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# CONSUMER PROTECTION: SHOULD IT MANDATE EXTENSION OF SECTION 402A TO USED PRODUCTS DEALERS?

*Jordan v. Sunnyslope Appliance Propane & Plumbing Supplies Co.*[1]

When a consumer is injured by a product he has purchased new, strict liability in tort provides an avenue for redress against the manufacturer, supplier, and retailer of the product. When the consumer is injured by a second-hand product purchased from a used goods dealer, however, he may have little chance of holding the dealer responsible for his injuries. Courts are in conflict over the issue of whether strict liability in tort should be extended to dealers of non-reconditioned, used goods. Relatively few jurisdictions have actually considered the question. Courts in Wisconsin,[2] California,[3] and Oregon,[4] among others,[5] have refused to extend strict liability to used goods dealers. On the other hand, courts in New Jersey[6] and Texas[7] take the opposite view. In reaching their respective positions, courts on both sides of the issue relied on their perceptions of the competing policy considerations.

In *Jordan v. Sunnyslope Appliance Propane & Plumbing Supplies Co.*,[8]

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1. 135 Ariz. 309, 660 P.2d 1236 (Ariz. Ct. App. 1983).
2. Burrows v. Follett & Leach, Inc., 115 Wis. 2d 272, 340 N.W.2d 485 (1983).
3. LaRosa v. Superior Court, 122 Cal. App. 3d 741, 176 Cal. Rptr. 224 (Cal. Ct. App. 1981) (used machinery dealer); Tauber-Arons Auctioneers Co. v. Superior Court, 101 Cal. App. 3d 268, 161 Cal. Rptr. 789 (Cal. Ct. App. 1980) (auctioneer of used goods).
4. Tillman v. Vance Equip. Co., 286 Or. 747, 596 P.2d 1299 (1979) (used equipment dealer).
5. Masker v. Smith, 405 So. 2d 432 (Fla. Dist. Ct. App. 1981) (court limited its refusal to impose strict liability on the used goods seller to latent defects which the dealer could not discover by the exercise of reasonable care); Peterson v. Lou Bachrodt Chevrolet Co., 61 Ill. 2d 17, 329 N.E.2d 785 (1975) (used car dealer); Pridgett v. Jackson Iron & Metal Co., 253 So. 2d 837 (Miss. 1971) (seller of scrap iron sold 55-gallon drum which exploded when the plaintiff attempted to cut the drum with an acetylene torch); Brigham v. Hudson Motors, 118 N.H. 590, 392 A.2d 130 (1978) (court stated in a two sentence paragraph that it was not prepared to extend strict liability to a used automobile dealer).
6. Turner v. International Harvester Co., 133 N.J. Super. 277, 336 A.2d 62 (1975) (used truck dealer); Ortiz v. Farrell Co., 171 N.J. Super. 109, 407 A.2d 1290 (1979) (used machinery dealer).
7. Hovenden v. Tenbush, 529 S.W.2d 302 (Tex. Civ. App. 1975) (used brick dealer).
8. 135 Ariz. 309, 660 P.2d 1236 (Ariz. Ct. App. 1983).

the court extended strict liability to dealers of used products following Restatement (Second) of Torts, Section 402A.[9] The father of plaintiff Jordan purchased a used propane storage tank in December, 1975, from Canyon Gas and Appliance Co. (Canyon Gas), a dealer of used propane tanks. The tank was manufactured nearly thirty years earlier, in 1947, by American Pipe & Steel Company. Jordan's father inspected and then purchased the tank without any guarantees regarding its condition. The tank was placed on a lot adjacent to Jordan's home and used regularly for eighteen months without incident. Then, while the tank was being filled by Sunnyslope, the hose used to fill the tank disconnected; the propane then exploded and totally destroyed Jordan's house.[10]

Jordan sued Canyon Gas, the used tank dealer, and American Pipe alleging that the tank's shut-off valve malfunctioned, thus allowing propane in the tank to escape. Jordan sued on the theory of strict liability in tort, alleging the valve was defective in design, material, construction, or workmanship. The trial court dismissed American Pipe because there was no evidence that the valve was on the tank when it left the manufacturer. The trial court also granted the used tank dealer's motion for summary judgment, dismissing Canyon Gas from the case.[11]

On appeal, the Arizona Court of Appeals reversed the summary judgment, holding that a dealer in used goods may be held strictly liable under section 402A.[12] The court reasoned that the "unreasonably dangerous" requirement of section 402A sufficiently protected the used goods dealer.[13] Imposing strict liability on used goods dealers was found consistent with the enterprise liability concept integral to Arizona's version of the strict liability theory.[14]

Strict liability under section 402A was originally directed to manufactur-

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9. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

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

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

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

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

10. *Sunnyslope*, 660 P.2d at 1237.

11. *Id.* at 1237.

12. *Id.* at 1242.

13. *Id.* at 1241.

14. *Id.* at 1242 (citing Tucson Indus. v. Schwartz, 108 Ariz. 464, 501 P.2d 936 (1972)). The enterprise liability theory is discussed in greater detail *infra* notes 33-38 and accompanying text.

ers, suppliers, and sellers of new products in the initial chain of distribution.[15] Recently, courts extended strict liability to used product dealers who rebuilt or reconditioned goods prior to sale.[16] Courts have disagreed concerning whether strict liability under section 402A should be extended further to include dealers of used goods who have not rebuilt or reconditioned their products.[17]

Support for extending strict liability to used goods dealers is found in the comments to section 402A. Comment f states that section 402A does not apply to the occasional seller who is not operating as a business.[18] "Nor does it apply to the owner of an automobile who, on one occasion, sells it to his neighbor, or even sells it to a dealer in used cars, and this even though he is fully aware that the dealer plans to resell it."[19] This implies that if the owner of the used automobile sold it in the course of business, rather than in an isolated sale, the seller may be liable for defect-related injuries under section 402A.

The basis for section 402A strict liability is the special responsibility for the public's safety undertaken by one in the business of "supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods."[20] Section 402A applies to one in the business of supplying the public with products. It is beyond dispute that a dealer in used goods supplies the public with products. Neither section 402A nor its comments expressly limits the rule to sellers of new products.[21] Rather, liability is imposed on the seller of "any product."[22] In addition, comment f provides that the rule "applies to *any* person engaged in the business of selling products for use or consumption."[23] Section 402A literally applies, therefore, to used goods dealers.

There are three general bases for imposing strict liability under section 402A upon manufacturers, distributors, and retailers of new products: manufacturing defects,[24] design defects,[25] and failure to warn.[26] With used prod-

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15. *See, e.g.*, Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969) (wholesale distributor of sump pump could be held liable for wrongful death under strict liability in tort theory).

16. *See* Crandell v. Larkin & Jones Appliance Co., 334 N.W.2d 31 (S.D. 1983) (seller of a reconditioned clothes dryer can be held strictly liable under section 402A for damages caused by defective thermostat in dryer).

17. *See supra* notes 2-8 and accompanying text.

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

19. *Id.*

20. *Id.*

21. Hovenden v. Tenbush, 529 S.W.2d 302, 306 (Tex. Civ. App. 1975).

22. *Id.* at 306 (quoting RESTATEMENT (SECOND) OF TORTS § 402A (1965)). The *Sunnyslope* court could not find any Arizona cases nor any language in section 402A which required the seller to be in the initial chain of distribution. *Sunnyslope*, 660 P.2d at 1242.

23. RESTATEMENT (SECOND) OF TORTS § 402A, comment f (1965) (emphasis added).

24. A product has a manufacturing defect when it has either deviated in some material way from the manufacturer's specifications or standards or differs from other-

ucts, "subsequent defects" can arise after the product has left the manufacturer or original seller.[27]

Since the used goods dealer is not responsible for and generally unable to remedy manufacturing or design defects, courts are justified in refusing to impose strict liability for these defects.[28] The enterprise liability theory would impose strict liability on used goods dealers for design and manufacturing defects. Requiring used goods dealers to insure against these defects, however, could lead to overlapping insurance coverage and unnecessarily increase the cost of consumer protection.[29]

The policy reasons for strict liability justify holding a dealer in used goods responsible for injuries caused by subsequent defects. There are three major policy justifications for imposing strict liability: enterprise liability,[30] satisfaction of reasonable consumer expectations, and risk reduction.[31]

Enterprise liability is the primary policy justification for imposing strict liability on manufacturers and commercial dealers of goods.[32] Under this theory, the cost of injuries resulting from defective products is imposed on the

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wise identical units of the same product line. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A(4)(f)(iii) (1981); *see also* Diamond, *Eliminating the "Defect" in Design Strict Products Liability Theory*, 34 HASTINGS L.J. 529, 534 (1983) ("[a] manufacturing defect is readily identifiable because the product differs from the manufacturer's intended result.").

25. A design defect affects a whole line of products and is the result of the manufacturer's decision to adopt a particular design. Note, *Torts—Product Liability—Strict Liability for Defect in Design*, 43 MO. L. REV. 601, 602 (1978).

26. *See* Keeton, *The Meaning of Defect in Products Liability Law—A Review of Basic Principles*, 45 MO. L. REV. 579, 586 (1980) (a product may be defective as marketed because of the manufacturer's or seller's failure to warn purchasers and users of some risk or hazard). *See generally* Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339 (1974); Keeton, *Products Liability—Design Hazards and the Meaning of Defect*, 10 CUM. L. REV. 293 (1979).

27. Burrows v. Follett & Leach, Inc., 340 N.W.2d 485, 491 (Wis. 1983).

28. *See* Comment, *Used Products and Strict Liability: A Practical Approach to a Complex Problem*, 1981 B.Y.U. L. REV. 154, 156-57. Often, courts do not analyze the nature of the defect. *See Sunnyslope*, 660 P. 2d at 1236; *Hovenden*, 529 S.W.2d at 305. *But see Turner*, 133 N.J. Super. at 292, 336 A.2d at 70 (court focused on the nature of the defect, labelling defects in parts which ordinarily receive regular maintenance and replacement as "safety defects").

29. *See* Comment, *supra* note 28, at 159-64 (absent special circumstances, strict liability should not be imposed upon a commerical seller of used goods for design and manufacturing defects).

30. *See, e.g., Turner*, 133 N.J. Super. at 289, 336 A.2d at 69.

31. *See, e.g., Tillman*, 286 Or. at 752-54, 596 P.2d at 1302-03. *See generally* Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980); Comment, *Used Products and Strict Liability: Where Public Safety and Caveat Emptor Intersect*, 19 CALIF. W.L. REV. 330 (1983); Note, *Protecting the Buyer of Used Products: Is Strict Liability for Commercial Sellers Desirable?*, 33 STAN. L. REV. 535 (1981).

32. Note, *Sales of Defective Used Products: Should Strict Liability Apply?*, 52 S. CAL. L. REV. 805, 811 (1979).

business enterprise which profits from their sale. This theory assumes that the business enterprise will include damages caused by its products in their cost.[33] The business enterprise can insure against the risk of injury caused by defective products and distribute the cost among consumers as a cost of doing business.[34] Losses incurred by an individual are thus spread over a large group of people, thereby lessening the impact on the individual.[35]

Section 402A, comment c supports the enterprise liability rationale.[36] Comment c states that public policy requires commercial sellers to bear the burden of accidental injuries caused by the products they sell. This burden can be treated as a production cost and insured against.[37]

Courts primarily have relied on the enterprise liability concept in extending strict liability to used goods dealers.[38] In effect, these courts are spreading the risk of injury and forcing used goods dealers to pay for injuries caused by subsequent defects in their products.

In *Sunnyslope*, the court relied on the enterprise liability concept as the main justification for imposing strict liability under section 402A.[39] The court noted that used goods dealers should be able to distribute costs and either shift or insure against losses.[40] The court noted that small business' ability to obtain

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33. *See Turner*, 133 N.J. Super. at 289, 336 A.2d at 69; *see also* Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring). For an in-depth article on the enterprise theory of liability, see Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (1976).

34. *See Escola*, 24 Cal. 2d at 462, 150 P.2d at 441 (Traynor, J., concurring).

35. *See* Note, *supra* note 32, at 543.

36. RESTATEMENT (SECOND) OF TORTS § 402A, comment c (1965).

37. *Id.*

38. *See Hovenden*, 529 S.W.2d at 310; *Turner*, 133 N.J. Super. at 289, 336 A.2d at 69. In *Hovenden*, strict liability was imposed on a used brick dealer for damages resulting from plaintiff's use of defective bricks. The court noted that section 402A, comment c clearly adopted the enterprise liability theory. *Hovenden*, 529 S.W.2d at 310. The *Hovenden* court cited cases holding lessors of defective products strictly liable as support for its holding because a leased chattel is generally a used product. *Id.* at 307. Cases extending strict liability to lessors of defective products include: Cintrone v. Hertz Trucking, Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965); Stewart v. Budget Rent-A-Car Corp., 52 Haw. 71, 75, 470 P.2d 240, 243 (1970); Rourke v. Garza, 530 S.W.2d 794, 800 (Tex. 1975). *See generally* Annot., 52 A.L.R.3d 121 (1973). In *Turner*, strict liability was extended to a used truck dealer; the enterprise liability theory was mentioned as the primary justification for imposing strict liability. *Turner*, 133 N.J. Super. at 289, 336 A.2d at 69.

39. *Sunnyslope*, 660 P.2d at 1242 (quoting Tucson Indus. v. Schwartz, 108 Ariz. 464, 467-68, 501 P.2d 936, 939-40 (1972), for the proposition that "[s]trict liability is a public policy device to spread the risk from one to whom a defective product may be a castastrophe, to those who marketed the product, profit from its sale, and have the know-how to remove its defects before placing it in the chain of distribution."). This rationale follows the justifications set forth in section 402A, comment c. *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment c (1965).

40. *Sunnyslope*, 660 P.2d at 1242. For an analysis of the role of insurance and risk distribution in products liability law, see Comment, *Solving the Products Liability Insurance Crisis: A Study of the Role of Economic Theory in the Legislative Reform*

product liability insurance was greatly enhanced by the Product Liability Risk Retention Act of 1981.[41] The Act permits manufacturers and sellers of products to establish "risk retention groups" to write product liability insurance.[42]

The leading case refusing to extend strict liability to a seller of used products is *Tillman v. Vance Equipment Co.*[43] The *Tillman* court was unwilling to rely exclusively on enterprise liability as justification for imposing strict liability.[44] The court noted that even though used goods dealers were capable of both providing compensation to injured parties and allocating the cost of injuries caused by their products, it was not convinced that the overall policy considerations justified the imposition of strict liability.[45]

The approach taken by the court in *Sunnyslope* is preferable from a policy standpoint to that taken by the court in *Tillman*. The used goods dealer's cost of doing business should include the cost of damages caused by subsequent defects in the products he sells. As between the purchaser and seller of used goods, the burden of accidental injuries should be placed on the seller who marketed the product with a subsequent defect.[46] By marketing a product with a subsequent defect, the used products dealer causes the purchaser to incur a risk of injury. Liability for the purchaser's injuries should be imposed on the seller who created "the risk and reaped the profit by placing the product in the stream of commerce."[47] If the used goods dealer includes the risk of damages in the cost of his products, any actual loss by an individual purchaser is spread to many persons thereby relieving "uninsured accident victims of a sudden, crushing economic blow that may tear apart the fabric of the victim's life."[48]

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*Process*, 31 MERCER L. REV. 755 (1980).

41. *Sunnyslope*, 660 P.2d at 1242 n.4 (citing 15 U.S.C. §§ 3901-04 (1982)).

42. The "risk retention" group is an insurance company primarily organized to assume and spread the product liability risk exposure of its group members. *See* King, *Product Liability Risk Retention—The Act and Its Implications*, 39 J. MO. BAR 265 (1983); Maxfield, *Risk Retention Act: An Alternative Form of Product Liability Insurance for Small Business*, 32 FED'N INS. COUNS. Q. 263 (1982); Murphy, *Product Liability Self Insurance*, 38 J. MO. BAR 55 (1982); Shea, *The Product Liability Risk Retention Act of 1981*, 28 PRAC. LAW. 9, 11 (1982).

43. 286 Or. 747, 596 P.2d 1299 (1979). *Tillman* involved injuries from a defective used crane sold to plaintiff's employer by the defendant. *Id.* at 749, 596 P.2d at 1300.

44. *Id.* at 753-54, 596 P.2d at 1302-03.

45. *Id.* at 757, 596 P.2d at 1303.

46. RESTATEMENT (SECOND) OF TORTS § 402A, comment c (1965).

47. Suvada v. White Motor Co., 32 Ill. 2d 612, 619, 210 N.E.2d 182, 186 (1965).

48. Owen, *supra* note 31, at 706. Similar language is found in Justice Traynor's concurring opinion in *Escola*, 24 Cal. 2d at 462, 150 P.2d at 441 (Traynor, J., concurring):

> Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the

The safety of the general public demands that when a used car, for example, is sold for use as a serviceable vehicle, the dealer be responsible for safety defects present when the vehicle is sold. Otherwise, the purchaser and general public would be bearing the liability rather than the used car dealer.[49] With respect to subsequent defects, the used goods dealer is the only commercial seller that can distribute the cost of the risk of the defective products he is selling. A purchaser who has sustained damages from a subsequent defect has no recourse against the manufacturer or original retailer of the product.[50] Even though it refused to hold a used goods dealer responsible for a design defect injury, the Oregon Supreme Court noted that "if a jurisdiction has adopted the principle of strict liability on the basis of enterprise liability, the liability of the seller of either a new or used product would logically follow."[51] Since dealers in used goods can insure against injuries arising from products having subsequent defects,[52] they are in a better position to spread the risk of injuries to all customers.

The satisfaction of reasonable consumer expectations, or implied representations, has been identified as another policy justification for imposing strict liability for injuries caused by defective products. The implied representations theory assumes that, by placing a product on the market, a manufacturer or commercial seller impliedly represents that the product is not unreasonably dangerous for its intended use.[53] If the product falls below the degree of safety that reasonable consumers expect, strict liability is justifiably imposed on the manufacturer,[54] or commercial seller.

The *Tillman* court identified the implied representations theory as an additional justification for strict liability. When used goods are involved, however, the court reasoned that the dealer makes no particular representations about the quality of his goods merely by offering them for sale. If a buyer wants assurances of quality, he can bargain for it or purchase from a dealer who offers quality.[55] In contrast, other courts have noted that reading section 402A to limit liability to representational conduct is inconsistent with lan-

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public as a cost of doing business.

49. *Turner*, 133 N.J. Super. at 289, 336 A.2d at 69.

50. RESTATEMENT (SECOND) OF TORTS § 402A (1)(b) (1965) requires an injury causing product to be in substantially the same condition as when it was sold to impose liability on the manufacturer or original commercial seller of the product.

51. *Tillman*, 286 Or. at 753, 596 P.2d at 1302.

52. *See supra* note 42 and accompanying text.

53. *See* Markle v. Mulholland's, Inc., 265 Or. 259, 267, 509 P.2d 529, 532 (1973); *see also Escola*, 24 Cal. 2d at 467, 150 P.2d at 443 (Traynor, J., concurring) (consumers accept products on faith, relying on the manufacturer's reputation or on the product's trademark).

54. *E.g.*, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963) ("[i]mplicit in the machine's presence on the market was a representation that it would safely do the jobs for which it was built").

55. *Tillman*, 286 Or. at 753-54, 596 P.2d at 1303. Examples given by the court include purchases from a dealer who provides a guarantee, limits his goods to those of a certain quality, or advertises that his goods are specially selected.

guage in comments c and m of that section.[56]

The court in *Sunnyslope* disagreed with the *Tillman* court's conclusion that sales of used products do not normally generate expectations of safety.[57] The *Sunnyslope* court could find no empirical evidence indicating that consumers of used products expected such products to contain unsafe defects. Moreover, the *Tillman* court's conclusion ignores the interests of bystanders who may be injured by a defective product purchased by another.[58] Even though they do not rely on the dealer's implied representations of safety, the majority of courts now allow bystanders injured by defective products to recover under strict liability.[59] Furthermore, the *Tillman* court's contention that sales of used products do not imply any representation of safety or quality contradicts the well-reasoned decisions extending the implied warranty of merchantability to used goods.[60]

Generally, a merchantable good must be fit for the ordinary purposes for which it is used[61] and be safe for its intended use.[62] Since many courts imply a

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56. *Hovenden*, 529 S.W.2d at 309. Section 402A, comment c justifies strict liability on the enterprise liability theory. RESTATEMENT (SECOND) OF TORTS § 402A, comment c (1965). Comment m notes that a number of courts have used a warranty theory as a basis for strict liability under section 402A. *Id.* comment m. Since a warranty has become so identified with a contract of sale, the warranty becomes an obstacle to imposing strict liability when there is no contract. Courts using a warranty theory as a basis for strict liability should recognize that the warranty is different than that usually found in the sale of goods and is not subject to contract rules normally associated with such sales. Comment m further notes:

> [Section 402A] does not require any reliance on the part of the consumer upon the reputation, skill, or judgment of the seller who is to be held liable, nor any representations or undertaking on the part of that seller . . . . In short, 'warranty' must be given a new, different meaning if it is used in connection with this Section. It is much simpler to regard the liability here stated as merely one of strict liability in tort.

57. *Sunnyslope*, 660 P.2d at 1240 (citing *Tillman*, 286 Or. at 755, 596 P.2d at 1303).

58. 660 P.2d at 1240.

59. *See* W. PROSSER & W. KEETON, HANDBOOK ON THE LAW OF TORTS 704 (5th ed. 1984).

60. *See, e.g.*, Moore v. Burt Chevrolet, Inc., 39 Colo. App. 11, 563 P.2d 369 (1977); Worthey v. Specialty Foam Prods., Inc., 591 S.W.2d 145, 148 (Mo. App., St. L.D. 1979) (sale of used goods carries an implied warranty of merchantability); *see also* Note, *Sales: Extension of Implied Warranty of Merchantability to Used Goods*, 46 MO. L. REV. 249 (1981).

61. U.C.C. § 2-314(2)(c).

62. *See* Mosier v. American Motors Corp., 303 F. Supp. 44, 50 (S.D. Tex. 1967) (under Ohio law, manufacturer/seller of product impliedly warrants that the product sold is of good and merchantable quality, fit and safe for its intended use), *aff'd*, 414 F.2d 34 (5th Cir. 1969); Nash v. General Elec. Co., 64 Ohio App. 2d 25, 27, 410 N.E.2d 792, 794 (1979) (manufacturer of product impliedly warrants that the product sold is of merchantable quality, fit and safe for its ordinary intended use); Logan v. Montgomery Ward & Co., 216 Va. 425, ___, 219 S.E.2d 685, 687 (1975) (gas stove sold by defendant was under implied warranty of merchantability that stove was reasonably safe for its intended use).

warranty of merchantability in the sale of used goods, there must be some expectation of safety generated when a used goods dealer sells a product. Moreover, Oregon's implied representation justification for strict liability has its basis in the implied warranty of merchantable quality in the law of sales.[63]

Reliance on the implied representations theory as a justification for strict liability is suspect, especially when one considers that it is based on a "warranty." Section 402A, comment m noted that some courts have resorted to a warranty theory as a theoretical basis for strict liability.[64] In some instances, however, use of the warranty theory has proved to be unfortunate. If the warranty theory is based on tort concepts, it is not subject to contract rules. Rather than give a new meaning to "warranty," it is simpler to regard section 402A liability as strict liability in tort, since section 402A "does not require . . . any representation or undertaking on the part of" the seller who is to be held strictly liable.[65] Thus, the implied representations theory espoused by the *Tillman* court seems inconsistent with section 402A, comment m. Liability under section 402A does not require any representation by the seller. Presumably, this means no implied representations as to safety or quality are required to impose strict liability on the seller. The purchaser should not have to bargain for some assurance of quality since liability arises without representations or undertakings by the seller. Accordingly, use of the implied representations theory as a rationale for refusing to extend strict liability to used products dealers should be abandoned.

The risk reduction justification for strict liability assumes that manufacturers and commercial sellers of goods are less apt to place unreasonably dangerous goods in the market if they are held financially responsible for defect-related injuries.[66] Comments to section 402A do not directly address this justification. However, the *Tillman* court relied on this theory to refuse extension of strict liability to used goods dealers. Since the used products dealer generally has no direct relationship with the manufacturer, the court reasoned that no significant risk reduction could be achieved by imposing strict liability upon such dealers.[67] Further, the court noted that the dealer might have difficulty in

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63. Markle v. Mulholland's Inc., 265 Or. 259, 266, 509 P.2d 529, 532 (1973); *see also* Cornelius v. Bay Motors, Inc., 258 Or. 564, 484 P.2d 299 (1971) (O'Connell, J., concurring). In *Cornelius*, Justice O'Connell stated that:

> [t]he idea running through the implied warranty cases is that a seller who purports to sell an article of a certain character impliedly represents that the product meets the standard which an article of that type normally has in the market. We may assume that the legislature, in adopting the commercial code, intended to limit the seller's liability within this framework of representational conduct, however implied. If so, § 402A must be similarly circumscribed.

*Id.* at 579-80, 484 P.2d at 306-07.

64. RESTATEMENT (SECOND) OF TORTS § 402A, comment m (1965).

65. *Id.*

66. *Tillman*, 286 Or. at 756, 596 P.2d at 1304.

67. *Id.*

obtaining indemnity from the manufacturer, which would have provided an incentive for the manufacturer to produce safer products.[68]

The Wisconsin Supreme Court, in *Burrows v. Follett & Leach, Inc.*,[69] adopted the *Tillman* court's rationale to justify a refusal to extend section 402A to the seller of a used corn picker. The plaintiff had been seriously injured when he became entangled in the power take-off shaft of the used cornpicker. In refusing to impose strict liability upon the seller, the court placed particular significance on the risk reduction policy and the fact that the defect arose after the product left the manufacturer or original seller. The court noted that "the risk prevention policy identified in *Tillman* loses all force in the case of defects that arise after the product leaves the original manufacturing and distribution chain."[70] Furthermore, the court reasoned that when the manufacturer is not responsible for the defect that caused the injury, there is no incentive to improve the safety of the goods.[71] However, such reasoning fails to take into account the ability of the seller to inspect and repair defective used products before they are sold.

In *Burrows*, the dealer who sold the used corn picker could have averted the accident by eliminating the defect,[72] or not selling the cornpicker (recouping his investment by selling the corn picker for parts). Alternatively, the dealer did not have to accept on trade the corn picker with a subsequent defect. Therefore, imposing strict liability on the dealer of used goods provides an incentive for the dealer to inspect, remedy, or warn the consumer about subsequent defects before placing the good into the stream of commerce, thereby reducing the risk of injury from the used product.

The *Sunnyslope* court noted that "imposing strict liability on the commercial dealer of used products should result in increased maintenance and inspection of such products before they are offered for sale."[73] For example, a dealer of used cars or machinery has an extended opportunity to inspect the

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68. *Id.* The court noted that the ability of the used products dealer to obtain indemnity from the product's manufacturer was affected by the statute of limitations and difficulties in locating a solvent manufacturer.

69. 340 N.W.2d 485 (Wis. 1983).

70. *Id.* at 491.

71. *Id.*

72. In *Burrows*, the used corn picker was defective in that the guard that shielded the power take-off shaft was missing. *Id.* at 487. The dealer could have purchased the missing guard or had its shop personnel fashion a replacement. The corn picker was a 1949 model and was sold to the plaintiff's father in 1974, approximately one year after replacement shields ceased to be available from the manufacturer. *Id.* at 487-88. Nevertheless, the dealer probably could have obtained a shield from an area dealer for that manufacturer or from a scrapped corn picker. Apparently, the dealer made no effort to replace the missing shield. *Id.* at 488. Evidence was controverted concerning whether the missing shield was discussed at the time of sale, much less whether an adequate warning of the danger was given. *Id.* The dealer could have reduced the risk of harm by either replacing the shield or not selling the dangerous corn picker.

73. *Sunnyslope*, 660 P.2d at 1240.

good and normally has the facilities and expertise to detect subsequent defects. The dealer is, at least, in a far better position to inspect and remedy defects than the consumer. In a case involving a lessor of automobiles, the New Jersey Supreme Court stated that "[t]he operator of [a] rental business must be regarded as possessing expertise with respect to the service life and fitness of his vehicles for use. That expertise ought to put him in a better position than the bailee to detect or to anticipate flaws or defects or fatigue in his vehicles."[74] Similarly, the used goods dealer should be regarded as possessing expertise with respect to the safety of his products. That expertise puts him in a better position than the consumer to detect or anticipate flaws or defects in his products, particularly the risk of injuries from subsequent defects. Since the used goods dealer is generally familiar with his products, he should know which parts are likely to become defective and how these defects can be remedied before sale. In the case of a used car dealer, the dealer has the best opportunity to determine the condition of the car. By placing a value on the car, the dealer must determine the car's condition, particularly whether it is reasonably safe for the buyer to operate.[75]

Imposing strict liability on used goods dealers provides an incentive for dealers to have the facilities necessary to inspect a good before placing it for sale. Subsequent safety defects arise in ordinary parts expected to receive regular maintenance and replacement (such as an automobile's brake shoes and linings, steering linkage, and exhaust system).[76] Inspection and replacement of worn-out items reduces the safety risk associated with used cars. Since the car is used, expectations of quality and durability will be lower, commensurate with the price, age, and appearance of the vehicle.[77] The dealer, nevertheless, could be expected to remedy subsequent defects, making the car reasonably safe for use. Safety of the general public demands that the dealer be responsible for safety defects existing at the time of sale when a vehicle is sold for use as a serviceable vehicle (not for scrap).[78] Similarly, dealers of other used goods can inspect for and remedy safety or subsequent defects. Accordingly, the risk reduction policy justification for strict liability is furthered by extending strict liability to used goods dealers for injuries caused by subsequent defects in their products.[79]

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74. Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 457, 212 A.2d 769, 778 (1965) (court imposed strict liability on lessors). For cases extending strict liability to lessors of defective chattels, see *supra* note 38.

75. Armour v. Haskins, 275 S.W.2d 580, 584 (Ky. 1955).

76. *Turner*, 133 N.J. Super. at 289, 336 A.2d at 69.

77. *Id.*

78. *Id.*; *see also* 2 L. FRUMER & M. FRIEDMAN, *supra* note 24, § 19.03 (5), where the authors state that "[i]t is conceded that a buyer of a used car, for example, cannot expect it to last as long as a new one. But, it can be argued that he is entitled to expect that there is no latent defect in the brakes or other parts of the car."

79. Therefore, the *Tillman* and *Burrows* courts' reliance on the risk reduction theory as a justification for refusing to extend strict liability to used goods dealers is misplaced in the case of subsequent defects. The *Tillman* case, however, involved a

A court declined to extend strict liability to a used goods dealer for a defect that arose after the product had left the manufacturer because the used goods dealer did not create the risk.[80] However, this rationale fails to take into account that, as between the consumer and the dealer, the dealer is obviously in the better position to reduce the risk. Also, the dealer placed the used product into the stream of commerce and, like the manufacturer, reaped a profit therefrom.[81]

In one case, a court placed particular emphasis on the "unreasonably dangerous" standard of section 402A in extending strict liability to a used goods dealer.[82] Under section 402A, liability can be imposed only if the product's defective condition was unreasonably dangerous to the user or consumer.[83] An unreasonably dangerous product "must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[84] However, the "unreasonably dangerous" test can be modified to enable a court to look at the "sophistication of the injured purchaser and the reasonable expectations of the seller to determine whether the strict liability rule should be applied."[85]

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design defect. There, the risk reduction theory might not be served by imposing strict liability on the used goods dealer for the manufacturer's design defect. As for subsequent defects, however, the dealer normally can remedy them before offering the goods for sale. In any event, as evidenced by the comments to section 402A, risk reduction is not listed as a justification for the rule.

80. *See Burrows*, 340 N.W.2d at 491.

81. Metzger, *Products Liability and the Seller of Used Goods*, 15 AM. BUS. L.J. 159, 164 (1977).

82. *See Turner*, 133 N.J. Super. at 291, 336 A.2d at 71. RESTATEMENT (SECOND) OF TORTS § 402A imposes liability on a commercial seller "who sells any product in a defective condition *unreasonably dangerous* to the consumer or user" (emphasis added).

83. RESTATEMENT (SECOND) OF TORTS § 402A, comment i (1965).

84. *Id.* In effect, the jury applies a consumer expectations test to determine if a used product is unreasonably dangerous. *See* Slepski v. Williams Ford, Inc., 170 Conn. 18, 23, 364 A.2d 175, 178 (1975) (held proper for jury to determine that a two-year-old used car driven only 46,000 miles and containing structural defects affecting the suspension of the left front wheel, was "unreasonably dangerous"). In *Slepski*, the court noted that "the jury can draw its own reasonable conclusions as to the expectations of the ordinary consumer and the knowledge in the community at large." *Id.*

85. *Turner*, 133 N.J. Super. at 293, 336 A.2d at 71. Although prior New Jersey decisions questioned the "unreasonably dangerous" qualification, *see* Glass v. Ford Motor Co., 123 N.J. Super. 599, 601, 304 A.2d 562, 564 (1973) (unreasonably dangerous requirement held inapplicable to common law concept of strict liability in tort), the *Turner* court stated that the qualification was necessary to impose strict liability on used products dealers. *Turner*, 133 N.J. Super. at 291, 336 A.2d at 70 (citing Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972)). The *Turner* court noted that the New Jersey Supreme Court declined to consider whether the unreasonably dangerous requirement would be applicable in contexts other than hepatitis-infected blood. *Turner*, 133 N.J. Super. at 290-91, 336 A.2d at 70 (citing Brody v. Overlook Hosp., 66 N.J. 448, 451, 332 A.2d 596, 597 (1975)). The New

The unreasonably dangerous standard serves as a liability-limiting factor.[86] The term "unreasonable" enables the court or jury to inquire into the product's nature, age, and condition, thus providing a standard against which to measure any defect.[87] The unreasonably dangerous standard also allows a court to consider the sophistication of the injured purchaser, as well as the seller's reasonable expectations, to determine whether strict liability applies.[88] The relationship of the parties and the purchaser's sophistication might indicate the product was not unreasonably dangerous to this particular purchaser.[89] The used goods dealer may avoid liability if the product was in such poor condition that an ordinary consumer would be expected to find the defects that caused the plaintiff's injuries.[90] Moreover, the dealer might also avoid liability if he gives a definite and specific warning of the particular defect to the buyer and an ordinary consumer would not expect the used good to operate safely until the defect was remedied.[91] Accordingly, "[w]ith this 'unreasonably dangerous' element intact, the Restatement rule is as applicable to the sale of a used product as to the sale of a new product."[92]

In *Sunnyslope*, the court placed particular reliance on the unreasonably dangerous requirement of section 402A. Relying on the findings of the *Turner* court, the court noted that the unreasonably dangerous requirement sufficiently protected the used goods dealer since that standard allows inquiry into the age and condition of the product and sophistication of the buyer.[93]

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Jersey Supreme Court has since rejected the unreasonably dangerous standard in design defect cases. *See* Suter v. San Angelo Foundry & Mach. Co., 81 N.J. at 175, 406 A.2d at 152-53.

86. *See generally* Annot., 53 A.L.R.3d 337, 340 (1973) (potential liability of used goods dealer would not approach that of an insurer if liability was limited to used products sold in a defective condition which were unreasonably dangerous considering the age and condition of the product).

87. *Turner*, 133 N.J. Super. at 292, 336 A.2d at 70.

88. *Id.* at 293, 336 A.2d at 71. *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment g (1965) ("The rule stated in this section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."). Note that comment g refers to the ultimate consumer, not the ordinary consumer.

89. *Turner*, 133 N.J. Super. at 293, 336 A.2d at 71. An example cited by the court would be when a hot rod enthusiast purchases a car containing various defects and the relationship between the seller and purchaser is such that both reasonably expect the purchaser to inspect the car and correct defects. *Id.* (citing Greenman v. Yuba Power Prods. Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963) (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")).

90. Comment, *Suit Against Used Car Dealer Based Upon Strict Liability in Tort Dismissed For Failure to State a Cause of Action*, 7 LOY. U. CHI. L.J. 159, 180 (1976).

91. *Id.*

92. *Turner*, 133 N.J. Super. at 294, 336 A.2d at 71.

93. *Sunnyslope*, 660 P.2d at 1241. Thus, the unreasonably dangerous requirement takes into account factors such as mileage and age of a used car. Therefore, a

The unreasonably dangerous requirement of section 402A has been rejected by California courts in cases involving used goods dealers.[94] These courts have adopted the *Tillman* rationale as consistent with the policy underlying California's strict liability doctrine.[95] Consequently, California used goods dealers do not have the liability-limiting protection of the unreasonably dangerous standard.

Some courts and commentators argue that imposition of strict liability on used goods dealers dramatically increases the price of used goods.[96] However, limiting the dealer's liability for injuries caused by subsequent defects should result in safer used products without significantly altering the used goods market. The resulting increase in product safety justifies any price increase. If goods sold by non-commercial sellers become more attractive as lower-priced substitutes, then consumers assume the risk that the product will not be as safe as one purchased from the commercial dealer.

Enterprise liability, the primary policy justification for strict liability under section 402A,[97] is as applicable to dealers of used products with subsequent defects as it is to manufacturers and retailers of new products. Extending section 402A to such dealers would reduce the risk associated with used products. The unreasonably dangerous requirement of section 402A serves as a liability-limiting factor since it permits consideration of the condition of the product and circumstances surrounding the sale. Although the *Sunnyslope* holding was not so limited, courts should extend strict liability under section 402A to cover injuries caused by used products with subsequent defects sold by commercial dealers.

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dealer would not be expected to have new parts on a ten-year-old car with 80,000 miles. Nor would the dealer be expected to have new brake shoes on the car. However, the vital safety parts such as steering linkage and brake system would be expected to be in such condition that the car would be reasonably safe to drive. Reasonably safe used parts could be substituted by the dealer for worn-out parts. Although the ordinary consumer would not expect the used car's vital safety parts to last as long as a new car's, he would expect the car's brakes, lights, and steering linkage to work in a reasonably safe manner.

94. *Tauber-Arons*, 101 Cal. App. 3d at 279 n.1, 161 Cal. Rptr. 795 n.1; Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 135, 501 P.2d 1153, 1163, 104 Cal. Rptr. 433, 435 (1972).

95. *E.g.*, LaRosa v. Superior Court, 122 Cal. App. 3d 741, 176 Cal. Rptr. 224 (Cal. Ct. App. 1981); *Tauber-Arons*, 101 Cal. App. 3d 268, 161 Cal. Rptr. 789 (Cal. Ct. App. 1980).

96. *See* Note, *Protecting the Buyer of Used Products: Is Strict Liability for Commercial Sellers Desirable?*, 33 STAN. L. REV. 535, 538 (1981).

97. *See supra* note 32.