Strict Liability of the Bailor, Lessor and Licensor

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COMMENTS

STRICT LIABILITY OF THE BAILOR, LESSOR AND LICENSOR

The fall of a citadel is a dramatic moment. The stronghold has long been invested; the siege has endured for months. Parallels have been dug and gun emplacements mounted; and a grim cannonade has made breaches in the great wall, behind which the defenders have erected demilunes, so that the struggle goes on. There is a final heavy bombardment; the assault goes forward against the main breach, and the storming party ascends over the corpses of the slain. There is a desperate hour of hand-to-hand combat, and then the moment when the defense falters. The line wavers; the break becomes a retreat, the retreat a rout. The rest is the story of sack and slaughter, of riot, rape and rapine . . .

William L. Prosser

INTRODUCTION

In 1965, the American Law Institute approved and adopted Sec. 402A of the Second Restatement of Torts, which purported to express the liability of a seller of defective products to injured users or consumers in tort, independent of warranty considerations. The draftsmen of Sec. 402A were of the opinion that much of the confusion spawned by the application of warranty doctrine to products liability litigation would be alleviated by a forthright definition of the liability of sellers of products which sounded in tort and obviated any necessity of determining the significance of the traditional warranty defenses of privity, disclaimer and notice of breach. To a certain extent, their belief has proven correct. The

2. Restatement (Second) of Torts § 402A (1965).
3. Restatement (Second) of Torts § 402A, Comment (m) at 355-56 (1965).
liability of sellers of defective products to injured users or consumers of such products is better stated as a matter of tort law than as an unstable hybrid of contract law and traditional negligence principles. However, the formulation of the doctrine of strict liability in tort has not cured all the problems involved in the field of products liability. One of the most recurrent and significant problems confronting the courts today involves the definition of the class subject to the imposition of strict liability under Sec. 402A. At this juncture in time, it appears that the reference to "sellers" in Sec. 402A should not be considered a designation of limitation, excluding all those individuals not engaged in the sale of products. It has yet to be determined, though, precisely what parameters should govern the application of strict liability. It is the purpose of this paper to explore the extent to which strict liability has been imposed on bailors, lessors and licensors. In so doing, hopefully, the ultimate limits of strict liability will be glimpsed.

As a necessary first step in the analysis of bailor-lessor-licensor strict liability, some consideration shall be paid to the Restatement provisions pertinent thereto. Sec. 402A presumes to define the liability of the seller of a product for physical harm to the user or consumer of the product. As a precondition to the imposition of liability under this section, it must first be established that the product sold was in a defective condition, unreasonably dangerous to the user or consumer, that it was expected to and did reach the user or consumer in substantially the same condition in which it was sold and, finally, that the seller was engaged in the business of selling such a product. The rule specifically provides that strict liability will apply even though the seller has exercised all possible caution in the manufacture or preparation and sale of the product and even in the absence of privity between the injured user or consumer and the seller.

4. Restatement (Second) of Torts § 402A, Comment (m) at 355 (1965); Prosser, The Fall of the Citadel, 50 Minn. L. Rev. 791 (1966).
7. Restatement (Second) of Torts § 402A, Comment (c) at 349-50 (1965) provides an expression of the fundamental justification for strict liability, ascribing the imposition of liability under the delineated circumstances to the fact that: . . . the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that
Reading the rule as it is written, it appears that one of the most significant requirements postulated, if the literal sense of the section is accorded highest priority, is the necessity for a sales transaction in which ownership of the product alleged to have been defective and to have caused some injury to a user or consumer, has passed from a "seller" to a "user" or "consumer." If this particular requirement is given the ultimate determinative value and the term is interpreted as a designation of limitation to a peculiar, well-defined class as opposed to a designation of simple generic significance, the question of bailor-lessee-licenseor strict liability can be quickly answered in the negative. However, if this requirement of a sale is loosely interpreted as referring to the event by which a particular product is injected into the stream of commerce (without attaching dispositive importance to the form of the event), the result in application will undoubtedly be different.

The comments to Sec. 402A offer precious little guidance in this matter of interpreting the scope of the term "seller" for purposes of determining the applicability of Sec. 402A. Comment (f) provides that the rule should be regarded as bearing on "any person engaged in the business of selling products for use or consumption," including product manufacturers, wholesale or retail dealers or distributors and restaurant operators. It further provides that the rule encompasses only those engaged in selling activity. The rule does not apply, however, to the ordinary individual who makes the isolated sale and the occasional seller of food who is not engaged in that particular activity as a normal incident of his business. It is also clear that the rule does not apply to "sales of the stock of merchants out of the usual course of business, such as execution sales, bankruptcy sales, bulk sales, and the like." In view of the particular delineation of those individuals in the distributive scheme to whom strict liability is applicable according to Comment (f) and the specific exemptions to the operation of the rule contained therein, all of which invariably involve some kind of commercial activity, the rule applies to those who market the products.

See also Restatement (Second) of Torts § 402A, Comment (k) at 353-54 (1965).
8. Restatement (Second) of Torts § 402A, Comment (f) at 350 (1965).
9. Id. at 350-51.
10. Id. at 350-51.
of technical sales transaction, it might be inferred that the category of "sellers" is not subject to expansion beyond its common sense scope. As a necessary consequence, the liability stated in Secs. 388, 407, and 408,\textsuperscript{11} pertaining to the provision of a chattel known to be dangerous for intended use and applicable to any supplier of the chattel (defined to include sellers, lessors, donors, lenders, bailors of all kinds and service personnel) to the extent of anyone whom the supplier should expect to use the chattel (including those who might be expected to use the chattel with permission of the person to whom the chattel is supplied) must be regarded as exclusive. Indeed, several courts have determined that this is the only conclusion that can be drawn from the absence of any reference to anyone other than sellers in Sec. 402A.\textsuperscript{12} This is only one of two permissible inferences, however.

It might also be argued that Sec. 402A was not intended to be restricted in application to those individuals injecting products into the stream of commerce through a technical sale of such products

\textsuperscript{11} Restatement (Second) of Torts § 388 (1965).

\textit{Chattel Known to be Dangerous for Intended Use}

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

since the rule does not specifically so provide. Moreover, it can be asserted with some confidence that the draftsmen of Sec. 402A intended the term “seller” to be interpreted liberally, consistent with the evolution of business practices, since Comment (c) defines the term “seller” as one who markets his product for use and consumption.\textsuperscript{13} The sense of such reference indicates that all those individuals having a significant function in the marketing enterprise of a given product were meant to be encompassed by the term “seller.” This interpretation is even more credible when one considers that, by the express language of Sec. 402A, strict liability applies although the user or consumer has not bought the product or entered into any contractual relation regarding the product, indicative of an intent that the mere circumstance of a technical sales transaction will not be conclusive.\textsuperscript{14}

An even more compelling argument for the proposition that the term “seller” should be accorded generic significance is suggested by analogy to the law of warranty. It has long been recognized that the policies governing the law of warranties are not limited to technical sales transactions. Thus, it has frequently been held that the existence of a bailment or a lease instead of a sale would not preclude a plaintiff from recovering against the bailor or lessor under a theory of implied warranty.\textsuperscript{15} The draftsmen of the Uniform Commercial Code have similarly recognized that recovery on warranty need not be limited to instances of sales transactions.\textsuperscript{16}

\begin{itemize}
\item 13. \textit{Restatement (Second) of Torts} § 402A, Comment (c) at 349 (1965).
\item 14. \textit{Restatement (Second) of Torts} § 402A (1965).
\item 15. Cintrone v. Hertz Truck Leasing & Rental Service, 45 N.J. 434, 212 A.2d 769 (1965); Delaney v. Townmotor Corp., 339 F.2d 4 (2d Cir. 1964); Booth Steamship Co. v. Meier & Oelhef Co., 262 F.2d 310 (2d Cir. 1958); Gambino v. John Lucas & Co., 263 App. Div. 1054, 34 N.Y.S.2d 383 (App. Div. 1942); Yarbrough v. Ball U-Drive System (Fla. 1950) 48 So. 2d 82; Donner v. Morse Auto Rentals, Inc., 147 So. 2d 577 (Fla. 1963); Bachner v. Pearson, 479 P.2d 319 (Alaska 1970); Gray Line Co. v. Goodyear Tire & Rubber Co., 280 F.2d 294 (9th Cir. 1960); W.E. Johnson Equipment Co. v. United Airlines, 238 So. 2d 98 (Fla. 1970); Bengiat v. State of New York, 256 N.Y.S.2d 876 (Ct. of Cl. N.Y. 1965); Baker v. Seattle, 79 Wash. 2d 198, 484 P.2d 405 (1971); Tombs v. Fort Pierce Gas Co., 208 So. 2d 615 (Fla. 1968); \textit{See also} 63 Am. Jur. 2d Products Liability § 6 (1972) wherein the rule as to the applicability of warranty doctrine to non-sales transactions is expressed as:
\begin{quote}
\ldots the general rule is that the bailor impliedly warrants the reasonable suitability of the bailed chattel for the bailee's known intended use of it. To a certain degree, the rule applies even where the bailment is not one for hire. \ldots In particular, where there is a bailment for hire \ldots the bailment is circumscribed by an implied warranty that the rented article is fit for the purpose for which it is intended \ldots
\end{quote}
\item 16. \textit{Uniform Commercial Code} § 2-313, Comment 2:
\end{itemize}
Furthermore, the recommendation of the Code draftsmen has just recently received judicial approval. In *W. E. Johnson Equipment Co. v. United Airlines, Inc.*, the Florida Supreme Court extended Sec. 2-315 of the UCC to lease transactions, holding that in the absence of an agreement to the contrary, where the lessor has reason to know any particular purpose for which the leased chattel is required and that the lessee is relying on the skill and judgment of the lessor to select or furnish a suitable chattel, there is an implied warranty that the chattel is fit for that purpose. Recognizing that it was establishing a precedent in the products liability area, the court outlined the reasons for imposing a warranty of fitness and described the "appropriate circumstances" demanding application. The court examined the essential purposes and the policy involved in applying warranties to protect the consumer in sales transactions and concluded by analogy that the same justification was present in a lease situation.

The risk of harm from a defective product exists in lease situations as well as sales. The person leasing a product is in equal need, and has an equal right to, protection from an unreasonable risk of harm. The lessee, like the buyer, is relying on the skill and judgment of the lessor to provide a safe product. Finally, the commercial lessor, primarily or substantially involved in leasing goods, is in the best position to bear and distribute the loss resulting from injury caused by a defective product. He is also in a position to know and control the conditions of the chattel as well as protect against loss through insurance.

In further recognition of the contemporary expansion in leasing enterprises and the concomitant need for consumer protection, the Washington Supreme Court imposed a warranty of fitness in a case involving the lease of an electric golf cart from the city. The court cited *W. E. Johnson Equipment Co. v. United Airlines, Inc.*, although this section is limited in scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire. . . .

See also Uniform Commercial Code § 2-102. The scope of article 2 of the Code is defined in terms of "transactions in goods," a clear indication that article 2 was not intended to be limited to sales; 2 Harper and James, The Law of Torts § 28.19 (1956):

. . . development of the warranty doctrine in sales should point the way by suggestive analogy to similar results in cases where a commodity is leased. . . .

17. 238 So. 2d 98 (Fla. 1970).
19. 238 So. 2d 98 (Fla. 1970).
as authority for the extension of UCC Sales Article policy to lease transactions and reaffirmed the Johnson court's conclusion that commercial lessors should be responsible to the same extent as sellers.\(^\text{20}\)

If the doctrinal relationship between strict liability and implied warranty of merchantability and fitness is anywhere near as strong as has been suggested,\(^\text{21}\) certainly the development of warranty law should stand as precedent for a construction of strict liability which would have application beyond the narrow confines of the sales transaction. In any event, the evolution of the warranty doctrine to the point where it embraces the many and varied forms of business enterprise and organization, including but not limited to the lease and bailment transactions, militates in favor of according the term "seller" in Sec. 402A a broad significance.

In the final analysis, however, it is highly questionable whether one can deduce the propriety of considering the term "seller" as either a designation of strict limitation or a reference to a generic class solely from an inspection of the express terms of Sec. 402A or the comments thereto. It is even more questionable whether one should. The scope and extent of strict liability has been considered by numerous courts in its short life and the most accurate determination of the applicability of strict liability to the bailor-bailee, lessor-lessee and licensor-licensee relationships can be gained by examining these decisions. With this in mind, the following discussion will focus on the judicial application of strict liability to bailors, lessors and licensors, respectively, with some consideration given over to the future development of strict liability in these areas.

**LIABILITY OF BAILORS UNDER SEC. 402A**

It must be noted at the outset that strict liability does not apply to the gratuitous bailor, who is not engaged in the business of bailment, nor does it apply to the isolated bailment situation, even though the bailment may be supported by a consideration.\(^\text{22}\) The gratuitous bailor ordinarily does not fall within the ambit of the limitation on liability ordained by Sec. 402A pertaining to

\[^{20}\text{See also Jones v. Keetch, 200 N.W.2d 227 (Mich. 1972).}\]
\[^{21}\text{Titus, Restatement (Second) of Torts Section 402A and the Uniform Commercial Code, 22 Stan. L. Rev. 713 (1970).}\]
"sellers engaged in the business of selling [a] product."

Inasmuch as the gratuitous bailment is typically an isolated transaction, involving a rather casual, short-term transfer of possession by a person not in the bailment business, the gratuitous bailor does not fit the description of the individual to which strict liability was intended to apply. Nor is there any reason to impose strict liability on the gratuitous bailor for injuries resulting from the defective condition of the bailed article. Comment (f) to Sec. 402A of the Restatement recognized the basis of the rule of strict liability to be:

the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods.

Obviously, the justification for strict liability is lacking in the case of an individual who has not entered into the business of supplying the public with products and who has not created any reliance in the public on the quality of his goods.

Similarly, the non-gratuitous occasional bailment is also without the scope of the class to which strict liability applies. In this connection, the reasons for exempting isolated sales transactions from the sanction of strict liability are apposite. It cannot be said that the occasional bailor has undertaken and assumed a special responsibility toward the consuming public. In sum, it must be recognized that the occasional bailor has done nothing to incur any duty toward the consuming public beyond that imposed under traditional negligence principles. It should be borne in mind, however, that a seller of products, engaged in the business of selling, will not be absolved from strict liability for injuries resulting from a defective product, suffered by a user or consumer of such product, simply because the transaction by which the product reached the user or consumer can be characterized as a bailment, incidental to the seller's primary business of selling and preliminarily classifiable as occasional.

The considerations urged in discussion of the rules surrounding

23. Restatement (Second) of Torts § 402A (1965).
24. Id. at 351.
the occasional bailment, where such bailment is made for a consideration, nominal or otherwise, are also applicable to the occasional lease transaction. The rules pertaining to the occasional bailment or lease transaction can best be illustrated by reference to several concrete factual situations.

In *Speyer, Inc. v. Humble Oil and Refining Co.*, a gasoline supplier, at whose direction a service contractor installed a flexsteel hose on a gas pump, leased by the supplier to the plaintiff, was held not to be a "seller" of the pump for purposes of imposing strict liability under Sec. 402A. In April of 1954, an Erie Meter Systems gasoline pump was installed in the garage of plaintiff, Yellow Cab Co., by Cemico, the gasoline supplier of Yellow Cab at the time. Yellow Cab changed its supplier from Cemico to Humble in 1955 and purchased Cemico's pump. In performance of a condition imposed by Yellow Cab for obtaining the supply contract, Humble Oil then purchased the pump and leased it back to Yellow Cab for free. In 1963, a service contractor of Yellow Cab installed a new type, heavy-duty flexsteel hose on the pump. Through misuse of the flexsteel hose by Yellow Cab employees, a leakage of gasoline from the pump occurred. The spilled gasoline erupted into flames and destroyed plaintiff-Speyer's garage and sixty-five taxicabs owned by Yellow Cab. A suit to recover the fire damage was instituted against Humble Oil, the gasoline supplier and lessor of the allegedly defective pump. The trial court rendered judgment for the defendant. Plaintiffs, Speyer and Yellow Cab, appealed, contending that liability might be imposed on the defendant under the theory of strict liability. The court of appeals rejected plaintiffs' contention, ruling that Humble Oil was not a seller engaged in the business of selling within the purview of Sec. 402A and thus could not be held strictly liable. The court of appeals based its decision on the isolated character of the transaction involved, viewing it as merely incidental to Humble's primary business of gasoline supply. While the case has been cited for the proposition that a lessor may not be held strictly liable under any circumstances for injuries resulting from the lease of a defective product, the more reasonable view attributes the holding to a finding that the defendant was not in the business of leasing gas pumps, considering the type of lease-back arrangement involved in the case.

A more typical illustration of the inapplicability of strict liability to the isolated lease transaction is furnished by *Conroy v. 10*

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26. 403 F.2d 766 (3d Cir. 1968).
In this case, the Superior Court of New Jersey refused to hold a landlord strictly liable for injuries sustained by the seven year old child of the landlord's tenants. The child had been playing in the basement area of the rented house with another one of the tenants' children and had reached into a basement tub to retrieve an errant ball. As the child reached, his arm grazed the hot water faucet on the tub, causing hot water to gush out of the faucet nozzle and splash over his arm and upper body. The child received a severe scalding over that portion of his body exposed to the water. On subsequent inspection of the faucet mechanism, it was discovered that the apostat, which controlled the temperature of the hot water supplied to the basement tub, was defective in that it was set to maintain the temperature of the water at 240°. The court held that strict liability as it pertains to the lessor-lessee situation applies only to the mass lessor and not to the kind of individual involved in this case. Once again, the court seemed particularly impressed with the isolated character of the lease transaction.

At this juncture, it must be conceded that the isolated bailment or lease transaction is beyond the pale of strict liability, regardless of whether that transaction be gratuitous or quasi-commercial in nature. The same is not true in the case of the large-scale bailor-for-hire or the commercial lessor. The following discussion will focus on the case law application of strict liability to the commercial bailment or lease transaction. Because the cases do not make any critical distinction between the commercial lessor and the bailor-for-hire when treating this issue, the terms are hereafter used synonymously. For purposes of organization, the cases will be considered under the heading of lessor.

**Commercial Lessor Liability Under Sec. 402A**

The landmark case on the subject of commercial lessor liability under Sec. 402A arose in 1965. In *Cintrone v. Hertz Truck Leasing and Rental Service*, the New Jersey Supreme Court established a precedent in the field of strict products liability by ruling that the liability of a bailor-for-hire might properly be stated in terms of strict liability in tort. The defendant in *Cintrone* was actively engaged in the U-drive-it business as a truck leasing firm. An employee of the lessee of one of defendant's trucks was injured

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28. See also Katz v. Slade, 460 S.W.2d 608 (Mo. 1970).
as a result of a brake failure on the truck and brought an action against defendant-lessee. The plaintiff alleged breach of an implied warranty and negligence in maintenance of the truck as against the defendant. The trial court dismissed the warranty claim and plaintiff appealed, contending that the trial court erred in so doing. The supreme court reversed, holding that the leasing agreement gave rise to a continuing implied promissory warranty that the leased trucks would be fit for plaintiff's employer's use for the duration of the lease (independent of any undertaking by the lessor to service and maintain the trucks throughout the lease period) and that the nature of the U-drive-it business is such that the responsibility to Hertz (defendant) might properly be stated in strict liability terms.

The specific holding of the court on the issue of strict liability was couched in the following words:

A bailor for hire, such as a person in the U-drive-it business, puts motor vehicles in the stream of commerce in a fashion not unlike a manufacturer or retailer. . . . The very nature of the business is such that the bailee, his employees, passengers and the traveling public are exposed to a greater quantum of potential danger of harm from defective vehicles than usually arises out of sales by the manufacturer. . . . By analogy [the rule of strict liability in tort] should be made applicable to the U-drive-it bailor-bailee relationship.30

The significance of the decision was two-fold. For the first time, judicial recognition was afforded to the proposition that no viable distinction could be drawn between the commercial function of the manufacturer and the mass lessor of automobiles. Secondly, judicial sanction was conferred upon the identification of a new standard for determining the propriety of applying strict liability. Heretofore, it was thought necessary to establish the existence of a technical sale of the allegedly defective product. The decision subordinated this consideration to the higher priority of finding conduct on the part of a supplier of products amounting to product distribution through the stream of commerce.

In support of its decision, the court cited an earlier federal court decision on the strict liability of the manufacturer to the consumer. In Delaney v. Towmotor Corp.,31 decided by the Second Circuit Court of Appeals in 1964, the manufacturer-bailor of a fork-lift truck was held to strict liability in tort for injuries sus-

30. Id., at 444-45, 212 A.2d 777-78.
tained by an employee of the bailee while operating the fork-lift. Speaking for the court, Judge Friendly discounted any necessity of finding a sale of the defective product as a condition to the imposition of strict liability so long as it could be established that the product was "placed in the stream of commerce by other means" through the responsibility of the party-defendant. Significantly, the court interpreted the traditional limitation of liability to sales transactions as merely "descriptive of the situation that has most commonly arisen," and expressly rejected the suggestion that such classification was intended as a designation of exclusive limitation.

The decision in Cintrone sounded the clarion call for the assault on the bastion of strict liability. Numerous courts were quickly confronted with the necessity for resolving the liability of the commercial lessor in terms of strict liability in tort. The next decision emerged from California. In McClain v. Bayshore Equipment Rental Co., the California Court of Appeals ruled that lessors of personal property, engaged in the business of distributing goods to the public and functioning as an integral part of the overall marketing enterprise connected with such goods, could be held strictly liable in tort. The court reasoned that no distinction could be drawn between the ultimate function served by the commercial lessor in the distributive scheme of a given product and that served by a manufacturer or retailer. In either case, the marketing enterprise was advanced and a conduit established for the large-scale transfer of products from the producer to the consumer. In further justification of its decision, the court argued that:

In some cases the lessor may be the only member of the enterprise reasonably available to the injured plaintiff and the imposition of strict liability upon him serves, as in the case of the retailer, as an incentive to safety. This will afford maximum protection to the injured plaintiff while working no injustice upon the lessor: the latter can recover the cost of the protection by charging for it in his business.

32. Id. at 6.
33. Id. at 6. The Cintrone court also relied on Booth Steamship Co. v. Meier & Oelhaf Co., 262 F.2d 310 (2d Cir. 1958), wherein the court indicated that the liability of suppliers of equipment under the implied warranty theory should be co-extensive with the liability imposed on sellers of the same equipment, and Gambino v. John Lucas & Co., 263 App. Div. 1054, 34 N.Y.S.2d 383 (1942), which involved a finding that a lessor of a piece of machinery could be held liable for breach of an implied warranty that the machine was safe and suitable for the use intended.
35. Id. at _____, 79 Cal. Rptr. at 340.
In short succession, courts in Illinois, Hawaii, Alaska and New Mexico adopted the reasoning of the Cintrone and McClain decisions and imposed strict liability on commercial lessors for injuries resulting from the lease of defective goods. In Gallucio v. Hertz Corporation, the Appellate Court of Illinois sustained a jury verdict for the plaintiff in a case arising out of an accident involving brake failure on a rental van. Defendant-lessee argued that the complaint, as amended, sounding in strict liability, failed to state a cause of action and that the liability of a commercial lessor for injuries resulting from the lease of defective goods rested solely on negligence principles appurtenant to the law of bailment. In rejecting the defendant-lessee's argument, the court declared that strict liability of a commercial lessor rested on the basis that such lessor functioned to place motor vehicles in the stream of commerce in a fashion not unlike the manufacturer or retailer.

The Hawaii Supreme Court followed suit in extending the protection of strict liability in Stewart v. Budge Rent-A-Car Corp. The case involved an action by the driver of a leased auto against an automobile rental agency for injuries sustained when the automobile left the road and overturned. The court considered the arguments supporting the rule of strict products liability and determined that, in reason and justice, the public interest in human life and safety required the maximum possible protection against dangerous defects in products marketed by either manufacturers or lessors. The court defined the class subject to the imposition of strict products liability and explained the basis for such definition in the following language:

... by placing the goods on the market the maker and those in the chain of distribution represent to the public that the products are suitable and safe for use and that the burden of accidental injuries caused by defective chattels should be placed upon those in the chain of distribution as a cost of doing business and as an incentive to guard against such defects...

In Bachner v. Pearson, the Alaska Supreme Court held strict

40. 1 Ill. App. 3d 272, 274 N.E.2d 178 (1971).
42. Id. at ——, 470 P.2d 243.
liability applicable to commercial lease transactions in Alaska. The court reasoned that the existence of a lease instead of a sale would not preclude a plaintiff from recovering under a theory of implied warranty, and therefore should not preclude recovery under strict liability in tort. The court declared any distinction between sales and leases inconsequential in situations where the lessor functions in the same capacity as the retailer and manufacturer in distributing products through the stream of commerce. Echoing the logic of those courts which had previously confronted the issue, the court rationalized its decision by remarking that:

. . . the lessor will in most instances be in a better position than the consumer to prevent the circulation of defective products and . . . like the retailer and the manufacturer, will generally be able to spread damages and insure against the risk of injuries stemming from the use of defective products which he has placed on the market.\(^4\)

The New Mexico Supreme Court recently entertained a case presenting the question of whether strict liability or the negligence liability of Secs. 407 and 408 of the Restatement (Second) of Torts should govern the commercial lease transaction, and arrived at much the same conclusion that previous courts had reached.\(^5\) The court rejected in no uncertain terms the suggestion that strict liability was to be confined to sales transactions and was not intended to supplement the liability of lessors under the aforementioned sections of the Restatement. The court then proceeded to itemize and examine the policy considerations inherent in the decision to impose strict liability on sellers of defective products, for the purpose of ascertaining whether the same considerations had some relevant bearing on lessors of defective products. The court concluded that the nature of the transaction by which the consumer obtained possession of the defective product was extraneous to the true purpose of strict liability and that the public interest in affording injured consumers an adequate remedy to obtain recompense was every bit as well served by imposing strict liability on dealers in the business of leasing as it was by imposing strict liability on sellers in the business of selling. In either instance, the imposition of strict liability promotes the policy of spreading the risk of loss from injuries resulting from the use of defective products throughout society.

\(^4\) Id. at 326-27.

The most recent case involving lessor strict liability arose in Oregon. In *Summers v. Interstate Tractor and Equipment Co.*, plaintiff sought recovery for the wrongful death of her husband against the owner and lessor of the truck which decedent was driving when he was killed. Plaintiff alleged that decedent's death was caused by a defective steering mechanism in the truck which was present at the time the vehicle was leased by defendant to decedent's employer. Without discussion, the court held that plaintiff had stated a good cause of action in strict liability against defendant-lessee. Although Oregon had never confronted the issue of lessor strict liability, the Ninth Circuit Court of Appeals interpreted Oregon products liability case law to afford protection to injured consumers regardless of whether the product causing injury entered the stream of commerce through a sales or a lease transaction.

Although the aforementioned cases are virtually unanimous in their support of extending strict liability beyond the bounds of the technical sales transaction, there is a singular point of distinction in the cases which deserves comment.

In *Lechuga, Inc. v. Montgomery*, the Arizona Court of Appeals entertained the question of the applicability of strict liability to commercial lessors and suggested a point of departure from the

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46. 466 F.2d 42 (9th Cir. 1972).
47. At this juncture, it seems expedient to opt for a more abbreviated discussion of the cases supporting the rule of lessor strict liability. To this end, let the following list and the parenthetical remarks contained therein suffice: Fakhoury v. Magner, 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972) (imposing strict liability on the lessor of certain personal property furnished concomitantly with an apartment which formed the subject of another lease involving the same lessor for injuries resulting from use by the lessee of the personal property under circumstances indicating that the lease of the personal property was not an isolated or casual transaction and that the lessor was engaged in the business of placing such personal property in the stream of commerce); Price v. Shell Oil Co., 2 Cal. 3d 345, 85 Cal. Rptr. 178, 466 P. 2d 722 (1970) (imposing strict liability on an oil company which leased a defective truck for injuries sustained by an employee of the lessee of the truck under circumstances which established the commercial character of the lease transaction and the lessor, party thereto); Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr 306 (1966) (imposing strict liability on a wholesale-retail distributor who merely distributed tires from stock on order of the manufacturer on the theory that, while occupying the status of a non-seller, he was nonetheless actively engaged in placing products within the stream of commerce); Perfection Paint and Color Co. v. Konduris, 258 N.E.2d 681 (App. Ct. Ind. 1970) (imposing strict liability on the gratuitous supplier of lacquer reducer for the death of a distributee caused by a fire resulting from the ignition of the lacquer reducer on the premise that the application of strict liability was not limited to sales transactions but extended to transactions suggestive of the commercial character of the supplier of a defective product and the commercial nature of the role filled by the supplier in placing articles in the stream of commerce).
position taken by those courts which had previously considered the issue.

The court refused to answer the question on the basis of a finding that plaintiff-lessee had not met his burden of proof on the question of whether the defect complained of was present when the leased vehicle was placed in the stream of commerce by defendant-lessee. In a concurring opinion, Judge Jackson suggested that strict liability would apply to the commercial lessor of chattels but only on the condition that plaintiff could establish the existence of the defect as of the time the chattel left the hands of the manufacturer, thus characterizing the defect complained of as one occurring in the manufacturing process and bringing the case within the ambit of the express purpose of strict liability. The effect of such conditional application of strict liability is to significantly restrict the availability of the remedy and to seriously increase the burden of proof devolving upon those who attempt to make use of it. Since the time of this decision, another court has opted to condition the application of strict liability in a similar fashion.

It should be noted that not every case has applied strict liability to the commercial lessor alleged to have marketed a defective product, but these few cases are distinguishable and offer little support for the proposition that strict liability under Sec. 402A should be restricted to sellers of products, narrowly defined. The case most often cited for this proposition is Speyer, Inc. v. Humble Oil and Refining Co., decided by the Second Circuit Court of Appeals in 1968, and discussed in some detail earlier. The defendant in this case had ordered a new flexsteel hose installed on a gasoline pump which it owned and leased to the plaintiff for use in the plaintiff's business under a lease-back arrangement with the plaintiff. The plaintiff's employees caused certain damage to the flexsteel hose and as a result a leakage of gasoline from the pump occurred. The spilled gasoline erupted into flames which, in turn, caused considerable damage to the building and property of the plaintiff. The plaintiff sought to recover against the defendant on the theory that since the defendant had leased the defective product, it was liable under strict liability principles for causing such product to enter the stream of commerce. The court of appeals ruled that:

49. Id. at ___, 467 P.2d at 262.
51. 403 F.2d 766 (3d Cir. 1968).
If Humble is not a seller, then no responsibility may attach under the doctrine of strict liability. 52

The court held that Humble incurred no liability to the plaintiff under the theory of strict liability because it was not a seller of gas pumps regularly and customarily engaged in the business of selling gas pumps. While it is possible to urge the case in support of a restrictive interpretation of the term “seller” for purposes of determining the scope of the class exposed to liability under Sec. 402A, it is more accurate and eminently more reasonable to regard the decision as predicated upon the finding that Humble Oil was not in the business of selling or leasing gasoline pumps and had assumed the responsibility of furnishing this particular pump as a one-time, only-time concession to a prospective customer in order to obtain a service contract.

The same distinction might be made in the case of Freitas v. Twin City Fisherman’s Cooperative Association, 53 which is also cited in support of a restrictive interpretation of the term “seller.” In Freitas, a truck driver brought an action, seeking recovery for personal injuries sustained in a fall from a platform leading to the top of an oil tank which he was filling, against the oil company which owned the tank and a shrimp boat service cooperative to whom the tank had been leased for storage of the oil company’s products. Plaintiff alleged that the platform and ladder were defective in that they were not anchored to the tank, either at the ground or to any fixed object as such ladders customarily are. The platform, from which the driver fell, had been designed, made and installed by an independent contractor employed by the oil company, at the direction of the oil company in fulfillment of a contract for the lease of an oil storage tank from the oil company to the cooperative.

On appeal from a judgment for defendants, plaintiff-truck driver asserted that the trial court had erred in refusing to enter judgment against defendants on the theory of strict liability. After viewing the evidence and finding that the oil company was not in the business of selling tanks, ladders, or platforms, the Texas Civil Court of Appeals ruled that plaintiff had failed to state a case for the application of strict liability. While some have urged the case in support of the proposition that strict liability should be limited to technical sales transactions, a closer reading reveals the opposite to be true.

52. Id. at 772.
The court did not condition the application of strict liability on proof of a sale of the allegedly defective product. As a matter of fact, the court specifically admitted that where it could be established that the transaction by which the product is transmitted into the stream of commerce is essentially commercial in character, liability could arise under Section 402A. In the final analysis, the most that can be said of the decision is that it forbids the application of strict liability to those persons who merely construct items intended to facilitate the use of other products made the subject of an isolated lease.

Just recently, however, a decision was rendered by the Maryland Court of Appeals which makes the aforementioned distinctions somewhat less persuasive. In Bona v. Graefe, a patron of a Maryland golf club sought recovery for injuries sustained in a golf cart spill. The plaintiff had rented the cart from the club professional who was in charge of maintaining the carts and owned the concession thereto. Plaintiff instituted an action against the distributor of the cart and the club professional-manager-lessee of the cart, alleging negligence, breach of warranty and strict liability. The trial court directed a verdict in favor of the defendants. Plaintiff appealed, arguing that the trial judge had erred in directing verdicts for the defendants on the theories of breach of warranty and strict liability. The court of appeals affirmed. In holding for defendant-lessee the court adopted a restrictive interpretation of the scope of liability to which a lessor is exposed. The court limited the applicability of liability predicated upon breach of implied warranty or breach of the duty prescribed by Sec. 402A to "sellers" of products and restricted the liability of lessors of products to negligence. The court cited Speyer v. Humble Oil and Refining Co. for the proposition that Sec. 402A was directed solely at the seller of a defective product and thus could not be applied in a case involving a lease. The case is of limited precedential value, however, for Maryland has not yet adopted Sec. 402A.

In summary, then, it might be said that the courts have demonstrated a decided reluctance to distinguish between sellers of products and non-sellers or products, such as bailors and lessors, for purposes of strict liability, when it can be established that, in either instance, products are placed on the market for distribution to the use of consumers with the knowledge that such products will in all

54. Id. at 937-38.
55. Id. at 937.
56. 264 Md. 69, 285 A.2d 607 (1972).
probability be used without inspection for defects. So long as it can be determined (1) that the lessor of products is engaged in the business of lending; (2) that he is actively functioning as an integral part of the marketing enterprise or distributive scheme established for a product; (3) that he has leased a defective product, unreasonably dangerous to the user or consumer or to his property which caused injury to the user or consumer or to his property and (4) that the product leased was expected to and did reach the user or consumer without substantial change in its condition after lease, then it can be expected that strict liability will be imposed on the lessor. The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market through the conduit of the commercial links in the distributive scheme rather than by the injured persons who are powerless to protect themselves. Keeping in mind the market realities and the widespread use of the lease of personalty in today's business world, it seems quite reasonable to impose on the lessors of chattels the same liability for physical harm which has been imposed on manufacturers and retailers. Strict liability works no injustice to either class. Lessors, as well as manufacturers and retailers, are quite competent to adjust the costs accruing through imposition of strict liability by spreading the loss to the consuming public. As between themselves, they may adjust the costs of protection against strict liability in the course of their continuing business relationship.\(^{58}\)

With respect to the potential for strict liability exposure of lessors in the years to come, it should be noted that institutional lenders such as banks, savings and loan associations, and insurance companies are presently entering the lease business by writing leases of expensive construction equipment and industrial machinery for individuals unable or unwilling to expend money to purchase such items.\(^{59}\) Although it might be argued that such institutional lenders are actually doing no more than financing the purchase of such items (since most of these “leases” contain an option to purchase at the end of the lease period, exercisable by payment of some nominal value), and thus, are not really functioning as

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58. For a listing of cases considering lessor strict liability, see FRUMER AND FRIEDMAN, PRODUCTS LIABILITY § 16A [4] [iii]; See also Annot., 13 A.L.R.3d 1057 (1972).

commercial lessors, such as to warrant imposition of strict liability, the ultimate resolution of the question might well hinge on whether it can be said that such institutional lenders constitute an integral link in the marketing enterprise or distributive scheme relative to a given product. Although it is highly improbable that a particular lending institution would become so involved in writing these hybrid lease-finance agreements that it could be termed an institutional lessor of chattels in the traditional sense, it is quite likely that they could become sufficiently involved to consider the venture something more than a purely incidental aspect of their business. That being the case, might it not be said that the lender involved was in the business of negotiating such arrangements and in so doing functioning as an integral link in the marketing enterprise by which products flowed into the stream of commerce?

**Licensor Liability Under Sec. 402A**

The final consideration of this paper involves the question of the liability of a licensor of a product for injuries resulting from the use of such product caused by a defect in the product. In this connection, it is important to distinguish between the type of licensor who confers a privilege on the consumer to use a product and in such fashion projects a particular product into the stream of commerce and the type of licensor who enters into a franchising or trademark licensing agreement with another manufacturer wherein a franchise or license is conferred upon that other manufacturer by the franchise donor or trademark owner to produce and market a product protected by the franchise or trademark and in this fashion projects a product into the stream of commerce. The former situation will be discussed first.

The most prominent case involving the strict liability of a licensor for injuries sustained by a licensee in making use of a defective product arose in California in 1970. In *Garcia v. Halsett*, an 11-year-old boy sought recovery for injuries sustained when his arm became entangled in a washing machine at defendant's launderette. The boy had reached into the machine in order to retrieve some clothes at a time when the machine was not in motion and as he was in the process of pulling the clothes out, the machine suddenly and unexpectedly started up. Plaintiff established the defective character of the machine by expert testimony to the effect that (1) the timing mechanism (which regulated the cycle of the machine)
had gone awry (in that it failed to prevent the machine from stopping mid-cycle and starting again when jostled), and (2) that the machine was not equipped with a micro switch which functioned to close off all circuits when the door was open even though such devices were available as of the time and place of manufacture. Plaintiff sought to submit the case on the theory of strict liability but the trial judge refused to so instruct. Plaintiff appealed, contending that the refusal to instruct on strict liability was error. The California Court of Appeals agreed and reversed. The court held that although defendant was only a licensor of the product in question, nonetheless:

Licensors of personal property, like the manufacturers or retailers or lessors thereof "are an integral part of the overall marketing enterprise that should bear the cost of injuries resulting from defective products." (Quoting from McCafflin v. Bayshore Equipment Rental Co.).

In rationalizing its decision, the court observed that, although the licensor is not engaged in the distribution of the product, in the same manner as a manufacturer, retailer or lessor, the licensor does provide the product to the public for use by the public and does play more than an ancillary role in the overall marketing enterprise of the product in question, thus coming within the rationale of strict products liability. The court’s reasoning suggests that the precise legal relationship between the parties is of slight significance in determining the applicability of strict liability so long as it can be said that the rationale of strict liability applies to the transaction in question.

Several other jurisdictions have directly confronted the issue of strict liability for the licensor but have reached the opposite conclusion. In Wagner v. Coronet Hotel, a paying guest at a hotel sought to recover for personal injuries allegedly sustained when he slipped on a bath mat while taking a shower as a result of the defective condition of the mat. The plaintiff named both the hotel and the manufacturer of the bath mat as defendants in an action predicated on strict liability. The jury returned a verdict for the plaintiff, but the trial judge granted defendants’ motion for judgment notwithstanding the verdict. The plaintiff appealed and the Arizona Court of Appeals reversed as to the manufacturer. In discussing the question of whether the hotel might be held liable

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61. Id. at ___, 82 Cal. Rptr. at 423.
on the theory of strict liability in tort, the court observed that none of the justifications for the imposition of strict liability extended so far as to encompass the liability of a hotel to its paying guest.

The same result was reached in Katz v. Slade, involving an action in strict liability to recover against the owner-licensor of a golf cart for injuries sustained by a bystander when struck by the golf cart as it careened out of the control of the licensee. The court rejected plaintiff's claim that defendant-licensor could be held strictly liable in tort and offered the soothing balm of potential negligence liability as a substitute theory. The case is particularly significant, however, for its reasoning. Although the court did not find liability on the part of the licensor in this instance, the court's analysis suggests that it would be inclined to do so in the future under the proper circumstances. When it can be established that a given licensor's operation was essentially commercial in character, functioned as an integral link in the over-all marketing enterprise connected with the product made the subject of the license and constituted a commercial distribution by a profit-making concern to a public forced to depend upon the representation that the product was suitable and safe to use, the court indicates that strict liability against the licensor will lie. The effect of the decision is to add support to the rule enunciated by the California Court of Appeals in Garcia v. Halsett.

With respect to this aspect of licensor strict liability, it must be conceded that the issue is still in doubt. Most cases arising out of the licensor-licensee relationship will probably be tried under a negligence theory. Some will be tried under the negligence principles appurtenant to the common-law entrant classification scheme for the disposition of premises liability cases. Some potential licensor liability cases will go by the boards on plaintiff's option to travel the strict liability route against the manufacturer, or the wholesaler, or the retailer. However, it can be expected that a certain few cases will arise under the theory of strict liability of the licensor. As yet, it is not clear how the courts will handle the issue. If the court is concerned that the licensor is functioning as an integral part of the overall marketing enterprise connected with a given product and does not simply play an ancillary role in the distributive scheme, the court is likely to hold the licensor liable under strict liability, assuming of course that similar liberality has

63. 460 S.W.2d 608 (Mo. 1970).
64. Id. at 613.
been demonstrated by the court in treating of strict liability cases involving lessors. Conversely, if the court is primarily concerned with differentiating between the various manners of distribution of the product and according controlling significance thereto, the decision is likely to reflect a policy determination that liability should not extend that far down in the chain of distribution. Although it seems incongruous to speak of the licensor as transmitting products into the stream of commerce, when, most typically, those products will not even leave the possession of the licensor, this test will apparently govern the determination of the licensor’s liability. However, for a more informed judgment as to the likelihood of a finding of licensor strict liability in any given jurisdiction, reference should be made to the standard prevailing in that jurisdiction by which the liability of commercial lessors is measured.

The second aspect of licensor strict liability is concerned with the trademark licensor-licensee relationship. Whereas the cases previously considered have all been concerned with the propriety of applying strict liability in tort downward through the various links in the marketing chain from manufacturer to distributor, to wholesaler, to retailer, to lessor and finally to licensor, the question of whether strict liability should apply to the trademark licensor, who contracts with another manufacturer for the purpose of conferring on that manufacturer a license to produce the product protected by the trademark, is primarily one of determining the propriety of extending strict liability, predicated on enterprise involvement, upwards from the manufacturer.

The issue, to date, has only been confronted by a single court. *Kasel v. Remington Arms Co., Inc.* involved an appeal from a judgment on a jury verdict for defendant, Remington Arms Co., Inc., in an action for personal injury damages arising out of the explosion of an allegedly defective 12-gauge shotgun shell. Plaintiff established that the shell which caused him injury had been manufactured in Mexico by a company called Cartuchas Deportivas De Mexico, S.A. (hereinafter referred to as CDM). The evidence also established that Remington had caused CDM to be created and that CDM was affiliated with Remington through Remington’s ownership of 40 percent of the outstanding common stock of CDM and the existence of interlocking directorates and common officers.

In 1961, Remington entered into a Trademark Licensing Agreement with CDM, granting CDM a 20-year nonexclusive,
non-transferable license to use Remington’s registered trademarks on ammunition manufactured by CDM. Remington retained a right to inspect and control the quality of all ammunition on which its trademarks were used.

After a jury verdict in favor of Remington, plaintiff moved for a new trial, asserting error by the trial court in its refusal to give the jury any of plaintiff’s requested special instructions and particularly in its instruction that Remington’s liability was contingent on a finding that it was the actual manufacturer of the defective shell or on a finding that CDM was acting as the agent of Remington in the manufacturing business. Plaintiff appealed from a judgment on the verdict in favor of defendant, following denial of the motion. The California Appellate Court reversed.

The court held that evidence of either actual manufacture by Remington or an agency relationship between CDM and Remington was unnecessary and irrelevant to a finding of strict liability against Remington. The court also held that the evidence adduced of Remington’s involvement in the enterprise was sufficient to require the trial court as a matter of law to find that Remington was an integral part of the business enterprise which placed the defective shell in the stream of commerce and thus, if the usual conditions could be met, strictly liable in tort. As the determinative factor in the decision to impose strict liability, the court reiterated the test which had been utilized in measuring the liability exposure of other links in the marketing enterprise:

It is the defendant’s participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product and not the defendant’s legal relationship, such as agency, with the manufacturer . . . which calls for imposition of strict liability.67

Under the facts in the Remington case, the court did no more than demonstrate a remarkable consistency in its treatment of those entities involved in the manufacturing-marketing system. Had the court permitted Remington to stay without the scope of strict liability, it would have been faced with the reality of holding producers, manufacturers and others in the distributive scheme to one standard of care with respect to the public and trademark owners and franchisors, who license others to manufacture products and, typically, bestow upon such licensees and franchisees the

67. Id. at ______, 101 Cal. Rptr. at 323.
knowledge required for production, to another standard. Given the premise that the trademark constitutes a significant factor in consumer product selection, insofar as it produces considerable consumer reliance on the quality of the product, the imposition of strict liability on the trademark licensor or franchisor seems perfectly consistent with the stated rationale for strict liability.\(^6\) In any event, the extension of strict liability to apply to the trademark licensor of a manufacturer, allegedly responsible for the production of the defective product and an injury resulting to a consumer subsequent thereto, may well signify the future direction of strict liability.

Some indication of the significance attaching to this shift in direction can be gleaned from an examination of several recent cases, not directly related to the subject of this paper, but sufficiently connected with it to merit inclusion. In the *Remington* case, the court adverted to the decision in *Hanberry v. Hearst Corp.*,\(^6\) wherein the California Court of Appeals refused to apply strict liability in tort to a product endorser. It was suggested in *Remington* that *Hanberry* might well warrant reevaluation under the determinative standards enunciated in *Remington*. The *Remington* court allowed that where it could be established that a product endorser by its avowed and well-publicized testing activity operated as the responsible inducement for the purchase of a product by a consumer, which product subsequently caused the consumer injury through a manufacturing defect, the product endorser would be held strictly liable on the enterprise involvement theory, regardless of its lack of control over the manufacturing process.

*Canifax v. Hercules Powder Co.*,\(^7\) is equally surprising in its application of strict liability upwards from the manufacturer in the marketing enterprise. This case involved an action arising out of a dynamite explosion, the cause of which was attributed to a defective fuse. Defendant-Hercules was a large dynamite manufacturer who accepted an order from a jobber for a shipment of dynamite and fuses. Hercules supplied the dynamite to the jobber (who in turn delivered them to the customer) but delegated responsibility for the production and delivery of the fuses to another manufacturer (who assumed responsibility for distribution of the fuses to


\(^7\) 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965).
the customers). Denying that Hercules had played no part in the manufacture of the defective product the court ruled that Hercules could not delegate responsibility for the fulfillment of an order which it had accepted and cause the actual manufacturer to place a defective product into the stream of commerce as a result thereof and claim that strict liability did not attach. The court indicated that strict liability will be applied to any manufacturing or marketing entity, whether upwards or downwards from the actual manufacturer in the distributive enterprise, whenever it can be found that such entity functioned as an essential link in the scheme established for placing a product in the stream of commerce. Canifax does not state the limit, however, in enterprise involvement, strict liability litigation. A more recent case reaches even further upwards from the manufacturer in an effort to posit strict liability.

In Hall v. E.I. DuPont De Nemours and Co.,[71] thirteen children sued six manufacturers of blasting caps and their trade association in a products liability action brought under federal diversity jurisdiction. The plaintiffs were allegedly injured by blasting caps in twelve unrelated accidents occurring in ten different states between 1955 and 1959. Because of the inability of most of the plaintiffs to identify the specific manufacturer whose product caused the injury complained of, plaintiffs sought to hold the entire group of manufacturers and their trade associations, comprising virtually the entire blasting cap industry of the United States, jointly liable for injuries caused by their product. Plaintiffs alleged that the longstanding industry practice of not placing a warning message on individual blasting caps and failing to manufacture caps which would have been less easily detonated was the result of a conscious agreement among the defendants, reached in the light of known dangers, and constituted grounds for imposing industry-wide negligence and strict tort liability. The court agreed with plaintiffs' central contention, stating that "there are circumstances, illustrated by this litigation, in which an entire industry can be held liable for harm caused by their product," but declined to resolve the issue in favor of these particular plaintiffs.

As to the five plaintiffs who were able to identify the particular offending manufacturer, the court held that the arbitrary basis of plaintiffs' selection of the non-producer defendants, and the absence of any demonstrable need for joint liability in administrative or remedial terms, compelled the dismissal of each plaintiff's

claims against the non-producer defendants. The court ordered the action against the alleged offending manufacturers to be tried in the federal districts of the place of injury. As to the eight plaintiffs who were unable to identify the particular manufacturers of the injury-causing caps, the court held that plaintiffs' allegations of joint knowledge and action raised sufficient issues of fact to defeat dismissal and dictated a finding that the case be ordered brought on for trial.

The significance of the decision lies in this last finding. Whether the plaintiffs are successful in establishing industry-wide strict liability at trial remains to be seen, but the precedent has been set. Heretofore, no court had ever considered holding an entire industry strictly liable. The DuPont court not only considered the possibility but admitted the viability of such a decision. Beyond any doubt, new vistas in strict liability have been opened up. In suggesting that non-offending manufacturers and an industry trade association might be held responsible in strict liability for injuries caused by certain trade practices, the court has added an extra dimension to the enterprise involvement theory.

It is quite obvious that we have come some distance from the rather conservative expression of the proper scope of strict liability contained in Sec. 402A of the Restatement (Second) of Torts. There is no way of knowing whether the trend toward an expanded, almost all-inclusive strict liability will continue. It is fairly certain that commercial lessors can expect to be subject to the imposition of strict liability. It is also quite conceivable that licensors of products who grant the public a license or a privilege to use certain products will be subjected to the imposition of strict liability to the same extent as have been lessors of products. However, the case law on this point is still rather inconclusive. As for the potential strict liability exposure of other entities in the marketing enterprise, the most that can be said is that the possibility exists. Whether the somewhat less impulsive jurisdictions in the country choose to follow the lead of California in tracing liability for injuries resulting from defective products upwards from the manufacturer to the trademark licensor, to the product certifier and endorser and, indeed, to the institutional lender providing the necessary capital to fuel the marketing effort, remains to be determined. The recent California cases harboring liability for defective products upwards through the manufacturing enterprise might well prove to be aberrations. On the other hand, they might well prove to be the precursors of another assault on another citadel in the field of products liability.
The Law in Wisconsin

The question of lessor-licensor strict liability has not yet been presented to the Wisconsin Supreme Court for determination and a definite answer as to the status of the law in Wisconsin is therefore impossible. However, some indication of what the position of the Wisconsin Supreme Court is likely to be can be gleaned from an analysis of the court's opinion in Dippel v. Sciano.72 The case involved an action to recover for personal injuries sustained when the front-leg assembly of a large coin-operated pool table collapsed, crushing plaintiff-Dippel's foot. The accident happened on January 1, 1964, in a tavern operated by defendants, Tony and Dottie Sciano. Plaintiff alleged that the table was being moved to a position where it could be used at the request and with the consent of the tavernkeeper's employee. Plaintiff brought the action against (1) Fisher Manufacturing Company, the manufacturer of the coin-operated table, (2) Pioneer Sales and Service, Inc., the sales distributor for the manufacturer, (3) Carl J. Dentice, d/b/a City-Wide Amusement Company, the owner and lessor of the coin-operated table, and (4) Tony and Dottie Sciano d/b/a Tony and Dottie's Tavern, the lessee of the table.

Plaintiff alleged negligence against all defendants and breach of express and implied warranties against the manufacturer and the sales distributor. The sales distributor, Pioneer, demurred to the cause of action for breach of express and implied warranties on the grounds that the complaint did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer for the reason that there was no privity of contract between plaintiff-user and defendant-seller. Plaintiff appealed, contending that no just reason existed for treating lack of privity between user and seller as a bar to an action for breach of implied warranty.

The court first determined that products liability cases of the kind herein involved should be considered as a matter of strict liability in tort rather than as matters of implied warranty exclusively.73 The court next determined that the lack of privity of contract between the seller of a defective product and its ultimate consumer was immaterial to the injured consumer's claim of strict liability in tort against the seller.74 In reaching this second conclusion, the court relied upon the following policy considerations justifying the abolition of the privity requirement in strict liability actions.

72. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).
73. Id. at 458-59, 155 N.W.2d at 63.
74. Id.
the seller is in the paramount position to distribute the costs of the risks created by the defective product he is selling. He may pass the cost on to the consumer via increased prices. He may protect himself either by purchasing insurance or by a form of self-insurance. In justification of making the seller pay for the risk, it is argued that the consumer or user has the right to rely on the apparent safety of the product and that it is the seller in the first instance who creates the risk by placing the defective product on the market. A correlative consideration, where the manufacturer is concerned, is that the manufacturer has the greatest ability to control the risk created by his product since he may initiate or adopt inspection and quality control measures thereby preventing defective products from reaching the consumer.\textsuperscript{75}

Although, in this instance, the court was concerned with the propriety of imposing strict liability on the manufacturer or distributor of defective products, it is immediately apparent that these same policy considerations can be used to justify the application of strict liability to the commercial lessor or licensor. Since the disposition of a strict liability case ultimately turns on the court's appreciation of the operative policy considerations, it seems quite reasonable to conclude that the Wisconsin justification for strict liability is sufficiently broad to encompass the commercial lessor or licensor. Certainly, the commercial lessor or licensor is in a better position to spread the costs of the risks created by the defective product than is the consumer. Similarly, the commercial lessor or licensor has a much greater opportunity to insure himself against the risk of loss than does the consumer. Furthermore, it is not unreasonable to maintain that the consumer has a right to rely on the apparent safety of the product marketed by the commercial lessor or licensor, given the market realities of today's world. Finally, it must be conceded that the commercial lessor or licensor has a much greater ability to control the risk created by the products he markets than does the consumer, not only because of the inspection procedures which he is capable of initiating, but also because of the pressure which he can bring to bear on the manufacturer.

While it is somewhat hazardous to rely upon the \textit{Dippel} case as authority for the proposition that Wisconsin would apply strict liability to the commercial lessor or licensor, since the question was not considered therein, the policy considerations which were relied

\textsuperscript{75} \textit{Id.} at 450-51, 155 N.W.2d at 58-59.
upon to impose strict liability on the seller of a product certainly apply with equal force to the lessor or licensor of products. The ironic thing about the Dippel case is that it could have answered this question had the plaintiff's strategy been different. If the plaintiff had pleaded a cause of action in strict liability against the City-Wide Amusement Company, the owner and lessor of the allegedly defective pool table, instead of an action in negligence, City-Wide Amusement Company would undoubtedly have entered a demurrer along with the sales distributor. The case would then have gone up to the Supreme Court on appeal from the order sustaining the demurrers of the lessor and the sales distributor. The court would therefore have been forced to decide the extent to which strict liability could descend through the distributive chain.

If the Wisconsin court decides not to extend strict liability to the commercial lessor or licensor, it will probably do so on the authority of Carall v. Minneapolis Drive Your-self System,76 in which a commercial lessor of automobiles was held bound by the negligence standard of liability in the matter of leasing. The court imposed a requirement that a lessor of automobiles exercise reasonable diligence to discover the condition of his machines before releasing them into the hands of drivers for use on the highways. This might have seemed like an entirely reasonable standard of liability in 1931 when the leasing business was in a fledgling stage of development, but it is unacceptable today. Since that time, the commercial leasing business has become a major force in the marketplace. There is no reason for holding lessors to a lower threshold of liability than presently binds manufacturers and distributors. In view of the intervention of Dippel, it is entirely possible that the Wisconsin court will abandon the negligence standards presently governing lessors in favor of strict liability as soon as the opportunity presents itself. Whether the court will opt to extend strict liability further in the distributive chain and give full expression to the enterprise involvement test is another matter entirely. To forecast the future direction of the Wisconsin court in this matter would be baseless conjecture. Before mounting an assault on this most foreboding of citadels, however, the court would be well-advised to distinguish between the carefully reasoned campaign and the frenzied religious crusade.

—William A. Wiseman

76. 206 Wis. 287, 239 N.W. 501 (1931).