58.

234. *Id.*

235. See, UPLA, *supra* note 22, at 62,723 (§ 104 Analysis). See also Henderson, *Manufacturers' Liability for Defective Design: A Proposed Statutory Reform*, 56 N.C. L. REV. 625, 634-35 (1978).

236. UPLA, *supra* note 22, at 62,723 (§ 104 Analysis). *Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979) provides a paradigm of a court's struggle to apply strict liability principles in a design defect case. The case began in 1971, and the Supreme Court of Texas issued a number of opinions during the eight years in which Texas courts wrestled with the case. See also *General Motors v. Turner*, 514 S.W.2d 497 (Tex. Civ. App. 1974). The major problem preventing resolution of the case resulted from the difficulty courts had in enunciating which factors the jury should consider in determining liability.

237. UPLA, *supra* note 22, at 62,723 (§ 104 Analysis). A subjective test focusing only on the safety of the product follows the consumer expectation approach. See note 226 *supra*. The drafters explicitly rejected such an approach for design defects because the consumer would often have no knowledge in regard to the safe manufacturing of the product. UPLA, *supra* note 22, at 62,724 (§ 104 Analysis).

posed to an automatic imposition of liability was necessary.²³⁸

c. The Product Was Unreasonably Unsafe Because Adequate Warnings or Instructions Were Not Provided

The UPLA also adopts a negligence standard with respect to products that are allegedly defective because the product seller failed to provide an adequate warning or instructions with its product.²³⁹ Initially, the fact-finder must determine whether, at the time of production, a likelihood existed that the product could cause the claimant's specific or similar harm and whether the potential seriousness of that harm rendered the warning inadequate.²⁴⁰ The question then becomes whether the manufacturer could or should have provided the warnings that the claimant alleges would have enabled him to avoid his injury.²⁴¹ Factors which the fact-finder should consider in evaluating the reasonableness of the manufacturer's conduct include:

- (1) [t]he manufacturer's ability, at the time of manufacture,²⁴² to be aware of the product's danger and the nature of the potential harm;
- (2) [t]he manufacturer's ability to anticipate that the likely product user would be aware of the product's danger and the nature of the potential harm;²⁴³ (3) [t]he technological and practical feasibility of providing adequate warnings and instructions;²⁴⁴ (4) [t]he clarity

238. See UPLA, *supra* note 22, at 62,723 (§ 104 Analysis).

239. *Id.* at 62,722 (§ 104 Analysis).

240. Schwartz, *Initiatives*, *supra* note 53, at 718.

241. *Id.*

242. Phillips, *supra* note 19, at 344-45. While attorneys have argued that under strict liability, as applied in warning cases, the manufacturer's ability to anticipate the danger before marketing the product is irrelevant. Most courts, however, hold that even under strict liability the manufacturer cannot be responsible for failing to warn of risks that were scientifically undiscoverable at the time of manufacture, i.e. development risks. See, e.g., *O'Hare v. Merck & Co.*, 381 F.2d 286, 291 (8th Cir. 1967); *Woodill v. Parke Davis & Co.*, 58 Ill. App. 3d 349, 353, 374 N.E.2d 683, 686-87 (1978).

243. UPLA, *supra* note 22, at 62,723 (§ 104 Analysis). Courts have held that the user's anticipated awareness of a product's inherent risks is irrelevant to the duty to warn, at least under strict liability. See, e.g., *Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809, 812 (9th Cir. 1974); *Haugen v. Minnesota Mining & Mfg. Co.*, 15 Wash. App. 379, 383-85, 550 P.2d 71, 74-75 (1976). Many other courts, however, recognize that there may not be a duty to warn if the manufacturer can anticipate that the contemplated user will be aware of the product's risks. This circumstance exists when the risk is within the "common knowledge." See, e.g., *Bojorquez v. House of Toys, Inc.*, 62 Cal. App. 3d 930, 933-34, 133 Cal. Rptr. 483, 484-85 (1976) (slingshot); *Menard v. Newhall*, 135 Vt. 53, 55-56, 373 A.2d 505, 506-07 (1977) (BB gun). It is also true where the manufacturer may fairly assume expertise on the part of the intended user sufficient to make him familiar with the product's risks. See, e.g., *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 463-67 (5th Cir. 1976) (industrial chemical); *Walter v. Valley*, 363 So. 2d 1266, 1270 (La. App. 1978) (professional power tool).

244. UPLA, *supra* note 22, at 62,721 (§ 104 Code). That warnings are relatively "easy" to provide, in the sense of labelling a product or including a warnings circular or instruction booklet with it encounters few practical difficulties, is widely assumed. See *id.* at 62,724 (§ 104 Analysis). One must not give this factor too much weight, however, by making the facile assumption that because warnings are technically feasible they are simple to formulate or even desirable. See Note, *Standards*, *supra* note 197, at

and conspicuousness of the warnings or instructions that the manufacturer provided;²⁴⁵ and (5) [t]he adequacy of the warnings or instructions that the manufacturer provided.²⁴⁶

Therefore, the UPLA delineates specific factors which the fact-finder should consider to determine whether the manufacturer acted reasonably in a warning case.

The UPLA limits this balancing approach to those dangers which are neither obvious²⁴⁷ nor involve unanticipated conduct by the consumer.²⁴⁸ This approach

127 n.39. The manufacturer faces very difficult choices in deciding whether a particular risk warrants a warning at all, and if so, how to phrase and emphasize it relative to warnings of other risks. *Id.* It must consider the effects that a warning will have on the perceptions and conduct of the user. *Id.* In making critical warnings decisions, the manufacturer must use language and psychology — tools unfamiliar to most engineers and the impact of which is less predictable than alternative designs or formulae. *Id.* Thus, providing effective warnings is no less difficult a problem than selecting among alternative designs, where the range of choice — and consequently the scope of responsibility — is narrowed by greater practical and economic limitations. *Id.* Courts should, consequently, not rely on failure to warn as an “easier” ground of liability. See generally Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Product Liability — Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495 (1976) [hereinafter cited Twerski, Weinstein *et al.*].

245. UPLA, *supra* note 22, at 62,721 (§ 104 Code).

246. *Id.*

247. *Id.* “A manufacturer shall not be liable for its failure to warn or instruct about dangers that are obvious, for ‘product misuse’ . . . ; or for alterations or modifications of the product which do not constitute ‘reasonably anticipated conduct’ . . .” *Id.* The effect of the “obviousness” of a risk on the manufacturer’s duty to protect the user against it through warnings or design features has been a divisive issue. *Id.* While general recognition exists that the manufacturer has no duty to warn against “commonly known” dangers, the courts are widely split on the question of whether such a duty exists with respect to dangers that consumers cannot readily discover but that may have been “patent” to the particular claimant. *Id.* Many courts, particularly those relying on consumer expectations as the principal test of defect, apply a “patent danger rule” that absolves the manufacturer from responsibility to protect the user against such risks. *Id.* Commentators have criticized this rule as unrealistic, given the often inattentive manner in which products are used, and as inconsistent with strict liability principles. See Note, *Standards*, *supra* note 197, at 128 n.42. Consequently, a growing number of courts have limited the importance of the user’s perception of the danger — a few, by making the user’s perception entirely irrelevant, but most, by making the user’s perception simply one of several factors to consider in determining whether the manufacturer should have provided a warning or assigned the product in a different way. *Id.* See also 2 LEGAL STUDY, *supra* note 60, at 30-33 (collecting cases). See generally 1 FRUMER & FRIEDMAN, *supra* note 212, § 8.04. This approach is, in fact, inconsistent with the growing trend rejecting the patent danger rule, at least in the warnings area. Since the purpose of a warning is to inform the user of that which he would not otherwise know, the manufacturer should not warn about things which the consumer does or should know. See Little, *Products Liability — The Growing Uncertainty About Warnings*, 12 FORUM 995, 998 (1977) [hereinafter cited as Little]. While warnings against obvious hazards might have some “reminder” value, their proliferation could undermine public respect for, and thus the effectiveness of, warnings in general. UPLA, *supra* note 22, at 63,725 (§ 104 Analysis). For these reasons, the drafters of the UPLA state that its products liability standard should address the manufacturer’s responsibility to protect users against obvious risks as a matter of proper design rather than one of adequate warnings. *Id.*

248. UPLA, *supra* note 22, at 62,721 (§ 104 Code). Profound confusion exists among the courts about whether manufacturers should warn against a foreseeable misuse or alteration if that misuse would constitute contributory negligence or assumption of the risk. See Little, *supra* note 247, at 1007-10. The UPLA’s answer is that if product misuse occurs when the user does not act in a manner that a manufacturer would expect of an ordinary, reasonably prudent person, the trier of fact may determine

follows the premise that a manufacturer can expect the consumer to act as a reasonable person.²⁴⁹ On the question of whom warnings or instructions must reach, the UPLA requires that the manufacturer direct his warnings to the actual user unless he has provided those warnings to one whom he can reasonably expect to control the risk or pass the warning on to the user (i.e., a physician or foreman).²⁵⁰ These considerations involving the scope of the duty to warn result from the drafters' recognition that some situations exist in which a manufacturer cannot transmit a warning to the actual user.²⁵¹ Therefore, the manufacturer

that the party who misused the product should bear partial or sole responsibility for the resulting harm. UPLA, *supra* note 22, at 62,737 (Optional Section). Consequently, manufacturers need not warn against dangers arising from misuse even if the manufacturer can foresee such misuse. *Id.* Manufacturers should warn against product alteration only if the alteration would constitute "reasonably anticipated conduct." *Id.* The act defines this phrase as "conduct which would be expected of an ordinary reasonably prudent person . . ." *Id.* at 62,717 (§ 102 Code). Thus, the manufacturer has no duty to warn of risks resulting from foreseeable yet imprudent uses or alterations of the product.

249. *Id.* at 62,737. See also *Kimble v. Waste System International*, 23 Wash. App. 331, 595 P.2d 569 (1979); Twerski, Weinstein, *et al.*, *supra* note 244, at 514 (recognizing that warnings, to be truly effective, must be selective).

250. UPLA, *supra* note 22, at 62,721 (§ 104 Code).

A manufacturer is under an obligation to provide adequate warnings or instructions to the actual product user unless the manufacturer provided such warnings to a person who may be reasonably expected to assure that action is taken to avoid the harm, or that the risk of the harm is explained to the actual user.

Id. The UPLA also discusses instances where an expert must supervise the product and where handling the products in bulk and individual warnings to each user or employee are not feasible. *Id.* "For products that may be legally used only by or under the supervision of a class of experts, warnings or instructions may be provided to the employer of the employee-claimant if there is no practical and feasible means of transmitting them to the employer-claimant." *Id.*

251. *Id.* at 62,724-25 (§ 104 Analysis). See, e.g., *Bryant v. Hercules Inc.* 325 F. Supp. 241 (W.D. Ky. 1970); *Carmichael v. Reitz*, 17 Cal. App. 3d 58, 95 Cal. Rptr. 381 (1971); *Terhune v. A. H. Robbins Co.*, 90 Wash. 2d 9, 577 P.2d 975 (1978). The UPLA recognizes the duty of a manufacturer to use reasonable care to inform consumers of latent dangers in its product that are discovered or become discoverable after the manufacturer markets the product. UPLA, *supra* note 22, at 62,725 (§ 104 Analysis). Several federal statutes impose a post-sale warning duty on manufacturers of household products, electronic equipment, motor vehicles and recreational boats. These statutes generally require notification to the appropriate agency and, in some cases, recall after discovering a hazard. See, e.g., National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1411-1414 (Supp. 1970); Consumer Product Safety Act, 15 U.S.C. § 2064 (1974); Radiation Control for Health and Safety Act of 1968, 42 U.S.C. § 263g (1974); Federal Boat Safety Act of 1971, 46 U.S.C. § 1464 (1975). A number of courts have recognized this duty under strict liability and negligence theories. See, e.g., *Basko v. Sterling Drug, Inc.*, 416 F.2d 417 (2d Cir. 1969) (drug); *Braniff Airways, Inc. v. Curtiss Wright Corp.*, 411 F.2d 451 (2d Cir.), *cert. denied*, 396 U.S. 959 (1968) (airplane); *Comstock v. General Motors Corp.*, 358 Mich. 163, 98 N.W.2d 627 (1959) (automobile dealer).

The same basic factors considered by courts in determining whether a manufacturer has adequately discharged a pre-sale duty to warn also arise in evaluating his post sale conduct, his knowledge of or ability to discover the danger, its foreseeability, probability and seriousness and the difficulty of providing the warning. See UPLA, *supra* note 22, at 62,725 (§ 104 Analysis). Of special importance in the post-sale situation are the magnitude of the risk and the difficulty of providing the warning: the greater the risk and the potential harm, the greater the effort required of the manufacturer to reach present users. Factors bearing on the relative difficulty of providing the warning include 1) the number of products sold; 2) the records available to the manufacturer of initial and subsequent purchases; 3) the continuing relationship (if any) between the manufacturer and users; and 4) the length of time since initial sale. *Id.* See generally Comment, *Products Liability — Post Sale Warnings*, 1978 ARIZ. ST. L. J. 49.

may give a warning or instructions to a person whom the manufacturer could reasonably expect to communicate the warning or to supervise the use of the product.²⁵² The drafters of the UPLA, by eliminating the need to warn of obvious dangers and by recognizing the limitations on manufacturers' ability to warn the actual user, have created a selective rather than a broad approach to warnings.²⁵³

The adequacy of warnings poses a disruptive threat to the stability of any proposed products liability standard.²⁵⁴ The reason for this effect is that courts consider warnings and instructions relatively easy to give²⁵⁵ and plaintiffs increasingly use the failure to warn claim as a secondary theory of liability.²⁵⁶ Thus, the drafters decided to consider several criteria in deciding whether a failure to warn exists.²⁵⁷ They also adopted the majority view among U.S. state courts today that the duty to provide adequate warnings and instructions cannot extend beyond the data reasonably available at the time of production.²⁵⁸ The drafters believed this type of negligence approach would create a more definite and objective guide for courts.²⁵⁹ They were also convinced that this type of negligence approach would adequately protect the injured consumer while imposing a reasonable and clearly defined obligation on the manufacturer.²⁶⁰ Therefore, they rejected the harsher strict liability standard and opted for a

252. This includes the manufacturer of tangible goods sold or handled in bulk or of other workplace products who may communicate warnings to the employer of the claimant when that is the only practical and feasible avenue for making a warning. UPLA, *supra* note 22, at 62,725 (§ 104 Analysis). *See also* Reed v. Pennwalt Corp., 22 Wash. App. 718, 591 P.2d 478 (1979). One criteria not included in the UPLA comes from the "informed consent" doctrine applicable in many medical malpractice cases. *See*, Canterbury v. Spence, 464 F.2d 772, 790-91 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Cobbs v. Grant, 8 Cal. 3d 229, 245-46, 502 P.2d 1, 11-12, 104 Cal. Rptr. 505, 515-16 (1972); Trognur v. Fruchtmann, 58 Wis. 2d 569, 603, 207 N.W.2d 297, 314-15 (1973); Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L. J. 683, 691 (1975); Plant, *An Analysis of Informed Consent*, 36 FORDHAM L. REV. 639 (1968). Specifically, this doctrine focuses on what a reasonable consumer would wish to know in formulating a decision. *See, e.g.*, Miller v. Kennedy, 11 Wash. App. 272, 522 P.2d 852, *aff'd* 85 Wash. 2d 151, 530 P.2d 334 (1975) (where the relevant standard was defined as: "Would the patient as a human being considered this item in choosing his or her course of treatment?") *Id.* at 282, 522 P.2d at 860. Courts can easily paraphrase this standard to meet the product liability situation. Twerski & Weinstein, *supra* note 213, at 237. Once the claimant establishes that a warning is necessary, then the next question should be whether a reasonable consumer would want to have the information before deciding to utilize the product. *Id.* This test applies only to warnings whose function is solely to inform the consumer about non-reducible risks. *Id.*

253. *See* Twerski & Weinstein, *supra* note 213, at 234.

254. Phillips, *supra* note 19, at 325.

255. *See, e.g.*, West v. Broderick & Bascom Rope Co., 197 N.W.2d 202, 211-12 (Iowa 1972) (referring to wire rope sling); Moran v. Fabergé, Inc., 273 Md. 538, 543-44, 332 A.2d 11, 15 (1975) (referring to bottle of cologne); Hamilton v. Motor Coach Indus., 569 S.W.2d 571, 575 (Tex. Civ. App. 1978) (referring to spring loaded air cylinder on a bus).

256. Phillips, *supra* note 19, at 325.

257. UPLA, *supra* note 22, at 62,724 (§ 104 Analysis).

258. *Id.* *See, e.g.*, Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 790-96 (8th Cir. 1977) (analyzing cases from numerous jurisdictions).

259. UPLA, *supra* note 22, at 62,722 (§ 104 Analysis).

260. *See id.*

standard which considers both the risks to the consumer and the actions of the manufacturer in light of reasonably available alternatives.

IV. ANALYSIS

The EEC Directive and UPLA differ greatly in their respective considerations of the manufacturer's standard of liability to the consumer for injury from a defective product. The drafters of both wish to provide uniformity in products liability law.²⁶¹ The drafters of both intend to protect the interests of manufacturers as well as consumers.²⁶² The EEC Directive, according to manufacturers, does not fulfill this latter objective,²⁶³ whereas the UPLA does.²⁶⁴ Manufacturers feel that the Directive's standard disregards the interests of manufacturers by assuring the consumer of almost automatic recovery whenever he is injured by a product.²⁶⁵ This sentiment arises from the application of strict liability to all products liability claims and through the use of pro-consumer terms to define the application of that standard.²⁶⁶ The UPLA is more successful in protecting the interests of both the manufacturer and consumer.²⁶⁷ This success results from the combination of negligence and strict liability theories in its products liability standard along with succinct and objective delineations of the component parts of that standard.²⁶⁸

Little doubt exists among manufacturers that an injured consumer will almost automatically recover if the Directive's strict liability standard becomes law.²⁶⁹ Their fear of virtual automatic recovery under the Directive arises not just from the fact that the Directive uniformly applies a liability without fault standard.²⁷⁰ The fear also comes from the application of this standard which is determined by the definition of the component parts of the standard.²⁷¹ The expansive definition of "producer," which includes anyone who handles the product, could assure the injured claimant that he will always have someone from whom he can recover.²⁷² The only affirmative defenses available to the manufacturer once the claimant has proven injury resulting from the product's defect, are: that the product was not defective at the time of manufacture, that he did not put the

261. 22 O.J. EUR. COMM. (No. C 271) 3-4 (1979); UPLA, *supra* note 22, at 62,714 (Introduction).

262. 22 O.J. EUR. COMM. (No. C 271) 3-4 (1979); UPLA, *supra* note 22, at 62,714 (Introduction).

263. See *Liability Law's Bite*, *supra* note 7, at 52, col. 2.

264. Cf. Orban, *supra* note 6, at 392 (declaring that the Directive proposes a standard more liberal than that existing in the United States today).

265. *Public Enterprises*, *supra* note 42, at 14.

266. *Id.* See also Orban, *supra* note 6, at 392.

267. See Schwartz, *Initiatives*, *supra* note 53, at 725.

268. Cf. Orban, *supra* note 6, at 394 (declaring that the Directive provides a liberal attitude toward recovery through the use of its strict liability under all circumstances and its pro-consumer definition).

269. *Public Enterprises*, *supra* note 42, at 14.

270. See *Liability Law's Bite*, *supra* note 7, at 52, col. 2.

271. *Id.*

272. See BULLETIN, *supra* note 7, at 14-15.

article into circulation or that he did not intend to distribute the product commercially.²⁷³ These defenses appear to provide little relief in most products liability cases, and consequently the manufacturer could successfully raise them in only rare instances.²⁷⁴ However, these limited defenses attain great importance as the burden of proof shifts to the manufacturer once the claimant has proven injury resulting from the product's defect.²⁷⁵

The only major limitation on a consumer's recovery under the EEC standard lies with the term defect; the defective article which caused the injury must be industrially produced.²⁷⁶ Since the Directive only vaguely defines "defect", confusion about its limiting effect could arise as courts begin to define it.²⁷⁷ Thus, the extent of its limitation of the manufacturer's liability is presently unknown. The use of a "consumer expectations" test to define the term "defect" ensures that the consumer's safety interests and not the actions of the manufacturer will be the court's primary focus.²⁷⁸ Manufacturers thus conclude that the expansive definition of the term "producer," the vague definition of "article" and the explicitly pro-consumer definition of "defect" will provide that in virtually all defective products cases the courts will impose the Directive's liability without regard to fault standard on the manufacturer.²⁷⁹

Manufacturers contend that an increase in potential liability under the Directive could force manufacturers, distributors, suppliers and importers to protect themselves by raising prices of their products by as much as twenty percent²⁸⁰ in order to cover increased insurance premiums. In addition, manufacturers claim that these groups may hesitate to produce or handle newly marketed goods as a result of the wide application of this strict products liability standard.²⁸¹ If this claim is even partially true, the Directive's ultimate effect may be that while the consumer will recover whenever injured by a product, he will have to pay for this guarantee of recovery in all circumstances through higher product prices and a decrease in the number of newly marketed goods, which is a major source of concern to industry.²⁸² The UPLA offers an alternative, comprehensive products liability standard. The UPLA represents a uniform approach to products

273. 22 O.J. EUR. COMM. (No. C 271) 8-9 (1979).

274. See Orban, *supra* note 6, at 388.

275. *Id.*

276. 22 O.J. EUR. COMM. (No. C 271) 8 (1979); see also text accompanying notes 127-137 *supra*.

277. Orban, *supra* note 6, at 387.

278. *Id.*

279. See *Public Enterprises*, *supra* note 42, at 14.

280. *Id.* Consumer groups strongly disagree with this estimate. For example, the consumers in the European Community Group, which represents the large majority of British consumers' organization, claim that the burden on industry for insurance would remain bearable if the Directive were to become law. See *British Consumers Call for Producers to Be Made Liable for Development Risks Under EEC Legislation*, 3062 EUROPE 15 (Jan. 23, 1981).

281. *Liability Law's Bite*, *supra* note 7, at 52, col. 2.

282. See *id.* at 52, cols. 2-3.

liability law²⁸³ that also recognizes the disparate interests of consumers and manufacturers.²⁸⁴ A products liability standard that includes both strict liability and negligence and an application of the standard based on objectively defined terms achieves this balancing of both consumers' and manufacturers' interests. The definition of the term "manufacturer" provides that only those who regularly engage in the production process will fall within its ambit and thus be subject to liability.²⁸⁵ The injured consumer will, therefore, be able to recover from the party that actually causes the defect because all those who alter the product face potential liability. However, not everyone who handles the product will face potential liability.²⁸⁶ The Act's definition of product also provides an unbiased approach favoring neither consumers nor manufacturers. The drafters used three factors to define the term "product": intrinsic value, movability and production for commercial purposes.²⁸⁷ The use of these three criteria ensures that an objective and predictable analysis will exist to define this term.²⁸⁸

The UPLA also takes an objective approach incorporating both consumer and manufacturer perspectives in defining defect.²⁸⁹ Under the UPLA, no all-encompassing definition of "defect" exists.²⁹⁰ Rather, the definition depends on the type of defect alleged. The method of defining a manufacturing defect lies in comparing the allegedly defective good with other ostensibly identical goods manufactured by the same process.²⁹¹ If the comparison reveals a significant deviation from the manufacturer's specifications, the UPLA imposes strict liability on the manufacturer.²⁹² This approach protects the consumer's interest in recovery as he would have great difficulty proving that a defect existed at the time of manufacture.²⁹³ It also considers the position of the manufacturer who can readily insure himself against the risk of production process defects.²⁹⁴

The UPLA proposes a balancing of specific factors to determine whether a design defect exists.²⁹⁵ This test compares the risk of injury to the consumer and the gravity of the harm should that risk materialize with the burden of producing a safer product on the manufacturer.²⁹⁶ Such an approach incorporates the consumer's desire for the safest possible product with the manufacturer's con-

283. See Schwartz, *Initiatives*, *supra* note 52, at 717-19.

284. *Id.* at 715.

285. UPLA, *supra* note 22, at 62,718 (§ 102 Code).

286. See text accompanying notes 185-88 *supra*.

287. See UPLA, *supra* note 22, at 62,717 (§ 102 Code).

288. See text accompanying notes 193-95 *supra*.

289. See Schwartz, *Initiatives*, *supra* note 53, at 717-19.

290. See text accompanying notes 196-200 *supra*.

291. UPLA, *supra* note 22, at 62,721 (§ 104 Code).

292. *Id.*

293. See *id.* at 62,722 (§ 104 Analysis).

294. *Id.*

295. *Id.* at 62,721 (§ 104 Code).

296. *Id.* at 62,723 (§ 104 Analysis).

cern that an alternatively designed product be economically practical.²⁹⁷ Thus, in their desire to balance the interests of these two groups, the drafters concluded that a specifically defined negligence approach to design defects should exist.²⁹⁸

Complementing their approach in design defect cases, the drafters of the UPLA have employed a balancing test to define a defect arising from a failure to adequately warn or instruct.²⁹⁹ Both the likelihood of harm to the consumer and the gravity of the harm are again factors in this balancing test.³⁰⁰ Countervailing these consumer safety considerations is the question of whether the manufacturer could and should have provided an adequate warning.³⁰¹ Specific criteria for determining this question of fact exist in the UPLA.³⁰² The consumer's desire to avoid serious harm is weighed in conjunction with the manufacturer's ability to provide a more effective warning under the circumstances through the use of a negligence approach comprised of specifically defined factors.³⁰³ Thus, the definitions of the component parts of the UPLA's standard reveal a conscious effort to incorporate both objective criteria and manufacturer and consumer perspectives into these terms.

In its desire to establish a uniform products liability standard,³⁰⁴ the Commission of the EEC has chosen to apply a strict liability standard to all defective product claims.³⁰⁵ The application of the standard, as revealed through its consumer oriented terms, could provide the injured consumer with almost automatic recovery according to some manufacturers.³⁰⁶ Consequently, manufacturers argue that this standard forces them to become guarantors of a product's safety.³⁰⁷ They contend that such an approach would be unfair for a number of reasons. First, unfairness would result from the fact that a manufacturer would be liable for any defect regardless of the care which he took to test and produce his product.³⁰⁸ This approach would not weigh the benefits to the public of a new product and thus deprives the public of potentially beneficial products, which may contain some risk.³⁰⁹ Second, application of the Directive's standard could subject anyone handling the product to potential liability.³¹⁰ This procedure would totally ignore the differing functions of distributors and pro-

297. *See id.*

298. *Id.*

299. *Id.* at 62,721 (§ 104 Code).

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *See* O.J. EUR. COMM. (No. C 271) 3-4 (1979).

305. *See id.* at 4.

306. *Public Enterprises, supra* note 42, at 14.

307. *Id.*

308. *European Industry, supra* note 42, at 15.

309. *Id.*; *Liability Law's Bite, supra* note 7, at 52, col. 2.

310. *See* BULLETIN, *supra* note 7, at 3.

ducers.³¹¹ Distributors would have to insure themselves against product liability claims in exactly the same manner as producers, although they have no connection with the manufacture of a product.³¹² Therefore, industry feels the EEC approach does not equitably balance its interests with those of the consumer.³¹³

In order to protect the interests of both consumers and manufacturers, the drafters of the Directive should have looked at the UPLA and employed a standard which recognizes the essential differences among defects due to faulty manufacture, improper design and failure to adequately warn. They should also have succinctly and objectively defined the terms of the standard which would enable courts to apply this standard in a way that favors neither the consumer nor the manufacturer. This approach to a products liability standard, as indicated by the UPLA, ensures that uniformity can exist simultaneously with a products liability standard that considers fundamental differences among product defects. By applying its standard of liability depending on the type of defect alleged, the UPLA assures that both manufacturer and consumer interests receive consideration. In manufacturing defect cases, the consumer expects the product he purchased to be identical to those from the same assembly line.³¹⁴ The manufacturer can and presently does insure himself against such defects since they are readily calculable.³¹⁵ Considering these factors, the drafters have imposed strict liability for manufacturing defects without regard to the reasonableness of the manufacturer's actions.³¹⁶

In the case of defects due to faulty design and failure to adequately warn, the drafters believed that a balancing of interests is appropriate.³¹⁷ The UPLA considers both the utility of the product and its possible harmful effect on the consumer.³¹⁸ Thus, the UPLA balances the consumer's desire for protection against potential harm with the reasonableness of the manufacturer's actions in light of the circumstances.³¹⁹ By present specific and objective guidelines for this balancing and for the defining of the other component parts of the standard, the drafters have provided courts with the means to uniformly apply this standard.³²⁰ This specificity assures both the manufacturer and consumer that courts will have specific criteria and elements on which to focus in resolving a claim under the UPLA.³²¹ A consistent application of this standard should result as

311. Lukomski, *supra* note 42, at 20, col. 1.

312. *Id.* at 20, col. 7.

313. See *Liability Law's Bite*, *supra* note 7, at 52, col. 3.

314. See UPLA, *supra* note 22, at 62,722 (§ 104 Analysis).

315. *Id.*

316. *Id.* at 62,723 (§ 104 Analysis).

317. *Id.*

318. *Id.*

319. *Id.*

320. See Orban, *supra* note 6, at 386-87.

321. *Id.*

courts will be applying the same criteria.³²² Therefore, manufacturers and consumers alike will be able to predict how courts will apply this standard and can plan their behavior accordingly. This uniform standard of liability contained in the UPLA should, therefore, provide both manufacturers and consumers with an alternative to the Directive that equitably considers their disparate interests.

U.S. manufacturers exporting products to Europe could be subjected to the toughest products liability law in the world if the EEC Proposed Directive becomes binding law.³²³ Under the Directive U.S. manufacturers would have to adhere to two different standards when marketing products in the United States and in Europe.³²⁴ This double standard could have an adverse effect on U.S. manufacturers' desire to export goods to Europe.³²⁵ Because of this possibility, U.S. manufacturers are reconsidering their approach to trade with European nations.³²⁶ Thus, the EEC should consider the potential effects of the Directive on both European and U.S. manufacturers.

V. CONCLUSION

Products liability law in Europe is rapidly changing. European nations are now beginning to apply strict liability principles to products liability cases. The EEC's Proposed Directive provides a specific example of this trend. The Directive applies strict liability in all defective products claims to achieve uniformity and to protect the interests of consumers and manufacturers alike. However, manufacturers believe that the effect of such a strict liability standard is to ensure consumer recovery in all products liability cases and to force manufacturers to become the guarantors of all product safety.

The three key terms of the Directive's standard of liability, "producer," "article" and "defect", determine the effect of the standard. Courts could interpret the Directive's use of "producer" and "defect" as an authorization to protect the consumer at the expense of the manufacturer. The term "article" has only a general definition under the Directive. Manufacturers argue that this approach to defining "article" could result in inconsistent interpretations or even a pro-consumer approach. Thus, manufacturers believe that the Directive does not equitably protect the interests of both consumers and manufacturers.

The UPLA, a codification of common law trends in U.S. products liability law, demonstrates that both uniformity and protection of consumers' and manufacturers' interests can result from a products liability standard that includes negligence and strict liability theories. Similar to the Directive, the UPLA's standard

322. *Id.*

323. *See* INA, *supra* note 2, at 6.

324. *See Liability Law's Bite*, *supra* note 7, at 52, col. 1.

325. *Id.*

326. *See* INA, *supra* note 2, at 8.

has three key terms, "manufacturer," "product" and "defect." The drafters of the UPLA have defined all three in an objective and concise manner so that courts can readily apply them. In addition, they have divided the term "defect" into three separate circumstances with either a strict liability or negligence approach applicable to each. The UPLA's use of strict liability in manufacturing defect cases and its use of negligence in design defects and failure to adequately warn claims provide equitable treatment for both consumers and manufacturers. Perhaps the EEC should consider the UPLA's approach to products liability law before ratifying the Directive. "[I]f the EEC proposal, as presently drafted, is accepted . . . it will only be a short time before obviously unfair results will come out of European courts, and a call for reform legislation will soon be heard in the European Community."³²⁷

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327. Corrigan, *supra* note 17, at 118.