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A Comparison of the Restatement (Third) of Torts: Products Liability and the Maryland Law of Products Liability

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A COMPARISON OF THE *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY* AND THE MARYLAND LAW OF PRODUCTS LIABILITY

Robert D. Klein†

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I. INTRODUCTION

In May 1997, the membership of the American Law Institute (ALI) voted to adopt its *Restatement (Third) of Torts: Products Liability* ("*Restatement (Third)*").¹ This historic vote occurred some thirty years after the ALI first articulated the theory of strict liability in tort in section 402A of the *Restatement (Second) of Torts* ("*Restatement (Second)*"),² and twenty-one years after the Court of Appeals of Maryland adopted section 402A as the law of Maryland in *Phipps v. General Motors Corp.*³ As Maryland has yet to adopt the *Restatement (Third)*, its precedent in the products liability arena is rooted in statutory and common law developed from the *Restatement (Second)*.

The ALI's formulation of section 402A liability in turn was rooted primarily in the experience of claims for manufacturing defects. In the three decades since its adoption by the ALI, the law of products

1. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998) [hereinafter RESTATEMENT (THIRD)].

2. RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter RESTATEMENT (SECOND)]. See *infra* text accompanying note 394 in the Appendix for the text of section 402A.

3. 278 Md. 337, 363 A.2d 955 (1976). See *infra* notes 22-26 and accompanying text for a discussion of *Phipps v. General Motors Corp.*

liability has expanded exponentially and the breadth of that development is now reflected in the ALI's newest *Restatement*. This latest ALI effort reflects thirty years of common-law precedent concerning design-defect claims, failure-to-warn claims, crashworthiness/enhanced injury claims, special rules for claims arising out of contaminated human blood and prescription products, claims involving products whose manufacturers cannot be identified, changes in burdens of proof and quantum of proof, the limits of recovery for so-called "pure economic loss," judicial and legislative adoption of comparative fault principles, evidentiary issues involving compliance and noncompliance with safety statutes and regulations, statutory preemption of common-law liability principles, and claims testing the limits of foreseeability and the appropriate allocation of social responsibility for accidents arising out of products placed in the stream of commerce by commercial enterprises. In short, the law of products liability has gone far beyond its simple origins as articulated in section 402A of the *Restatement (Second)*.

This Article sets forth the twenty-one sections comprising the ALI's replacement for section 402A and contrasts the principles enunciated in those new sections with current Maryland products liability law.⁴ The Article identifies the areas of congruence, points of divergence, and territory explored in the *Restatement (Third)* yet uncharted in Maryland appellate decisions.

II. CHAPTER 1: LIABILITY OF COMMERCIAL PRODUCT SELLERS BASED ON DEFECTS AT TIME OF SALE

A. *Liability Rules Applicable to Products Generally*

1. Section 1: Liability of Commercial Seller or Distributor for Harm Caused by Defective Products

One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the product defect.⁵

4. The "black letter" of each section of the *Restatement (Third) of Torts: Products Liability* ("*Restatement (Third)*") is reprinted as the heading of each subsection, following the chapter and heading organization adopted and promulgated by the ALI at its May 20, 1997 membership meeting. To conserve space only the black letter of the *Restatement (Third)* appears; the official comments and the Reporters' Notes have been omitted. Undoubtedly, as was true with section 402A, the comments will be looked to by the courts as an invaluable guide in interpreting the new black letter provisions. It should be remembered that when the Court of Appeals of Maryland adopted section 402A strict liability, it also adopted all of the official comments that went with it. *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 436, 601 A.2d 633, 641 *reconsideration denied*, 325 Md. 665, 602 A.2d 1182 (1992); *Phipps*, 278 Md. at 346, 363 A.2d at 959-60.

5. RESTATEMENT (THIRD) § 1.

This general rule of tort liability applies to commercial sellers and other distributors for harm caused by defective products. Liability rules specific to certain types of products are set forth in sections 5 through 8 under the next topic.⁶

Section 1 reflects the expansion of products liability law from cases involving manufacturing defects—upon which section 402A of the *Restatement (Second)* was grounded—to cases of design defects or defects based on inadequate warnings or instructions.⁷

The majority of jurisdictions, including Maryland,⁸ recognize these three categories of defect in products liability law. Maryland cases reflect the general difficulties of courts nationwide attempting to fit all three categories of defect into the same doctrinal mold under section 402A.

The *Restatement (Third)* recognizes that the rule developed to protect users from manufacturing defects—where a seller is held liable for harm caused by the defect although all possible care has been exercised in the preparation of the product—is inappropriate to resolve claims of defective design and defects based on inadequate warnings or instructions. Using a traditional negligence “reasonableness test,” subsections 2(b) and 2(c) require a determination that the product could have reasonably been made safe by a better design, instruction, or warning.⁹ This alleviates the difficulties found using section 402A principles with these product-defect categories. This too is consistent with current Maryland law.¹⁰

2. Section 2: Categories of Product Defects

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

- (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;**

6. See *infra* notes 127-202 and accompanying text for a discussion of sections 5 through 8 of *Restatement (Third)*.

7. See *infra* notes 11-84 and accompanying text for a discussion of section 2 of the *Restatement (Third)*.

8. See, e.g., *Phipps v. Gen. Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976); *Ziegler v. Kawasaki Heavy Indus., Ltd.*, 74 Md. App. 613, 539 A.2d 701 (1988); *Valk Mfg. Co. v. Rangaswamy*, 74 Md. App. 304, 537 A.2d 622 (1988), *rev'd on other grounds sub nom. Montgomery County v. Valk Mfg. Co.*, 317 Md. 185, 562 A.2d 1246 (1989).

9. See *infra* text accompanying note 11 for the text of section 2 of the *Restatement (Third)*.

10. See *infra* notes 52-65 and accompanying text for a discussion of subsections 2(b) and 2(c).

- (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
- (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.¹¹

“Strict products liability” is a term of art recognizing that products liability, an area of tort law, borrows concepts from both negligence and warranty law.¹² Section 2 of the *Restatement (Third)* clarifies the existing categories of products liability by defining them: a product may be defective upon its sale or distribution as a result of its manufacture, design, or failure to warn.¹³

Maryland courts resolve product defects under section 402A of the *Restatement (Second)* recognizing the same three categories of defect.¹⁴ A product is defective if: (1) at the time of sale, the product contained a flaw that made it more dangerous than intended; (2) the product’s manufacturer failed to adequately warn the consumer of a risk or hazard; or (3) the product was defectively designed.¹⁵

Under section 402A, recovery for any defect requires that: (1) the product was in a defective condition at the time it left the seller’s control; (2) the product was unreasonably dangerous to the user; (3) the

11. RESTATEMENT (THIRD) § 2.

12. *Id.* § 1 cmt. a.

13. *Id.* § 2.

14. See generally *Phipps v. Gen. Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976).

15. *Nissan Motor Co. v. Nave*, 129 Md. App. 90, 118, 740 A.2d 102, 117 (1999). A “defective condition” is present when 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.” RESTATEMENT (SECOND) § 402A cmt. g. Comment i defines an “unreasonably dangerous” product as one that is “dangerous to an extent beyond that which would be [the contemplation of] the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.” *Id.* § 402A cmt. i. In design defect cases, however, Maryland courts employ the “risk/utility” balancing test rather than a “consumer-expectation test” to determine whether a specific design is defective and unreasonably dangerous. See *Nissan Motor Co.*, 129 Md. App. at 118, 740 A.2d at 117; see also *infra* notes 72-75.

defect caused the injury; and (4) the product was expected to and did reach the user without a substantial change in its condition.¹⁶

a. Manufacturing Defects

Section 2(a) imposes liability irrespective of whether a manufacturer's quality control efforts satisfy standards of reasonableness. Maryland subscribes to this rule.¹⁷

Liability without fault is imposed on manufacturing defects rather than design or warning defects because manufacturing defects may be caused by fault difficult to prove.¹⁸ Also, manufacturing flaws may be said to disappoint reasonable consumer expectations as to product performance. Moreover, sellers of products are in a better position than consumers to insure against the statistical risks of manufacturing defects and spread that risk through product pricing.¹⁹

(1) Maryland's Adoption and Application of Strict Liability for Manufacturing Defects

In a strict liability claim involving a manufacturing defect the burden of proof is on the plaintiff to prove that the product was in a defective condition when it left the hands of the manufacturer.²⁰ Unless evidence is offered to prove the defect, the burden is not met.²¹

Strict liability under section 402A for a manufacturing defect was adopted in Maryland in *Phipps v. General Motors Corp.*²² In *Phipps*, the plaintiff was injured when the accelerator of his employer's vehicle locked, resulting in a collision.²³ Reasoning that defective products result in injuries and the cost of these injuries should be borne by the manufacturer rather than the injured victims, the Court of Appeals of Maryland abandoned the contractual privity between the plaintiff and

16. RESTATEMENT (SECOND) § 402A.

17. *Phipps*, 278 Md. at 344, 363 A.2d at 958 (“[I]n an action founded on strict liability in tort, as opposed to a traditional negligence action, the plaintiff need not prove any specific act of negligence on the part of the seller. The relevant inquiry . . . focuses not on the conduct of the seller, but rather on the product itself.”); *Klein v. Sears, Roebuck & Co.*, 92 Md. App. 477, 484-85, 608 A.2d 1276, 1280 (1992) (dicta); *Singleton v. Int'l Harvester Co.*, 685 F.2d 112, 115 (4th Cir. 1981) (applying Maryland law) (“In manufacturing defect cases, the plaintiff proves that the product is defective simply by showing that it does not conform to the manufacturer's specifications.”). See generally MARYLAND CIVIL PATTERN JURY INSTRUCTIONS 26:14 (3d ed. 1993 & Supp. 1998) [hereinafter MPJI].

18. RESTATEMENT (THIRD) § 2 cmt. a.

19. *Id.*

20. RESTATEMENT (SECOND) § 402A cmt. g.

21. *Id.*

22. 278 Md. 337, 363 A.2d 955 (1976).

23. *Id.* at 339, 363 A.2d at 956.

the manufacturer required for recovery.²⁴ The court recognized that strict liability was imposed by law rather than by contract.²⁵ For a manufacturer to be liable under section 402A, the product must be defective and unreasonably dangerous at the time it leaves the manufacturer's hands.²⁶

(2) Maryland Plaintiffs' Burden to Prove Defect, Attribution, and Causation

In addition to satisfying section 402A, Maryland courts impose a burden on a plaintiff to prove that a defect in the product exists, that the defect is attributed to the seller, and that the defect was the proximate cause of the accident.²⁷ For instance, in *Jensen v. American Motors Corp.*,²⁸ the plaintiff was injured after his jeep, manufactured by the defendant, rolled over on the highway.²⁹ The defendant was granted summary judgment because Mr. Jensen did not prove a causal relationship between the defect and the accident.³⁰ He unsuccessfully relied on circumstantial evidence to infer that the accident was caused by a defect in the vehicle.³¹ The Court of Special Appeals of Maryland held that, "proof of a defect must arise above surmise, conjecture or speculation; and one's right to recovery may not rest on any presumption from the happening of an accident."³²

Similarly, in *Singleton v. International Harvester Co.*,³³ a plaintiff suffered injuries when his tractor, manufactured by the defendant, overturned.³⁴ The plaintiff contended that his injuries were caused by the absence of a rollover protective structure, which was a defect in design and not manufacture. The trial court dismissed the case because there was insufficient proof of both defect and a causal connection to the defendant.³⁵ The Fourth Circuit, applying Maryland law, affirmed the trial court, holding that a strict liability claim, regardless of

24. *Id.* at 342, 343, 363 A.2d at 957, 958. This allows the risk to be shifted to the manufacturer, who is in a better financial position to absorb the loss. *Id.* at 343, 363 A.2d at 958.

25. *Id.* at 342, 363 A.2d at 958. Previously, manufacturer defects claims were based on the theory of an express or implied warranty between the plaintiff and the manufacturer. *Id.*

26. *Id.* at 344, 363 A.2d at 959.

27. See *Jensen v. American Motors Corp.*, 50 Md. App. 226, 437 A.2d 242 (1981); *Virgil v. Kash N' Carry Corp.*, 61 Md. App. 23, 484 A.2d 652 (1984); *Ziegler v. Kawasaki Indus.*, 74 Md. App. 613, 539 A.2d 701 (1988).

28. 50 Md. App. 226, 437 A.2d 242 (1981).

29. *Id.* at 228, 437 A.2d at 244.

30. *Id.*

31. *Id.* The driver testified that he last heard a squeal in the tires and then lost control of his vehicle. *Id.* These facts were insufficient to draw an inference that a defect was the cause of the accident. *Id.*

32. *Id.* at 232, 437 A.2d at 242.

33. 685 F.2d 112 (4th Cir. 1981).

34. *Id.* at 113.

35. *Id.* at 114.

whether a defect in manufacture or design is alleged, must focus on the product and not the reasonableness of the manufacturer.³⁶ As the plaintiff was unable to produce sufficient evidence to establish a connection between a defect in the product and the cause of the accident, his case was dismissed.³⁷

This burden has been more easily met in other fact situations that involve an alleged defect in *manufacturing* as opposed to a defect in *design*.³⁸ Various Maryland cases have ruled that evidence of few facts, in addition to an accident occurring, may be sufficient to raise an inference of a manufacturing defect by circumstantial evidence.³⁹ A plaintiff must introduce evidence supporting the following three-prongs in a products liability claim: "(1) the existence of a defect, (2) the attribution of the defect to the seller, and (3) a causal relation between the defect and the injury."⁴⁰

In *Virgil v. Kash N' Karry Corp.*,⁴¹ the plaintiff suffered injuries while using her thermos, manufactured by the defendant, which imploded after she filled it with hot coffee and milk.⁴² The court of special appeals stated that the plaintiff needed minimal additional evidence to establish that the defect causing the implosion either existed when the product was purchased or soon thereafter.⁴³ The court permitted an inference of a defect from the accident's occurrence, so long as other causes of the accident were eliminated by circumstantial evidence.⁴⁴ As such, the court held that the evidence introduced was sufficient to reasonably infer that the defect existed at the time of manufacture and was the cause of the accident.⁴⁵

In addition, the court of appeals in *Eaton Corp. v. Wright*⁴⁶ held that a manufacturing defect caused an accident with little evidence prof-

36. *Id.* at 114, 117.

37. *Id.* at 117.

38. *See, e.g., Virgil v. Kash N' Karry Corp.*, 61 Md. App. 23, 484 A.2d 652 (1984); *Eaton Corp. v. Wright*, 281 Md. 80, 375 A.2d 1122 (1977). For example, the accelerator of a car sticking to the floor, and the brakes of a new vehicle failing are instances in which very little additional evidence of a manufacturing defect would be necessary. *Phipps v. Gen. Motors Corp.*, 278 Md. 337, 345-46, 363 A.2d 955, 959 (1976).

39. *See supra* note 38 and accompanying text.

40. *Virgil*, 61 Md. App. at 23, 484 A.2d at 352.

41. 61 Md. App. 23, 484 A.2d 652 (1984).

42. *Id.* at 25, 484 A.2d at 654.

43. *Id.* at 30-31, 484 A.2d at 657-58. The plaintiff has the burden of establishing that the defect existed at the time of manufacturing by a more likely than not standard. *Id.* This determination was based on the testimony of the plaintiff, which tended to eliminate the possibility that the defect was created after the thermos was purchased. *Id.* Generally, the lapse of time between purchase and accident is a factor in determining causation; it was not a substantial factor in this case because the thermos was purchased three months prior to the accident. *Id.*

44. *Id.*

45. *Id.*

46. 281 Md. 80, 375 A.2d 1122 (1977).

ferred by the plaintiff.⁴⁷ After being injured in an explosion using the propane torch and fuel canister manufactured by the defendant, the plaintiff alleged that these products were defectively manufactured.⁴⁸ On reviewing the trial court's decision on summary judgment, the court held that, in the absence of misuse by the plaintiff, the explosion of the canister only hours after its purchase is *prima facie* evidence of the defendant's strict liability.⁴⁹ The court required no additional evidence regarding the precise nature of the defect.⁵⁰

b. Design Defects

In defective design cases, the focus is on whether the design of the product is defective, rather than on the conduct of the manufacturer in designing it.⁵¹ Because design defects cannot be determined by reviewing the manufacture's specifications, they are predicated on a different concept of responsibility than manufacturing defects.⁵²

(1) Tests Used to Determine Design Defects

Historically, different states have employed one of two tests to determine the existence of a design defect: the "risk-utility test," the majority rule, and the "consumer-expectation" test, the minority rule.

Section 2(b) of the *Restatement (Third)* adopts the reasonableness (risk-utility balancing) test as the standard for judging design defects. If a reasonable, alternative design would have reduced, at a reasonable cost, the foreseeable risks of harm posed by the product such that omission of the alternative design rendered the product not reasonably safe, then the risk outweighs the utility and the manufacturer is strictly liable. Maryland decisions support this analysis.⁵³

47. *Id.* at 89, 375 A.2d at 1127.

48. *Id.*

49. *Id.*

50. *Id.*

51. RESTATEMENT (SECOND) § 402A cmt. g.

52. RESTATEMENT (THIRD) § 2 cmt. a.

53. *Phipps v. Gen. Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976); *Volkswagen of Am., Inc. v. Young*, 272 Md. 201, 321 A.2d 737 (1974); *Nissan Motor Co. v. Nave*, 129 Md. App. 90, 740 A.2d 102 (1999); *Klein v. Sears, Roebuck & Co.*, 92 Md. App. 477, 608 A.2d 1276 (1992); *Lundgren v. Ferno-Wash. Co.*, 80 Md. App. 522, 565 A.2d 335 (1989); *Ziegler v. Kawasaki Heavy Indus., Ltd.*, 74 Md. App. 613, 539 A.2d 701 (1988); *C & K Lord, Inc. v. Carter*, 74 Md. App. 68, 536 A.2d 699 (1988); *Troja v. Black & Decker Mfg. Co.*, 62 Md. App. 101, 488 A.2d 516 (1985); *Banks v. Iron Hustler Corp.*, 59 Md. App. 408, 475 A.2d 1243 (1984); *see also Binakonsky v. Ford Motor Co.*, 133 F.3d 281, 285 (4th Cir. 1998) (applying Maryland law); *Johnson v. Int'l Harvester Co.*, 702 F.2d 492, 494 (4th Cir. 1983) (applying Maryland law); *Singleton v. Int'l Harvester Co.*, 685 F.2d 112, 115 (4th Cir. 1981) (applying Maryland law). *Accord Kelley v. R.G. Indus.*, 304 Md. 124, 136, 497 A.2d 1143, 1149-50 (1989) (stating in dicta, "[a]nother test used to determine whether a defect exists under § 402A is the 'risk/utility' test").

The burden of proving a reasonable alternative design lies with the plaintiff, however, a plaintiff is not required to actually produce a prototype in order to present a *prima facie* case of design defect.⁵⁴ For the case to be submitted to the trier of fact, the plaintiff must produce sufficient evidence such that reasonable persons could conclude that a reasonable alternative design could have been practically adopted at the time the product was originally marketed.⁵⁵ Maryland courts already follow this approach.⁵⁶

Undertaking a risk-utility assessment by weighing the relevant advantages and disadvantages of the product's features is necessary.⁵⁷ This category of strict liability is more challenging because consumer expectations are more difficult to discern for such defects, and setting appropriate levels of design safety is not directly analogous to the setting of levels of quality control by a manufacturer.⁵⁸

Reference to consumer expectations is more appropriate in manufacturing defect cases because they are easier to apply than in cases involving defects in design, warnings, or instructions.⁵⁹ Maryland case law is somewhat inconsistent regarding the proper role of consumer expectations in determining the existence of a design or warnings defect.⁶⁰

The better-reasoned Maryland decisions, the general weight of authority and the *Restatement (Third)* do not employ a consumer-expectation test for determining defects in design, warnings, or instructions. While what the consumer expects arguably may be one of several *factors* to be balanced as *part* of the risk-utility test, consumer expectations in and of themselves do not serve as an independent standard for determining the existence of a defect in design, warning, or instruction. Rather, the proper test for design-defect cases is the risk-utility test.⁶¹

Maryland courts have carved out, however, a narrow subset of defects involving so-called "inherently unreasonable risks." In these cases, the courts have found it unnecessary, as a matter of law, to even determine whether the defect is one of manufacture or design, much

54. RESTATEMENT (THIRD) § 2 cmt. f.

55. *Id.*

56. See *Phipps*, 278 Md. 337, 363 A.2d 955; *Nissan Motor Co.*, 129 Md. App. 80, 740 A.2d 102; *Nicholson v. Yamaha Motor Co.*, 80 Md. App. 695, 566 A.2d 135 (1989), *cert. denied*, 318 Md. 683, 569 A.2d 1242 (1990).

57. See *supra* note 55 and accompanying text; see also *infra* notes and accompanying text 71-71.

58. RESTATEMENT (THIRD) § 2 cmt. a.

59. *Id.* § 2 cmt. g. More than any other type of defect, manufacturing defects disappoint consumer expectations. The consumer-expectation test is more difficult to apply in design-defect cases. See *Phipps*, 278 Md. at 344, 363 A.2d at 958-59.

60. RESTATEMENT (SECOND) § 402A cmt. g.

61. See *supra* notes 53-55 and accompanying text for a discussion of the risk-utility test.

less to differentiate between the standards of proof for either type of defect.⁶² To the extent that such defects potentially involve inherently unreasonable *design* defects, they may be viewed as instances in which no reasonable person could conclude that the manufacturer's chosen design was reasonably safe. In other words, in these rare instances, reasonable consumer expectations as to safety so overwhelm any off-setting benefits of the design as to render it defective as a matter of law.⁶³

According to the *Restatement (Third)*, as long as the plaintiff establishes a defect under the functional criteria enumerated in section 2, courts are free to utilize the concepts of negligence, strict liability, or implied warranty of merchantability as theories of liability.⁶⁴ Failure to meet the requisites of section 2 will defeat a cause of action under these other legal theories.⁶⁵

Comment n states, however, that two or more factually identical *design*-defect claims, or two or more factually identical *failure-to-warn* claims, may not be submitted to the trier of fact under different doctrinal labels, as doing so would create general confusion and could result in inconsistent verdicts. Both of these categories of defect involve a risk-utility assessment under sections 2(b) and 2(c), respectively, a determination that is functionally indistinguishable from proof of negligence. Thus, for example, if a design-defect claim is characterized as strict liability, a negligence in design claim on the same facts should not be permitted. The same is true for claims based on inadequate warnings. To date, Maryland courts have not demonstrated, at least not *sua sponte*, any inclination to curtail the pursuit of alternative legal theories for factually identical design-defect claims, or identical failure-to-warn claims.⁶⁶

62. *Lundgren v. Ferno-Wash Co.*, 80 Md. App. 522, 529, 565 A.2d 335, 339 (1989) (holding that the threshold question of whether a defect involves an inherently unreasonable risk is for the court to decide).

63. For discussion of defects involving "inherently unreasonable risks," see *supra* note 53.

64. RESTATEMENT (THIRD) § 2 cmt. n.

65. *Id.*

66. See, e.g., *Singleton v. Int'l Harvester Co.*, 685 F.2d 112, 117 (4th Cir. 1981) (applying Maryland law) (noting that because proof requirements are *greater* for negligence than for strict liability, there is no need to instruct jury concerning negligence if the evidence does not support strict liability); *Liesener v. Weslow, Inc.*, 775 F. Supp. 857, 860 (D. Md. 1991) (noting that strict liability, negligence and breach of implied warranty alleged for failure to warn); *Frericks v. Gen. Motors Corp.*, 274 Md. 288, 291, 336 A.2d 118, 120 (1975) (noting that negligence and breach of implied warranty alleged for failure to warn); *Blaw Knox Constr. Equip. Co. v. Morris*, 88 Md. App. 655, 667-68, 596 A.2d 679, 685 (1991) (noting that strict liability and negligence alleged for design defect and failure to warn); *Dechello v. Johnson Enters.*, 74 Md. App. 228, 235 n.4, 536 A.2d 1203, 1207 n.4, *cert. denied sub nom.*, *Albert E. Pecora Imps. v. Dechello*, 312 Md. 601, 541 A.2d 964 (1988) (noting that strict liability, negligence and breach of implied warranty alleged for manufacturing defect and for failure to warn); *Banks v. Iron Hus-*

A claim of *manufacturing* defect under section 2(a), however, *may* be combined with a claim of negligent manufacturing, because they rest on different factual predicates.⁶⁷ Negligence rests on proof of fault leading to a product defect, whereas strict liability merely requires proof of the defect itself, not whether it arose from carelessness.

(2) Maryland's Application of Strict Liability for Design Defects

Generally,⁶⁸ Maryland courts employ the risk-utility balancing test to determine whether a design is defective.⁶⁹ To prevail, plaintiffs are required to prove six elements: (1) the existence of an alternative design that is safer than the suspect product design; (2) the availability of the materials necessary for production of the alternative design; (3) the technological feasibility of manufacturing the alternative design at the time that the product was manufactured from the suspect design; (4) the cost of producing the alternative design; (5) the price to the consumer resulting from the manufacturer's use of the alternative design; and (6) the chances of consumer acceptance of the alternative design.⁷⁰

tlar Corp., 59 Md. App. 408, 411, 475 A.2d 1243, 1244 (1984) (noting that strict liability and negligence alleged for design defect). *But see*, Volkswagen of Am., Inc. v. Young, 272 Md. 201, 220-21, 321 A.2d 737, 747-48 (1974) (noting that negligence theory, not strict liability theory, applies to claim that an alleged design defect rendered motor vehicle uncrashworthy); Ziegler v. Kawasaki Heavy Indus., Ltd., 74 Md. App. 613, 618, 539 A.2d 701, 704, *cert. denied*, 313 Md. 32, 542 A.2d 858 (1988) (declining to address the validity, *vel non*, of strict liability claim, as opposed to negligence claim, for a failure to warn). *Cf.* Hood v. Ryobi Am. Corp., 181 F.3d 608, 611 (4th Cir. 1999) (noting that defenses based on post-sale alteration of product are "functionally equivalent" under both strict liability and negligence causes of action).

67. RESTATEMENT (THIRD) § 2 cmt. n.

68. The *Phipps* court stated that there are some cases where design defects are "inherently unreasonable" and do not require a balancing test. *Phipps v. Gen. Motors Corp.*, 278 Md. 337, 344-45, 363 A.2d 955, 959 (1976). An example of an inherently dangerous design defect is a gas pedal on a new car that suddenly sticks, causing the vehicle to accelerate without warning. Other examples include "a steering mechanism which causes a car to suddenly veer off the road, a drive shaft on an automobile which falls off while the car is being operated in a safe manner, and brakes on a new automobile which suddenly fail." *Id.* at 345-46, 363 A.2d at 955.

69. *See supra* note 53 and accompanying text; *see also* MPJI 26:13 (explaining the factors to be balanced: "the user's anticipated awareness of the dangers inherent in the product and their avoidability"). *But see* *Simpson v. Standard Container Co.*, 72 Md. App. 199, 203-04, 527 A.2d 1337, 1340 (1987) (suggesting in dicta that the "consumer expectation test" may also be applicable in design defect cases). *Cf.* *Kelley v. R.G. Indus.*, 304 Md. 124, 135, 497 A.2d 1143, 1148 (1985) (deviating from Maryland's general application of the consumer-expectation test when considering handguns because consumers expect handguns to be dangerous as part of their normal function).

70. *Nissan Motor Co. v. Nave*, 129 Md. App. 90, 120, 740 A.2d 102, 118 (1999).

c. *Inadequate Instructions or Warnings*

Like design defects, a determination as to whether instructions or warnings are inadequate and, thus, defective cannot be made by reviewing the manufacturer's specifications.⁷¹ Therefore, the *Restatement (Third)* employs the risk-utility test to make this determination.⁷²

(1) Maryland's Application of Strict Liability for Inadequate Instructions or Warnings of Product Hazards

It is well-established in Maryland law that a manufacturer may be liable for placing a product on the market that has inadequate instructions and warnings.⁷³ To determine whether a warning is adequate, Maryland has adopted the same reasonableness balancing test, also referred to as the risk-utility balancing test, as is used in analyzing design-defect claims.⁷⁴ When determining this balance, instructions and warnings that are too detailed may not be considered to provide a sufficient warning. This is so because "[w]ell-meaning attempts to warn of every possible accident lead over time to voluminous yet impenetrable labels—too prolix to read and too technical to understand."⁷⁵ In addition, Maryland imposes no duty on manufacturers to predict a consumer's violation of clear, easily understandable safety warnings.⁷⁶

71. RESTATEMENT (THIRD) § 2 cmt. a.

72. *Id.*

73. *See Simpson*, 72 Md. App. at 203, 527 A.2d at 1339-40; *Moran v. Faberge, Inc.*, 273 Md. 538, 543, 332 A.2d 11, 15 (1975).

74. *Moran*, 273 Md. at 543, 332 A.2d at 15.

75. *Hood v. Ryobi Am. Corp.*, 181 F.3d 608, 611 (4th Cir. 1999) (applying Maryland law).

76. *Hood*, 181 F.3d at 612; *see also Simpson*, 72 Md. App. at 206-07, 527 A.2d at 1341 (stating that "[w]here warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous'") (quoting RESTATEMENT (SECOND) § 402A cmt. j).

In *Hood v. Ryobi America Corp.*, the plaintiff was using an electric saw manufactured by the defendant from which he removed the blade-guards. *Hood*, 181 F.3d at 609. After using the saw without the guards for about twenty minutes, the blade detached from the saw cutting Mr. Hood's leg and thumb. *Id.* at 609-10. Although there were several warnings on both the saw and in the owner's manual to never operate the saw without the guards, the plaintiff alleged that there were inadequate warnings on the saw and, thus, were defective. *Id.* The plaintiff thought the warnings were to prevent objects such as clothing and fingers from coming into contact with the blade, not that removal would cause the blade to become detached. *Id.* He contended that the manufacturer had the duty to state the actual consequences of operating the saw without the guards and that the warnings given were inadequate. *Id.* at 610. The court held that the manufacturer's warnings were not required to list all the consequences of improper use and that the saw was not defective because the plaintiff altered and used the tool against the defendant's warnings. *Id.* In reaching this determination, the court stated that "a clear and specific warning will nor-

(2) Failure-to-Warn Inconsistencies: Cause of Action and Distinction of Claim

In Maryland, failure-to-warn cases have either proceeded as negligence causes of action or, if brought as strict liability claims, have been rendered functionally indistinguishable from common-law negligence claims.⁷⁷ When failure-to-warn cases proceed as negligence claims, however, the claimant need not prove the manufacturer failed to exercise reasonable care.⁷⁸

A second issue regarding treatment of failure-to-warn claims is whether this claim is subsumed under design defects or whether it is an independent ground for recovery. At least one case interpreting Maryland law has observed that "'failure to warn' liability is merely a type of design defect."⁷⁹

mally be sufficient—the manufacturer need not warn of every mishap or source of injury that the mind can imagine flowing from the product." *Id.* (quoting *Liesener v. Weslo*, 775 F. Supp. 857, 861 (D. Md. 1991)).

77. *See, e.g., Higgins v. Diversey Corp.*, 998 F. Supp. 598, 604 (D. Md. 1997) (referencing the "strong resemblance" and common elements of negligence and strict liability for failure to warn under Maryland law); *Liesener*, 775 F. Supp. at 860 ("There is persuasive authority that the duty to warn in Maryland is essentially identical under the U.C.C. [for breach of implied warranty], the law of negligence, and the law of strict liability, *i.e.*, there is a duty to provide a reasonable warning of latent defects There is, of course, no duty to warn of obvious dangers"); *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 435, 601 A.2d 633, 640 (1992) ("[I]n a failure to warn case governed by the Restatement § 402A and Comment j, negligence concepts to some extent have been grafted onto strict liability."); *Mazda Motor of Am. v. Rogowski*, 105 Md. App. 318, 325, 659 A.2d 391, 394 (1995) (noting the "strong resemblance" and common elements of negligence and strict liability for failure to warn); *Kennedy v. Mobay Corp.*, 84 Md. App. 397, 410, 579 A.2d 1191, 1198 (1990) ("The distinction between negligence and strict liability lessens considerably in failure to warn cases." (citing *Werner v. Upjohn Co.*, 628 F.2d 848 (4th Cir. 1980))). *See also Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1165 (4th Cir. 1986) (applying Maryland law) (including references to "reasonableness" at the time of manufacture in jury charge concerning strict liability for failure to warn was not in error); MPJI 26:3 (classifying a manufacturer's failure to fulfill its duty to give an adequate warning as "negligence"). There also is significant overlap between strict liability of a failure to warn and a breach of an implied warranty of merchantability for the same failure to warn. *Dechello v. Johnson Enters.*, 74 Md. App. 228, 235 n.4, 536 A.2d 1203, 1207 n.4 (1988).
78. *Singleton v. Int'l Harvester Co.*, 685 F.2d 112, 117 (4th Cir. 1981) (applying Maryland law) ("The sole difference between liability for negligence and strict liability [for a failure to warn] is that the plaintiff in proving negligence must prove not only that the product was unreasonably dangerous but also that the failure to warn was the result of the defendant's failure to use due care.").
79. *Reed v. Sears, Roebuck & Co.*, 934 F. Supp. 713, 718 (D. Md. 1996) (citing *Ziegler v. Kawasaki Heavy Indus.*, 74 Md. App. 613, 539 A.2d 701 (1988)).

d. *Defenses to Strict Liability Claims in Maryland*

Maryland courts recognize several defenses in an action based on strict liability in tort.⁸⁰ A manufacturer is not liable where injury results from the user's abnormal handling or use of the product.⁸¹ Nor is the seller liable when the product is delivered in a safe condition but is subsequently mishandled.⁸² In addition, if adequate warnings and instructions are supplied but are disregarded by the consumer, liability will not be imposed.⁸³ Finally, a manufacturer may also defend under the consumer's assumption of the risk.⁸⁴

3. Section 3: Circumstantial Evidence Supporting Inference of Product Defect

It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of the specific nature of the defect, when the incident that harmed the plaintiff:

- (a) was of a kind that ordinarily occurs as a result of product defect; and
- (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.⁸⁵

Section 3 is rooted in the negligence concept of *res ipsa loquitur*—"the thing speaks for itself."⁸⁶ As products liability law developed, cases arose in which an inference of defect could be drawn from the incident itself, without proof of the precise nature of the defect. More often than not, such cases arose in the context of manufacturing defects, typically evidenced by a product malfunction. The rule is not, however, restricted to manufacturing defects alone.

Comment b to section 3 emphasizes the difference between a general inference of defect under section 3 and claims of defect brought directly under sections 1 and 2: "Section 3 claims are limited to situations where a product fails to perform its manifestly intended function, thus supporting the conclusion that a defect of some kind is the most probable explanation."⁸⁷

80. *Phipps v. Gen. Motors Corp.*, 278 Md. 337, 344, 363 A.2d 955, 958-59 (1976).

81. *Id.*; see also RESTATEMENT (SECOND) § 402A cmt. h. A seller is not liable for a child who becomes ill from eating too much candy. *Id.* Similarly, a manufacturer is not liable for mishandling when a bottled beverage is kicked over and the cap is removed. *Id.*

82. RESTATEMENT (SECOND) § 402A cmt. g.

83. *Id.* § 402A cmt. j.

84. *Id.* § 402A cmt. n. Assumption of the risk applies where "a consumer unreasonably proceeds to use a product despite its known risk or danger." *Id.*

85. RESTATEMENT (THIRD) § 3.

86. BLACK'S LAW DICTIONARY 1311 (7th ed. 1999).

87. RESTATEMENT (THIRD) § 3 cmt. B.

Maryland allows circumstantial evidence to prove a defect in a products liability action in appropriate circumstances.⁸⁸ A plaintiff filing a products liability suit in Maryland has the burden of establishing that it is more probable than not that the defect in the product existed when the product was sold.⁸⁹ If this cannot be proven by direct evidence, the plaintiff can introduce circumstantial evidence from which an inference of a product defect can be drawn.⁹⁰ Proof of a defect,

88. Compare *Virgil v. Kash N' Karry Serv. Corp.*, 61 Md. App. 23, 31, 484 A.2d 652, 656 (1984) (establishing defect without expert testimony "when a product [such as an imploding thermos bottle] fails to meet the reasonable expectations of the user, the inference is that there was some sort of defect, a precise definition of which is unnecessary") and *Eaton Corp. v. Wright*, 281 Md. 80, 89, 375 A.2d 1122, 1127 (1977) ("There can be little doubt that a propane canister, used immediately after purchase according to instructions on the label, which continues to allow gas to be released after an appliance has been removed, is defective and unreasonably dangerous. . . . There was no necessity for [plaintiffs] to show more concerning the precise nature of the defect.") with *Jensen v. Am. Motors Corp.*, 50 Md. App. 226, 229, 437 A.2d 242, 244 (1981) (preventing inference of defect where plaintiff did not present evidence negating other causes of an accident and stating "[t]he bare fact that an accident happens to a product . . . is usually not sufficient proof that it was in any way defective.").

89. *Virgil*, 61 Md. App. at 32, 484 A.2d at 657. For the elements of a products liability claim filed under Maryland law, see *supra* note 40 and accompanying text.

90. See *Harrison v. Bill Cairns Pontiac*, 77 Md. App. 41, 50, 549 A.2d 385, 390 (1988). In *Harrison*, the plaintiffs brought a products liability action against the manufacturer and seller of a used car to recover damages caused by a fire within or behind the instrument panel of their 1978 Mercury Zephyr, which plaintiffs purchased "used" in 1982 with nearly 59,000 miles on the odometer. *Id.* at 43, 549 A.2d at 386. Shortly after purchasing the four-year-old car, the Harrison's returned it to the seller, complaining that the tires were bald and it smelled of mildew. *Id.* at 43-44, 549 A.2d at 387. The tires were replaced, and the sales staff told the Harrison's that the smell would go away. *Id.* at 44, 549 A.2d at 387. Less than one year later, a fire ignited behind the instrument panel on the dashboard while Ms. Harrison was driving the car. *Id.* at 44, 549 A.2d at 387. She was injured when she escaped from the vehicle just prior to it colliding with a tree. *Id.* The plaintiffs asserted a breach of implied warranty and strict liability against the manufacturer. *Id.* at 50, 549 A.2d at 390. One of the plaintiffs' experts testified that "[c]ars shouldn't catch on fire going down the road," but could not determine what defect, if any, existed. *Id.* at 51, 549 A.2d at 390. A second expert concluded that the fire was caused by an electrical short but was unable to give any indication that the short was caused by a defect in the automobile that existed at the time of the sale of the car in 1978. *Id.* In upholding the lower court's decision, granting summary judgment in favor of the defendant, the appellate court focused on the weakness of plaintiffs' evidence. *Id.* at 52, 549 A.2d at 391. The court emphasized this point, "[The appellants] have been unable to show that what might possibly have happened did probably happen [B]ecause a one-car accident happened without apparent cause, the manufacturer must be to blame. Such a theory is not supported by established principles of [products liability]. It is simply wishful thinking." *Id.* at 54, 549 A.2d at 392 (quoting *Jensen*, 50 Md. App. at 234-35, 437 A.2d at 247). Thus, the court concluded that a reasonable fact-finder would not be able to draw an inference that the

however, must rise above conjecture or speculation, and may not rest on a presumption that a defect exists based on the mere happening of the accident.⁹¹ This method of proving a product defect has been referred to as the "indeterminate defect theory."⁹²

Generally, an inference of a defect may be drawn where the circumstantial evidence tends to eliminate other possible causes, such as product misuse or alteration.⁹³ In determining whether a product defect may be inferred from circumstantial evidence, Maryland courts consider at least five factors: (1) expert testimony as to possible causes; (2) if the accident occurred shortly after the sale of the product in a "new" condition; (3) whether the same accident occurred in similar products; (4) the elimination of other causes of the accident; and (5) whether the type of accident is one that occurs without a defect.⁹⁴

Expert testimony is only required when the subject of the inference is so particularly related to a science or profession that it is beyond the understanding of the average layperson.⁹⁵ Expert testimony was not required on the issue of whether a product warning "gets its message across to an average person."⁹⁶ As discussed in *Virgil v. Kash N' Karry Service Corp.*,⁹⁷ no expert testimony was given to support why the plaintiff's three-month-old thermos imploded after she poured hot coffee into it.⁹⁸ The Court of Special Appeals of Maryland stated:

Expert testimony is hardly necessary to establish that a thermos bottle that explodes or implodes when coffee and milk are poured into it is defective. When a product fails to meet the reasonable expectation of the user, "the inference is that there was some sort of a defect, a precise definition of which is unnecessary."⁹⁹

product was defective at the time it was manufactured. *Id.* at 53, 549 A.2d at 391.

91. *Jensen*, 50 Md. App. at 232, 437 A.2d at 242.

92. *Riley v. De'Longhi Corp.*, 2000 WL 1690183, at *2 (4th Cir. 2000) (applying Maryland law).

93. *Harrison*, 77 Md. App. at 51, 549 A.2d at 390.

94. *Id.*; see also PROSSER, LAW OF TORTS, § 103 at 673-74 (4th ed. 1971).

95. *Virgil*, 61 Md. App. at 31, 484 A.2d at 656.

96. *Ferebee v. Chevron Chem. Co.*, 552 F. Supp. 1243, 1304 (D.D.C. 1982) ("The Court can think of no question more appropriately left to a common sense lay judgment than that of whether a written warning gets its message across to an average person.").

97. See *supra* notes 40-38 and accompanying text for a discussion of *Virgil*.

98. *Virgil*, 61 Md. App. at 27, 484 A.2d at 654.

99. *Id.* at 31, 484 A.2d at 656 (quoting *Heaton v. Ford Motor Co.*, 435 P.2d 806 (Or. 1967)).

Thus, the appellant's testimony¹⁰⁰ regarding her purchase of the thermos and her subsequent use of the product gave rise to a reasonable inference that the thermos was defective when she acquired it.¹⁰¹

Although Maryland has not yet had occasion to consider adoption of the *Restatement (Third)*, the Fourth Circuit used the principles enunciated therein in an unpublished decision applying Maryland law, *Riley v. De'Longhi Corp.*¹⁰² In *Riley*, the plaintiffs sued the manufacturer of a six-month-old portable heater that had been used only three times, alleging that a defect in it ignited a fire in their home.¹⁰³ The plaintiffs' expert witness testified that the most probable cause of the fire was a failure inside the heater.¹⁰⁴ The defendant challenged that this testimony did not suffice as expert testimony as to possible causes¹⁰⁵ because the expert "failed to identify a precise defect within the heater."¹⁰⁶ The court, relying on section 3, comment c of the *Restatement (Third)*, stated that the expert's inability to identify a precise defect was not fatal to the plaintiffs' case because, in a circumstantial case,¹⁰⁷ the "plaintiff need not explain specifically what constituent part of the product failed."¹⁰⁸ Thus, it appears that the Fourth Circuit has made an initial step in accepting the concept of inferential evidence of product defects set forth in section 3 of the *Restatement (Third)*.

4. Section 4: Noncompliance and Compliance with Product Safety Statutes or Regulations

In connection with liability for defective design or inadequate instructions or warnings:

(a) a product's noncompliance with an applicable product safety statute or administrative regulation renders the

100. Mrs. Virgil testified that she had bought the thermos several months prior to the implosion and denied dropping it or misusing, abusing, or damaging it in any way. *Id.* at 27, 484 A.2d at 654.

101. *Id.* at 33, 484 A.2d at 657.

102. *Riley v. De'Longhi Corp.*, 2000 WL 1690183, at *2 (4th Cir. 2000) (applying Maryland law).

103. *Id.* at *1.

104. *Id.* at *3. The plaintiffs' expert contended that the fire was caused by an electrical malfunction within the heater's control panel and its attached wiring. *Id.*

105. This issue raised by the defendant-manufacturer goes to the first element in determining whether a product defect may be inferred from circumstantial evidence as set forth in *Harrison v. Bill Cairns Pontiac*, 77 Md. App. 41, 50, 549 A.2d 385, 390 (1998). See *supra* text accompanying note 94 for five factors set forth in *Harrison*.

106. *Riley*, 2000 WL 1690183, at *3.

107. The court reasoned that the use of circumstantial proof of defect was appropriate in this case because the heater sustained such severe damage that "direct evidence may not be available." *Id.* at *2 (citing RESTATEMENT (THIRD) § 3 cmt. b).

108. *Id.* (quoting RESTATEMENT (THIRD) § 3 cmt. c).

product defective with respect to the risks sought to be reduced by the statute or regulation; and

- (b) a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether a product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.¹⁰⁹

a. *Noncompliance with a Safety Statute or Regulation*

Section 4(a) provides that a design defect or a warnings defect necessarily exists if there has been a violation of an applicable safety statute or regulation.

There is no reported Maryland appellate court decision addressing whether there is a design defect or warning defect *per se* if the manufacturer has violated an applicable safety statute. The Maryland cases to date dealing with violation of safety statutes have been in the context of negligence causes of action, and even then not in cases involving the sale of a product.¹¹⁰ Under longstanding general negligence precedents in Maryland, however, violation of a statute is not negligence *per se*, but rather "some evidence" of negligence if three requirements are met.¹¹¹ First, the plaintiff must be a member of the class the statute was designed to protect; second, the injury suffered must be of the type the statute was designed to prevent; and third, the violation must be a proximate cause of the injury.¹¹²

109. RESTATEMENT (THIRD) § 4.

110. In *Hammond v. Robins*, the plaintiffs were injured when a dog ran in front of the heavy duty tandem bicycle they were riding, causing them to swerve and the bike to topple. *Hammond v. Robins*, 60 Md. App. 430, 433, 483 A.2d 379, 380 (1984). The defendant and owner of the dog had not complied with the Carroll County Code requiring dogs be kept under restraint. *Id.* at 435, 483 A.2d at 381. The court acknowledged that violation of a statutory duty establishes a *prima facie* case of negligence only where the violation is the proximate cause of the accident or injury. *Id.* The court clarified, however, that such a violation does not constitute negligence *per se*. *Id.* See also *infra* note 111 for a discussion of a similar case.

111. *Pahanish v. Western Trails, Inc.*, 69 Md. App. 342, 362, 517 A.2d 1122, 1132 (1986). In *Pahanish*, the plaintiff sued the operator of a horse stable for negligence after being injured on one its trails. *Id.* at 348, 517 A.2d at 1125. The plaintiff claimed that the lower court erred in failing to find that the owner's violation of certain statutory licensing and inspection stipulations established a *prima facie* case of negligence. *Id.* at 361, 517 A.2d at 1132. The Court of Special Appeals of Maryland stated that the violation of a statute does not constitute negligence *per se*, rather it may be considered evidence of negligence so long as three requirements were met. *Id.* at 362, 517 A.2d at 1132; see also *infra* note 112 and accompanying text for a discussion of the three requirements for a *prima facie* case of negligence based on the violation of a statutory duty.

112. *Pahanish*, 69 Md. App. at 362, 517 A.2d at 1132; see also MPJI 19:7.

It is unclear whether Maryland courts would conclude that a violation of an applicable safety statute or regulation constitutes conclusive proof of the existence of a defect, as opposed to mere evidence of a possible defect. The Reporter's Note in section 4 of the *Restatement (Third)* states that common-law negligence principles in some states, such as Maryland, treat a violation of an applicable safety statute or regulation as mere evidence, but not conclusive proof, of negligence.¹¹³ The *Restatement (Third)*, however, subscribes to the rule of "the overwhelming majority of American courts"¹¹⁴ that, in cases involving both design and failure to warn, violations of product safety regulations cause products to be defective as a matter of law.¹¹⁵

b. Compliance with a Safety Statute or Regulation

Maryland law is generally in accord with the principle enunciated in section 4(b), which states that compliance with statutes or regulations governing product designs or warnings does not preclude, as a matter of law, a finding of product defect. Maryland provides, however, that such a legal preclusion of defectiveness may arise in some circumstances.¹¹⁶ For example, in *Ellsworth v. Sherne Lingerie, Inc.*,¹¹⁷ the plaintiff was wearing a flannel nightgown inside-out when it ignited after she was standing near the front burner of her electric stove.¹¹⁸ She was severely burned as a result.¹¹⁹ In her products liability suit against the fabric manufacturer, the trial judge refused to admit evidence of the Flammable Fabrics Act.¹²⁰ In holding the evidence admissible, the Court of Appeals of Maryland noted that although compliance with a statutory standard suggests due care, it does not preclude a finding of negligence due to failure to take additional pre-

113. RESTATEMENT (THIRD) § 4 cmt. d, rptr. n.

114. *Id.*

115. *Id.*

116. *See, e.g.*, *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 625 A.2d 1005 (1993); *Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581, 495 A.2d 348 (1985); *see also* *Troja v. Black & Decker Mfg. Co.*, 62 Md. App. 101, 116, 488 A.2d 516, 523 (1985) (holding that harmless error occurred when expert testimony by defendant was admitted after plaintiff introduced that the product was in compliance with statutes, regulations, and industry practices). *Cf.* *Liesener v. Weslo*, 775 F. Supp. 857, 862 (D. Md. 1991) (following accepted industry standards, even if counsel has urged a more cautious approach, is not reckless conduct for a manufacturer to follow).

117. 303 Md. 581, 495 A.2d 348 (1985).

118. *Id.* at 586, 495 A.2d at 350.

119. *Id.*

120. *Id.* at 602, 495 A.2d at 359. Although the manufacturer exceeded the requirements imposed by statute, plaintiff wished to introduce evidence that the "incidence and severity of burns caused by ignition of clothing that was subject to the Federal standard" in an attempt to overcome the inference that clothing manufactured in compliance with the standard was not unreasonably dangerous. *Id.*

cautions.¹²¹ The court asserted that this rule was similar in strict liability cases, where proof of compliance with a product statutory standard does not prevent a judgment of defectiveness.¹²²

Similarly, in *Beatty v. Trailmaster Products, Inc.*,¹²³ a tort action against three corporate defendants responsible for designing, manufacturing, and selling an automobile "Lift Kit" device installed on an automobile that was later involved in a two-car collision, the court asserted that compliance with a statute does not necessarily preclude a finding of negligence or product defectiveness where a reasonable person would take precautions beyond the statutorily required measure.¹²⁴ The court expanded their holding beyond the principle of section 4(b), however, declaring that a legal preclusion of defectiveness as a matter of law may arise from compliance in some circumstances.¹²⁵ After reviewing evidence that the defendants complied with standards of the Transportation Article regarding vehicle bumper heights, the court held that "where no special circumstances require extra caution, a court may find that conformity to the statutory standard amounts to due care as a matter of law."¹²⁶ Thus, while Maryland law is in accord with the general principle set forth in section 4(b), if there are no special circumstances requiring additional caution, then a court may hold that statutory compliance indicates due care or lack of defectiveness as a matter of law.

B. Liability Rules Applicable to Special Products or Product Markets

1. Section 5: Liability of Commercial Seller or Distributor of Product Components for Harm Caused by Products into Which Components are Integrated

One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to liability for harm to persons or property caused by a product into which the component is integrated if:

- (a) **the component is defective in itself, as defined in this Chapter, and the defect causes the harm; or**
- (b) **(1) the seller or distributor of the component substantially participates in the integration of the component into the design of the product; and**

121. *Id.* at 602, 495 A.2d at 358.

122. *Id.*

123. 330 Md. 726, 625 A.2d 1005 (1993).

124. *Id.* at 729, 743, 625 A.2d at 1007, 1014 ("Our cases recognize, however, that compliance with a statute does not necessarily preclude a finding of negligence or product defectiveness where a reasonable person would take precautions beyond the statutorily required measure.")

125. *Id.* at 743-44, 625 A.2d at 1014.

126. *Id.*

- (2) the integration of the component causes the product to be defective, as defined in this Chapter; and
 (3) the defect in the product causes the harm.¹²⁷

Section 5 is founded on the fundamental policy that component sellers should not be liable when the component itself is not defective. Subsection (b) sets forth a three-prong test that plaintiffs must meet before holding a component-part manufacturer strictly liable for participating in the design of the integrated product.¹²⁸

Although there are no reported Maryland decisions on this topic, the policy underlying section 5(a) is consistent with Maryland's general approach to products liability law. Maryland courts impose liability only on those in the distribution chain who either caused or at least are in a position to reasonably detect the defect that caused the harm.¹²⁹

Maryland case law and the *Restatement (Second)*, however, are less instructive regarding section 5(b). Although there is no fully comparable section to 5(b), section 395 in the *Restatement (Second)*¹³⁰ addresses the liability of component-part manufacturers but not a comparable standard for substantial participation.¹³¹

127. RESTATEMENT (THIRD) § 5.

128. *Id.* § 5(b)(1)-(3).

129. *See, e.g.* *Harrison v. Bill Cairns Pontiac*, 77 Md. App. 41, 549 A.2d 385 (1988); *see supra* note 90 for a more detailed description of the facts of *Harrison*. The Harrisons initiated a products liability action against the car dealership to recover damages after the used car they bought from the defendant caught fire. *Harrison*, 77 Md. App. at 44, 549 A.2d at 387. The court held that dealers of used products should not, in most instances, be held strictly liable for defects created by the manufacturer of a product sold in a used condition by the dealer. *Id.* at 55-56, 549 A.2d at 392-93. In dicta, the *Harrison* court suggested that the liability of a dealer of used products should be limited to defects created in the product by the dealer, or perhaps to situations where the dealer knew or should have known of the existence of the manufacturing defect. *Id.* at 55, 549 A.2d at 392.

130. Section 395 of the *Restatement (Second)*, entitled "Negligent Manufacture of Chattel Dangerous Unless Carefully Made" states:

A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.

RESTATEMENT (SECOND) § 395.

131. *See* RESTATEMENT (SECOND) § 395 rptr. n. Reporter's Note m, titled "Manufacturer of raw material or parts of article to be assembled by a third person" states in part: "A manufacturer of parts to be incorporated in the product of his buyer or others is subject to liability under the Section if they are so negligently made as to render the products in which they are incorporated unreasonably dangerous for use." *Id.*

Maryland courts have not interpreted section 395 of the *Restatement (Second)* regarding liability of component product manufacturers for harm caused by the products into which the components are integrated. Thus, there is no indication what the trend in Maryland might be. Decisions of other courts are instructive of how Maryland courts may treat the issues associated with section 5(b) of the *Restatement (Third)*.¹³²

2. Section 6: Liability of Commercial Seller or Distributor for Harm Caused by Defective Prescription Drugs and Medical Devices

- (a) **A manufacturer of a prescription drug or medical device who sells or otherwise distributes a defective drug or medical device is subject to liability for harm to persons caused by the defect. A prescription drug or medical device is one that may be legally sold or otherwise distributed only pursuant to a health-care provider's prescription.**
- (b) **For purposes of liability under Subsection (a), a prescription drug or medical device is defective if at the time of sale or other distribution the drug or medical device:**
 - (1) **contains a manufacturing defect as defined in Section 2(a); or**
 - (2) **is not reasonably safe due to defective design as defined in Subsection (c); or**
 - (3) **is not reasonably safe due to inadequate instructions or warnings as defined in Subsection (d).**
- (c) **A prescription drug or medical device is not reasonably safe due to defective design if the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable health-care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients.**
- (d) **A prescription drug or medical device is not reasonably safe due to inadequate instructions or warnings if**

132. See, e.g., *In re Silicone Gel Breast Implants Prods. Liab. Lit.*, 996 F. Supp. 1110, 1116-17 (D. Ala. 1997) (stating that technical service assistance and advice provided by component manufacturer did not constitute such substantial participation in the design of the integrated products as would subject a component manufacturer to potential liability if those products were shown to be defective); *Buonanno v. Colmar Belting Co.*, 733 A.2d 712, 716 (R.I. 1999) (adopting the *Restatement (Third)* approach that the manufacturer or seller of a component part may be liable to the ultimate user, particularly if it substantially participated in the integration of the component into the design of the final product).

reasonable instructions or warnings regarding foreseeable risks of harm are not provided to:

- (1) prescribing and other health-care providers who are in a position to reduce the risks of harm in accordance with the instructions or warnings; or
 - (2) the patient when the manufacturer knows or has reason to know that health-care providers will not be in a position to reduce the risks of harm in accordance with the instructions or warnings.
- (e) A retail seller or other distributor of a prescription drug or medical device is subject to liability for harm caused by the drug or device if: (1) at the time of sale or other distribution the drug or medical device contains a manufacturing defect as defined in Section 2(a); or (2) at or before the time of sale or other distribution of the drug or medical device the retail seller or other distributor fails to exercise reasonable care and such failure causes harm to persons.¹³³

Prescription drugs and medical devices entail weighing unique risks and benefits—what may be harmful to one patient may be beneficial to another. Section 6(a) of the *Restatement (Third)* is the general provision imposing liability on the manufacturer of a defective prescription drug or medical device.¹³⁴

The following three subsections refine when liability for a defect is to be imposed on a manufacturer of a prescribed drug or medical device. Such a product is defective if, at the time of its distribution, it: (1) deviates from its intended design, despite using all possible care;¹³⁵ (2) is created from a defective design making it unreasonably safe, such that the foreseeable harm is sufficiently great in comparison to its foreseeable benefit that reasonable health-care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients;¹³⁶ or (3) fails to adequately warn or instruct its users, which occurs when reasonable instructions or warnings regarding foreseeable risks of harm are not provided to either (a) health-care providers in a position to

133. RESTATEMENT (THIRD) § 6.

134. *Id.* § 6(a).

135. *Id.* § 6(b)(1).

136. *Id.* § 6(b)(2), (c). Because of the special nature of prescription drugs and medical devices, section 6(c) provides a special standard for determining their design-defect liability rather than the more general test for design defect under section 2(b). RESTATEMENT (THIRD) § 6 cmt. b. See *supra* text accompanying note 11 for the text of section 2(b). See also *supra* notes 51-51 and accompanying text for a discussion of design defects. Under section 6(c), a prescription drug or medical device is defectively designed only when it provides no net benefit to any class of patients. RESTATEMENT (THIRD) § 6 cmt. b.

reduce the risks of harm,¹³⁷ or (b) to the patient, when the manufacturer has reason to know that health-care providers will not be in a position to reduce the risk of harm.¹³⁸

The last subsection of section 6 imposes liability on the retailer or other distributor of a defective, prescription drug or medical device. Section 6(e) provides that a retailer or other distributor of a prescription drug or device that causes harm may be liable if it contains a manufacturing defect¹³⁹ when it is distributed¹⁴⁰ or if, at or before distribution, the retailer or distributor fails to exercise reasonable care, causing injury to others.¹⁴¹

Maryland has not had the opportunity to consider defective prescription drug or medical devices cases that would implicate section 6 of the *Restatement (Third)*. Drawing analogies to similar products liability cases and reviewing the approaches taken by other jurisdictions, however, leads to a better understanding of whether Maryland courts will adopt section 6.

a. Manufacturer's Liability for Prescription Drugs or Medical Devices with Manufacturing Defects

There are no Maryland cases addressing the liability of a manufacturer of a defectively *manufactured* prescription drug or medical device.

b. Manufacturer's Liability for Prescription Drugs or Medical Devices with Design Defects

Although there are no Maryland appellate decisions on point, other jurisdictions traditionally have refused imposing tort liability for defective *design* of prescription drugs and medical devices.¹⁴² The objective standard to show defective design under section 6(b)(2) is "very demanding;" liability is imposed "only under unusual circumstances."¹⁴³

Decisions refusing to impose strict liability for design defects of prescription drugs or medical devices are rooted in the "unavoidably un-

137. *Id.* § 6(b)(3), (d)(1).

138. *Id.* § 6(b)(3), (d)(2).

139. RESTATEMENT (THIRD) § 2(a) (defining the manufacturing defect). See *supra* text accompanying note 11 for the text of section 2(a). See also *supra* notes 17-17 and accompanying text for a discussion of manufacturing defects, generally under section 2(a). See *supra* notes 20-20 and accompanying text for a discussion of Maryland's adoption of application of strict liability for a manufacturing defect. See *supra* notes 27-37 and accompanying text for a discussion of Maryland plaintiffs' burden to prove defect, attribution, and causation. See *supra* notes 38-50 and accompanying text for a discussion of Maryland's reconsideration of degree and lessening of the evidence necessary for plaintiffs to recover for a manufacturing defect.

140. RESTATEMENT (THIRD) § 6(e)(1).

141. *Id.* § 6(e)(2).

142. *Id.* § 6 cmt. b.

143. *Id.* § 6 cmt. f.

safe product" exception in the *Restatement (Second)*.¹⁴⁴ To determine whether a drug or product is considered unavoidably unsafe, two approaches have developed. One is to insulate all prescription drugs approved by the Food and Drug Administration (FDA).¹⁴⁵ The second is to determine eligibility for immunity on an individual basis, looking at the drug and the circumstances.¹⁴⁶

144. RESTATEMENT (SECOND) § 402A cmt. k. Comment k states:

Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs.

An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

Id. Maryland expressly adopted comment k in *Miles Lab. Inc. v. Doe*, 315 Md. 704, 732-33, 556 A.2d 1107, 1121 (1989) (certifying that Maryland implicitly adopted comment k in *Phipps*, and permitted recovery from the commercial preparer and supplier of a blood product based on strict liability in tort, where, assertedly as a result of receipt of the blood product, the recipient was infected with the AIDS virus).

145. *See, e.g.*, *Brown v. Superior Court*, 751 P.2d 470 (Cal. 1988).

146. *See, e.g.*, *Toner v. Lederle Labs.*, 112 P.2d 297 (Idaho 1987). This approach is problematic because jurors may challenge the FDA's approval of the drug by deciding whether it would have been reasonable to prescribe the drug or device to any class of patients. If they determine that it would not be, then they will have concluded, in effect, that the product should not have been marketed at all. This determination contradicts the FDA's finding, which is made after thorough risk-benefit analysis. Given this complication, courts applying this approach have determined that a judge is to make the determination of whether comment k immunity is applicable to a particular defendant and that determination is to be made at an evidentiary hearing outside of the presence of the jury. *See, e.g.*, *Johnson v. Am. Cyanamid Co.*, 718 P.2d 1318, 1326-27 (Kan. 1986) (determining that trial judge should have heard evidence on issue outside presence of jury and made ruling thereon); *Kearl v. Lederle Labs.*, 218 Cal. Rptr. 453, 463 (Cal. Ct. App. 1985) (excepting drug from strict liability design-defect analysis can only be made after evidence is taken out of jury's presence and relevant factors

The design-defect standard focuses on the drug or device at issue, not on other experimental or approved products that an expert witness believes are safer or reasonable alternatives.¹⁴⁷ As such, a drug or device is not defective simply because an alternative product is said to present fewer risks.

c. Manufacturer's Liability for Inadequately Instructing or Warning About Risks Associated with Prescription Drugs or Medical Devices

The traditional "learned intermediary" rule, requiring the manufacturer to warn the prescribing health-care provider, rather than the patient, about risks attendant to the use of prescription drugs and medical devices, is embodied in section 6.¹⁴⁸ Section 6(d), however, also recognizes that, in some limited circumstances, the manufacturer has a duty to warn the patient directly, rather than the health-care provider.¹⁴⁹

The Court of Appeals of Maryland has not expressly addressed whether Maryland should adopt the learned intermediary doctrine in a strict liability case.¹⁵⁰ In *Fellows v. USV Pharmaceutical Corp.*, however, the United States District Court for the District of Maryland saw no reason to conclude that Maryland courts would not adopt the doctrine.¹⁵¹

In *Fellows*, the plaintiff alleged that USV Pharmaceutical Corp. ("USV"), a drug manufacturer, was strictly liable for injuries suffered from the side effects of taking Doriden, a drug prescribed for insomnia.¹⁵² Upon granting USV's summary judgment motion,¹⁵³ the court stated:

Although the Maryland courts have not yet addressed the effect of comment k on section 402A, this court has been presented with no evidence suggesting that they would not follow the approach of other courts that have decided the issue. These and numerous other cases have held that pre-

considered). Another court has determined that whether a product is immune from liability under comment k is a question for the judge if reasonable minds could reach only one conclusion. *Castrignano v. E.R. Squibb & Co.*, 546 A.2d 775, 783 (R.I. 1988).

147. RESTATEMENT (THIRD) § 6(b)(1).

148. *Id.* § 6(d)(1); *see also id.* § 6(b)(3); *Perez v. Wyeth Labs. Inc.*, 734 A.2d 1245, 1245 (N.J. 1999) (defining learned intermediary doctrine).

149. RESTATEMENT (THIRD) § 6(d)(2); *see also id.* § 6(b)(3), cmt. b.

150. *Cf. Nolan v. Dillon*, 261 Md. 516, 522-23, 276 A.2d 36, 40 (1971) (implicitly creating the learned intermediary doctrine in Maryland in a case decided before Maryland adopted *Restatement (Second)* section 402A strict liability principles); *Miller v. Bristol-Myers-Squibb Co.*, 121 F. Supp. 2d 831, 838 (D. Md. 2000) (acknowledging Maryland's recognition of the learned intermediary doctrine).

151. 502 F. Supp. 297, 300 (4th Cir. 1980).

152. *Id.* at 298.

153. *Id.* at 301.

scription drugs are not considered unusually dangerous under section 402A, and the manufacturer will not incur liability under that section unless the manufacturer has failed to provide adequate warnings of the drug's possible dangers. The audience to whom these warnings must be directed is the medical community, not the consuming public. Since there is no dispute regarding the adequacy of USV's warnings to the medical community, as well as to [the prescribing physician], USV is not liable to plaintiff under section 402A as a matter of law.¹⁵⁴

In *Werner v. Upjohn Co.*,¹⁵⁵ the United States Court of Appeals for the Fourth Circuit stated that it was adequate for a drug manufacturer to avoid liability for marketing a new drug that, although beneficial, was unavoidably dangerous if a warning was included regarding the drug's known side effects.¹⁵⁶ The court stated:

Any remaining distinction in theories [between negligence and strict liability] disappears when a failure to warn case involves an unavoidably dangerous drug which the product in this case admittedly was. The *Restatement of Torts (Second)* [section] 402A, comment k makes it clear that a drug manufacturer is not to be held strictly liable for injuries caused by an unavoidably dangerous new drug if the warning is adequate. The standard for liability under strict liability and negligence is essentially the same.¹⁵⁷

154. *Id.* at 300 (citations omitted).

155. 628 F.2d 848, 858 (4th Cir. 1980) (applying Maryland law and comment k of the *Restatement (Second)* section 402A). The plaintiff, Jack Werner, brought this action to recover damages for injuries received from taking Cleocin, a prescribed broad-spectrum antibiotic manufactured by Upjohn. *Id.* at 851. Cleocin was approved by the FDA for general use in 1970, and was popular for persons allergic to penicillin. *Id.* After use of the drug increased, Upjohn received reports of side effects such as diarrhea and colitis, which were reported to the FDA, and resulted in studies performed independently and in-house by Upjohn. *Id.* As a result of the studies, the warnings associated with the drug were frequently revised, and in 1974, a letter was mailed to every physician in the United States warning physicians of the side effects of the drug and recommended treatment if they arise. *Id.* at 852. The warning stated, in part: "severe and persistent diarrhea, which may be accompanied by blood and mucus, and which may be associated with changes in large bowel mucosa diagnosed as 'pseudomembranous colitis,' has been reported in association of Cleocin HCl (clindamycin HCl hydrate)." *Id.* It further stated warning signs, and recommended treatment if the warning signs occur. *Id.* Upjohn updated the warning again in 1975, which expanded upon the earlier version and recommended that Cleocin be "reserved for serious infections where less toxic antimicrobial agents are inappropriate." *Id.* at 853. The warning also stated side effects, other limitations on prescribing the drug, proposed treatment if the side effects manifest, and other drugs that may prolong or worsen the condition. *Id.*

156. *Id.*

157. *Id.* at 858.

The New Jersey Supreme Court is the only court to date that has adopted section 6(d)(2) of the *Restatement (Third)*. In *Perez v. Wyeth Laboratories Inc.*,¹⁵⁸ the New Jersey Supreme Court held that the learned intermediary doctrine¹⁵⁹ does not apply to direct marketing of prescription drugs to consumers.¹⁶⁰ It is appropriate to impose a duty on the manufacturer to warn the patient directly because situations may exist when the health-care provider assumes a "much-diminished role as an evaluator or decision maker."¹⁶¹ Thus, under the *Restatement (Third)*, "warnings may have to be provided to a health-care provider or even to the patient," depending on the circumstances.¹⁶²

d. *Liability of Retailer or Distributor of Prescribed Drug or Medical Device for Harm Caused by Defect Existing Before or After the Sale*

Maryland courts have not addressed a case with facts to which section 6(e) would apply. Analogies can be drawn, however, from Maryland's current treatment of retailers.

Normally, a retailer is a "conduit" between the manufacturer and the customer; the seller "ordinarily has no duty in negligence to discover the defects or dangers of a particular product."¹⁶³ Where the seller is more than a mere "conduit," however, a supplier-installer defendant may be liable because he "should have known" of the products dangers.¹⁶⁴ Generally, ordinary retailers are protected because the responsibility of detecting potential defects would be too onerous a task.¹⁶⁵ Retail vendors of prescription drugs and medical devices, however, must exercise reasonable care, which includes following manufacturers' warnings and relaying those warnings to their custom-

158. 734 A.2d 1245 (N.J. 1999). This case was a consolidated action in Middlesex County, New Jersey with twenty-five Norplant cases involving approximately fifty Norplant users. *Id.* at 1248.

159. See *supra* text accompanying note 148 for a definition of the learned intermediary doctrine.

160. *Perez*, 734 A.2d at 1257.

161. *Id.* at 1253.

162. *Id.*

163. *Eagle-Picher Indus. v. Balbos*, 326 Md. 179, 202, 604 A.2d 445, 455 (1992).

164. *Id.* at 198-99, 604 A.2d at 454-56. "Reason to know" and "should know" are terms of art in the *Restatement (Second)*. "Reason to know" means that the actor of reasonable intelligence would infer that a defect, in fact, exists (strict liability). "Should know" means that the actor of reasonable intelligence would discover the defect in the course of his ordinary duty, in light of his peculiar experience dealing with such products (negligence). See *id.* at 203-04, 604 A.2d at 457. Defendants properly exercising their ordinary duty to inspect are not liable under a "should have known" negligence standard. See *Woolley v. Uebelhor*, 239 Md. 318, 325, 211 A.2d 302, 305 (1965) (holding that liability could only be imposed on defendant-car dealer if defect could have been discovered through the exercise of reasonable care); *Frericks v. General Motors Corp.*, 274 Md. 288, 305-06, 336 A.2d 118, 128 (1975) (same).

165. See *Frericks*, 274 Md. at 305, 336 A.2d at 128.

ers/patients. Given the disparity in financial resources of pharmacies and medical suppliers, from the super-store to the corner store, it would be unfair to impose strict liability upon retailers when the manufacturers' resources are more abundant.¹⁶⁶

3. Section 7: Liability of Commercial Seller or Distributor for Harm Caused by Defective Food Products

One engaged in the business of selling or otherwise distributing food products who sells or distributes a food product that is defective under § 2, § 3, or § 4 is subject to liability for harm to persons or property caused by the defect. Under § 2(a), a harm-causing ingredient of the food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient.¹⁶⁷

Section 7 provides that liability for harm caused by defective, commercially distributed food products should be determined under the same rules generally applicable to non-food products. For example, the presence of a foreign object in food, such as a pebble in a can of peas, may readily be handled as a manufacturing defect under section 2(a). Food product cases, however, may also present unique questions of whether food is defective where the foreign matter that caused the harm naturally occurs in the thing being consumed, such as a shell in a crabcake or a blood vessel in a chicken wing. To resolve this indeterminacy, section 7 adopts the majority rule that applies a reasonable consumer-expectation test for purposes of determining whether a manufacturing defect exists under section 2(a).¹⁶⁸

The United States District Court for the District of Maryland, predicting that Maryland appellate courts would impose liability on the food distributor, has applied a reasonable consumer-expectation test to determine whether the defect in the food fell below reasonable consumer expectations.¹⁶⁹

166. *Id.* The Maryland General Assembly has codified the principle in section 5-311 of the Courts and Judicial Proceedings Article of the Maryland Code, the purpose of which "is to make the chickens of poor design come home to roost with the manufacturer, not the retailer." *Liesener v. Weslo*, 775 F. Supp. 857, 859 (D. Md. 1991); MD. CODE ANN., CTS. & JUD. PROC. § 5-311(b) (1989).

167. RESTATEMENT (THIRD) § 7.

168. *Id.* § 7 cmt. b.

169. *Id.*; *Yong Cha Hong v. Marriott Corp.*, 656 F. Supp. 445, 448-49 (D. Md. 1987).

a. *The United States District Court for the District of Maryland Imposes Reasonable Expectation*

In *Yong Cha Hong v. Marriott Corp.*,¹⁷⁰ the court addressed whether the manufacturer and seller were liable for defects in the manufacture of food products, manifested by harm caused by the presence of an ingredient not intended by the product seller.¹⁷¹ The suit arose when the plaintiff, while eating a fried chicken wing, bit into what she perceived to be a worm, which was actually either the chicken's trachea or a major blood vessel.¹⁷² The plaintiff sued Marriott Corp., the proprietor of the restaurant, and Gold Kist, the store's chicken supplier, for negligence and breach of warranty.¹⁷³ Defending against plaintiff's summary judgment motion, the proprietor and supplier contended that breach of warranty only occurs if the offending item was a "foreign object," not part of the chicken itself.¹⁷⁴

After reviewing the law in other jurisdictions, the statement of law in the Uniform Commercial Code hornbook, and the characteristics of fried chicken,¹⁷⁵ the court concluded that when the item discovered in the food object is a natural item that could be "reasonably

170. 656 F. Supp. 445 (D. Md. 1987).

171. *Id.*

172. *Id.* at 447. Based on the Strasburger and Siegel Certificate of Analysis introduced into evidence it could have been the aorta. *Id.*

173. *Id.* at 446. Strict liability was not alleged in *Yong Cha Hong*. Under the functional defect principles enunciated in the *Restatement (Third)*, however, the legal theory on which the claimant proceeds would have no bearing on the test to be used for determining whether a defect existed. An injured person was formerly precluded from bringing a breach of warranty claim against a restaurant owner under implied warranty that its food is of merchantable quality and fit for human consumption. See *Child's Dining Hall Co. v. Swinger*, 173 Md. 490, 493, 197 A. 105, 106 (1938) (recovering from injuries from eating bread containing tin at defendant's restaurant precluded unless negligence shown, as supplying food in a restaurant is service, where there is no implied warranty). Section 2-314(2) of the Commercial Law Article of the Maryland Code supercedes this holding, whereby the "U[niform] C[ommercial] C[ode] warranty of merchantability applies to sales of food in restaurants, including take-out sales." *Yong Cha Hong*, 656 F. Supp. at 447 n. 3 (citing MD. CODE ANN., COMM. LAW § 2-314(2) (1975)).

174. *Yong Cha Hong*, 656 F. Supp. at 447. Section 7 of the *Restatement (Third)* examines the difficulty of food product cases when it is unclear whether the ingredient that caused the plaintiff's harm is truly a manufacturing defect or is an inherent aspect of the product. See RESTATEMENT (THIRD) § 7 cmt. b. The *Restatement* claims that this problem stems from the fact that food products usually do not have "specific product designs that may be used as a basis for determining whether the offending product ingredient constitutes a departure from design, and is thus a manufacturing defect." *Id.* In order to resolve this problem, some courts have relied on a distinction between "foreign" and "natural" characteristics of food products to determine liability. *Id.* Under this test, a commercial seller or distributor is only liable for harm-causing *foreign* objects in the food product.

175. *Yong Cha Hong*, 656 F. Supp. at 447-49.

expected in the dish by its very nature under the prevailing expectation of the reasonable consumer,"¹⁷⁶ then the dish is merchantable and the plaintiff's recovery is denied.¹⁷⁷ In many jurisdictions, this standard, known as the "reasonable expectation" test, has displaced the natural/foreign distinction proffered by the defendants.¹⁷⁸

Considering the foregoing, as well as a previous Court of Appeals of Maryland opinion,¹⁷⁹ the federal district court was "confident that Maryland would apply the 'reasonable expectation' rule to this warranty case"¹⁸⁰ Because the presence of a trachea or large aorta in fast-food fried chicken was not clearly reasonably expected to render it merchantable as a matter of law, the court denied the defendant's summary judgment motion in order to allow a jury to determine the issue.¹⁸¹

b. Court of Appeals of Maryland's Predecessor to Yong Cha Hong

In *Bryer v. Rath Packing Co.*,¹⁸² a girl was injured by eating a small chicken bone found in chow mein at the school cafeteria with chicken from "Ready to Serve Boned Chicken"¹⁸³ in sealed, packaged cans.¹⁸⁴ The court stated, "warranty is one of merchantable quality or fitness for the general purpose for which the goods are sold which, in food cases, means reasonably fit and safe for human consumption."¹⁸⁵ Because the canned chicken was purported to be boneless, and, given that chow mein would be difficult to guard against bones, the court held that the trier of fact would likely find that chicken bones in the chow mein were "something that should not be there."¹⁸⁶

4. Section 8: Liability of Commercial Seller or Distributor of Defective Used Products

One engaged in the business of selling or otherwise distributing used products who sells or distributes a defective used product is subject to liability for harm to persons or property caused by the defect if the defect:

176. *Id.* at 448. This standard is the "reasonable expectation" test.

177. *Id.*

178. *Id.*

179. *Bryer v. Rath Packing Co.*, 221 Md. 105, 113, 156 A.2d 442, 447 (1959) (recognizing negligence claim for "something that should not be [in a prepared food item]," which renders it unfit). See *infra* notes 182-182 and accompanying text for a discussion of *Bryer v. Rath Packing Co.*

180. *Yong Cha Hong*, 656 F. Supp. at 448.

181. *Id.* at 448-49.

182. 221 Md. 105, 156 A.2d 442 (1959).

183. This was the advertisement on the can label. *Id.* at 107, 156 A.2d at 444.

184. *Id.* at 107, 156 A.2d at 443-44.

185. *Id.* at 108, 156 A.2d at 444.

186. *Id.* at 113, 156 A.2d at 447. This statement suggests the consumer's reasonable expectation test should be used to determine liability for a manufacturing defect in food products.

- (a) arises from the seller's failure to exercise reasonable care; or
- (b) is a manufacturing defect under § 2(a) or a defect that may be inferred under § 3 and the seller's marketing of the product would cause a reasonable person in the position of the buyer to expect the used product to present no greater risk of defect than if the product were new; or
- (c) is a defect under § 2 or § 3 in a used product remanufactured by the seller or a predecessor in the commercial chain or distribution of the used product; or
- (d) arises from a used product's noncompliance under § 4 with a product safety statute or regulation applicable to the used product.

A used product is a product that, prior to the time of sale or other distribution referred to in this Section, is commercially sold or otherwise distributed to a buyer not in the commercial chain of distribution and used for some period of time.¹⁸⁷

Section 8 of the *Restatement (Third)* sets forth when dealers selling or distributing used¹⁸⁸ products that are defective should be liable for harm caused as a result.¹⁸⁹ Although the policy behind adopting products liability standards for sellers of used products differs from those who deal in new products, under special circumstances a seller of used goods may be subject to a claim in strict liability.¹⁹⁰ For instance, when a dealer reviews and updates the used product, he may be liable for harm that results from a defect in the product.¹⁹¹

Section 8(a) expands potential liability imposed upon commercial sellers and distributors of defective, used products resulting from the seller's failure to exercise reasonable care.¹⁹² This includes conduct by the seller that makes the products defective or allows defects to remain when reasonable care would have eliminated them.¹⁹³ Section 8(b) of the *Restatement (Third)* specifically addresses distribution and dealership of used products, whereas the *Restatement (Second)* is silent.¹⁹⁴

187. RESTATEMENT (THIRD) § 8.

188. *See id.*

189. *Id.*

190. *Id.* § 8 cmt. a.

191. *Id.* The discounted price of the used product, when compared to a new product, does not relieve the seller of responsibility for such defects. *Id.*

192. *Id.* § 8(a), cmt. a.

193. *Id.*

194. *Compare Id.* § 8(b) with RESTATEMENT (SECOND) § 402A.

a. *Lesser Liability Imposed: Maryland's Liability of Commercial Seller of Defective Used Products Compared to Section 8*

Liability for sellers of used products set forth in section 8 of the *Restatement (Third)* is broader than the rule under current Maryland law. In *Harrison v. Bill Cairns Pontiac, Inc.*,¹⁹⁵ the Court of Special Appeals of Maryland held that dealers of used goods should not, in most instances, be strictly liable for defects created by the manufacturer.¹⁹⁶ In dicta, the court limited liability of dealers in used goods to defects in the product created by the dealer, himself, or where the dealer knew or should have known of the existence of the manufacturing defect.¹⁹⁷

b. *The "Sealed Container" Defense Possibly Precludes Maryland's Adoption of Section 8(b)*

It is possible that a seller or distributor of used products deviating from their intended design¹⁹⁸ may be immune from liability as a result of Maryland's statutory "sealed container" defense.¹⁹⁹ Section 5-405 of the Courts and Judicial Proceedings Article of the Maryland Code provides in pertinent part:

- (b) It shall be a defense to an action against a seller of a product for property damage or personal injury allegedly caused by the defective design or manufacturer

195. 77 Md. App. 41, 55, 549 A.2d 385, 392 (1988) (declining to impose strict liability on car dealership for defects in a used car causing plaintiff's injuries); see also *supra* note 90 for a more thorough discussion of the facts and rules of law promulgated in *Harrison*.

196. *Harrison*, 77 Md. App. at 55, 549 A.2d at 392. The court reviewed decisions of courts in other jurisdictions considering the same issue. See *id.* (citing *Court v. Grzelinski*, 379 N.E.2d 281, 282 (Ill. 1978) and *Realmuto v. Straub Motors, Inc.*, 322 A.2d 440, 444 (N.J. 1974)). The *Grzelinski* court stated that, "to the extent that plaintiff alleges that the defects were created not only by the manufacturer, but also by work defectively done by the used car dealer, his complaint satisfies the requirements." *Grzelinski*, 379 N.E.2d at 282.

197. *Harrison*, 77 Md. App. at 54-55, 549 A.2d at 392. The plaintiffs relied on *res ipsa loquitur* to support a finding of negligence from expert testimony that molten liquid does not normally fall from the bottom of the dashboard. *Id.* (citing *Petrus Chrysler-Plymouth v. Davis*, 671 S.W.2d 749 (Ark. 1984) for the "knew or should have known" standard, similar to the "failure to exercise reasonable care" standard in section 8(a)). The court dismissed this argument because the plaintiffs failed to demonstrate the elements of a strict liability claim. *Id.* at 51, 549 A.2d at 389; see also *supra* note 40 and accompanying text for the elements required to prove a strict liability claim in Maryland as set forth *Virgil*.

198. See *supra* note 11 and accompanying text for the text of section 2(a) of the *Restatement (Third)*.

199. See MD. CODE ANN., CTS. & JUD. PROC. § 5-405 (2000); *Reed v. Sears, Roebuck & Co.*, 934 F. Supp. 713, 717-18 (D. Md. 1996) (discussing Maryland's "sealed container defense" when manufacturing defect in a *new* product alleged).

of a product if the seller establishes that: (1) The product was acquired and then sold or leased by the seller in a sealed container or in an unaltered form; (2) The seller had no knowledge of the defect; (3) The seller in the performance of the duties he performed or while the product was in his possession could not have discovered the defect while exercising reasonable care; (4) The seller did not manufacture, produce, design, or designate the specifications for the product which conduct was the proximate and substantial cause of the claimant's injury; and (5) The seller did not alter, modify, assemble, or mishandle the product while in the seller's possession in a manner which was the proximate and substantial cause of the claimant's injury.²⁰⁰

- (c) Use of this defense is limited if it would be inequitable to preclude liability, such as if a judgment cannot be enforced against the manufacturer; the manufacturer cannot be identified; or the seller made express warranties, the breach of which resulted in the claimant's injuries.²⁰¹

Although the sealed container defense has been considered in Maryland three times, all of them federal district court cases,²⁰² it is unclear whether the mere fact that the product is used breaks the seal under the Maryland defense.

III. CHAPTER 2: LIABILITY OF COMMERCIAL PRODUCT SELLERS NOT BASED ON PRODUCT DEFECTS AT TIME OF SALE

A. *Liability of Commercial Product Seller or Distributor*

1. Section 9: Liability of Commercial Product Seller or Distributor for Harm Caused by Misrepresentation

One engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a fraudulent, negligent, or innocent misrepresentation of material fact concerning the product is subject to lia-

200. MD. CODE ANN., CTS. & JUD. PROC. § 5-405(b) (2000).

201. *Id.* § 5-405(c).

202. *Richardson v. Phillip Morris, Inc.*, 950 F. Supp. 700, 704 (D. Md. 1997) (asserting sealed container defense properly limited to reinstatement provision requiring uncertainty of federal district court's jurisdiction until conclusion of case); *Reed*, 934 F. Supp. at 717 (limiting exceptions to the sealed container rule to those enumerated in the statute, including when express warranties have been made); *Liesener v. Weslo*, 775 F. Supp. 857, 859 (D. Md. 1991) (applying the sealed container rule to insulate the seller from liability because the plaintiffs did not offer sufficient evidence that a judgment against the manufacture is unenforceable).

bility for harm to persons or property caused by the misrepresentation.²⁰³

Section 9 of the *Restatement (Third)* addresses the liability of commercial product sellers or distributors for harm caused by misrepresentations that may be negligent, fraudulent, or innocent.²⁰⁴ Under this section, a plaintiff is not required to prove the product was defective at the time of its sale or distribution so long as the misrepresentation was material and the actual cause of the harm.²⁰⁵ Although the tort rule set forth in this section would not apply to mere economic loss caused by harm to the product itself,²⁰⁶ it will often overlap with an independent basis for recovery under a breach of express warranty theory under the Uniform Commercial Code.

Although section 9 of the *Restatement (Third)* has not been formally adopted, Maryland law is in general accord with this section.²⁰⁷ Thus, when the issue of negligent, fraudulent or innocent misrepresentation²⁰⁸ arises in Maryland, the courts decide these issues separately under existing case law and the *Restatement (Second)*.²⁰⁹

203. RESTATEMENT (THIRD) § 9.

204. *Id.*

205. *Id.*

206. See *infra* note 352 and accompanying text for the text of RESTATEMENT (THIRD) § 20.

207. See, e.g., *Cross Keys, Inc. v. United States Gypsum Co.*, 315 Md. 741, 756-57, 556 A.2d 1126, 1133 (1989) (alleging negligent misrepresentation of product qualities although absence of reliance defeated causation requirement); *Boatel Indus., Inc. v. Hester*, 77 Md. App. 284, 307-08, 550 A.2d 389, 401 (1988) (denying recovery for negligent misrepresentation as to the product's quality where buyer sustained only "economic loss," but recovery for breach of warranties allowed). See also MPJI 11:1 (deceit), 19:6 (negligent misrepresentation), 26:6 (express warranty).

208. "Liability for innocent product misrepresentation is stated in the Restatement, Second, of Torts Section 402B." RESTATEMENT (THIRD) § 9 cmt. b. The issue of misrepresentation in advertising under section 402B of the *Restatement (Second)* was raised by the plaintiff in *Ziegler v. Kawasaki Heavy Indus.*, 74 Md. App. 613, 539 A.2d 701 (1988) in the circuit court, but the presiding judge granted the defendants' motion for judgment on this issue which was subsequently not raised on appeal. *Ziegler*, 74 Md. App. at 615, 539 A.2d at 702.

209. Fraudulent misrepresentation may be resolved under the tort of deceit. To prove deceit in Maryland, a litigant must show: (1) that the representation made is false; (2) that its falsity was either known to the speaker or the misrepresentation was made with such reckless indifference to truth as to be the equivalent to actual knowledge; (3) that it was made for the purpose of defrauding the person claiming to be injured thereby; (4) that such person both relied upon the misrepresentation and had a right to rely upon it, fully believing its truth; (5) that he would have not acted, and the resulting injury not have been caused, had the misrepresentation not been made; and (6) actual damages resulted as a direct result of the fraudulent misrepresentation. See *Martens Chevrolet, Inc. v. Seney*, 292 Md. 328, 333, 439 A.2d 534, 536 (1982); *Gittings v. VonDorn*, 136 Md. 10, 15-16, 109 A. 553, 554 (1920); Additionally, "an intermediate seller who provides false or deceptive information to a consumer is directly liable under the Consumer

2. Section 10: Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Warn
- (a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning.
 - (b) A reasonable person in the seller's position would provide a warning after the time of sale if:
 - (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
 - (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
 - (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
 - (4) the risk of harm is sufficiently great to justify the burden of providing a warning.²¹⁰

Section 10 of the *Restatement (Third)* places a duty on a product's manufacturer, seller, or distributor to warn consumers of a product where the producer discovers after its sale that the product poses a substantial risk of harm.²¹¹ Failure to provide such a warning results

Protection Act." *Morris v. Osmose Wood Preserving*, 340 Md. 519, 544, 667 A.2d 624, 637 (1994). To prove negligent misrepresentation, the plaintiff must show: (1) that the defendant, owing a duty of care to the plaintiff, negligently asserted a false statement; (2) that the defendant intended the plaintiff to act upon his statement; (3) that the defendant knew the plaintiff would probably rely on the statement, which if erroneous, would cause loss or injury; (4) that the plaintiff justifiably relied on the misrepresentation; and (5) that the Plaintiff suffered proximate damages as a result. See *Weisman v. Connors*, 312 Md. 428, 540 A.2d 783, (1988); *Martens Chevrolet, Inc. v. Seney*, 292 Md. 328, 439 A.2d 534 (1982). Claims of innocent misrepresentation are resolved under section 402B of the *Restatement (Second)*, which states:

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though: a) it is not made fraudulently or negligently, and b) the consumer has not bought the chattel from or entered into any contractual relations with the seller.

RESTATEMENT (SECOND) § 402B.

210. RESTATEMENT (THIRD) § 10.

211. *DeSantis v. Frick Co.*, 745 A.2d 624, 626 n.2 (Pa. 1999) (quoting section 10 of the *Restatement (Third)*).

in the seller's liability if a reasonable person in the same situation would have provided such a warning.²¹²

Cognizant of the onerous burden of post-sale warnings on commerce, the drafters of the *Restatement (Third)* warn that, if unfounded, it would impose unacceptable burdens on manufacturers and sellers.²¹³ Liability is limited to parties with actual knowledge of the risk creating the post-sale duty to warn or those who reasonably should have known of the defect.²¹⁴ Because a retailer is generally not in a position to know of this information, the retailer is normally not liable for failure to warn of a defect discovered after the sale.²¹⁵

Maryland law already embraces the continuing duty of a product seller to make reasonable efforts to warn of product defects of which the seller becomes aware after the product has left the seller's hands. The fact that a manufacturer or seller discontinued its product line or that the plaintiff no longer uses or is exposed to the product does not automatically relieve the manufacturer or seller of its continuing duty to warn. Rather, such matters are factors in determining what reasonable efforts to discover the danger and to warn are required, considered along with the likelihood of harm without the warning, the economic costs and practical limitations associated with giving the warning, and the difficulty in contacting the parties to be warned.²¹⁶ The continuing duty to warn applies not only to harm caused to per-

212. *Id.*

A reasonable person would provide such a warning if: one, the seller knew or reasonably should have known there was a substantial risk of harm to persons or property; two, the parties at risk of harm could be identified and reasonably be assumed to be unaware of the risk of harm; three, the warning could be communicated to and acted upon by those to whom it is given; and four, the risk of injury is sufficiently great to justify providing the warning.

Id.

213. RESTATEMENT (THIRD) § 10 cmt. a.

214. *Id.*

215. *Id.* Once a retailer is made aware of the risk, however, the retailer is also subject to liability for failure to warn if a reasonable person in the retailer's position would have made such a warning. *Id.*

216. *Owens-Illinois v. Zenobia*, 325 Md. 420, 448 n. 3, 601 A.2d 633, 647 n.13 (1992). In *Owens-Illinois*, the Court of Appeals of Maryland held that a manufacturer or seller has a post-sale duty to warn consumers when it learns of a dangerous defect in the product, even if the production of the item has been discontinued. *Id.* at 448, 601 A.2d at 647. Once a manufacturer knows or should have known of defects discovered after a sale, it has a duty to use reasonable efforts to inform users of the hazards. *See id.* (citing *Rekab, Inc. v. Frank Hrubetz Co.*, 261 Md. 141, 274 A.2d 107 (1971)). Other Maryland cases imposing the post-sale duty to warn include *Ragin v. Porter Hayden Co.*, 133 Md. App. 116, 754 A.2d 503 (2000) and *ACandS v. Abate*, 121 Md. App. 590, 710 A.2d 944 (1998).

sons, but also to property.²¹⁷ These factors parallel those suggested in section 10 of the *Restatement (Third)*.

3. Section 11: Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Recall Product

One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to recall a product after the time of sale or distribution if:

- (a) (1) a governmental directive issued pursuant to a statute or administrative regulation specifically requires the seller or distributor to recall the product; or
- (2) the seller or distributor, in the absence of a recall requirement under Subsection (a)(1), undertakes to recall the product; and
- (b) the seller or distributor fails to act as a reasonable person in recalling the product.²¹⁸

There are no reported Maryland decisions on this topic. Given the significant burdens imposed on manufacturers when recalling products, Maryland courts are likely to embrace section 11's fundamental policy of allowing governmental regulatory agencies to evaluate the ramifications of product recall by gathering relevant data.²¹⁹ This policy recognizes that a common-law duty to recall that would be triggered every time a manufacturer made a product line improvement, even if to correct a product defect, would be undesirable.²²⁰

IV. CHAPTER 3: LIABILITY OF SUCCESSORS AND APPARENT MANUFACTURERS

A. *Liability of Successors*

1. Section 12: Liability of Successor for Harm Caused by Defective Products Sold Commercially by Predecessors

A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property

217. *United States Gypsum Co. v. Mayor of Baltimore*, 336 Md. 145, 165, 647 A.2d 405, 414 (1994) (imposing strict liability for asbestos-containing surface treatment materials incorporated into structures of public buildings).

218. *RESTATEMENT (THIRD)* § 11.

219. *See id.*

220. A duty to recall should be distinguished from a post-sale duty to warn about product hazards, as in sections 10 and 13 of the *Restatement (Third)*. See *supra* text accompanying note 210 for the text of *Restatement (Third)* section 10; *infra* text accompanying note 242 for the text of *Restatement (Third)* section 13.

caused by a defective product sold or otherwise distributed commercially by the predecessor if the acquisition:

- (a) is accompanied by an agreement for the successor to assume such liability; or
- (b) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor; or
- (c) constitutes a consolidation or merger with the predecessor; or
- (d) results in the successor becoming a continuation of the predecessor.²²¹

The *Restatement (Third)*'s approach to the liability of successor corporations for products sold by their predecessors follows the rule of the overwhelming majority of states, including Maryland.²²² A successor corporation will not be liable for the predecessor's products absent the presence of one of the four special circumstances articulated in subparagraphs (a) through (d) of section 12.²²³

a. Maryland's Imposition of Liability and Exceptions Thereto on Successor Entities For Acts of Predecessor Organization

Maryland imposes liability and provides exceptions to liability onto successor entities for acts of predecessor entities both through judicial decisions and statutory enactments.

(1) Judicially Imposed Liability and Exceptions in Maryland

In *Nissen Corp. v. Miller*²²⁴ a consumer was injured on a treadmill manufactured by a corporation sold to a successor entity.²²⁵ In that case, the Court of Appeals of Maryland adopted "the general rule of non-liability of a successor corporation, with its four traditional exceptions."²²⁶ The "four traditional exceptions" that result in the succes-

221. RESTATEMENT (THIRD) § 12.

222. See *infra* notes 226-225 and accompanying text for a discussion of judicially imposed liability on successor organizations.

223. See RESTATEMENT (THIRD) § 12.

224. 323 Md. 613, 594 A.2d 564 (1991).

225. *Id.* at 615, 594 A.2d at 565. Fredrick Brandt bought a treadmill from Atlantic Fitness Products that was designed, manufactured, and marketed by American TredeX Corporation. *Id.* Later that year, Nissen Corporation purchased the trade name, patents, inventory, and other assets of American TredeX in an asset purchase agreement. *Id.* The agreement included some obligations and liabilities but expressly excluded assumption of liability for injuries resulting from any product previously sold by American TredeX. *Id.* American TredeX would continue for five years under the name AT Corporation. *Id.* Over five years after his purchase, Brandt was injured using his treadmill. *Id.* at 616, 594 A.2d at 565. He filed suit against American TredeX, AT Corporation (after it had been administratively dissolved), Nissen, and Atlantic. *Id.*

226. 323 Md. 613, 619, 632, 594 A.2d 564, 566, 573 (1991). The court declined to add a fifth exception to successor non-liability, "continuity of enterprise."

sor entity being liable occur when: “(1) there is an express or implied agreement to assume the liabilities; (2) the transaction amounts to a consolidation or merger; (3) the successor entity is a mere continuation or reincarnation of the predecessor entity; or (4) the transaction was fraudulent, not made in good faith, or made without sufficient consideration.”²²⁷ Although phrased in the converse and ordered differently, the substance of section 12 of the *Restatement (Third)* was adopted by the Court of Appeals of Maryland in *Nissen Corp. v. Miller*.²²⁸

(2) Statutorily Created Liability of Successor Entities in Maryland

The *Nissen* court²²⁹ also recognized two statutorily created exceptions to the general rule that a successor corporation is not liable for acts of the predecessor entity—section 3-115 of the Corporations and Associations Article of the Maryland Code and the Fraudulent Conveyances Act, contained in the Commercial Law Article of the Maryland Code.²³⁰

Section 3-115(c) of the Corporations and Associations Article “provides that upon transfer of all or substantially all assets, [t]he successor is liable for all the debts and obligations of the transferor to the extent provided in the Articles of Transfer.”²³¹ When comparing section 12 of the *Restatement (Third)* to this subsection, under this statute, Maryland will at least impose liability for obligations expressly agreed under section 12(a) as set forth in the Articles of Transfer.²³²

Section 3-115(e) “provides that following a consolidation or merger ‘[t]he successor is liable for all debts and obligations of each non-surviving corporation.’”²³³ Section 12(c) of the *Restatement (Third)* provides that a successor entity is liable for acts of the predecessor if the joining of the organizations “constitutes a consolidation or merger with the predecessor.”²³⁴ In a consolidation, two or more entities are

Id. at 617, 594 A.2d at 565. See *infra* notes 239, 241 and accompanying text for an elaboration of the distinctions between continuity of enterprise and continuation of the predecessor.

227. *Nissen Corp.*, 323 Md. at 617, 594 A.2d at 566 (footnotes omitted in original) (citing 1 AMERICAN LAW OF PRODUCTS LIABILITY 3d § 7:1, at 10-12 (Travers rev. ed. 1999); accord 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 2.06 (1989); 15 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122, at 231 (rev. perm. ed. 1990)).

228. Compare *supra* note 226 and accompanying text with text accompanying *supra* note 221.

229. See *supra* notes 225-225 and accompanying text for a discussion of *Nissen Corp.*

230. *Nissen Corp.*, 323 Md. at 617-18, 594 A.2d at 566 (discussing *Smith v. Navistar Int'l Transp. Corp.*, 737 F. Supp. 1446 (D. Md. 1988)).

231. MD. CODE ANN., CORPS. & ASS'NS. § 3-114(c) (2001).

232. *Nissen Corp.*, 323 Md. at 617, 594 A.2d at 566 (citing *Smith*, 737 F. Supp. at 1446).

233. MD. CODE ANN., CORPS. & ASS'NS. § 3-114(e) (2001).

234. RESTATEMENT (THIRD) § 12(c).

joined and dissolved, resulting in a new entity, whereas, in a merger, two or more entities are joined and one of the original entities emerges as the successor entity.²³⁵ Because there is a non-surviving entity in both, the application of section 3-115(e) of the Maryland Code and section 12(c) of the *Restatement (Third)* is the same—liability is imposed on successor entities of the non-surviving predecessor of the acts of the predecessor that would otherwise impose liability had it remained in existence.

Liability on successor entities is additionally imposed as a result of the Fraudulent Conveyances Act, contained in title 15 of the Commercial Law Article of the Maryland Code.²³⁶ These provisions “protect[] the rights of creditors of a corporation which transfers its assets with an intent to defraud or without fair consideration. . . .”²³⁷ This is analogous to section 12(b) of the *Restatement (Third)*, which imposes liability on successor entities that “result[] from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor. . . .”²³⁸

b. Continuation of Predecessor Distinguished From Continuity of Enterprise

The “continuation of the predecessor” exception recognized in subparagraph (d) of section 12 should not be confused with the more liberal “continuity of enterprise” exception adopted by a small minority of states. Under this minority approach, liability may be imposed if there is a mere continuation of the predecessor’s business activities even though there is no continuity of shareholders, officers, or directors.²³⁹ Both Maryland and the *Restatement (Third)* have rejected that minority exception.²⁴⁰

In determining whether the continuation of the predecessor exception recognized in section 12(d) of the *Restatement (Third)* applies, the most important indicia of continuation, in addition to continuation of the predecessor’s business activities, are common identities of officers, directors, and shareholders in the predecessor and successor corporations.²⁴¹

235. BLACK’S LAW DICTIONARY 303, 1002 (7th ed. 1999).

236. See *supra* note 230 and accompanying text.

237. *Nissen Corp.*, 323 Md. at 617-18, 594 A.2d at 566 (quoting *Smith*, 737 F. Supp. at 1446).

238. RESTATEMENT (THIRD) § 12(b).

239. This theory is largely based on the on the need to compensate victims eligible under section 402A of the *Restatement (Second)*. See *Nissen Corp.*, 323 Md. at 619, 594 A.2d at 567 (quoting *Polius v. Clark Equip. Co.*, 892 F.2d 75, 80 (3rd Cir. 1986)).

240. See *supra* note 226 and accompanying text for a discussion of *Nissen Corp.*; see also RESTATEMENT (THIRD) § 12 cmt. b.

241. RESTATEMENT (THIRD) § 12 cmt. g.

2. Section 13: Liability of Successor for Harm Caused by Successor's Own Post-Sale Failure to Warn

- (a) A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity, whether or not liable under the rule stated in § 12, is subject to liability for harm to persons or property caused by the successor's failure to warn of a risk created by a product sold or distributed by the predecessor if:
- (1) the successor undertakes or agrees to provide services for maintenance or repair of the product or enters into a similar relationship with purchasers of the predecessor's products giving rise to actual or potential economic advantage to the successor; and
 - (2) a reasonable person in the position of the successor would provide a warning.
- (b) A reasonable person in the position of the successor would provide a warning if:
- (1) the successor knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
 - (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
 - (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
 - (4) the risk of harm is sufficiently great to justify the burden of providing a warning.²⁴²

Under section 13 of the *Restatement (Third)*, the successor is generally considered to be a pure volunteer upon whom there is no legal duty to act or warn.²⁴³ Exceptions arise in two circumstances: (1) the successor entered into a relationship with purchasers of the predecessor's products, such as a maintenance agreement, that results in actual or potential economic advantage; and (2) a reasonable person in the position of the successor would provide a warning of the defect.²⁴⁴ Section 13 imposes greater liability on successor entities that become involved with the predecessor product and its users, in comparison to section 12, where there is no similar relationship.²⁴⁵

There is no reported decision that *clearly* articulates whether and, if so, under what circumstances, Maryland imposes a duty on a successor

242. *Id.* § 13.

243. *See id.*

244. *See id.*

245. Compare RESTATEMENT (THIRD) § 12 with *supra* text accompanying note 242.

corporation to warn of risks created by a product sold or distributed by its predecessor. Dicta in two products liability cases considered by Maryland courts, however, is instructive.²⁴⁶

In *ACandS, Inc. v. Abate*,²⁴⁷ Maryland's intermediate appellate court appears to have approved the liability of a successor for a failure to warn of the hazards of asbestos products of its predecessor.²⁴⁸ Successor liability was addressed within a more general discussion of alleged juror confusion regarding the court's charge.²⁴⁹ The trial judge informed the jury that there was a successor liability claim against Rapid, one of the appellant-defendants, and that the claims against Rapid involved the predecessor entity.²⁵⁰ The trial court had previously instructed the jury of the continuing duty of a manufacturer to reasonably warn of product defects that the manufacturer discovers after the time the sale, and did not modify its instruction when instructing the jury about the successor liability.²⁵¹ Counsel for Rapid, the successor

246. See *Nissen Corp.*, 323 Md. at 613, 594 A.2d at 564; *ACandS v. Abate*, 121 Md. App. 590, 710 A.2d 944 (1998).

247. 121 Md. App. 590, 710 A.2d 944 (1998).

248. *Id.* at 638, 710 A.2d at 968. *ACandS* was an appeal of the second of two consolidated trials in the Circuit Court for Baltimore City known as "*Abate II*," concerning litigation over asbestos-containing products. *Id.* at 602, 710 A.2d at 950. See also *ACandS, Inc. v. Goodwin*, 340 Md. 334, 667 A.2d 116 (1995). *Abate II* involved five trial plaintiffs and an estimated 1,300 common-issue plaintiffs. *ACandS*, 121 Md. App. at 602, 710 A.2d at 950. The plaintiffs filed claims of negligence and strict liability against eleven defendants, five of who were appellants in the appeal: Rapid American Corp. ("Rapid"), the successor in interest to Philip Carey Mfg. Co.; John Crane, Inc. ("Crane"); US Mineral Production Co. ("U.S. Mineral"); E.L. Stebbing & Co., Inc. ("Stebbing"); and Hampshire Indust., Inc. ("Hampshire"). *Id.* at 604, 710 A.2d at 951. *Abate II* was divided into three phases. *Id.* at 605-07, 710 A.2d at 951-52. The parameters of the appeal were determined by a three-judge panel from members of the court of special appeals. *Id.* at 608, 710 A.2d at 953. As a result, the appeal of any order lacking the amount of damages was dismissed because there was no final order from which to appeal, leaving only Rapid, Crane, U.S. Mineral, Stebbing and Hampshire eligible to proceed with the appeal. *Id.*

249. *Id.* at 636-37, 710 A.2d at 967-68.

250. *Id.* The appellate court recounted the trial judge's finding:
[T]here were successor liability claims against Rapid [and another successor not included in this appeal]. [The trial judge] later instructed the jury that the claims against Rapid involved the Philip Carey Manufacturing Company, which because Philip Carey Corporation in 1967. The judge explained: "I have made a legal decision that you need not consider [Rapid's] liability for the Philip Carey Manufacturing Company ['old Carey, '] or the Philip Carey Corporation, new Carey, for any actions after June 1, 1967 Now I have also ruled, as a matter of law, that [Rapid] is liable as a successor to Philip Carey Manufacturing Company, which is old Carey, for its products and actions up through June 1, [19]67. "

Id. at 637, 710 A.2d at 967 (alteration in original). See also *supra* note 248 for a list of the appellant-defendants in *ACandS*.

251. *ACandS*, 121 Md. App. at 637, 710 A.2d at 967-68. The appellate court discussed the trial court's instruction:

entity, argued that the judge's instruction prohibited the jury from finding Rapid had successor liability for its predecessor beyond June 1, 1967, the date that the predecessor organized as another business entity.²⁵² In resolving the issue, the appellate court stated:

As its verdict makes clear, the jury disagreed. In light of [the trial judge's] instruction as to the continuing duty to warn, that disagreement was quite logical. It is apparent that the judge meant merely to inform the jury that it could not hold Rapid liable for the actions of new Carey. We acknowledge that the instruction could have been more carefully worded. We do not agree, however, that it can be read to *foreclose* a finding that old Carey or its successor, Rapid, had a continuing duty to warn after 1967.²⁵³

In essence, the court ruled that a successor may not be liable for failing to warn after becoming a successor entity. To simplify, an inference can be drawn from the last-quoted sentence that a successor entity *may* have a continuing duty to warn of products of its predecessor.

It is important to note the limitations of this case in relation to Maryland's adoption of the *Restatement (Third)*. The court did not discuss whether the criteria necessary for liability under section 13 were present, specifically whether the successor continued some sort of for-profit relationship with the predecessor's clients or whether a reasonable person would have made the warning.²⁵⁴ Also, there is no determination by the court that there is a duty to warn, merely a holding that the instruction given to the jury is not limited to a finding that

Previously, in the context of explaining the duty to warn of product defects, [the trial judge] had instructed the jury as follows:

"Now, there is also what is called a continuing duty to warn. A manufacturer of the defective product generally has the duty to warn of product defects which the manufacturer discovers at the time of the sale. A manufacturer is obligated to reasonably communicate an effective warning even after a sale of a product based on later acquired knowledge of the danger as soon as it is reasonably foreseeable.

This post-sale duty to warn requires reasonable efforts to inform users of the danger once the manufacturer is or should be aware of the need for a warning. The warning is required to the extent practicable under the circumstances."

The judge did not modify his instruction on duty to warn when he instructed the jury about old and new Carey.

Id. at 637-38, 710 A.2d at 967-68.

252. *Id.* See also *supra* note 250 for an excerpt of the trial court's instruction to the jury regarding Rapid and old and new Carey and *supra* note 251 for an excerpt of the trial court's instruction to the jury.

253. *ACandS*, 121 Md. App. at 638, 710 A.2d at 968 (emphasis added).

254. See *supra* text accompanying note 242 for the text of section 13 of the *Restatement (Third)*.

the successor had a continuing duty to warn.²⁵⁵ The court of special appeals did not disclose the circumstances under which the trial court had imposed successor liability nor its basis for charging the jury regarding a continuing duty to warn. Thus, it cannot be determined from the facts disclosed in the opinion whether Maryland law follows the rule enunciated in section 13 of the *Restatement (Third)*.²⁵⁶

3. Section 14: Selling or Distributing as One's Own a Product Manufactured by Another

One engaged in the business of selling or otherwise distributing products who sells or distributes as its own a product manufactured by another is subject to the same liability as though the seller or distributor were the product's manufacturer.²⁵⁷

Section 14 of the *Restatement (Third)* embodies the "apparent manufacturer" doctrine whereby a business distributing products manufactured by another is subject to the same liability as if the distributor had actually manufactured the product.²⁵⁸ This section is derived from section 400 of the *Restatement (Second)*,²⁵⁹ which establishes fault-based liability on manufacturers and distinguishes manufacturers from non-manufacturer product sellers.²⁶⁰ Because section 402A of

255. See *supra* text accompanying note 253 for the holding of the court in *ACandS* regarding this issue.

256. As discussed under section 12, in *Nissen Corp. v. Miller*, the Court of Appeals of Maryland reviewed its rationale for adopting strict products liability, stating "We adopted the theory of strict liability in tort to foreclose the unfair result 'where injured parties are forced to comply with the proof requirements of negligence actions or are confronted with the procedural requirements and limitations of warranty actions.'" *Nissen Corp. v. Miller*, 323 Md. 613, 623, 594 A.2d 564, 569 (quoting *Phipps v. Gen. Motors Corp.*, 278 Md. 377, 353, 363 A.2d 955, 963 (1976)). The court explained that, while the "equity" of shifting the risk of loss to those better able to bear it was a policy consideration, it was not the only consideration, and that the idea that sellers who place defective and unreasonably dangerous products on the market are at fault when someone is injured and should be held responsible is inherent in recognizing strict products liability. *Id.* at 624, 594 A.2d at 569. "A corporate successor is not a seller and bears no blame in bringing the product and the user together." *Id.* The court believed that it was unfair to require such a party to bear the liability because it is perceived as a "deep pocket." *Id.* See also *supra* section 12 beginning at note 221 for a discussion of Maryland's general rule for adoption of successor liability.

257. RESTATEMENT (THIRD) § 14.

258. See *id.*; see also *id.* § 14 cmt. c. This doctrine does not apply to impose liability on a trademark owner who grants a manufacturer a license to use the trademark or logo on the product, so long as the trademark owner does not substantially participate in the product's design, manufacture, or distribution. *Id.* § 14 cmt. d.

259. RESTATEMENT (SECOND) § 400. Section 400 states: "One who puts out as his own product a chattel manufactured by another is subject to the same liability as through he were its manufacturer." *Id.*

260. RESTATEMENT (THIRD) § 14 cmt. a.

the *Restatement (Second)* imposed strict liability on all commercial sellers of defective products for injuries that resulted from the defect,²⁶¹ this section is only relevant in jurisdictions that treat the liability of non-manufacturers differently than manufacturers.²⁶² Although Maryland courts initially did not differentiate between sellers and manufacturers when imposing strict liability for defective products,²⁶³ for sellers of defective products who, generally, did not manufacture, alter, or mishandle the product, did not know of the defect, and could not have discovered the defect while exercising reasonable care,²⁶⁴ the Maryland legislature created an exception in the form of a sealed-container defense.²⁶⁵ The sealed-container defense does not apply to sellers who “manufacture, produce, design, or designate the specifications for the product”²⁶⁶ or who “alter, modify, assemble, or mishandle the product.”²⁶⁷ It is not clear whether this defense is applicable to sellers “who sell[] or distribute[] as [their] own a product manufactured by another,”²⁶⁸ as is set forth in section 14 of the *Restatement (Third)*.

V. CHAPTER 4: PROVISIONS OF GENERAL APPLICABILITY

A. Causation

1. Section 15: General Rule Governing Causal Connection Between Product Defect and Harm

Whether a product defect caused harm to persons or property is determined by the prevailing rules and principles governing causation in tort.²⁶⁹

Maryland law requires that, under strict liability principles, a product defect must be the proximate cause-in-fact of the harm for which

261. *Id.*

262. *See id.* § 14 cmt. b; *see also* William A. Dreier, *The Restatement (Third) of Torts: Products Liability and New Jersey Law—Not Quite Perfect Together*, 50 *RUTGERS L. REV.* 2059, 2131 (1998) (noting that “[w]hether section 400 had been superceded by section 402A, which imposed strict liability on all product sellers, is of little moment because the outcome remains the same”).

263. *See, e.g.*, *Phipps v. Gen. Motors Corp.*, 278 Md. 337, 351-52, 363 A.2d 955, 963 (1976).

264. *MD. CODE ANN., CTS. & JUD. PROC.* § 5-405 (2000); *Reed v. Sears, Roebuck & Co.*, 934 F. Supp. 713, 713 (D. Md. 1996) (discussing Maryland’s “sealed container defense” when manufacturing defect in a new product alleged).

265. *See supra* notes 199-202 and accompanying text for a discussion of Maryland’s sealed container statute, contained in section 5-405(b) of the Courts and Judicial Proceedings Article of the Maryland Code.

266. *MD. CODE ANN., CTS. & JUD. PROC.* § 5-405(4) (2000).

267. *Id.* § 5-405(5).

268. *RESTATEMENT (THIRD)* § 14.

269. *Id.* § 15.

recovery is sought.²⁷⁰ Maryland courts have not adopted alternative theories of liability that would relieve a plaintiff of proving this burden, such as market share liability.²⁷¹

The concepts of product misuse, modification, and alteration are forms of post-sale conduct by product-users or others that can be relevant to the determination of issues of defect,²⁷² causation,²⁷³ and apportionment of liability.²⁷⁴ As such, they are not discrete legal issues²⁷⁵ but rather are largely intertwined with the concept of foreseeability, fairness in allocating the burdens of proof, and responsibility among the parties. The *Restatement (Third)* does not address the allocation of these burdens, which may differ widely from one jurisdiction to the next.²⁷⁶

270. See *Phipps v. Gen. Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976); see also generally *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 421 (D.C. Cir. 1988) (denying plaintiffs' recovery because, as they were unable to identify the defendants as the manufacturer of the drug they had ingested, they lacked the "essential element of a traditional products liability claim"—causation) (applying Maryland and District of Columbia laws); *Foster v. American Home Prods. Corp.*, 29 F.3d 165, 167-68 (D. Md. 1994) (denying plaintiffs' claim for negligent misrepresentation against a drug manufacturer initiated after their daughter's death by ingesting a generic equivalent of the defendant's drug because Maryland courts require showing that the defendant manufactured the injury-causing product); *Lee v. Baxter Healthcare Corp.*, 721 F. Supp. 89, 93 (D. Md. 1989) (denying recovery to a plaintiff unable to prove that defendant had manufactured the breast implant causing her injury and refusing to adopt a market-share approach, stating Maryland law "requires the plaintiff to prove that the defendant manufactured the product which allegedly caused the injury.").

271. Using a market-share theory of liability, plaintiffs may recover against each manufacturer proportionally according to each manufacturer's share of the market, without having to prove causation for each defendant. RESTATEMENT (THIRD) § 15 cmt. c. Some courts have rejected this market share approach because it is inconsistent with the concept of joint and several liability, the general rule of causation in tort law. *Id.* In *Tidler*, the court stated that the market-share approach is often rejected because approach because of the difficulty in apportioning the damages. *Tidler*, 851 F.2d at 422 (citing *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980), which applied the market-share approach in determining defendants' liability). Although the *Restatement (Third)* takes no position on whether the market-share theory of proportional liability should be adopted, a substantial number of courts addressing the issue have refused to adopt such a rule. RESTATEMENT (THIRD) § 15 cmt. c.

272. *Id.* § 2. See *supra* text accompanying note 11 for the text of section 2 of the *Restatement (Third)*.

273. Causation is discussed in this section.

274. RESTATEMENT § 17. See *infra* text accompanying note 295 for the text of section 17 of the *Restatement (Third)*.

275. RESTATEMENT (THIRD) § 2 cmt. p.

276. See *id.* §§ 2 cmt. p, 15 cmt. b, 17 cmts. c, d. For a discussion of the current Maryland law on these issues, see *infra* text accompanying notes 295-322.

2. Section 16: Increased Harm Due to Product Defect

- (a) When a product is defective at the time of commercial sale or other distribution and the defect is a substantial factor in increasing the plaintiff's harm suffered beyond that which would have resulted from other causes, the product seller is subject to liability for the increased harm.
- (b) If proof supports a determination of the harm that would have resulted from other causes in the absence of the product defect, the product seller's liability is limited to the increased harm attributable solely to product defect.
- (c) If proof does not support a determination under Subsection (b) of the harm that would have resulted in the absence of the product defect, the product seller is liable for all of the plaintiff's harm attributable to the defect and other causes.
- (d) A seller of a defective product that is held liable for part of the harm suffered by the plaintiff under Subsection (b), or all the harm suffered by the plaintiff under Subsection (c), is jointly and severally liable or severally liable with other parties who bear legal responsibility for causing the harm, determined by applicable rules of joint and several liability.²⁷⁷

Section 16 of the *Restatement (Third)* addresses "enhanced injury" claims, also referred to as "crashworthiness" or "second-collision" cases.²⁷⁸ In order to recover for enhanced injuries in a product-defect case under this section, a plaintiff must establish that the defect was a substantial factor in producing harm to the plaintiff, beyond the harm that would have resulted from causes not related to the defect.²⁷⁹ For example, in a design-defect claim, the plaintiff must show that a reasonable, alternative design would have reduced the plaintiff's injuries in the accident as well as not create other, different injuries.²⁸⁰

277. RESTATEMENT (THIRD) § 16.

278. *Id.* § 16 cmt. a (explaining that section 16 addresses "crashworthiness" cases). These cases may be referred to as enhanced injury cases because the plaintiff's claim is not that the defect in the product caused the accident, rather, that the injury resulting from the accident was either the cause of or exacerbated by, the defect. *Id.* These cases are typically brought against car manufacturers, whose design of a vehicle caused enhanced injuries during an accident that was otherwise unrelated to the defect. *Id.*

279. *See id.* § 16 cmt. a.

280. *Id.* § 16 cmt. b. Comment b states:

[I]n connection with a design defect claim in the context of increased harm, the plaintiff must establish that a reasonable alternative design would have reduced plaintiff's harm. . . . It is not sufficient that the alternative design would have reduced or pre-

Maryland law is consistent with the rules established in section 16.²⁸¹ The "crashworthiness" doctrine was recognized in 1974 in *Volkswagen of America, Inc. v. Young*.²⁸² In *Volkswagen*, the Court of Appeals of Maryland held that actions based on crashworthiness claims are essentially negligence claims and, therefore, liability should be imposed on a manufacturer based on "traditional principles of negligence."²⁸³ Although jurisdictions differed regarding the level of accident foreseeability and the extent to which a manufacturer should prevent injury, the *Volkswagen* court held that a manufacturer had a duty to reduce injuries in accidents when possible.²⁸⁴

The burden on the Maryland plaintiff establishing a *prima facie* enhanced injury cause of action is appropriately high. Six elements must be shown: (1) that a safer alternative design existed; (2) that it

vented the harm the plaintiff suffered if the alternative would introduce into the product other dangers of equal or greater magnitude.

Id.; accord *Ziegler v. Kawasaki Heavy Indus., Ltd.*, 74 Md. App. 613, 625-28, 539 A.2d 701, 707-08 (1998) (denying recovery for plaintiff's enhanced injuries because of failure to prove that the proposed design alternative, motorcycle crash bars, would have protected lower extremities without significantly increasing the risk of injury to other parts of the body).

281. *See, e.g.*, *Nissan Motor Co. v. Nave*, 129 Md. App. 90, 120, 740 A.2d 102, 118 (1999) (involving death from vehicle accident, "the plaintiff must produce sufficient evidence to establish that the design of the vehicle in question caused an otherwise survivable accident to be fatal"); *Ziegler*, 74 Md. App. at 627, 539 A.2d at 708 (design-defect claim—motorcycle crash bars) (finding plaintiff produced insufficient evidence "that the injuries sustained would have been lessened because of the presence of a protective device"); *Valk Mfg. Co. v. Rangaswamy*, 74 Md. App. 304, 327, 537 A.2d 622, 633 (1988) (design-defect claim—protruding snow plow hitch) ("[A] plaintiff need show only some evidence of enhanced injuries [caused by a product defect]."); *Lahocki v. Contee Sand & Gravel Co., Inc.*, 41 Md. App. 579, 589, 398 A.2d. 490, 498 (1979) (manufacturing defect claim—van roof welds); *see also Frericks v. Gen. Motors Corp.*, 274 Md. 288, 336 A.2d 118 (1975) (design defect claim—automobile roof and seat assembly); *Volkswagen of Am., Inc. v. Young*, 272 Md. 201, 321 A.2d 737 (1974) (design defect claim—automobile seat assembly); *Nicholson v. Yamaha Motor Co.*, 80 Md. App. 695, 566 A.2d 135 (1989) (design defect claim—motorcycle crash bars).
282. 272 Md. 201, 321 A.2d 737 (1974). In trying this wrongful death action, the United States District Court for the District of Columbia certified a question to the Court of Appeals of Maryland regarding the liability of manufacturers in enhanced injury cases under Maryland law. *Id.* at 203, 321 A.2d at 738. The plaintiffs alleged that the death of the driver of the 1968 Volkswagen Beetle resulted from the defective design of the passenger compartment. *Id.* at 203-05, 321 A.2d at 738-39. The driver, stopped at a traffic light, was rear-ended by another car. *Id.* at 204, 321 A.2d at 739. Relying on the crashworthiness doctrine, the plaintiffs claimed that the seat assembly failed during the collision, propelling the driver into the rear of the car where he sustained the fatal injuries. *Id.* at 204-06, 321 A.2d at 739-40. This defect, not the accident, caused or enhanced the driver's injuries after the initial accident. *Id.*
283. *Id.* at 221, 321 A.2d at 747.
284. *Id.* at 214-215, 321 A.2d at 744.

was technologically feasible to incorporate the alternative design at the time the product was manufactured; (3) that the materials required for the alternative design were available; (4) the anticipated cost of production with the alternative design; (5) the anticipated price to consumer with the alternative design; and (6) the likelihood of consumer acceptance of the alternative design.²⁸⁵ Further, the plaintiff must also demonstrate that the design utilized caused more injuries than an alternative design would.²⁸⁶ In cases where the injury resulted in death, the plaintiff must prove that the defective design "caused an otherwise survivable accident to be fatal."²⁸⁷

The manufacturer of a product, such as a car, is not required to design a perfectly safe product under the crashworthiness doctrine; it is only required to use reasonable care in the product's design while also incorporating safer designs when possible to prevent enhanced injuries in foreseeable accidents.²⁸⁸ Further, if the enhanced injury is the result of a less safe design that would be obvious to the user, such as a convertible roof-top versus a hard roof-top on an automobile, then the plaintiff's recovery is precluded.²⁸⁹

Consistent with section 16(c), Maryland law provides that if a plaintiff establishes that a product defect was a substantial factor in increasing the harm suffered by the plaintiff beyond that which would have resulted from other causes, and if the proof adduced at trial does not support apportionment of liability, then the product seller is liable for all the harm suffered by the plaintiff from both the defect and the other causes.²⁹⁰ Stated conversely, once the plaintiff establishes that at least some injuries were enhanced due to a defect, the burden shifts

285. *Nissan Motor Co.*, 129 Md. App. at 120, 740 A.2d at 118.

286. *Id.*

287. *Id.*

288. *See Volkswagen*, 272 Md. at 217, 321 A.2d at 745-46.

289. *Id.* at 219, 321 A.2d at 746-47. For example, in *Nicholson v. Yamaha Motor Co. Ltd.*, 80 Md. App. 695, 566 A.2d 135 (1989), the Court of Special Appeals of Maryland affirmed the lower court's holding granting summary judgment to the defendants, Yamaha Motor Company. *Id.* at 721, 566 A.2d at 148. In *Nicholson*, the plaintiff sustained injury to his legs as a result of an accident between his motorcycle and an automobile that had turned into the plaintiff's path. *Id.* at 697, 566 A.2d at 136. The plaintiff claimed that his injuries were caused, or enhanced, by the failure of the defendant to incorporate protective devices on the motorcycle. *Id.* The appellate court upheld the lower courts ruling on summary judgment because of the "latent/patent rule," limiting the manufacturer's liability when the defect was "open and obvious to the consumer." *Id.* at 715, 566 A.2d at 145. The court explained that this is an objective, rather than subjective rule, and the test is whether a reasonable consumer in the plaintiff's position would have noticed the danger in the particular design. *Id.*

290. *See Lahocki v. Contee Sand & Gravel Co.*, 41 Md. App. 579, 590, 398 A.2d 490, 501 (1979) ("indivisible injury"); *see also Valk Mfg. Co. v. Rangaswamy*, 74 Md. App. 304, 326-27, 537 A.2d 622, 633 (1988) ("[O]nce a plaintiff has shown a *modicum* of enhanced injuries by testimony that the defect caused an otherwise survivable accident to be fatal, the burden should shift to the

to the defendant to limit liability.²⁹¹ The defendant may do so by showing which injuries would have occurred had there been no defect.²⁹² This shift of the burden onto the defendant is consistent with traditional tort law.²⁹³ The manufacturer of a defective product is jointly and severally liable for harm enhanced as a result of a defective product.²⁹⁴

B. *Affirmative Defenses*

1. Section 17: Apportionment of Responsibility Between or Among Plaintiff, Sellers and Distributors of Defective Products, and Others
 - (a) **A plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care.**
 - (b) **The manner and extent of the reduction under Subsection (a) and the apportionment of plaintiff's recovery among multiple defendants are governed by generally applicable rules apportioning responsibility.**²⁹⁵

Section 17 defers to local law for the applicable rules of apportionment of liability, if any, among the various actors whose conduct or products contribute to the plaintiff's harm. Unlike the overwhelming majority of other states, Maryland has not adopted any principles of

defendants to apportion damages *inter se* and limit their liability, if they can.") (emphasis added).

291. *Lahocki*, 41 Md. App. at 595-96, 398 A.2d at 501.

292. *Id.*

293. *Id.* at 596, 398 A.2d at 501. In *Lahocki*, the Court of Special Appeals of Maryland held that once the plaintiff established injuries sustained in an automobile accident were at least enhanced by a defect in the defendant's product, it was the defendant's responsibility to limit its liability. *Id.*

294. See generally *Sinelli v. Ford Motor Co.*, 810 F. Supp. 668, 671 (D. Md. 1993) (holding the manufacturer of a defective seat belt jointly and severally liable with negligent driver liability for injuries); *Morgan v. Cohen*, 309 Md. 304, 316, 523 A.2d 1003, 1008 (1987) (finding a physician who negligently treated an automobile accident victim jointly and severally liable with the original tortfeasor); *Hardware Dealers Mut. Fire Ins. Co. v. Springmann*, 266 Md. 200, 204-05, 292 A.2d 96, 99 (1972) (concluding that anyone signing a minor's driver's license application jointly and severally liable for the minor's negligent actions); *Orient Overseas Line v. Globemaster Baltimore, Inc.*, 33 Md. App. 372, 374, 365 A.2d 325, 330 (1976) (finding all negligent defendants jointly and severally liable in mishandling cargo); *Myers v. Aragona*, 21 Md. App. 45, 54, 318 A.2d 263, 268 (1974) (determining all partners jointly and severally liable for the negligent actions of one partner).

295. RESTATEMENT (THIRD) § 17.

“comparative fault” or “comparative responsibility.”²⁹⁶ Section 17 does not alter current Maryland law in this regard, nor would it bar Maryland from adopting comparative fault principles. Indeed, a strong majority of jurisdictions apply the comparative responsibility doctrine to products liability actions.²⁹⁷ In the meantime, however, current Maryland products liability law regarding contributory negligence, assumption of the risk, misuse and product alteration remains unaffected by the *Restatement (Third)*.

a. Contributory Negligence in Maryland Tort Claims

Contributory negligence is not a defense to a strict liability claim in Maryland,²⁹⁸ although it is a defense to a claim for breach of an implied warranty of merchantability.²⁹⁹ Obviously, it also is a defense to a negligence claim.³⁰⁰

(1) Contributory Negligence by User as a Defense in Maryland Negligence Claims

In 1983, the Court of Appeals of Maryland refused to adopt comparative negligence principles.³⁰¹ Because contributory negligence was adopted in Maryland in 1847,³⁰² it was well-settled “that a plaintiff who fails to observe ordinary care for his own safety is contributorily negligent and is barred from all recovery, regardless of the quantum of a defendant’s primary negligence.”³⁰³

Although contributory negligence has not enjoyed exclusive domain in Maryland, the court of appeals, however, was not persuaded

296. *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 460-63, 456 A.2d 894, 904-05 (1983); see Edward S. Digges, Jr. & Robert Dale Klein, *Comparative Fault in Maryland—The Time Has Come*, 41 MD. L. REV. 276 (1982).

297. RESTATEMENT (THIRD) § 17 cmt. a.

298. See *Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581, 495 A.2d 348 (1985); *Valk Mfg. Co. v. Rangaswamy*, 74 Md. App. 304, 537 A.2d 622 (1988); *Sheehan v. Anthony Pools*, 50 Md. App. 614, 440 A.2d 1085 (1982).

299. *Yong Cha Hong v. Marriott Corp.*, 656 F. Supp. 445, 448 n.7 (D. Md. 1987); see also *Erdman v. Johnson Bros. Radio & Television Co.*, 260 Md. 190, 271 A.2d 744 (1970).

300. *Yong Cha Hong*, 656 F. Supp. at 448 n.7.

301. *Harrison*, 295 Md. at 463, 456 A.2d at 905. A mother, on behalf of herself and her son, brought suit against the local school board and three gym teachers for damages sustained by her son when he was severely and permanently injured during a gymnastic exercise in physical education class. *Id.* at 444, 456 A.2d at 895. At trial, plaintiffs sought jury instructions amounting to pure or modified comparative negligence, *i.e.* that damages should be diminished in proportion to the child’s fault. *Id.* at 445, 456 A.2d at 895. The trial judge rejected the proposed instructions, implementing those that would completely bar recovery of damages if the child were found contributorily negligent, which he was. *Id.* at 445-46, 456 A.2d at 895.

302. *Id.* at 448, 456 A.2d at 897 (citing *Irwin v. Spriggs*, 6 Gill 200 (1847)).

303. *Id.* at 451, 456 A.2d at 898 (citations omitted).

by movements toward comparative negligence. Early in the twentieth century, the General Assembly enacted two statutes—both of which have been repealed—akin to comparative negligence.³⁰⁴ In addition, although none passed, from 1966 to 1982, twenty-one bills were offered to the Maryland legislature seeking to replace contributory negligence with comparative negligence.³⁰⁵ Of the thirty-nine states subscribing to comparative fault, thirty-one had done so through statutory enactments.³⁰⁶ Therefore, in the absence of “a pressing societal need” to replace contributory negligence with comparative negligence, the court of appeals declined to disturb 135 years of *stare decisis*.³⁰⁷

All things considered, we are unable to say that the circumstances of modern life have so changed as to render contributory negligence a vestige of the past, no longer suitable to the needs of the people of Maryland. In the final analysis, whether to abandon the doctrine of contributory negligence in favor of comparative negligence involves fundamental and basic public policy considerations properly to be addressed by the legislature.³⁰⁸

(2) Contributory Negligence by User in Breach of an Implied Warranty of Merchantability Claim

The Court of Appeals of Maryland held contributory negligence was an appropriate defense to breach of an implied warranty of merchantability claim founded in tort, contract, or both.³⁰⁹ This defense may act as a total bar to a plaintiff's recovery.³¹⁰

It would appear that an individual using a product when he had actual knowledge of a defect or knowledge of facts which were so obvious that he must have known of a defect, is either no longer relying on the seller's express or implied

304. *Id.* at 452-53, 456 A.2d at 899.

305. *Id.* at 462, 456 A.2d at 904.

306. *Id.* at 453, 456 A.2d at 899.

307. *Id.* at 458, 456 A.2d at 902.

308. *Id.* at 463, 456 A.2d at 905.

309. *Erdman v. Johnson Bros. Radio & Television Co.*, 260 Md. 190, 196-97, 271 A.2d 744, 747 (1970). The plaintiffs in *Erdman* observed sparks and smoke emanating from their television set for the third time. *Id.* at 193, 271 A.2d at 745-46. Shortly after they turned off the set to go to bed, a fire began in the area of the television. *Id.* at 196-97, 271 A.2d at 747. The court determined that the defect in the set, of which the plaintiffs were well aware, could no longer be used as a basis for an action of breach of warranty. *Id.* at 200, 271 A.2d at 749. Any breach of the warranty was not the proximate cause of the fire due to the plaintiffs' continued use of an obviously defective product. *Id.* at 203, 271 A.2d at 750. *See also* *Yong Cha Hong v. Marriott Corp.*, 656 F. Supp. 445, 448 n.7 (D. Md. 1987).

310. *Erdman*, 260 Md. at 197, 271 A.2d at 748 (citing *Levin v. Walter Kidde & Co.*, 251 Md. 560, 561, 248 A.2d 151, 152 (1968)).

warranty or had interjected an intervening cause of his own, and therefore a breach of such warranty cannot be regarded as the proximate cause of the ensuing injury.³¹¹

b. Assumption of Risk by User as a Defense in Maryland Tort Claims

Maryland recognizes assumption of the risk³¹² as an affirmative defense to a strict liability claim, as well as to claims for negligence and breach of an implied warranty of merchantability.³¹³ To successfully assert assumption of the risk, a defendant must show three elements: (1) that the plaintiff was aware of and appreciated the specific risk or danger that the defect created; (2) that the plaintiff was aware of the risk and voluntarily encountered it; and (3) that the plaintiff's choice to encounter the risk was unreasonable.³¹⁴

c. Misuse by User as a Defense in Maryland Tort Claims

Like assumption of the risk, misuse of a product is also a defense³¹⁵ to strict liability action.³¹⁶ Where misuse is the sole, intervening, or superceding proximate cause of a plaintiff's injuries, a plaintiff may be barred from recovering in a strict liability action.³¹⁷

Once a plaintiff meets the burden of going forward with a strict liability claim by demonstrating that the defendant manufactured an unreasonably dangerous, defective product that proximately caused the plaintiff's injuries, the burden is shifted to the defendant to prove

311. *Id.* at 196-97, 271 A.2d at 747.

312. Assumption of the risk is enumerated in section 402A of the *Restatement (Second)* and a judicially recognized defense in actions based on strict liability in tort. *See, e.g., Phipps v. Gen. Motors Corp.*, 278 Md. 337, 346, 363 A.2d 955, 959-60 (1976); RESTATEMENT (SECOND) § 402A.

313. *Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581, 597-98, 495 A.2d 348, 356 (1985); *Phipps*, 278 Md. at 346, 363 A.2d at 959; *Sheehan v. Anthony Pools*, 50 Md. App. 614, 626 n.11, 440 A.2d 1085, 1092 n.11 (1982).

314. *Ellsworth*, 303 Md. at 598, 495 A.2d at 356 (citing *Sheehan*, 50 Md. App. at 626 n.11, 440 A.2d at 1092 n.11). In *Ellsworth*, the plaintiff sued the fabric manufacturer and seller of her nightgown after it caught fire while she was wearing it inside-out, severely and permanently injuring her. *Id.* at 586, 495 A.2d at 351. *See supra* text accompanying notes 117-122 for the facts of *Ellsworth*.

315. Maryland decisions recognize that evidence of misuse, although not technically an affirmative defense to be proved by a defendant, will defeat a strict liability claim where the misuse is not reasonably foreseeable. *Ellsworth*, 303 Md. 581, 495 A.2d 348; *Phipps*, 278 Md. 337, 363 A.2d 955; *Klein v. Sears, Roebuck & Co.*, 92 Md. App. 477, 608 A.2d 1276 (1992); *Simpson v. Standard Container Co.*, 72 Md. App. 199, 527 A.2d 1337 (1987).

316. *Ellsworth*, 303 Md. at 595-96, 495 A.2d at 355. *See also supra* text accompanying notes 117-122, note 314 for the facts of *Ellsworth*.

317. *Ellsworth*, 303 Md. at 595-96, 495 A.2d at 355.

the plaintiff misused the defective product.³¹⁸ Misuse typically is a jury issue.³¹⁹

The defense of mishandling is included under the umbrella of misuse.³²⁰ Mishandling occurs when an otherwise safe product becomes harmful after being mishandled by its user.³²¹

d. User's Alteration of Product as a Defense in Maryland Tort Claims

Evidence of substantial modification or alteration of a product after it has left the seller's control also may defeat a claim for strict liability in tort in Maryland.³²²

2. Section 18: Disclaimers, Limitations, Waivers and Other Contractual Exculpations as Defenses to Products Liability Claims for Harm to Persons

Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or reduce otherwise valid products liability claims against sellers or other distributors of new products for harm to persons.³²³

Section 18 provides that disclaimers by product distributors and waivers by buyers do not bar or limit otherwise valid products liability claims against sellers for harm to persons from new products that are defective.³²⁴ This section of the *Restatement (Third)* is entirely consistent with current Maryland law.³²⁵

The General Assembly of Maryland afforded the same protection to consumers, despite products liability waivers, found in section 18 of the *Restatement (Third)*.³²⁶ Similarly, in 1976, the Court of Appeals of Maryland held sellers unable to disclaim or limit warranties arising

318. *Id.* at 596, 495 A.2d at 355.

319. *See, e.g., Klein*, 92 Md. App. at 477, 608 A.2d at 1276.

320. *Ellsworth*, 303 Md. at 587, 495 A.2d at 356.

321. *Id.* at 597, 495 A.2d at 356.

322. *See generally Phipps v. Gen. Motors Corp.*, 278 Md. 337, 344-45, 363 A.2d 955, 959 (1976); *Banks v. Iron Hustler Corp.*, 59 Md. App. 408, 424, 475 A.2d 1243, 1251 (1984) (determining whether post-sale product modifications by owner constituted a substantial change or alteration in the condition under section 402A usually is a question of fact for jury). *But see Hood v. Ryobi Am. Corp.* 181 F.3d 608, 612 (4th Cir. 1999) (holding post-sale alteration of product defeated plaintiffs' claims of negligence and strict liability as a matter of law).

323. RESTATEMENT (THIRD) § 18.

324. *Id.*

325. *See Phipps*, 278 Md. at 349, 363 A.2d at 962 ("Under § 402A of the Restatement, a limitation or exclusion of warranties is irrelevant to the question of the seller's liability for injury caused by defective goods regardless of the classification of the goods [as consumer goods or otherwise].").

326. *Id.*

from sales of consumer goods under sections 2-316.1³²⁷ and 2A-503 of the Commercial Law Article of the Maryland Code in *Phipps v. General Motors Corp.*³²⁸ The *Phipps* court, adopting section 402A of the *Restatement (Second)*, stated: "Under [section] 402A of the Restatement, a limitation or exclusion of warranties is irrelevant to the question of a seller's liability for injury caused by defective goods regardless of the classification of goods."³²⁹

The court expanded this holding in *Owens-Illinois, Inc. v. Zenobia*,³³⁰ by adopting comment j to section 402A, which requires sellers to warn buyers of a known dangerous product.³³¹ Absent "knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the . . . danger," the seller is not strictly liable for failure to warn.³³² The court stated that "[i]n a strict liability failure to warn case . . . where a product lacks a warning because of insufficient knowledge on the part of the manufacturer or in the scientific field, the product is not defective."³³³

C. Definitions

1. Section 19: Definition of "Product"

For purposes of this Restatement:

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

327. MD. CODE ANN., COM. LAW § 2-316.1 (2000). Section 2-316.1 of the Commercial Law Article of the Maryland Code states in relevant part that "(2) [a]ny oral or written language used by a seller of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, is unenforceable." *Id.*

328. 278 Md. 337, 349, 363 A.2d 955, 961 (1976). Section 2A-503 of the Commercial Law Article of the Maryland Code states in relevant part that "[l]imitation, alteration or exclusion of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation, alteration or exclusion of damages where the loss is commercial is not prima facie unconscionable." MD. CODE ANN., COM. LAW § 2A-503 (2000).

329. *Phipps*, 278 Md. at 349, 363 A.2d at 962.

330. 325 Md. 420, 601 A.2d 633 (1992).

331. *Id.* at 437, 601 A.2d at 641.

332. *Id.* (quoting RESTATEMENT (SECOND) § 402A cmt. j).

333. *Id.* at 438, 601 A.2d at 641.

(c) **Human blood and human tissue, even when provided commercially, are not subject to the rules of this Restatement.**³³⁴

Section 19 defines "products" as items distributed commercially for use, particularly tangible, personal property—which most items classified as products tend to be—and certain improvements affixed to real property, if used in a similar manner as tangible, personal property.³³⁵ Services and human blood are not products within the context of the *Restatement (Third)*.³³⁶ Beyond these parameters, the issue of what is a "product" for purposes of strict liability is an issue for the court to decide as a matter of law.³³⁷

a. *Categories of Products Under Section 19 of the Restatement (Third)*

(1) Intangible Personal Property

As to intangible personal property, two basic types are involved. The first consists of information in media such as books, maps, and navigational charts. First Amendment concerns about impinging on free speech have caused most courts to refuse to apply strict liability for the dissemination of false and defective information.³³⁸ One exception in this area, however, appears to be false information contained in maps and navigational charts.³³⁹

The second type of intangible product involves the transmission of potentially harmful intangible forces, such as electricity and x-rays. Although there are no Maryland cases on point, a majority of courts in other states have held that electricity becomes a "product" only when it passes through the customer's meter and enters the customer's premises. Prior to that point of entry electricity is considered a "service."³⁴⁰

334. RESTATEMENT (THIRD) § 19.

335. *Id.*

336. *Id.* Human blood and human tissue are excluded from the scope of strict liability for purposes of public policy.

337. *Id.* § 19 cmt. a.

338. *See, e.g., Jones v. J. B. Lippincott Co.*, 694 F. Supp. 1216, 1217-18 (D. Md. 1988) (nursing student injured treating herself with constipation remedy listed in nursing textbook). In *Jones*, the court held that a publisher was not strictly liable for information disseminated in its books. *See id.* The court distinguished author liability from publisher liability and noted that, depending on the "nature of publication, on the intended audience, on the causation of fact, and on the foreseeability of damage," an author may or may not be liable. *Id.* at 1216. A publisher cannot, however, be liable for the contents of an idea or knowledge in books or other published material because to do so would violate the principles of free speech. *See id.* at 1217.

339. *See Aetna Cas. & Sur. Co. v. Jeppesen & Co.*, 642 F.2d 339, 341-42 (9th Cir. 1981) (holding defendant's "product" is the taking of tabular-form FAA landing specifications and portraying it on a graphical approach chart) (applying Nevada law).

340. RESTATEMENT (THIRD) § 19 cmt. d.

(2) Real Property

A majority of courts hold that a defective product that is incorporated into an improvement to realty does not lose its identity as a product, and that the manufacturer or a contractor may be strictly liable for any damages proximately caused by the defect.³⁴¹

(3) Services

Section 19 of the *Restatement (Third)* provides that services, even those provided commercially, are not products.³⁴² Some transactions, however, may involve hybrid situations where it is unclear whether the seller is predominantly providing a service or is selling a product.³⁴³ Depending on the facts, resolution of that issue may be one for the jury.³⁴⁴

b. Definition of a Product Utilized by Maryland Courts

Maryland defines a "product" as "a tangible article, including attachments, accessories, and component parts, and accompanying labels, warnings, instructions, and packaging."³⁴⁵ For purposes of determining products liability, this definition includes component parts and dust that contains asbestos.³⁴⁶

The Court of Special Appeals of Maryland classified human blood obtained via a transfusion as a service rather than the sale of a product after the plaintiff became infected with the Acquired Immune Deficiency Syndrome (AIDS) from receiving contaminated blood.³⁴⁷ The

341. *Id.* § 19 cmt. e. Although not expressly addressed in its opinion, this principle appears to at least have been tacitly approved by the Court of Appeals of Maryland in *United States Gypsum Co. v. Mayor of Baltimore*, 336 Md. 145, 647 A.2d 405 (1994), which allowed strict liability in tort recovery for asbestos-containing surface treatment materials incorporated into structures of public buildings.

342. RESTATEMENT (THIRD) § 19(c).

343. *See id.* § 20(c).

344. *See, e.g.,* ACandS v. Abate, 121 Md. App. 590, 638, 710 A.2d 944, 968 (1998) (holding that it was reversible error for the trial court to refuse to charge the jury that a contractor could not be held strictly liable in tort if its predominant purpose was the provision of a service rather than a sale of a product).

345. MD. CODE ANN., CTS. & JUD. PROC. § 5-115 (1998).

346. *Ford Motor Company v. Wood*, 119 Md. App. 1, 8, 703 A.2d 1315, 1318 (1998). (implying that asbestos-containing products as products subjecting manufacturers to liability). In *Wood*, the plaintiffs, on behalf of their deceased husbands, brought wrongful death claims against the manufacturers of asbestos-containing products. *Id.*

347. *Roberts v. Suburban Hosp. Ass'n*, 73 Md. App. 1, 15, 532 A.2d 1081, 1089 (1987) (holding that blood from a transfusion is not a product for four reasons: (1) it is the majority view throughout the country; (2) a transfusion is not just the sale of blood; rather the patient is paying for the actual injection and application of medical skill; (3) a court must apply the theory to all diseases contractible from transfusions; and (4) there is no distinction

court reached this conclusion after reviewing a similar case in which the New York Court of Appeals held that, although a hospital supplies blood, its predominant function is to deliver the blood through trained professionals—such as the hospital staff—and to provide whatever medical treatment considered advisable.³⁴⁸

Currently, those legally authorized to “obtain[], process[], store[], distribute[], or use[] whole blood tissue, organs, or bones or any substance derived from human blood, tissue, organs, or bones”³⁴⁹ are granted statutory immunity from strict liability.³⁵⁰ Prior to this statute, there was no indication that commercial preparers and suppliers were excused from strict liability for infecting the recipient of a blood transfusion.³⁵¹

2. Section 20: Definition of “One Who Sells or Otherwise Distributes”

For purposes of this Restatement:

- (a) **One sells a product when, in a commercial context, one transfers ownership thereto either for use or consumption or for resale leading to ultimate use or consumption. Commercial product sellers include, but are not limited to, manufacturers, wholesalers, and retailers.**
- (b) **One otherwise distributes a product when, in a commercial transaction other than a sale, one provides the product to another either for use or consumption or as a preliminary step leading to ultimate use or consumption. Commercial nonsale product distributors include, but are not limited to, lessors, bailors, and those who provide products to others as a means of promoting either the use or consumption of such products or some other commercial activity.**
- (c) **One also sells or otherwise distributes a product when, in a commercial transaction, one provides a combination of products and services and either the transaction taken as a whole, or the product component**

based on whether the patient was infected receiving some other service from the hospital).

348. *Id.* Before July 1, 1986, a court deciding whether a blood transfusion with contaminated blood a product looked to Maryland common law. *Id.* at 10, 532 A.2d at 1086.

349. MD. CODE ANN., HEALTH-GEN. § 18-402 (2000). The law provides, “[a] legally authorized person who obtains, processes, stores, distributes, or uses whole blood tissue, organs, or bones or any substance derived from human blood, tissue, organs, or bones shall have immunity from liability described under § 5-630 of the Courts and Judicial Proceedings Article.” *Id.*

350. *Id.*

351. *Miles Labs., Inc. v. Doe*, 315 Md. 704, 713, 556 A.2d 1107, 1111 (1989).

thereof, satisfies the criteria in Subsection (a) or (b).³⁵²

Section 20 defines “one who sells or otherwise distributes” for purposes of imposing liability for doing so with a defective product in order to impose strict liability within the context of the *Restatement (Third)*.³⁵³ Generally, this phrase refers to a person or entity involved in transferring ownership to another seller, component-part manufacturer, distributor, or to the end-user.³⁵⁴ This section departs from section 402A of the *Restatement (Second)* by recognizing that sales occur at all levels in the distributive chain including manufacturer sellers, wholesale sellers and retail sellers.³⁵⁵ Section 20 includes actual sales as well as promotional merchandise and free samples.³⁵⁶ In addition, commercial lessors of new and like-new products are treated alike.³⁵⁷ Products in an obviously used condition, however, fall under section 8 of the *Restatement (Third)*.³⁵⁸

Bailments also fall within the scope of section 20. “When the defendant is in the business of selling the same type of product as is the subject of the bailment, the seller/bailor is subject to strict liability for harm caused by defects.”³⁵⁹ If a customer is merely permitted to use an item while on the bailor’s premises, such as a bowling ball or a chair, however, a different rule applies.³⁶⁰ Thus, “when products are made available as a convenience to customers who are on the defendant’s premises primarily for different, although related purposes, and no separate charge is made, strict liability is not imposed.”³⁶¹

Lastly, section 20 touches upon “sale-service hybrid transactions” and notes that courts are split on whether to treat such transactions as a sale (subject to strict liability) or a service.³⁶² Regardless of which type of transaction has occurred, a product being developed that injures a plaintiff is not considered to be distributed into the stream of commerce and cannot be the basis of a product claim.³⁶³ The prod-

352. RESTATEMENT (THIRD) § 20.

353. *Id.*

354. *See id.*

355. *See id.* § 20 cmt. b.

356. *Id.*

357. *Id.*

358. *Id.* § 20 cmt. c.

359. *Id.* § 20 cmt. f (stating that “an automobile dealer who allows a prospective customer to test-drive a demonstrator will be treated the same as a seller of the demonstrator car”).

360. *See id.* § 20 cmt. c.

361. *Id.* § 20 cmt. f (stating that “even when sale of a product is not contemplated, the commercial bailor is subject to strict liability if a charge is imposed as a condition of the bailment. Thus, a laundromat is subject to strict liability for a defective clothes dryer, and a roller rink that rents skates is treated similarly”).

362. *Id.* § 20 cmt. d.

363. *See Dreier, supra* note 262, at 2147.

uct has not been sold or distributed and, therefore, principles of negligence must govern the plaintiff's claim.

When the Court of Appeals of Maryland adopted strict liability in *Phipps v. General Motors Corp.*,³⁶⁴ it expressly adopted the language of section 402A of the *Restatement (Second)*, which limited liability to "one who *sells* a product in a defective condition."³⁶⁵ Additionally, "seller" is defined in the Commercial Law Article of the Maryland Code as "a person who sells or contracts to sell goods."³⁶⁶

Although other jurisdictions have extended strict liability under section 402A to nonsale transactions, such as leases and bailments,³⁶⁷ to date Maryland has not expanded the reach of section 402A strict liability beyond the "sale" of a product. Lessors and bailors, however, continue to be treated under negligence principles in Maryland.³⁶⁸

Section 20(c) recognizes that some transactions may involve hybrid situations where it is unclear whether the seller is predominantly providing a service as opposed to selling a product.³⁶⁹ Depending on the facts, resolution of the issue may be one for the jury. For example, in *ACandS v. Abate*,³⁷⁰ Maryland's intermediate appellate court held that it was reversible error for the trial court to refuse to charge the jury that a contractor could not be held strictly liable if its predominant purpose was the provision of a service rather than a sale of a product.³⁷¹

3. Section 21: Definition of "Harm to Persons or Property." Recovery for Economic Loss

For purposes of this Restatement, harm to persons or property includes economic loss if caused by harm to:

(a) the plaintiff's person;

364. 278 Md. 337, 363 A.2d 955 (1976).

365. RESTATEMENT (SECOND) § 402A.

366. MD. CODE ANN., COM. LAW I § 2-103(1)(d) (2000); *see also, e.g.,* *Morris v. Osmose Wood Preserving*, 340 Md. 519, 667 A.2d 624 (1994); *Frericks v. Gen. Motors Corp.*, 274 Md. 288, 336 A.2d 118 (1975); *Sheehan v. Anthony Pools*, 50 Md. App. 614, 440 A.2d 1085 (1982).

367. *See Bona v. Graefe*, 264 Md. 69, 74, 285 A.2d 607, 610.

368. *See, e.g., id.* at 76, 285 A.2d at 611 (declining to impose strict liability on lessor of product and refusing to apply UCC implied warranty provisions to leases and bailments for hire because it applies to sales of goods); *Pahanish v. Western Trails, Inc.*, 69 Md. App. 342, 517 A.2d 1122 (1986). In *Pahanish*, the plaintiff sued the operator of a horse riding stable, contending that operator was strictly liable because the horse riding tack contained a latent defect. *Id.* at 349, 517 A.2d at 1125. The plaintiff's complaint, however, alleged only negligence, not strict liability. *Id.* at 354, 517 A.2d at 1128. The court held that even if strict liability had been alleged in the pleadings, it would not apply to a stable operator, who "was neither the manufacturer or seller of the product." *Id.* at 354-55, 517 A.2d at 1128.

369. RESTATEMENT (THIRD) § 20(c).

370. 121 Md. App. 590, 710 A.2d 944 (1998).

371. *Id.* at 638, 710 A.2d at 968.

- (b) the person of another when harm to the other interferes with an interest of the plaintiff protected by tort law; or
- (c) the plaintiff's property other than the defective product itself.³⁷²

Section 21 of the *Restatement (Third)* provides that "harm to persons or property" as economic loss to the plaintiff, to another when it interferes with a plaintiff's interest, or the plaintiff's property.³⁷³ Maryland law is consistent with the principles enunciated in this section³⁷⁴ and is, arguably, even more expansive.³⁷⁵ Maryland may be more expansive than section 21 because recovery is allowed for economic loss, which is defined as the cost of correcting the dangerous condition when a product defect "creates a substantial and unreasonable risk of death or personal injury."³⁷⁶

A manufacture must satisfy a two-part test that determines the degree of risk to avoid imposition of the economic loss rule.³⁷⁷ Under the first prong, the severity component,³⁷⁸ the nature of the possible damage is considered; under the second prong, the probability component,³⁷⁹ the likelihood of serious injury is analyzed.³⁸⁰ One factor may outweigh the other. For example, if the risk from the defect is severe, such as death or serious personal injury, then the probability

372. RESTATEMENT (THIRD) § 21.

373. *Id.*

374. *A. J. Decoster v. Westinghouse Elec. Co.*, 333 Md. 245, 260, 634 A.2d 1330, 1337 (1994) (limiting tort liability to situations where a product defect causes physical harm to persons or to property other than the defective product itself and allowing strict liability recovery under section 402A for both physical harm to persons and to property).

375. *See United States Gypsum Co. v. Mayor of Baltimore*, 336 Md. 145, 156-57, 647 A.2d 405, 410 (1994) (allowing strict liability recovery for costs of abating asbestos-containing building materials from structures of public buildings). In *United States Gypsum Co.*, Baltimore City sought to recover damages resulting from the cost of discovering, managing, rectifying, and removing surface products containing asbestos in several city-owned buildings. *Id.* at 152, 647 A.2d at 408. The court provided that, although the damages sought were purely economic, where the defect presented a substantial risk of personal injury or death, recovery is permitted. *Id.* at 157, 647 A.2d at 411.

376. *Id.* at 156-57, 647 A.2d at 410; *see also Morris v. Osmose Wood Preserving*, 340 Md. 519, 545-46, 667 A.2d 624, 637-38 (1994) (barring recovery for economic loss to homeowners who failed to establish that defects in plywood used in roofs had created serious and unreasonable risk of death or personal injury in tort).

377. *Morris*, 340 Md. at 533, 667 A.2d at 631.

378. This prong was developed from the holding of *Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co.*, 308 Md. 18, 35, 517 A.2d 336, 345 (1986).

379. This prong was developed from the holding of *United States Gypsum Co. v. United States Gypsum Co.*, 336 Md. at 156-58, 647 A.2d at 410-11.

380. *Morris*, 340 Md. at 533-34, 667 A.2d at 632.

factor maybe less determinative.³⁸¹ Similarly, if the probability of injury is great, the severity of the harm may be less.³⁸²

VI. CONCLUSION

Over the last forty years, thousands of judicial decisions nationwide have fine-tuned and expanded upon the simple but profound enunciation of legal principle distilled into the ALI's *Restatement (Second)* formulation of Section 402A strict liability for defective products. The evolution of products liability concepts sculpted by decades of common-law advance has necessitated the ALI's *Restatement (Third)*. What once was capable of articulation in two sentences of a single section of ALI "black letter" now requires 21 sections and many more sentences to convey.

By and large, the Maryland courts have traveled with the mainstream of other states' courts on an issue-laden journey from one *Restatement* to the next. Although the Court of Appeals of Maryland has not yet had occasion to consider formal adoption of any particular section of the *Restatement (Third)*, the Maryland law of products liability as developed by the Maryland courts under Section 402A has, in the main, been very consistent with the precepts now encapsulated in the *Restatement (Third)*.

In a few areas, current Maryland law appears to diverge—sometimes in a more liberal direction but at other times in a more conservative way—from the principles of the *Restatement (Third)*. Such areas include the circumstances under which a successor has a duty to warn of the hazards of the products of its predecessor;³⁸³ whether non-compliance or compliance with government safety standards, respectively, constitute *per se* liability or a *per se* defense;³⁸⁴ the circumstances under which a seller of used products may be liable for a product defect,³⁸⁵ and providing for recovery of "economic loss" in Maryland not only when there is *actual* harm to person or property, but also when there is "a substantial and unreasonable risk of death or serious personal injury."³⁸⁶

Finally, other areas covered by the *Restatement (Third)* remain as yet unexplored by Maryland judicial decisions. For example, Maryland appellate precedent has yet to clearly address whether strict liability will be extended to include bailors and lessors of products;³⁸⁷ the cir-

381. *Id.* at 533-34, 667 A.2d at 631-32.

382. *Id.* In *Morris*, the Court of Appeals of Maryland denied recovery to the plaintiffs, finding that the defective product did not present a substantial risk of death or serious personal injury. *Id.* at 536, 667 A.2d at 633.

383. *See supra* notes 224-41 and accompanying text.

384. *See supra* notes 109-26 and accompanying text.

385. *See supra* notes 187-202 and accompanying text.

386. *See supra* notes 372-82 and accompanying text.

387. *See supra* notes 352-68 and accompanying text.

cumstances, if any, under which intangible things (for example, electricity and X-rays) or things attached to real property will be considered products,³⁸⁸ or the line of demarcation between a product and a service in so-called hybrid transaction circumstances.³⁸⁹ Maryland courts have not yet considered whether to embrace the “no-net-benefit-to-any-class-of-patient” liability requirement for prescription drugs and medical devices of section 6(c) of the *Restatement (Third)*;³⁹⁰ the circumstances under which component-parts sellers may be liable for defects in the final product even though the component itself is not defective;³⁹¹ or whether to adopt, as the Maryland federal district court believes they will, the “reasonable consumer-expectation” test for tainted food products.³⁹² Importantly, Maryland courts also have yet to decide whether to follow the admonishment of section 2, comment n of the *Restatement (Third)* that courts should not submit under different, confusing doctrinal labels, multiple theories of recovery in jury charges in cases involving two or more factually identical defective-design claims or two or more factually identical failure-to-warn claims.³⁹³

In short, the Maryland judiciary is likely to have ample opportunity for many interesting debates about the course they wish to chart for Maryland products liability law for the decades yet to come—before the ALI steps forward to announce a “*Restatement (Fourth)*.”

388. See *supra* notes 338-40 and accompanying text.

389. See *supra* notes 342-44 and accompanying text.

390. See *supra* Part II.B.2.

391. See *supra* notes 127-32 and accompanying text.

392. See *supra* Part II.B.3.a.

393. See *supra* Part II.A.2.b.(1).

VII. APPENDIX: SECTION 402A OF THE *RESTATEMENT*
(*SECOND*)

Section 402A: Special Liability of Seller of Product for Physical Harm to User or Consumer

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.³⁹⁴

394. *RESTATEMENT (SECOND)* § 402A.