University of Dayton Law Review

Volume 10 | Number 1 Article 10

10-1-1984

S. 136: Ohio's New Law Limiting the Liability of Nonmanufacturing Sellers in Certain Product Liability Actions

Daniel P. Utt
University of Dayton

LEGISLATION NOTES

S. 136: OHIO'S NEW LAW LIMITING THE LIABILITY OF NONMANUFACTURING SELLERS IN CERTAIN PRODUCT LIABILITY ACTIONS

I. INTRODUCTION

Senate Bill 136[1] represents Ohio's first legislative modification of state common law in the product liability area. The field of product liability has expanded rapidly over the past twenty years, and state courts, including those in Ohio, have continued to recognize increasingly liberal theories of recovery for persons injured by defective products.[2] The explosion of litigation in product liability and the stricter standards imposed on sellers of defective products have raised a number of important policy issues. Of particular importance is whether nonmanufacturing sellers of defective products should be held strictly liable for injuries caused by such products.

S. 136 responds to this concern by offering protection to wholesalers, distributors, and retailers in certain product liability actions. The bill allows nonmanufacturing sellers of defective products to seek early dismissal from actions based on strict liability or implied warranty in tort once a number of criteria are met.[3] Thus, S. 136 imposes requirements on the nonmanufacturer seeking dismissal in order to safeguard the plaintiff's interest in obtaining compensation for injuries caused by defective products. In return, the legislature's offer of protection to nonmanufacturing sellers attempts to reduce the nonmanufacturer's defense costs and insurance premiums.[4]

This note will outline the current status of product liability law

---

1. Act of March 28, 1984, 1984 Ohio Legis. Serv. 5-75 (Baldwin) (to be codified at OHIO REV. CODE ANN. § 2305.33 (Page Supp. 1984)). For an examination of Ohio's prior legislative attempts in the product liability area, see Note, *The Proposed Product Liability Statute in Ohio—Its Purpose and Probable Results*, 29 CLEV. ST. L. REV. 141 (1980). *See also* B. BAUER, PRODUCTS LIABILITY—THE LAW IN OHIO § 1-11 (1982).

2. *See* W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 737 (7th ed. 1982) [hereinafter cited as W. PROSSER]. For a discussion of the common-law development of product liability in Ohio see *infra* text accompanying notes 52–72.

3. Act of March 28, 1984, 1984 Ohio Legis. Serv. 5-75, 5-75 (Baldwin) (to be codified at OHIO REV. CODE ANN. § 2305.33(B)(1)–(4) (Page Supp. 1984)).

4. Interview with Sen. Michael Schwarzwalder, Ohio state senator and sponsor of S. 136, in Columbus, Ohio (August 14, 1984) [hereinafter cited as Schwarzwalder interview] (on file with University of Dayton Law Review).

affecting nonmanufacturing sellers of allegedly defective products. It will then examine the important provisions of S. 136 including the various requirements imposed on the nonmanufacturer seeking dismissal from a product liability action. The provisions of Ohio's new law will then be compared to similar laws in other states. Finally, this note will conclude with an analysis of the interpretive difficulties of the bill, and an analysis of the effectiveness of S. 136 in balancing the respective interests of nonmanufacturers and injured plaintiffs.

II. BACKGROUND

A. A National Perspective

In the field of product liability there are basically three theories of recovery against the seller of a defective product. An injured plaintiff can seek recovery against the seller in actions based on negligence, warranty, and strict liability.[5] In recent years, strict liability has become the most prominent theory of recovery for persons injured by defective products.

The leading case in the development of strict liability in tort for injuries caused by a defective product is *Greenman v. Yuba Power Products, Inc.*[6] *Greenman* involved the mismanufacture of a power tool that ultimately resulted in injury to the plaintiff.[7] The manufacturer and retailer of the power tool were sued under negligence and warranty theories.[8] On appeal to the California Supreme Court, Justice Traynor avoided the notice pitfalls of the warranty action and embarked on the theory of strict liability in tort.[9] The justice stated: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[10] As a justification for imposing strict liability on the manufacturer of a defective product, Justice Traynor offered the following rationale: "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect

5. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY (MB) § 16A[1] (1984).

6. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

7. *Id.* at 59, 377 P.2d at 898, 27 Cal. Rptr. at 698.

8. The jury found that the retailer was neither negligent nor in breach of implied warranty, but held the manufacturer liable under either a negligence or breach of express warranty theory, although it could not be determined upon which theory the jury verdict was based because both were submitted to the jury. *Id.* at 59, 377 P.2d at 899, 27 Cal. Rptr. at 699.

9. The manufacturer argued that the warranty cause of action was barred because Greenman had failed to give notice of breach of warranty within a reasonable time. *Id.* at 60, 377 P.2d at 899, 27 Cal. Rptr. at 699.

10. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

themselves."[11] Therefore, the rationale behind Justice Traynor's opinion is that because a manufacturer derives an economic benefit from placing its product in the stream of commerce, the manufacturer impliedly represents that the machine will safely perform the job for which it was built.[12]

Although the strict liability theory used in *Greenman* was only applied to the manufacturer of the defective product, the California Supreme Court, led by Justice Traynor, soon thereafter extended strict liability in tort to a nonmanufacturing seller of a defective product in *Vandermark v. Ford Motor Co.*[13] *Vandermark* involved the imposition of strict liability upon a retail automobile dealer who sold a new 1958 Ford with a defective brake piston.[14] Justice Traynor offered the following justification for applying strict liability to the nonmanufacturing retailer of the defective automobile: "Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products."[15] Thus, again implicit in the California court's reasoning is that both retailers and manufacturers derive economic benefit from placing products on the market. Therefore, according to this line of reasoning, if a policy choice must be made between allowing compensation for injured consumers or extending immunity to retailers, the nonmanufacturing sellers of defective products should bear the price of such injuries as a cost of doing business.[16]

The *Vandermark* court offered a number of other reasons for holding retailers of defective products strictly liable in addition to the economic benefit justification. For instance, in some cases the retailer may be the only member of the marketing chain available for the injured party to sue.[17] In addition, holding the retailer strictly liable can serve as a safety incentive because the retailer may be able to inspect the product to ensure its safety, or the retailer may be able to exert pressure on the manufacturer to produce and market safer products.[18] Fi-

---

11. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.
12. *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.
13. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).
14. *Id.* at 259–60, 391 P.2d at 169–70, 37 Cal. Rptr. at 897–98.
15. *Id.* at 262, 391 P.2d at 171, 37 Cal. Rptr. at 899.
16. *Id.* In Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944), Justice Traynor first articulated his view that manufacturers should be held strictly liable for injuries caused by defective products since they can insure themselves against such risks and pass the risks along to the public as a cost of doing business. *Id.* at 462, 150 P.2d at 441 (Traynor, J., concurring). *Vandermark* can be viewed as an extension of this rationale to nonmanufacturers.
17. *Vandermark*, 61 Cal. 2d at 262, 391 P.2d at 171, 37 Cal. Rptr. at 899.
18. *Id.* at 262, 391 P.2d at 171–72, 37 Cal. Rptr. at 899; *see also* Hammond v. North Am.

nally, the California court offered the following rationale: "Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship."[19]

Although the *Vandermark* decision is truly a landmark case in the development of product liability law, Justice Traynor's policy justifications for extending strict liability to nonmanufacturing sellers of defective products can be criticized. As one commentator has observed, the rationales of courts that hold nonmanufacturers strictly liable can essentially be reduced to four theories: "economic benefit," "risk spreading," "market pressure," and "indemnity."[20] These policy justifications all seek to rationalize tipping the scales totally in favor of the plaintiff in a product liability action; however, in this polarization process, the courts often ignore the competing business interests of nonmanufacturers.

Under the "economic benefit" approach, the courts find it legitimate to hold nonmanufacturers strictly liable for injuries caused by defective products because such sellers derive monetary gains from participating in the product distribution chain. The problem with the "economic benefit" theory is that it does not proportionately account for the fact that this monetary gain is often minimal for wholesalers, distributors, and retailers because their profit margins are generally much smaller than manufacturers.[21] Moreover, since the nonmanufacturer generally does not have control over the manufacture or design of products in most distribution chains, the logic in holding such a seller strictly liable if not at fault is certainly questionable *when* the manufacturer is solvent and available for suit.[22]

A second justification for holding nonmanufacturers strictly liable is based on the "risk spreading" theory. Under this approach, it is presumed logical to hold the nonmanufacturer strictly liable for injuries since such sellers can insure themselves against product liability judgments and pass the cost along to their customers as a cost of doing business.[23] However, the shortcomings of this approach are its assump-

---

Asbestos Corp., 97 Ill. 2d 195, 206, 454 N.E.2d 210, 216 (1983).

19. 61 Cal. 2d at 262–63, 391 P.2d at 172, 37 Cal. Rptr. at 900.

20. Leete, *Caught in the Middle: The Need for Uniformity in Products Liability Statutes Affecting Non-Manufacturer Sellers*, 18 WAKE FOREST L. REV. 997, 1004–05 (1982).

21. Leete, *Products Liability for Nonmanufacturer Product Sellers: Is It Time to Draw the Line?*, 17 FORUM 1250, 1256 (1982). Profit margins for wholesalers and distributors, for example, reportedly average about 1% to 3% of gross sales. INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEP'T OF COMMERCE, FINAL REPORT VI-33 (1978).

22. Leete, *supra* note 20, at 1004.

23. *Id.*; *see also supra* note 16 and accompanying text.

tions that the general public should bear the cost of another's injury through increased product prices,[24] and that nonmanufacturers can always pass the full cost along to customers through price increases. Therefore, the burdensome effects of generally increasing product liability insurance premiums can often render it unprofitable for the nonculpable seller to engage in business.[25] Ultimately, when a seller ceases to operate, the product-using public is injured as well.

A third rationale for holding nonmanufacturers strictly liable is based on the "market pressure" theory which assumes that the seller can pressure the manufacturer to produce safer products. Market realities, however, seriously undercut the validity of this theory since small nonmanufacturing sellers are usually in no position to exert such influence on manufacturers.[26]

A final policy reason for allowing the plaintiff to recover against the nonmanufacturer based on strict liability is that the seller can thereafter seek indemnity from the manufacturer of the defective product.[27] The so-called "indemnity" theory has a serious shortcoming because it results in a succession of litigation that causes increased legal expenses for the nonmanufacturer and leads to the inefficient use of judicial resources.[28]

Notwithstanding the many theoretical flaws in imposing strict liability on nonmanufacturing product sellers, the application of strict liability principles to such sellers was greatly accelerated throughout the United States in 1965 when the American Law Institute promulgated section 402A of the *Restatement (Second) of Torts*.[29] Section 402A makes no distinction between manufacturers, distributors, or retailers of defective products in applying its "special liability" to "any seller"

---

24. Leete, *supra* note 20, at 1004.

25. The Commerce Department found in its sampling of businesses that product liability insurance premiums increased by an average of 280% between 1971 and 1976. The premiums increased by 210% between 1974 and 1976, and the increases appeared to be larger for smaller businesses. INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEP'T OF COMMERCE, FINAL REPORT III-2-3 (1978). Nonmanufacturers are particularly hard hit by increasing insurance premiums because while they have smaller profit margins than manufacturers, their insurance rates are usually based on gross sales. Leete, *supra* note 21, at 1256.

26. Leete, *supra* note 20, at 1005. The "market pressure" theory also fails to account for the fact that manufacturers will feel the same or greater pressure to produce safe products if they are sued directly for harms caused by their defective products. S. REP. NO. 476, 98th Cong., 2d Sess. 40 (1984), *reprinted in* [Extra Edition] PROD. LIAB. REP. (CCH) No. 546, at 40 (June 8, 1984).

27. Leete, *supra* note 20, at 1005.

28. Ironically, a justification for strict liability is that it allows the plaintiff to directly sue the manufacturer in the absence of privity of contract without maintaining successive actions. *See* Leete, *supra* note 20, at 1005.

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

engaged in the business of selling such a defective product.[30] Although section 402A does not technically impose strict liability on sellers of defective products since the plaintiff must prove not only that the product was defective but also that the defect made the product unreasonably dangerous, its coverage is broad if the plaintiff can meet this burden.[31] Most courts have interpreted the term "seller" broadly and consistently with comment f of section 402A, and have applied the *Restatement's* special or strict liability to wholesalers and retailers.[32] Thus, the courts that have applied section 402A as written have made the policy choice to allow plaintiffs to recover from all members of the product distribution chain, and have therefore treated the nonmanufacturer's interest in being free from liability when not at fault as less important in the balancing decision.

In addition to recovery based on strict liability in tort, the Uniform Commercial Code (U.C.C.) provides an injured plaintiff with an alternative contractually-based theory of recovery in a product liability action. The most important U.C.C. warranty provision in product liability cases is the implied warranty of merchantability.[33] The implied warranty of merchantability offers a plaintiff a very similar theory of recovery to that offered by strict liability in tort. This is because liability for breach of implied warranty is strict insofar as no element of fault is involved, and since the implied warranty arises as a matter of law.[34] Thus, the implied warranty of merchantability "is a first cousin to strict tort liability, and 'products liability' cases are often tried under the merchantability banner."[35]

Like strict liability recovery based on section 402A, the U.C.C. also allows liberal recovery against all members of the product distribution chain because the U.C.C. does not make a distinction between manufacturers or nonmanufacturers of defective products. The U.C.C. simply provides that "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."[36] Thus, the implied warranty of

---

30. *Id.* § 402A(1)(a); *see also id.* § 402A comment f.

31. *See* Davis, *Product Liability under Section 402A of the Restatement (Second) of Torts and the Model Uniform Product Liability Act*, 16 WAKE FOREST L. REV. 513, 514 (1980).

32. W. PROSSER, *supra* note 2, at 825 n.2 (7th ed. 1982). *See, e.g.*, Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969) (strict liability applied to wholesaler of defective hammer based on same rationale which led court to first apply strict liability to retailers).

33. U.C.C. § 2-314 (1977).

34. *See* 2 L. FRUMER & M. FRIEDMAN, *supra* note 5, § 16A[2], at 3B–6.

35. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-6, at 343 (2d ed. 1980).

36. U.C.C. § 2-314(1) (1977).

merchantability applies to any "merchant."[37] As a result, manufacturers as well as wholesalers, distributors, and retailers can be classified as merchants under the U.C.C., thereby making such parties amenable to suit for breach of the implied warranty of merchantability.[38]

Nonetheless, recovery based on the U.C.C. is more restrictive than that based on strict liability in tort, which makes the U.C.C. a less attractive option for plaintiffs suing nonmanufacturers for injuries caused by defective products. First of all, a plaintiff injured by a product through the merchant's breach of the implied warranty of merchantability has to give the seller notice of the breach within a reasonable time or be barred from recovery.[39] Second, a plaintiff relying on the U.C.C. must be aware that the implied warranty of merchantability can be excluded or modified by the seller of the defective product.[40] The nonmanufacturer can disclaim the implied warranty of merchantability by simply informing the buyer that the warranty is excluded, or by stating that the product is being sold "as is" or "with all faults."[41] However, many courts have disallowed liberal use of disclaimers by nonmanufacturers and have increased plaintiffs' available remedies under the U.C.C. by holding that disclaimer of warranty clauses as applied to consumers are unconscionable and contrary to public policy.[42] A final problem faced by plaintiffs attempting to utilize the U.C.C.'s implied warranty of merchantability against the nonmanufacturer is that posed by the privity of contract doctrine. Although "pure" privity of contract is not generally necessary under the

---

37. A "merchant" is a person or entity that deals in goods of the kind sold, or a person or entity that through its occupation holds itself out as having knowledge or skill peculiar to the practices or goods involved in the transaction. U.C.C. § 2-104(1) (1977).

38. Nonmanufacturers can be classified as merchants for purposes of the implied warranty of merchantability by simply dealing in goods of the kind that cause the injury. *See* U.C.C. § 2-104 official comment 2 (1977); *see also* J. WHITE & R. SUMMERS, *supra* note 35, § 9-6, at 345.

39. U.C.C. § 2-607(3)(a) (1977). As Prosser once said, U.C.C. § 2-607(3) often "becomes a booby-trap for the unwary" when applied to personal injury plaintiffs who purchase the product from a remote seller. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 97, at 655 (4th ed. 1971). However, many courts have heeded Prosser's well-founded criticism by being more liberal in applying this section to individual purchasers and consumers than in applying it to commercial purchasers. *See* 2A L. FRUMER & M. FRIEDMAN, *supra* note 5, § 19.05 at 5-160. *See also* U.C.C. § 2-607(3)(a) official comment 4 (1977).

40. U.C.C. § 2-316 (1977).

41. *Id.* § 2-316(3)(a).

42. W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 97 at 692 (5th ed. 1984) [hereinafter cited as W. KEETON]. The Code itself provides that a limitation or exclusion of consequential damages, as opposed to an exclusion of the warranty itself, is prima facie unconscionable when applied to injuries to persons in consumer goods cases. U.C.C. § 2-719(3) (1977). Thus, the Code and the courts, in limiting the effectiveness of disclaimer clauses, recognize the policy behind sales warranties by ameliorating the "harsh doctrine of *caveat emptor*, and in some measure to impose a reciprocal obligation on the seller to beware." Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 372, 161 A.2d 69, 77 (1960).

U.C.C., a plaintiff relying on contractually-based U.C.C. remedies must fall within a protected class of persons.[43]

Finally, a plaintiff in a product liability action can utilize traditional negligence principles to recover against a nonmanufacturing seller of a defective product. Although actions predicated on a negligence theory are clearly being supplanted by actions based on warranty and strict liability theories,[44] product liability actions based on negligence are useful as an alternative theory of recovery because a jury is more likely to favor the plaintiff when it is shown that the seller of a product was culpable.[45] Moreover, a negligence action is often an attractive alternative for the attorney because of the uncertainty surrounding strict liability actions caused by divergent state standards.[46]

Beginning with Justice Cardozo's decision in *MacPherson v. Buick Motor Co.*,[47] a general rule has emerged imposing liability on the seller for negligence in the manufacture or *sale* of any product which may be reasonably expected to cause substantial harm if defective.[48] Generally, this requires the seller of a product to exercise the care that a reasonable person would exercise under the same or similar circumstances in areas such as production, inspection, and warning of the dangerous propensities of a product.[49] It is clear that a negligence theory can be

---

43. *See* U.C.C. § 318 (1977). The Code provides the states with three alternatives to choose from in determining the protected class of persons. Alternative A provides:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of warranty. A seller may not exclude or limit the operation of this section.

Id. § 2-318.

Alternative B provides:

> A seller's warranty whether express or implied extends to any natural person who may reasonably be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Id.

Alternative C provides:

> A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

Id. The majority of states utilize the Code's most restrictive alternative, alternative A, in determining the scope of warranty protection. J. WHITE & R. SUMMERS, *supra* note 35, § 11-3, at 403.

44. W. PROSSER, *supra* note 2, at 743 n.6 (7th ed. 1982).

45. Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 HOFSTRA L. REV. 521, 531 (1974).

46. W. PROSSER, *supra* note 39, § 96 at 644.

47. 217 N.Y. 382, 111 N.E. 1050 (1916) (manufacturer held liable in negligence for defective wheel in absence of privity of contract).

48. W. KEETON, *supra* note 42, § 96 at 683.

49. W. PROSSER, *supra* note 39, § 96 at 644.

utilized against the nonmanufacturing seller of a defective product in regard to such seller's representations about the character of the product or through the seller's failure to disclose facts about the product that are dangerous to the consumer when the seller has knowledge of such facts.[50]

However, plaintiffs no longer have to rely on negligence principles to recover against nonmanufacturers for injuries caused by defective products because the strict liability and warranty theories that are currently in vogue do not require a showing of fault. Nevertheless, in the ultimate balancing of interests in product liability law, a strong argument can be made that it is more equitable and efficient to impose a fault-based standard of reasonable care on nonmanufacturing sellers of defective products. A standard that focuses on the nonmanufacturer's conduct rather than the characteristics of the product itself is desirable when the manufacturer—the party ultimately responsible for the product—is solvent and available for suit. Moreover, once the shortcomings of the various rationales for imposing strict liability on nonmanufacturers are realized,[51] it will be apparent that the imposition of strict liability on such parties is not always justified. After all, wholesalers and retailers who have no control over the manufacture of a product should not become virtual insurers of the product simply because they participate in the distribution chain. A return to a system of fault-based liability for such parties has merit in many cases.

B. Product Liability Law in Ohio

Ohio courts, and in particular, the Ohio Supreme Court, have been instrumental in the development and expansion of product liability law and in allowing increasingly liberal theories of recovery. In fact, as one federal judge observed, "[a] review of the decisions of the Supreme Court of Ohio reveals that Ohio has been at the forefront of those states which have shaped the format of modern products liability law."[52] However, in the molding of Ohio product liability law, it is apparent that Ohio courts have struck an unequal balance in favor of liberal plaintiff recovery.

The seminal case in Ohio product liability law is the Ohio Supreme Court's decision in *Lonzrick v. Republic Steel Corp.*[53] *Lonzrick* involved a plaintiff who was injured when defective steel roofing joists, manufactured and sold by the defendant, fell on him. The court ob-

50. *Id.* § 95 at 632.
51. *See supra* text accompanying notes 20–28.
52. Anton v. Ford Motor Co., 400 F. Supp. 1270, 1273 (S.D. Ohio 1975).
53. 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

served that in a product liability case, there were three possible causes of action which the plaintiff could pursue: an action in tort grounded upon negligence, an action based upon contract when there was a contractual relationship between the parties, and an action in tort based upon the breach of an implied duty assumed by the manufacturer-seller of a product.[54] The court referred to the last theory of recovery as "an action in tort for breach of an implied warranty."[55]

The *Lonzrick* court was careful to note that the implied warranty imposed on the manufacturer was a duty assumed by the manufacturer based on its "implicit" representation that its products were of "good and merchantable quality, fit and safe for their ordinary intended use."[56] It is noteworthy that in recognizing a tort action for breach of an implied warranty of merchantability, *Lonzrick* represented an extension of a previous Ohio Supreme Court decision which allowed a tort action for breach of an express warranty in the absence of privity of contract.[57]

In 1973, the Supreme Court of Ohio, in a product liability case involving the manufacturer of a truck with a defective braking system, categorized the implied warranty in tort theory articulated in *Lonzrick* as "strict liability."[58] In 1977, the court adopted section 402A of the *Restatement (Second) of Torts* in *Temple v. Wean United, Inc.*[59] Justice Celebrezze, in rendering the opinion for the court, stated that section 402A was being approved "[b]ecause there are virtually no distinctions between Ohio's 'implied warranty in tort' theory and the Restatement version of strict liability in tort, and because the Restatement formulation, together with its numerous illustrative comments, greatly facilitates analysis in this area."[60]

After the *Temple* court's adoption of section 402A, the issue still remained whether Ohio courts would extend strict liability principles to nonmanufacturing sellers of defective products because the Ohio Supreme Court's decisions in product liability cases had been limited to holding manufacturers strictly liable. However, it was clear after the court's adoption of section 402A with its illustrative comments, that strict liability could be extended to nonmanufacturing sellers of defective products.[61]

---

54. *Id.* at 229–30, 218 N.E.2d at 188.
55. *Id.* at 235, 218 N.E.2d at 191.
56. *Id.* at 235, 218 N.E.2d at 191.
57. Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).
58. State Auto Mut. Ins. Co. v. Chrysler Corp., 36 Ohio St. 2d 151, 156, 304 N.E.2d 891, 894 (1973).
59. 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).
60. *Id.* at 322, 364 N.E.2d at 271.
61. A relevant comment to Section 402A specifies that this section "applies to any manufac-

At least one Ohio appellate court, in reliance on the *Temple* decision, has indicated that section 402A could apply to a nonmanufacturing seller of a defective product in Ohio. In *Konowal v. Heinrich Baumgarden Co.*,[62] the plaintiff's son was severely burned when the handle on a kitchen pot broke. The appellate court was faced with the issue of whether section 402A could apply to Easterling Corporation, a distributor in the chain of sale from the manufacturer to purchaser.[63] The court held that the trial court's grant of summary judgment in favor of the distributor was improper since the Ohio Supreme Court had specifically adopted section 402A, which applies strict liability principles to any seller as long as the seller is engaged in the business of selling such a product.[64]

Thus, the *Konowal* court interpreted the *Temple* decision broadly in holding that the distributor could be held strictly liable for injuries caused by the defective product. The court in *Konowal* found that the supreme court's decision did not expressly limit the application of strict liability to manufacturers of products and that the court "intended to apply strict liability to distributors and retailers as well."[65]

In justifying its holding that strict liability could apply to the distributor of a defective product, the *Konowal* court stated that "public policy requires that the burden of accidental injuries caused by defective products intended for consumption be placed on those who market them, regardless of fault, so as to afford maximum protection for the consumer."[66] Implicit in the court's reasoning are two rationales for holding the nonmanufacturer strictly liable: the "economic benefit" theory and the "risk spreading" theory.[67]

A final supreme court decision deserves attention in order to fully understand the applicability of section 402A in Ohio, and to appreciate the Ohio court's plaintiff-orientation. In 1982, the court modified its adoption of section 402A in *Knitz v. Minster Machine Co.*[68] In *Knitz*,

---

turer of such a product, to any wholesale or retail dealer or distributor and to the operator of a restaurant." RESTATEMENT (SECOND) OF TORTS § 402A comment f (1965).

62. Konowal v. Heinrich Baumgarden Co., No. 3486 (Ohio Ct. App. 9th Dist. Aug. 31, 1983) (on file with University of Dayton Law Review).

63. *Id.*, slip op. at 1.

64. *Id.*, slip op. at 3.

65. *Id.*, slip op. at 5.

66. *Id.*, slip op. at 4 (citing RESTATEMENT (SECOND) OF TORTS § 402A reporter's note (1965)).

67. *See supra* notes 20–25 and accompanying text. However, even with the shortcomings of these rationales, the court was justified in imposing strict liability on the nonculpable distributor in this case as a way of protecting the plaintiff's interests because the manufacturer of the pot handle had been dismissed from the action for want of personal jurisdiction. *Konowal*, No. 3486, slip op. at 2.

68. 69 Ohio St. 2d 460, 432 N.E.2d 814 (1982), *cert. denied sub nom.*, Cincinnati Milacron

the court observed that the *Restatement* formulation of strict liability had come under criticism for appearing to impose a dual burden requirement on plaintiffs because they had to show that the product was both "defective" *and* "unreasonably dangerous."[69] The *Knitz* court noted that this dual requirement was more extensive than that required by the court in its initial formulation of strict liability in *Lonzrick*; therefore, "we focus our inquiry on the nature of 'defect' and dispense with any requirement for strict liability in tort that a defect be unreasonably dangerous."[70]

Thus, the Ohio standard for strict liability in tort can now be referred to as "technical" strict liability after the court's elimination of the "unreasonably dangerous" requirement of section 402A.[71] By lightening the plaintiff's burden in a product liability case based on strict liability, the *Knitz* court increased the potential liability of manufacturers as well as nonmanufacturing product sellers. Therefore, the opinion of one Ohio Supreme Court justice may be correct in categorizing Ohio product liability theory as "*absolute*, rather than strict, liability for manufacturers of products used in Ohio."[72]

In addition to recovery based on strict liability in product liability cases, the Ohio Supreme Court has also recognized that recovery could be based on a negligence theory.[73] Recovery under negligence is distinct from recovery based on strict liability. Generally, to recover under a negligence theory in Ohio the plaintiff must prove that the defendant breached a standard of reasonable care and that the plaintiff's injuries were the proximate result of this breach.[74] Thus, a plaintiff in Ohio cannot rest on just a showing that a defective product sold or manufactured by the defendant was the proximate cause of injury as can be done when the action is predicated on strict liability. However, even though recovery under negligence will generally be more difficult in a product liability action than recovery based on strict liability, a plaintiff relying on negligence in Ohio does have the benefit of the doctrine of res ipsa loquitur[75] to aid in establishing the defendant's negligent

---

Chem. Inc. v. Blankenship, 459 U.S. 857 (1982).

69. *Id.* at 464 n.2, 432 N.E.2d at 817 n.2.

70. *Id.*

71. *See supra* note 31 and accompanying text.

72. Cremeans v. International Harvester Co., 6 Ohio St. 3d 232, 236, 452 N.E.2d 1281, 1285 (1983) (Holmes, J. dissenting) (emphasis in original).

73. *Lonzrick*, 6 Ohio St. 2d at 229, 218 N.E.2d at 188.

74. Gast v. Sears Roebuck & Co., 39 Ohio St. 2d 29, 31, 313 N.E.2d 831, 833 (1974).

75. Generally to have standing to utilize the doctrine of res ipsa loquitur, which is treated as a form of circumstantial evidence in the great majority of jurisdictions, the plaintiff must show that: "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of

act.[76]

Finally, it is important to emphasize that in Ohio a plaintiff injured by a defective product can also proceed against the nonmanufacturing seller under a contractual theory of recovery based on the Uniform Commercial Code's express and implied warranty provisions as enacted in the Ohio Revised Code.[77] However, the scope of the nonmanufacturer's warranty liability is somewhat limited since Ohio has adopted the U.C.C. alternative which offers warranty protection only to natural persons who are in the household of the buyer, or to the guests in the product buyer's household if it is reasonable to expect that such persons may use, consume, or be affected by the product.[78] Moreover, Ohio has also adopted the U.C.C. provision which allows a seller to disclaim express and implied warranties.[79] A plaintiff relying on the U.C.C. in Ohio must also be aware of the troublesome notice provision which could bar the plaintiff's recovery if notice is not given within a reasonable time after the breach.[80] Nevertheless, an Ohio product liability plaintiff can avoid these potentially disqualifying U.C.C. provisions by simply classifying the action as one in "tort for breach of implied warranty."[81]

III. A Summary and Explanation of the Provisions of S. 136

The Ohio General Assembly enacted a detailed piece of legislation in S. 136 that is designed to protect nonmanufacturing product sellers. It is important to emphasize, however, that S. 136 does not offer a nonmanufacturing seller of a defective product absolute immunity in any product liability action. Instead, the bill essentially offers a seller *named* as a defendant in a product liability action based on strict tort liability or implied warranty in tort an early dismissal from the action if a two-step process is completed.

S. 136 begins by defining the terms "manufacturer" and "seller" for purposes of the legislation.[82] The bill defines manufacturer to include a person who *assembles* a product as well as a person who manu-

---

the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." W. Keeton, *supra* note 42, § 39 at 244.

76. *See Gast*, 39 Ohio St. 2d at 32, 313 N.E.2d at 834. However, the Ohio Supreme Court will not allow a plaintiff relying on the doctrine of res ipsa loquitur to argue that it creates an inference of negligence since the court believes this would essentially result in the disappearance of the distinction between strict liability and negligence theories in product liability cases. *Id.*

77. Ohio Rev. Code Ann. §§ 1302.26–.28 (Page 1979).

78. *Id.* § 1302.31.

79. Ohio Rev. Code Ann. § 1302.29 (Page Supp. 1983).

80. Ohio Rev. Code Ann. § 1302.65(C)(1) (Page 1979).

81. *See supra* text accompanying notes 54–55.

82. Act of March 28, 1984, 1984 Ohio Legis. Serv. 5-75, 5-75 (Baldwin) (to be codified at Ohio Rev. Code Ann. § 2305.93(A) (Page Supp. 1984)).

factures, compiles, fabricates, or produces a product.[83] Since the bill broadly defines manufacturer to include a person who assembles a product, a wholesaler or retailer could theoretically be considered a manufacturer by simply receiving a product in parts and then assembling the items into a final product for sale. The bill's definition of seller is also broad and seemingly all-encompassing. Included within this definition are those persons who convey title or *possession* of the product to another person in exchange for *anything of value.*[84] By including in the definition of a seller those persons who merely pass possession of the product to another person, the legislature apparently intended to embrace the sale of personal property as well as several other legal relationships short of ownership, such as bailments and leasing arrangements.[85]

Thus, the broad definition of seller should allow numerous nonmanufacturers to seek the protection offered by S. 136. In order to have standing to seek dismissal, however, the seller is specifically required to prove all the elements in a four-part test.[86] In addition, the second prong of S. 136 contains five more criteria that will disqualify the seller from seeking dismissal if any one of the criteria applies to the seller.[87]

The four-part test that the seller is required to establish is extensive. The first element of this test is aimed at culpability and requires the seller to show that it did not alter, modify, or fail to maintain the allegedly defective product before it left the seller's possession; or, if the seller engaged in one of the above acts or omissions, this did not render the product defective.[88]

The second element of the four-part test imposed on the seller seeks to ensure that the manufacturer can be sued in Ohio, and that the manufacturer will have the ability to satisfy a possible judgment rendered against it in a product liability action. Under this second element, the seller must first establish that the manufacturer of the allegedly defective product is subject to service of judicial process in Ohio.[89] Thus, this provision ensures that Ohio courts can secure personal juris-

---

83. *Id.*

84. *Id.*

85. OHIO LEGISLATIVE SERV. COMM'N, BILL ANALYSIS: AM SUB. S.B. 136 (AS REPORTED BY H. COMM. ON CIVIL & COMMERCIAL LAW) 2 (1984) [hereinafter cited as BILL ANALYSIS] (on file with University of Dayton Law Review). *See* Miles v. General Tire & Rubber Co., 10 Ohio App. 3d 186, 460 N.E.2d 1377 (1983) (application of strict liability to commercial lessor of product).

86. Act of March 28, 1984, 1984 Ohio Legis. Serv. 5-75, 5-75 (Baldwin) (to be codified at OHIO REV. CODE ANN. § 2305.33(B)(1)–(4) (Page Supp. 1984)).

87. *Id.* (to be codified at OHIO REV. CODE ANN. § 2305.33(D)(1) (Page Supp. 1984)).

88. *Id.* (to be codified at OHIO REV. CODE ANN. § 2305.33(B)(1) (Page Supp. 1984)).

89. *Id.* (to be codified at OHIO REV. CODE ANN. § 2305.33(B)(2) (Page Supp. 1984)).

diction over the manufacturer before allowing the seller to be dismissed.[90] Additionally, the seller must establish one of two other criteria that are both aimed at ensuring that the manufacturer will have the means to satisfy a possible judgment rendered in favor of the plaintiff. The seller can establish that it or the manufacturer provided the plaintiff who initiated the action with actual written notice specifying that the manufacturer is actually covered by insurance for the specific defect that is allegedly present in the product;[91] or alternatively, the seller can prove that the manufacturer has neither filed for bankruptcy nor been judicially declared insolvent.[92]

The third element of the four-part test imposed on the seller seeks to ensure that the injured plaintiff obtains the identity of the manufacturer. This element requires the seller to provide any person with the name and address of the manufacturer of the allegedly defective product that has been or is currently being offered for sale by the seller.[93] However, this provision does contain safeguards to prevent possible abuse of this identification requirement by plaintiffs. The person who requests the name and address of the manufacturer must state in a writing supported by an affidavit that bodily injury, death, or injury to real or personal property occurred as a result of using the manufacturer's allegedly defective product.[94] Only upon the receipt of a written request satisfying the above requirements is the seller then required to provide the requesting party with a written response containing the name and address of the manufacturer of the allegedly defective product within thirty days.[95]

Finally, the fourth element of the four-part test seeks to ensure that the seller is not at fault for injuries caused by the allegedly defective product. Thus, the seller must establish that it did not have actual knowledge of the alleged defect in the product.[96] However, even if the seller did not have actual knowledge of the defect, this provision requires a showing that based upon facts available to the seller, it could not have been expected to have had knowledge of the alleged defect in the product prior to its leaving the seller's possession.[97] Although the actual knowledge standard imposed on the seller is equitable and free

90. Ohio courts can obtain personal jurisdiction over nonresident manufacturers pursuant to Ohio's "long-arm" statute. *See* OHIO R. CIV. P. 4.3(A).

91. Act of March 28, 1984, 1984 Ohio Legis. Serv. 5-75, 5-75 (Baldwin) (to be codified at OHIO REV. CODE ANN. § 2305.33(B)(2)(a) (Page Supp. 1984)).

92. *Id.* (to be codified at OHIO REV. CODE ANN. § 2305.33(B)(2)(b) (Page Supp. 1984)).

93. *Id.* (to be codified at OHIO REV. CODE ANN. § 2305.33(B)(3) (Page Supp. 1984)).

94. *Id.*

95. *Id.*

96. *Id.* (to be codified at OHIO REV. CODE ANN. § 2305.33(B)(4) (Page Supp. 1984)).

97. *Id.*

from any interpretive difficulties, the wording of the second portion of this fourth element is troublesome since it is unclear whether a subjective or objective standard is being imposed on the seller in regard to knowledge of the defect.[98]

As indicated earlier, even if the seller establishes all the elements of the four-part test specifically allocated as the seller's burden of proof, the seller can still be disqualified from seeking the bill's protection if any *one* of five additional criteria applies.[99] Thus, in order to seek the bill's protection, the seller must essentially go through a two-step process: the seller must first establish all the elements in the four-part test, and then must be prepared to show that none of the additional criteria applies to the seller.

These additional criteria are all aimed at establishing whether or not the seller is directly involved in the production or marketing of the allegedly defective product. For instance, the seller is not entitled to the bill's protection if the seller is the manufacturer of the allegedly defective product or a component part thereof.[100]

In addition, the seller will not qualify for the bill's protection if the seller owns in whole or in part, or is owned in whole or in part by, the manufacturer of the allegedly defective product.[101] This limitation applies not only when this relationship between the seller and manufacturer existed at the time of the sale of the allegedly defective product, but also when such ownership exists at the time of suit.[102] This common ownership provision accounts for vertically integrated business entities by preventing jointly or wholly owned manufacturer-seller combinations from utilizing the protection offered by S. 136.

S. 136 also prevents a court from allowing a seller to be dismissed from the action if the seller furnished the manufacturer with a design for producing the allegedly defective product.[103] Thus, this limitation prevents a seller who is directly involved in the manufacturing process from seeking the protection offered by the bill. Finally, a nonmanufacturer who markets the allegedly defective product under the seller's label or trade name is disqualified from seeking the bill's protection.[104] This limitation will most likely prevent retailers that sell name brand products produced by independent manufacturers from seeking dismis-

---

98. *See infra* text accompanying notes 144–46.

99. Act of March 28, 1984, 1984 Ohio Legis. Serv. 5-75, 5-75 (Baldwin) (to be codified at OHIO REV. CODE ANN. § 2305.33(D)(1) (Page Supp. 1984)).

100. *Id.* (to be codified at OHIO REV. CODE ANN. § 2305.33(D)(1)(a) (Page Supp. 1984)).

101. *Id.* (to be codified at OHIO REV. CODE ANN. § 2305.33(D)(1)(b), (c) (Page Supp. 1984)).

102. *Id.*

103. *Id.* (to be codified at OHIO REV. CODE ANN. § 2305.33(D)(1)(d) (Page Supp. 1984)).

104. *Id.* (to be codified at OHIO REV. CODE ANN. § 2305.33(D)(1)(e) (Page Supp. 1984)).

sal from product liability actions.

Once the two-step process outlined above can be completed in the seller's favor, the seller is eligible to seek dismissal from the action.[105] The procedural methods offered to the seller in seeking dismissal are motions for summary judgment and motions for directed verdict.[106]

The summary judgment option offers the seller a device for terminating the litigation without actually proceeding to trial by allowing the seller to make a motion pursuant to Rule 56 of the Ohio Rules of Civil Procedure.[107] By utilizing this motion, the seller can avoid trial since a defending party can move for summary judgment at any time after being named a party in a civil action.[108] If the product liability action has been set for pretrial or trial, however, the seller may move for summary judgment only upon leave of court.[109] The burden of proof imposed on the seller under S. 136 is basically the same as the standard for summary judgment under Rule 56 because the bill provides that the seller is entitled to summary judgment if there is no genuine issue in regard to the seller's proof of all the elements in the four-part test.[110]

In the event the seller is not granted summary judgment or does not make such a motion, S. 136 also provides the seller with a method for seeking dismissal from a product liability action once it has reached the trial stage. Upon a motion by the seller, the court is required to consider directing a verdict for the seller pursuant to Rule 50 of the Ohio Rules of Civil Procedure.[111] The seller is entitled to a directed verdict if reasonable minds could come to but one conclusion that the seller has met its burden of proving all elements in the four-part test.[112] A seller named a defendant in a product liability action can move for a directed verdict on the opening statement of the plaintiff, at the close of the plaintiff's evidence, or at the close of all the evidence.[113]

The protection offered by S. 136 does not apply to all theories of recovery available to a plaintiff against a nonmanufacturing seller in a product liability action. The bill is expressly limited to product liability

---

105. *Id.* (to be codified at OHIO REV. CODE ANN. § 2305.33(C) (Page Supp. 1984)).

106. *Id.*

107. OHIO R. CIV. P. 56.

108. *Id.* 56(b).

109. *Id.*

110. Act of March 28, 1984, 1984 Ohio Legis. Serv. 5-75, 5-75 (Baldwin) (to be codified at OHIO REV. CODE ANN. § 2305.33(C) (Page Supp. 1984)). However, the court cannot grant summary judgment for the seller if any one of the five additional criteria applies. *Id.* (to be codified at OHIO REV. CODE ANN. § 2305.33(D)(1)(a)–(e) (Page Supp. 1984)).

111. *Id.* (to be codified at OHIO REV. CODE ANN. § 2305.33(C) (Page Supp. 1984)).

112. *Id.* The court cannot direct a verdict for the seller, however, if any one of the five additional criteria applies to the nonmanufacturer. *Id.* (to be codified at OHIO REV. CODE ANN. § 2305.33(D)(1)(a)–(e) (Page Supp. 1984)).

actions based on strict tort liability or implied warranty in tort.[114] Thus, S. 136 does not totally insulate product sellers from liability if the plaintiff sues the nonmanufacturer under an alternative theory of recovery.[115] The alternatives still left open to the plaintiff under the bill are product liability actions based on negligence, contract, or any action based on the express or implied warranty provisions of the Ohio Revised Code that is not "cognizable as an action based upon implied warranty in tort."[116] Although this provision is unambiguous in establishing that the seller can be sued under negligence and contract theories, it is not absolutely clear whether S. 136 actually intends to allow express and implied warranty actions to be maintained against a seller who has met all the requirements under the bill.

This uncertainty exists because of the somewhat ambiguous language used in this particular bill provision. It provides that express and implied warranty actions can be maintained against the seller unless such actions are *cognizable* as actions based upon implied warranty in tort.[117] Thus, the language implies that an express or implied warranty action could be disallowed if such an action is classified as one in tort. As will be seen, the interpretive difficulty posed by this particular language will play an important role in determining the effectiveness of S. 136 in protecting sellers' interests.[118]

S. 136 concludes with two significant provisions that deserve attention since they are restrictive in defining the interpretation and effective date of the bill. First, S. 136 contains a catch-all provision specifying that nothing contained in the bill is to be construed as creating a new cause of action or substantive right against the seller of an allegedly defective product based upon strict tort liability or implied warranty in tort.[119] This provision is aimed at preventing unnecessary confusion over S. 136 in limiting the liability of nonmanufacturing sellers. For example, this provision will prevent a court from creating a presumption of liability against the seller if the nonmanufacturer attempted but failed to establish its burden of proof under the four-part test.[120] Moreover, it will prevent a plaintiff from arguing that he or she has an abso-

114. Act of March 28, 1984, 1984 Ohio Legis. Serv. 5-75, 5-75 (Baldwin) (to be codified at OHIO REV. CODE ANN. § 2305.33(B) (Page Supp. 1984)).

115. *Id.* (to be codified at OHIO REV. CODE ANN. § 2305.33(D)(2) (Page Supp. 1984)).

116. *Id.*

117. *Id.*

118. *See infra* text accompanying notes 153–62.

119. Act of March 28, 1984, 1984 Ohio Legis. Serv. 5-75, 5-75 (Baldwin) (to be codified at OHIO REV. CODE ANN. § 2305.33(E) (Page Supp. 1984)).

120. Schwarzwalder interview, *supra* note 4. *See* Act of March 28, 1984, 1984 Ohio Legis. Serv. 5-75, 5-75 (Baldwin) (to be codified at OHIO REV. CODE ANN. § 2305.33(B)(1)–(4) (Page Supp. 1984)).

lute right to receive the name and address of the manufacturer of the allegedly defective product from the seller of such a product if the seller refuses to comply with the request.[121] Instead, a seller who refuses to comply with such a request could only be disqualified from utilizing the protection offered by the bill. The second provision of interest is drafted for the plaintiff's protection, and specifies that the protection offered to nonmanufacturers by the bill is *not* to have retroactive application.[122] Therefore, S. 136 does not apply to any action for bodily injury, death, or injury to real or personal property caused by a defective product if the injury arose before July 2, 1984.[123] This limitation applies even if the complaint for such an action is filed after the effective date of the bill.[124]

IV. Similar Statutes of Other States Limiting the Liability of Nonmanufacturers in Certain Product Liability Cases

Recently, efforts have been made at the federal and state levels to limit the liability of nonmanufacturing sellers of defective products. On the federal level, the Department of Commerce offered to the states in 1979 the Uniform Product Liability Act (Uniform Act) in an attempt to create uniformity among product liability actions between the several states.[125] The Uniform Act contains a provision which limits the liability of a seller who is not the manufacturer of a defective product.[126] On the state level, several legislatures have enacted laws offering nonmanufacturing sellers protection in certain product liability actions.[127]

---

121. Schwarzwalder interview, *supra* note 4. *See supra* text accompanying notes 93–95.

122. *See* Bill Analysis, *supra* note 85, at 3.

123. *Id.*

124. *Id.*

125. Model Uniform Prod. Liab. Act (Dep't of Commerce 1979), *reprinted in* 44 Fed. Reg. 62,714 (1979) [hereinafter cited as Uniform Act].

126. *Id.* § 105, *reprinted in* 44 Fed. Reg. at 62,726–27. A bill was pending before the 98th Congress, titled the Uniform Product Liability Law, which would have offered nonmanufacturing product sellers protection similar to that proposed by the Uniform Act. The bill was not substantially different from Ohio's new law protecting sellers of defective products who are not manufacturers. S. 44, 98th Cong., 2d Sess. § 8 (1984), *reprinted in* [Extra Edition] Prod. Liab. Rep. (CCH) No. 546, at 124–26 (June 8, 1984). Congress adjourned for the November, 1984, elections without voting on the bill.

127. These laws vary in nature and degree between the several states but are of three basic types—a specific limitation on nonmanufacturer liability, a limitation on the time within which actions may be commenced, and a requirement that manufacturers assume the cost of defending the action and any liability that may be imposed on the seller.

The most common limitation placed on product liability claims is the statute of repose. This statutory scheme limits the time in which actions may be commenced to a specific period which begins to run for the seller of the product on the date of initial purchase by the buyer, instead of when the actual injury occurs. In so limiting actions, product liability insurance premiums can be more reasonably and accurately calculated. At least thirteen states have passed such statutes.

Section 105 of the Uniform Act is similar to Ohio's new law and was consulted by the sponsors of S. 136 in drafting the bill.[128] The Uniform Act offers protection from liability to the seller of an allegedly defective product who is not the manufacturer, if the seller has exercised reasonable care with respect to the product and is not in breach of any express or implied warranties.[129] Additionally, the Uniform Act, like S. 136, requires the seller to establish that the manufacturer of the allegedly defective product is subject to service of process in the plaintiff's state,[130] and that the manufacturer has not been declared judicially insolvent.[131] Thus, in imposing liability, the Uniform Act and S. 136 both focus on the *fault* of nonmanufacturing sellers of defective products while still protecting the plaintiff's interest in having the responsible and solvent manufacturer to sue.

Some of the provisions of the Uniform Act were derived in part from a Tennessee law limiting the liability of the nonmanufacturer in

---

ARIZ. REV. STAT. ANN. § 12-551 (1982); CONN. GEN. STAT. ANN. § 52-577(a) (West Supp. 1984); FLA. STAT. ANN. § 95-031(2) (West 1982); GA. CODE ANN. § 51-1-11 (1982); IDAHO CODE § 6-1403 (Supp. 1984); KAN. STAT. ANN. § 60.3303 (Supp. 1984); MINN. STAT. ANN. § 604.03(3) (West Supp. 1984); N.D. CENT. CODE § 2801.1-01 (Supp. 1983); OR. REV. STAT. § 30.905 (1983); R.I. GEN. LAWS § 9-1-13 (Supp. 1984); TENN. CODE ANN. § 29-28-103 (1980); UTAH CODE ANN. § 78-15-3 (1977); WASH. REV. CODE ANN. § 7.72.060 (West Supp. 1984).

It has recently become more common to specifically limit the nonmanufacturing seller's liability in a product liability action. This is the type of scheme chosen by the Ohio General Assembly in enacting its new law to protect nonmanufacturing product sellers. In general, such statutory schemes require the seller to establish that it did not have knowledge of the defect, that the seller was not negligent in handling the product, that the manufacturer of the product is subject to service of process in the particular state, and that the manufacturer is solvent or otherwise able to satisfy a possible judgment. In differing degrees, many states offer nonmanufacturing sellers protection from product liability claims. COLO. REV. STAT. § 13-21-402 (Supp. 1983); IDAHO CODE § 6-1407 (Supp. 1984); ILL. ANN. STAT. ch. 110, § 2-621 (Smith-Hurd 1984); KAN. STAT. ANN. § 60.3306 (1983); KY. REV. STAT. ANN. § 411.340 (Baldwin 1979); NEB. REV. STAT. § 25-21,181 (1979); N.C. GEN. STAT. § 99B-2 (1979); TENN. CODE ANN. § 29-28-106 (Supp. 1983); WASH. REV. CODE ANN. § 7.72.040 (West Supp. 1984).

The third way in which state legislatures have offered protection to nonmanufacturing sellers is by providing such sellers with a cause of action against the manufacturer of the defective product for indemnity. Many of these indemnification statutes further impose on the manufacturer the duty to tender defense for a seller sued for injuries caused by the manufacturer's defective product. ARIZ. REV. STAT. ANN. § 12-684 (1982); ARK. STAT. ANN. § 34-2806 (Supp. 1983); IND. CODE ANN. § 34-4-20A-6 (Burns Supp. 1984); MINN. STAT. ANN. § 604.02 (Supp. 1984); N.D. CENT. CODE § 28-01.1-07 (Supp. 1983).

128. Schwarzwalder interview, *supra* note 4.

129. UNIFORM ACT, *supra* note 125, § 105(A) & (B). The Uniform Act requires the court to undertake an extensive examination of the nonmanufacturer's conduct "with respect to the design, construction, inspection, or condition of the product, and any failure of such product seller to transmit adequate warnings or instructions about the dangers and proper use of the product." *Id.* § 105(A).

130. *Id.* § 105(C)(1).

131. *Id.* § 105(C)(2). The Uniform Act also requires a court determination of whether it is probable that the plaintiff would be able to enforce a court judgment against the product's manufacturer before allowing the nonmanufacturer protection. Id. § 105(C)(3).

product liability cases.[132] The Tennessee statute disallows product liability actions against nonmanufacturing sellers of defective products when the product is acquired and sold by the seller in a sealed container.[133] Although S. 136 is not as specific as the Tennessee statute in this regard, the Ohio bill accomplishes the same objective by requiring the seller to show that it did not alter, modify or fail to maintain the product.[134] The Tennessee statute also allows the nonmanufacturer protection when it acquires the product under circumstances in which the seller is afforded no reasonable opportunity to inspect the product.[135] S. 136 is not as explicit in specifying the nonmanufacturer's standard of care, but accomplishes a similar objective by not allowing a seller protection when it has actual knowledge of the defect or, based on facts available to the seller, it could not have been expected to have had knowledge of the defect.[136] The Tennessee and Ohio laws are similar in not allowing the nonmanufacturing seller protection from liability when the manufacturer of the allegedly defective product is not subject to service of process in the state, or when the manufacturer has been declared judicially insolvent.[137] Thus, both laws seek to protect the plaintiff's interests while at the same time extending needed protection to nonmanufacturers.

The Product Liability Act of Kentucky also offers wholesalers, distributors, and retailers protection in certain product liability actions.[138] However, the Kentucky statute is more plaintiff-oriented since it only allows a seller protection when the nonmanufacturer establishes that the product was sold in its original manufactured condition or package.[139] The Ohio bill's specificity in this regard is noteworthy because under S. 136, the nonmanufacturer who actually alters or modifies the product before sale can still seek the bill's protection by establishing that the alteration or modification did not render the product defective.[140] The Kentucky and Ohio laws are similar in requiring that the

---

132. *Id.* § 105 (Analysis).

133. TENN. CODE ANN. § 29-28-106 (Supp. 1983).

134. Act of March 28, 1984, 1984 Ohio Legis. Serv. 5-75, 5-75 (Baldwin) (to be codified at OHIO REV. CODE ANN. § 2305.33(B)(1) (Page Supp. 1984)).

135. TENN. CODE ANN. § 29-28-106 (Supp. 1983). If the nonmanufacturer is afforded an opportunity to inspect the product, the seller is judged by the standard of reasonable care in determining whether the defect should have been discovered. *Id.*

136. Act of March 28, 1984, 1984 Ohio Legis. Serv. 5-75, 5-75 (Baldwin) (to be codified at OHIO REV. CODE ANN. § 2305.33(B)(4) (Page Supp. 1984)).

137. *Id.* (to be codified at OHIO REV. CODE ANN. § 2305.33(B)(2)(b) (Page Supp. 1984)); TENN. CODE ANN. § 29-28-106(a)(2),(a)(3) (Supp. 1983).

138. KY. REV. STAT. ANN. § 411.340 (Baldwin 1979).

139. *Id.*

140. Act of March 28, 1984, 1984 Ohio Legis. Serv. 5-75, 5-75 (Baldwin) (to be codified at OHIO REV. CODE ANN. § 2305.33(B)(1) (Page Supp. 1984)).

manufacturer of the allegedly defective product be subject to the court's jurisdiction before allowing the seller protection, and by disqualifying the nonmanufacturer if it has knowledge of the defect.[141]

A common provision in state statutes that offer protection to nonmanufacturers is the requirement that the manufacturer of the allegedly defective product be amenable to suit in the state where the action is brought. Such provisions are imperative in product liability statutes offering seller protection because they ensure that the plaintiff has a responsible party to sue for his or her injuries. However, a notable exception is the Nebraska statute limiting the liability of nonmanufacturing sellers of defective products. This statute simply provides that no product liability action shall be maintained against the product seller based on strict tort liability unless the seller is the manufacturer of the product.[142] Although the statute is similar to S. 136 in including lessors within the definition of nonmanufacturers,[143] the Nebraska statute is flawed because it offers the nonmanufacturer protection without first ensuring that the manufacturer of the allegedly defective product is subject to service of process in the state. Under this scheme, the consumer's interest in bringing suit in the state where the product was sold is placed in a subordinate position to the state's interest in providing broad protection to the nonmanufacturer.

V. AN ANALYSIS OF THE EFFECTIVENESS OF S. 136

A. Interpretive Difficulties Contained in the Bill

S. 136 takes a quantum leap in protecting nonmanufacturing sellers of defective products under certain conditions by allowing such sellers to seek early dismissal from product liability suits when they are not at fault. The bill should be effective in providing increased protection to nonculpable sellers from the ruinous consequences of product liability judgments. S. 136 also contains sufficient safeguards to protect the plaintiff's interest to sue and receive compensation in Ohio when the defective product is bought in this state. Nevertheless, there are interpretive difficulties in some of the provisions of S. 136 that could cause Ohio courts to interpret the bill in a manner contrary to the interpretation sought by the Ohio General Assembly.

One troublesome provision of S. 136 specifies that the seller is not entitled to the bill's protection if the seller has actual knowledge of the alleged defect in the product, or if the seller could have been expected

141. *Id.* (to be codified at OHIO REV. CODE ANN. § 2305.33(B)(4) (Page Supp. 1984)); KY. REV. STAT. ANN. § 411.340 (Baldwin 1979).

142. NEB. REV. STAT. § 25-21,181 (1979).

143. *Id.*, *see supra* note 85 and accompanying text.

to have had knowledge of the alleged defect based on facts available to the seller.[144] Although the actual knowledge standard imposed on the seller is unambiguous, the second portion of this provision could present interpretive difficulties because it is unclear whether the language used in the provision imposes an objective or subjective standard of care on the nonmanufacturer regarding its constructive knowledge of the product's defect.

Imposing a subjective standard of care on the seller concerning its constructive knowledge of the defect would unduly favor the nonmanufacturer's interests and would reduce the effectiveness of the bill in protecting potential plaintiffs. However, the sponsor of S. 136 maintains that the intent of the Ohio General Assembly in drafting this particular provision was to impose an *objective* standard of care on the nonmanufacturing seller.[145] Therefore, if the seller did not have actual knowledge of the defect, the appropriate inquiry under this provision is whether a reasonable person with the same facts as the seller had at its disposal would have discovered the defective condition of the product.[146]

A closely related issue regarding the application of subdivision (B)(4) of the law is whether this provision imposes an absolute duty of inspection on wholesalers, distributors, and retailers. Such a requirement, while favorable to plaintiffs, would often be burdensome and costly to the nonmanufacturer, as well as create an added obligation for the seller in order to obtain the bill's protection.[147] However, the sponsor of S. 136 stated that it would be a strained interpretation of the bill to read it as mandating an absolute duty of inspection.[148] Instead, the nonmanufacturing seller's obligation to inspect the product for defects depends on the particular facts of each case and whether a reasonable person would do so under the circumstances.[149]

Another provision of the law that will likely be the subject of in-

144. Act of March 28, 1984, 1984 Ohio Legis. Serv. 5-75, 5-75 (Baldwin) (to be codified at OHIO REV. CODE ANN. § 2305.33(B)(4) (Page Supp. 1984)).

145. Schwarzwalder interview, *supra* note 4.

146. *Id.*

147. Testimony was presented before the House by one distributor of products which indicated the burdensome and costly effects that an absolute duty of inspection would have on nonmanufacturers. This distributor bought electrical parts from 100 different manufacturers and had stock of approximately 25,000 parts. These parts often came to the distributor in sealed containers from the manufacturer. Testimony of William Feth, president of Akron Electronic Supply Company, before the House Civil and Commercial Law Comm. (February 7, 1984) [hereinafter cited as Feth testimony] (on file with University of Dayton Law Review.).

148. Schwarzwalder interview, *supra* note 4.

149. *Id.* Senator Schwarzwalder cited a hypothetical example in which a reasonable retailer would inspect a lawnmower for damage if it were dropped. Requiring an inspection in such circumstances is consistent with the traditional fault-based standard of reasonable care.

terpretive difficulties is subdivision (D)(1) that specifies five additional criteria that can disqualify the nonmanufacturer from seeking the bill's protection if just one of these criteria applies to the seller.[150] The difficulty is caused by an absence of language in the bill specifying which party is required to show that one of the criteria applies or is inapplicable. S. 136 uses specific language in requiring the seller to prove all the elements of the four-part test in division (B) in order to be eligible for the bill's protection, but does not make such an allocation in subdivision (D)(1).[151] This presents the issue of whether the seller must actually prove that none of the five criteria applies, or whether the plaintiff can use subdivision (D)(1) as a method of establishing that the seller is not entitled to the bill's protection by proving that one of the criteria applies to the seller.

In promulgating S. 136, the Ohio General Assembly envisioned that the seller of the allegedly defective product would establish that none of the criteria contained in subdivision (D)(1) applied to the nonmanufacturer rather than the plaintiff establishing the presence of any one of those criteria.[152] According to this interpretation, the nonmanufacturer would not only have to prove all the elements of the four-part test specifically allocated to the seller in division (B), but would also have to prove that none of the additional criteria in subdivision (D)(1) applies to the seller. However, as a practical matter, because the bill does not contain any language which would prevent the plaintiff from showing that one of the criteria in subdivision (D)(1) applies, it may be a useful strategy for plaintiff's counsel to assert the presence of one of these criteria in order to prevent the seller from invoking the protection of S. 136.

The most troublesome provision of S. 136 is subdivision (D)(2) which limits application of the bill to certain product liability actions.[153] This provision provides that a seller of a defective product can be sued under negligence and contract theories notwithstanding the protection S. 136 offers nonmanufacturers in actions based on strict tort liability or implied warranty in tort.[154] However, it is further specified that a plaintiff can sue a seller under the express and implied warranties of the Ohio Revised Code if the warranty action is *not cogniza-*

150. Act of March 28, 1984, 1984 Ohio Legis. Serv. 5-75, 5-75 (Baldwin) (to be codified at OHIO REV. CODE ANN. § 2305.33(D)(1) (Page Supp. 1984)).

151. *See id.* (to be codified at OHIO REV. CODE ANN. § 2305.33(B) (Page Supp. 1984)).

152. Schwarzwalder interview, *supra* note 4.

153. Act of March 28, 1984, 1984 Ohio Legis. Serv. 5-75, 5-75 (Baldwin) (to be codified at OHIO REV. CODE ANN. § 2305.33(D)(2) (Page Supp. 1984)).

154. *Id.*

ble as an action based upon implied warranty in tort.[155] The language used in this portion of subdivision (D)(2) is ambiguous because it is unclear whether this provision is actually intended to allow plaintiffs to maintain warranty actions against nonmanufacturing sellers.

A review of the seminal Ohio Supreme Court decision in the product liability area will help to resolve this ambiguity. In *Lonzrick v. Republic Steel Corp.*,[156] the court observed that under Ohio law, an action for breach of warranty in a product liability case *may* sound in tort rather than contract.[157] In fact, the *Lonzrick* court essentially allowed the contractually-based action for breach of an implied warranty of merchantability to be maintained as an action in tort for breach of implied warranty.[158] Therefore, the contractually-based warranty action was *cognizable* in tort.

In applying the holding of the *Lonzrick* court to the ambiguous language of subdivision (D)(2), one can reasonably conclude that any contractually-based implied warranty action in a product liability case can be classified as an action in *tort* for breach of implied warranty. Therefore, since the bill specifies that express or implied warranty actions can only be maintained against the nonmanufacturer if such actions are not cognizable as actions based on implied warranty in tort, this provision of S. 136 could reasonably be interpreted to mandate that *implied warranty* actions under the U.C.C. *cannot* be maintained against the nonmanufacturing seller of a defective product.

Such a conclusion would be consistent with the policy behind S. 136 to limit the liability of nonmanufacturers in product liability actions. Prohibiting contractually-based implied warranty actions against nonmanufacturers is consistent with this policy because a plaintiff can often achieve the same result under an implied warranty action as can be achieved in an action based on strict tort liability.[159] Therefore, in order for S. 136 to be consistent with its purpose of limiting the liability of nonmanufacturing sellers of defective products in actions based on strict tort liability or implied warranty in tort, it is imperative that the language of subdivision (D)(2) be interpreted as *prohibiting* contractually-based implied warranty actions.[160]

---

155. *Id.*

156. 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

157. *Id.* at 233, 218 N.E.2d at 190.

158. *Id.* at 235–36, 218 N.E.2d at 191.

159. J. WHITE & R. SUMMERS, *supra* note 35, § 9-6. *See* Leete, *supra* note 20, at 1010–12. Importantly, the Ohio Supreme Court has stated that there is virtually no distinction between an action based on strict tort liability and a tort action for breach of implied warranty. Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 322, 364 N.E.2d 267, 271 (1977).

160. At least one other writer maintains that a statutory limitation on strict liability would be defeated if an action based on implied warranty is permissible. Leete, *supra* note 20, at 1012.

An interpretation of this provision of the bill as prohibiting implied warranty actions under the U.C.C. is also consistent with the interpretation sought by the legislature. The sponsor of S. 136 stated that the "not cognizable" language used in subdivision (D)(2) is intended to encourage a judicial determination of whether an express or implied warranty action can be maintained as an action in tort for breach of implied warranty.[161] In fact, the sponsor takes the position that he would like to see the bill supersede the implied warranty provisions of the Ohio Revised Code so that S. 136 can meet its objective of protecting nonmanufacturing sellers who are not at fault in product liability actions.[162]

B. The Objectives of S. 136 and How They Are Met

S. 136 is a response to the lobbying efforts of numerous business organizations which have criticized current product liability policy in one general respect: the pendulum has swung too far in favor of liberal recovery for injured plaintiffs. In a partial answer to this criticism, S. 136 seeks to curb the damaging effects that liberal strict liability recovery can have on nonmanufacturing sellers of allegedly defective products. By swinging the pendulum back to a fault basis, S. 136 attempts to reduce product liability litigation involving nonmanufacturers in order to reduce sellers' legal expenses and insurance premiums.[163] In striking this more equitable balance, however, the Ohio General Assembly has included many safeguards in S. 136 to ensure that persons injured by defective products are not denied needed compensation.

The hearings on S. 136 illustrated both the imbalance in current Ohio product liability law and the costly effects that this imbalance has had on nonmanufacturing sellers of defective products. For example, testimony was presented by a retailer of football helmets who was forced to incur legal expenses when named as a defendant in a product liability action that lasted seven years before being settled for a modest sum.[164] This retailer had never directly touched the product in question, but had only acted as a middleman between the manufacturer and the customer.[165] Testimony was also presented on behalf of another small business that was named as a defendant in a product liability

161. Schwarzwalder interview, *supra* note 4.

162. *Id.*

163. Schwarzwalder interview, *supra* note 4.

164. Testimony of Bill Hart, wholesale manager of Agler-Davidson Sporting Goods, Inc., before the House Civil and Commercial Law Comm. (February 7, 1984) [hereinafter cited as Hart testimony] (on file with University of Dayton Law Review). The original complaint against Agler-Davidson asked for $16,000,000. The case was settled for $2,500. *Id.*

165. *Id.*

action for merely selling a defective relay switch that it received and sold in the same closed container that the manufacturer had shipped the product.[166] This wholesaler incurred legal expenses of $5,000.00 in defending against this suit, which was an amount equal to the business' normal yearly costs for both legal and accounting services.[167]

In response to the pressures that small business persons have exerted on Ohio legislators, S. 136 was enacted to offer nonmanufacturers, such as the above retailer and wholesaler, with some protection by allowing such parties to seek early dismissal from product liability actions. It is obvious that nonmanufacturers will still incur legal expenses in making motions for summary judgment or a directed verdict. S. 136 should be effective, however, in reducing the legal expenses of nonmanufacturers named as defendants in product liability actions because such sellers will be able to move for summary judgment as soon as they are served with a complaint.[168] The option to move for summary judgment will enable many nonmanufacturers to avoid the legal expenses of a protracted product liability case. More importantly, it is anticipated that the minimal costs incurred by the nonmanufacturers in moving for summary judgment will be clearly outweighed by the benefit the plaintiff receives when the court is required to determine, as a matter of law, that all the requirements of the bill designed to protect the plaintiff are met before granting the seller's motion.[169] Therefore, in balancing the respective interests, S. 136 does not completely eliminate the nonmanufacturer's legal expenses, but does reduce such expenses while ensuring that the plaintiff has a solvent party to sue in Ohio courts.

Although a goal of S. 136 is to reduce product liability litigation involving nonmanufacturers, because S. 136 does not exclude actions based on negligence, it is likely that nonmanufacturers will be sued more frequently under negligence theory.[170] This possible ramification was recognized and discounted by the proponents of S. 136. They believed it was imperative to allow negligence actions to be maintained against nonmanufacturers because the underlying rationale for the bill was to return the liability of such sellers to a fault basis so that the party ultimately accountable for injuries caused by defective products, the manufacturer, could be sued under strict liability and held solely responsible.[171]

---

166. Feth testimony, *supra* note 147, at 1.
167. *Id.* at 2.
168. *See supra* text accompanying notes 107–10.
169. Schwarzwalder interview, *supra* note 4.
170. *See supra* text accompanying notes 114–16.
171. Schwarzwalder interview, *supra* note 4. It is recognized by the Ohio Supreme Court

Nevertheless, any possible shift in litigation involving nonmanufacturers will not be detrimental to the effectiveness of S. 136 because there is a substantial distinction between a product liability action predicated on negligence and one based on strict liability. In Ohio, to recover for negligence, "a plaintiff must show that defendant was under a duty to exercise reasonable care to prevent injuries to others, that he breached that duty, that the plaintiff's alleged injuries were the proximate result of the breach, and that the plaintiff was in fact injured."[172] Recovery under strict liability in Ohio is distinct because the plaintiff must only show that: "(1) There was, in fact, a defect in the product manufactured and sold by the defendant; (2) such defect existed at the time the product left the hands of the defendant; and (3) the defect was the direct and proximate cause of the plaintiff's injuries or loss."[173] Thus, the key difference between recovery under negligence theory and recovery based on strict liability is that under negligence theory, the court's focus is on the conduct of the defendant; whereas, in a strict liability action, the court's focus is not on the conduct of the defendant but on the defect in the product. The Ohio Supreme Court has recognized this distinction, noting that it is very difficult for a plaintiff to recover based on negligence theory in a product liability action because it is difficult for a plaintiff to show "that the specific defect which caused the injury could have been eliminated had the manufacturer exercised ordinary care."[174] Therefore, the likelihood of a shift in litigation against nonmanufacturers from actions based on strict liability to those predicated on negligence is slight because once the seller is dismissed from the action pursuant to the provisions of S. 136, the plaintiff will have a solvent manufacturer to sue under the more liberal theory of strict liability.

Finally, a paramount concern prompting the enactment of S. 136 was the increasing insurance premiums for product liability coverage faced by wholesalers, distributors, and retailers.[175] The insurance problem has been particularly burdensome on smaller businesses which find it difficult to afford increasing product liability insurance premiums because of their lower sales volume and profit margins.[176] Thus, these businesses have been forced to pay the increased insurance premiums,

---

that the doctrine of strict liability evolved to place liability on the party primarily responsible for the injury, the manufacturer. Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 464, 424 N.E.2d 568, 575 (1981).

172. Gast v. Sears Roebuck & Co., 39 Ohio St. 2d 29, 31, 313 N.E.2d 831, 833 (1974).

173. State Auto Mut. Ins. Co. v. Chrysler Corp., 36 Ohio St. 2d 151, 156, 304 N.E.2d 891, 895 (1973).

174. *Gast*, 39 Ohio St. 2d at 31, 313 N.E.2d at 833.

175. Schwarzwalder interview, *supra* note 4.

176. *See supra* note 25 and accompanying text.

or to forego insurance altogether, thereby operating under a risk of having to pay substantial damage awards.[177] This scenario is not desirable for the businesses affected, for persons injured by defective products, or for the consumers in general who ultimately bear the cost of rising insurance rates through increased product prices.

During the hearings on S. 136, testimony was presented by the National Federation of Independent Business (NFIB) which demonstrated the product liability insurance problem.[178] The NFIB determined in a poll of its Ohio members that 26% of these businesses had experienced insurance rate increases of greater than 30% during the period of 1980–82.[179] The findings of the United States Department of Commerce also show that product liability insurance premiums have risen sharply in recent years resulting in increased product prices, as well as causing numerous product sellers to do business without insurance coverage.[180]

In addition to jeopardizing the availability of compensation to persons injured by defective products, increasing product liability insurance premiums cause consumers in general to pay a price. In its poll of Ohio member businesses, the NFIB found that increases in insurance premiums were passed directly to consumers.[181] The NFIB also found that increasing insurance costs affect economic development by restricting market entry and by limiting product availability.[182] Thus, the insurance problem is a broad one that affects numerous interests. As a result, the balancing of interests inevitably involved in the development of product liability policy must look beyond the immediate parties in a lawsuit to the general public.

Whether S. 136 will meet its goal of stabilizing or decreasing product liability insurance rates for nonmanufacturers will not be readily known. Uncertainty exists because compliance with product liability insurance reporting requirements in Ohio has been minimal.[183] Nevertheless, the bill should have an impact on the insurance rates paid by Ohio nonmanufacturers who sell products because underwriters will be

177. *See infra* notes 178–80 and accompanying text.

178. Testimony of the National Federation of Independent Business before the House Civil and Commercial Law Comm. (February 7, 1984) [hereinafter cited as NFIB testimony] (on file with University of Dayton Law Review). NFIB's Ohio Chapter represents 25,000 small family-owned businesses in Ohio. Thirty-one percent of this number consists of retail, wholesale, and distribution businesses. *Id.* at 1.

179. *Id.* at 2. The poll also revealed that 59% of NFIB's Ohio members had been affected by product liability law. *Id.*

180. UNIFORM ACT, *supra* note 125, § 101 (Findings).

181. NFIB testimony, *supra* note 178, at 2.

182. *Id.*

183. *Id.* at 4.

better able to define the sellers' risk of being held strictly liable in Ohio by simply evaluating the manufacturers with which the nonmanufacturer deals. Through such an evaluation, an underwriter is better able to determine the likelihood of whether or not the manufacturer of the seller's product is subject to service of process in Ohio, and whether the manufacturer is insured or currently solvent. Additionally, underwriters will be able to evaluate the nonmanufacturer's conduct with respect to the marketing of products to determine whether the seller alters or modifies any of its products before sale. Such risk evaluations should result in more predictability for underwriters who insure nonmanufacturers, and could, in the long run, provide an incentive for nonmanufacturers to obtain products only from reputable manufacturers.

VI. CONCLUSION

The enactment of S. 136 will result in increased protection for nonmanufacturing sellers of defective products in many Ohio product liability actions. As Ohio's first legislative modification of state common law in the product liability field, the bill is a response to the liberal plaintiff recovery allowed by Ohio courts and the costly effects that strict liability has had on wholesalers, distributors, and retailers. In making this balancing decision, however, the Ohio General Assembly has not subordinated the injured party's interests.

The protection offered by S. 136 allows nonmanufacturers to seek early dismissal from product liability actions which are based on the theories of strict tort liability or implied warranty in tort. S. 136 does contain safeguards for the injured party because the court is only allowed to dismiss the nonmanufacturer after it is shown that the manufacturer of the defective product is subject to jurisdiction in Ohio and is solvent or insured. The bill does not allow a seller who is at fault in marketing the product to seek dismissal and, in fact, allows negligence actions to be maintained against the nonmanufacturer. In this respect, however, the effectiveness of S. 136 could be vitiated if it is interpreted to allow implied warranty actions to be maintained against the seller even though such an interpretation is not mandated by the bill or the legislative history.

In the final analysis, it is clear that S. 136 has struck an appropriate balance between the respective interests of injured consumers and nonmanufacturing sellers. The bill will be effective in protecting the interests of businesses that sell defective products without any knowledge of the product's infirmity. At the same time, S. 136 ensures that the injured party will be able to proceed directly against the manufacturer, and contains a provision that will help plaintiffs to identify the manufacturer. By placing the responsibility for defective products on the party primarily at fault in most cases, Ohio has joined a number of

other states in curbing liberal strict liability recovery against all members of the product distribution chain. It is appropriate that Ohio has finally offered this protection to vulnerable wholesalers, distributors, and retailers.

Daniel P. Utt

Code Sections Affected: To enact section 2305.33.

Effective Date: July 2, 1984.

Sponsor: Schwarzwalder (S)

Committees: Judiciary (S)
Civil and Commercial Law (H)