

1996

Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part I

Phillip L. McIntosh

Follow this and additional works at: <https://dc.law.mc.edu/lawreview>



Part of the [Law Commons](#)

Custom Citation

16 Miss. C. L. Rev. 393 (1995-1996)

This Article is brought to you for free and open access by MC Law Digital Commons. It has been accepted for inclusion in Mississippi College Law Review by an authorized editor of MC Law Digital Commons. For more information, please contact walter@mc.edu.

TORT REFORM IN MISSISSIPPI: AN APPRAISAL OF THE NEW LAW OF PRODUCTS LIABILITY, PART I*

Phillip L. McIntosh**

I. INTRODUCTION

A. The Mississippi Products Liability Act of 1993 – Its Purpose

In 1993, as a result of tort reform efforts,¹ the Mississippi legislature enacted legislation that made dramatic changes in the law of products liability as well as in the law of punitive damages.² On July 1, 1994, the substantive portions of the new legislation became effective,³ and the products liability portion of the new legislation⁴ replaced the judicially adopted Section 402A of the Restatement (Second) of Torts⁵ as the primary basis of products liability law in the state.⁶ Those who supported the new Act did so because they saw it as a way to bring stability and predictability to the law of products liability in Mississippi.⁷ Governor Fordice supported the measure as making "our product liability laws clearer and fairer for all our people."⁸ Stability and fairness to both producers and consumers are laudable goals, but as this Article will demonstrate, the Act may actually result in more confusion and less fairness for the people and businesses of Mississippi. The Act is deeply flawed, and the legislature needs to more carefully address products liability reform.

* PART II of this Article will appear in Volume 17 No. 2 of the MISSISSIPPI COLLEGE LAW REVIEW, forthcoming in the Spring of 1997.

** Associate Professor, Mississippi College School of Law, B.S. 1977, Louisiana State University; LL.M. 1981, New York University. The author wishes to thank Professors Jeffrey Jackson and Carol West for their helpful comments on earlier draft versions of this Article. The work on this Article was supported in part by a summer research grant from the Mississippi College School of Law.

1. Jay Eubank, *Tort Reform Bill Headed to Fordice*, CLARION-LEDGER, Feb. 18, 1993, at A1.

2. Act of Feb. 18, 1993, H.B. 1270, 1993 Miss. Laws ch. 302, (codified MISS. CODE ANN. § 11-1-63 (Supp. 1995)) (concerning product liability claims); MISS. CODE ANN. § 11-1-65 (Supp. 1995) (concerning punitive damage claims); amended MISS. CODE ANN. § 11-7-13 (Supp. 1995) (concerning wrongful death claims); and MISS. CODE ANN. § 75-2-715 (Supp. 1995) (concerning damages for breach of warranty). For a discussion of the effect of the 1993 legislation on claims for wrongful death, see Bobby Harges, *An Evaluation of the Mississippi Products Liability Act of 1993*, 63 MISS. L.J. 697, 753-65 (1994).

3. Section 5 of the Act provides:

This act shall take effect and be in force from and after July 1, 1993. Procedural provisions of this act including subsections (1)(a), (b), (c) and (d) of Section 2 (pertaining to punitive damages) shall apply to all pending actions in which judgment has not been entered on the effective date of the act and all actions filed on or after the effective date of the act. All other provisions shall apply to all actions filed on or after July 1, 1994.

Act of Feb. 18, 1993, H.B. 1270, 1993 Miss. Laws, ch. 302, sec. 5.

4. MISS. CODE ANN. § 11-1-63 (Supp. 1995) [hereinafter referred to as the Mississippi Products Liability Act of 1993 or the Act].

5. RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter Section 402A].

6. See *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss.), cert. denied, 386 U.S. 912 (1966); *Sperry-New Holland v. Prestage*, 617 So. 2d 248 (Miss. 1993).

7. *Product-liability Provision Gets Boost From House*, CLARION-LEDGER, Mar. 18, 1992, at B2.

8. Jay Eubank, *Tort Reform Bill Headed to Fordice*, CLARION-LEDGER, Feb. 18, 1993, at A1.

B. The Scope of the Act

A determination of the scope of the Act is basic to understanding its proper application. Initially, the question is whether the legislature intended to occupy the field of products liability and to generally replace the common law of products liability, with the explicit exception of common law defenses,⁹ or whether the legislature merely intended to provide minimum requirements for claimants to meet, leaving it to the common law to provide an affirmative cause of action. The language of the Act creates the possibility of an issue on this point because the legislature wrote the Act in the negative, stating when a manufacturer or seller will not be liable, rather than affirmatively stating when a manufacturer or seller will be liable.¹⁰ Because of the absence of language affirmatively creating a cause of action, an argument exists that the Act merely limits or modifies existing common law rights without replacing them. However, the overall structure of the Act creates the impression that the legislature intended to create exclusive causes of action for injuries caused by products¹¹ and to replace common law, except as to defenses,¹² and where resort to common law is necessary to supply definitions of terms not otherwise defined in the Act.¹³ The Act's language appears to occupy the field, relying on the common law to provide definitions and defenses in addition to those enumerated in the Act.

C. An Overview of the Act

The Act requires that the claimant prove the existence of a defect at the time the product left the control of the manufacturer or seller, that the product was defective and unreasonably dangerous to the user or consumer and that the defec-

9. The Act provides that "[n]othing in this section shall be construed to eliminate any common law defense to an action for damages caused by a product." MISS. CODE ANN. § 11-1-63(h) (Supp. 1995).

10. MISS. CODE ANN. § 11-1-63(a) (Supp. 1995). The Act provides in pertinent part:

In any action for damages caused by a product except for commercial damage to the product itself:

(a) The manufacturer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller . . . [the product was defective] and

(ii) The defective condition rendered the product unreasonably dangerous to the use or consumer; and

(iii) The defective and unreasonably dangerous condition of the product proximately cause the damages for which the recovery is sought.

Id.

11. The descriptive title of H.B. 1270 described the act as "[a]n Act to Codify Certain Rules and Establish New Rules Applicable to Product Liability Actions." See *infra* text accompanying notes 18-32, for a discussion of the establishment of categories of defect under which claims must be brought.

12. MISS. CODE ANN. § 11-1-63(h) (Supp. 1995) ("Nothing in this section shall be construed to eliminate any common law defense to an action for damages caused by a product.").

13. The Act does not define its key terms. As this Article demonstrates, the lack of definitions creates unnecessary confusion in the law despite the stated purpose of its promoters to clarify and stabilize the law of products liability in Mississippi.

tive condition proximately caused damage.¹⁴ The requirement of proof that a defect existed when the product left the defendant's control does not represent a change in the law.¹⁵ The proximate cause requirement also is not new.¹⁶ However, the term "unreasonably dangerous" as used in the Act appears to make a change in the law. Under the Act, the law apparently no longer provides for a claim resulting from defects that render a product unreasonably dangerous to bystanders or property as opposed to consumers or users.¹⁷

1. Categories of Defect

In setting forth the basis of liability for sellers and manufacturers, the Products Liability Act creates four exclusive categories of defect: (1) design defect; (2) warnings or instruction defect; (3) deviation defect (a defect that results from a deviation from product specifications, either during the manufacturing process or at some later point prior to delivery to a consumer or purchaser);¹⁸ and (4) breach of express warranty.¹⁹ In creating these exclusive categories of product defects, the Act apparently eliminates implied warranty as a theory for recovery for damages caused by a defective product, except as to the product itself.²⁰

a. Design Defects

The Act moves the theory of liability for design defects from strict liability under Section 402A to one that is more akin to negligence.²¹ The claimant must show that "the manufacturer or seller knew, or in light of reasonably available knowledge or in the exercise of reasonable care should have known about the

14. MISS. CODE ANN. § 11-1-63(a) (Supp. 1995) (emphasis added). The Act provides in pertinent part: In any action for damages caused by a product except for commercial damage to the product itself:
 (a) The manufacturer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller . . . [the product was defective] and
 (ii) The defective condition rendered the product unreasonably dangerous to the user or consumer; and
 (iii) The defective and unreasonably dangerous condition of the product proximately cause the damages for which the recovery is sought.

Id.

15. *E.g.*, *Ford Motor Co. v. Matthews*, 291 So. 2d 169, 171 (Miss. 1974).

16. *Id.* at 173.

17. See *infra* text accompanying notes 286-328 and 362-72.

18. This type of defect has been traditionally referred to as a "manufacturing defect," however, this Article uses the term "deviation defect" since the scope of the defect is not limited to defects occurring during the manufacturing process. For example, deviation defects may occur during shipping from the manufacturer to the distributor, or even when the product is placed on the retailer's shelf.

19. MISS. CODE ANN. § 11-1-63(a)(1) (Supp. 1995). In creating the categories of defect, the Act provides:
 (a) The manufacturer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller:
 (i) 1. The product was defective because it deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured to the same manufacturing specifications, or
 2. The product was defective because it failed to contain adequate warnings or instructions, or
 3. The product was designed in a defective manner, or
 4. The product breached an express warranty or failed to conform to other express factual representations upon which the claimant justifiably relied in electing to use the product . . .

Id.

20. But see *Harges*, *supra* note 2, at 729, 732.

21. But see *Harges*, *supra* note 2, at 712 (contending that the act is "similar to existing Mississippi products liability law based on strict liability in tort").

danger that caused the damage.”²² Under the prior law, a plaintiff making a design defect claim only needed to prove that the product was unreasonably dangerous in design; the seller’s lack of knowledge of the danger was immaterial because the focus was on the product itself, not the manufacturer’s fault.²³ Moreover, under the new Act, the claimant must prove the feasibility of an alternative design.²⁴

b. Warnings and Instruction Defects

The Act likewise articulates a negligence-based approach to liability for defective warnings or instructions. This approach does not make an appreciable change in the law since courts have treated warnings defects under Section 402A in a manner virtually indistinguishable from a negligence standard.²⁵ Under the Act, the claimant must prove that the manufacturer or seller knew or should have known about the danger that caused the damage and that the ordinary user or consumer would not be aware of the danger.²⁶ The Act deems adequate a warning or instruction that a reasonable person would provide under the circumstances.²⁷

c. Deviation Defects and Breaches of Express Warranty

The Act retains strict liability as a basis of liability for the manufacturer or seller for defects which result from flaws that occur during the manufacturing

22. MISS. CODE ANN. § 11-1-63(f)(i) (Supp. 1995). Compare RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2(b) (Tent. Draft No. 2, 1995) [hereinafter TENTATIVE DRAFT] (“[A] product 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 . . . , and the omission of the alternative design renders the product not reasonably safe . . .”).

23. See *Hall v. Mississippi Chem. Express, Inc.*, 528 So. 2d 796, 799 (Miss. 1988); *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113, 120-21 (Miss.), cert. denied, 386 U.S. 912 (1966).

24. MISS. CODE ANN. § 11-1-63(f)(ii) (Supp. 1995). The Act provides with reference to feasible alternative design that the claimant must prove that

the product failed to function as expected and that there existed a feasible design alternative that would have to a reasonable probability prevented the harm. A feasible alternative design is a design that would have to a reasonable probability prevented the harm without impairing the utility, usefulness, practicality or desirability of the product to users or consumers.

Id.

25. See 1 M. STUART MADDEN, PRODUCTS LIABILITY, § 10.3 (2d ed. 1988); cf. *Wyeth Laboratories, Inc. v. Fortenberry*, 530 So. 2d 688, 691-92 (Miss. 1988) (holding that a drug manufacturer must warn of the drug’s known adverse effects and that “[a]n adequate warning is one reasonable under the circumstances”).

26. MISS. CODE ANN. § 11-1-63(c)(1) (Supp. 1995). The Act provides with respect to knowledge of the danger that:

In any action alleging that a product is defective because it failed to contain adequate warnings or instructions pursuant to paragraph (a)(i)2 of this section, the manufacturer or seller shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller, the manufacturer or seller knew or in light of reasonably available knowledge should have known about the danger that caused the damage for which recovery is sought and that the ordinary user or consumer would not realize its dangerous condition.

Id.

27. MISS. CODE ANN. § 11-1-63(c)(i) (Supp. 1995). The Act defines an adequate warning or construction as one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates sufficient information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to an ordinary consumer who purchases the product; or in the case of a prescription drug, medical device or other product that is intended to be used only under the supervision of a physician or other licensed professional person, taking into account the characteristics of, and the ordinary knowledge common to, a physician or other licensed professional who prescribes the drug, device or other product.

Id.

process or otherwise occur while the product is in the chain of distribution before delivery to the user or consumer.²⁸ The manufacturer or seller is liable for any material deviation in the product that exists at the time the product left the control of the manufacturer or seller. Since the liability for a deviation defect is strict under the Act, there is no change in the law as to this type of defect.²⁹

The Act also makes the manufacturer or seller strictly liable for the breach of an express warranty or for the product's failure to conform to express factual representations made to the consumer or user when he has justifiably relied upon the warranty or representation.³⁰ The inclusion of express breach of warranty within products liability law, rather than the application of the traditional rules of the Uniform Commercial Code, represents a departure from prior law.³¹ The requirement that the claimant prove justifiable reliance may also represent a departure from prior law.³²

2. Interests Protected

If literally interpreted by the courts, the Act may have far reaching effects on the interests protected that the legislature may not have fully intended or anticipated.³³ The Act provides that its terms govern any claim for damage against a manufacturer or seller caused by a product, except claims for commercial damage to the product itself.³⁴ Thus, in addition to the right to recover damages for physical harm to person or property, the Act appears to cover pure economic loss claims. Traditionally, warranty law and contract law, rather than tort law, cover pure economic loss claims.³⁵ Where a claim involves either personal injury or damage to other property, plaintiffs may also claim out of pocket losses and consequential damages.³⁶ By its language, the Act appears to eliminate claims for property damages or pure economic loss when the product is not unreasonably dangerous to the user or consumer as opposed to bystanders or property. The elimination of such claims represents a dramatic departure from the law of products liability and the law of warranty.³⁷

28. MISS. CODE ANN. § 11-1-63(a)(i)1 (Supp. 1995). The Act states that a product is defective if "it deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured to the same manufacturing specifications." *Id.*

29. Section 402A does not categorize defects by type. Section 402A, *supra* note 5. However, courts and commentators have done so in applying Section 402A. Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 659 (1995). The traditional categories have been design defects, manufacturing defects and warnings defects. *Id.* Under Section 402A courts have applied strict liability to design and manufacturing defects, but have treated warnings cases more like traditional negligence cases. 1 MADDEN, *supra* note 25, § 10.3.

30. MISS. CODE ANN. § 11-1-63(a)(i)4 (Supp. 1995). The Act provided that the manufacturer or seller is liable for injuries caused by a product when "[t]he product breached an express warranty or failed to conform to other express factual representations upon which the claimant justifiably relied in electing to use the product." *Id.*

31. *See generally* MISS. CODE ANN. §§ 75-2-313, 75-2-318, 75-2-714 (1972), 75-2-715 (Supp. 1995). *But see* Harges, *supra* note 2, at 729.

32. *See* JEFFREY D. WITTENBERG, PRODUCTS LIABILITY: THE LAW IN MISSISSIPPI § 3-3 (1982); Harges, *supra* note 2, at 725.

33. *See infra* text accompanying notes 294-328.

34. MISS. CODE ANN. § 11-1-63 (Supp. 1995). The Act provides the basis for "any action for damages caused by a product, except for commercial damages to the product itself." *Id.*

35. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 95, 101 (5th ed. 1984) [hereinafter PROSSER & KEETON].

36. 2 MADDEN, *supra* note 25, § 22.1, at 308.

37. *See infra* text accompanying notes 303-323. *But see* Harges, *supra* note 2, at 729, 732.

3. Punitive Damages

In addition, the 1993 tort reform legislation made changes to the law regarding punitive damages, including specific rules pertaining to product liability claims.³⁸ In particular, the new punitive damage statute restricts claims for punitive damages against nonmanufacturer sellers to cases involving the active creation by the seller of the dangerous condition that caused the claimant's injury where the seller acted maliciously, fraudulently, or with willful, wanton or reckless disregard for the safety of others.³⁹

4. Defenses

Under the traditional common law of Mississippi, assumption of the risk was a complete bar to a strict products liability claim,⁴⁰ although courts have rarely applied it.⁴¹ The Act codifies the doctrine as a complete bar to a products liability claim.⁴² The Act also makes "open and obvious danger" a complete defense to claims arising from failure to warn.⁴³ In addition, it appears to make "open and obvious danger" a complete defense to design defect claims as well.⁴⁴ The reestablishment of the "patent danger" rule represents a departure from recent pronouncements by the Mississippi Supreme Court.⁴⁵ The Act also provides that it does not eliminate any common law defense applicable to a products liability claim.⁴⁶

38. See MISS. CODE ANN. § 11-1-65 (Supp. 1995). For a discussion of the changes made by the 1993 legislation to the law of punitive damages see Harges, *supra* note 2, at 737-44.

39. See MISS. CODE ANN. § 11-1-65 (Supp. 1995). See *infra* text accompanying notes 331-34.

40. See *Nichols v. Western Auto Supply Co.*, 477 So. 2d 261, 264 (Miss. 1985). However, in the recent case of *Horton v. American Tobacco Co.*, 667 So. 2d 1289 (Miss. 1995), a majority of the court indicated that the doctrine of assumption of the risk should be encompassed by Mississippi's comparative fault doctrine. See *id.* at 1293 (plurality opinion by Banks, J.), 1305 (Dan Lee, J., concurring in part, joined by Sullivan, Pittman, and McRae, JJ.).

41. *Richardson v. Clayton & Lambert Mfg. Co.*, 63 F. Supp. 1480 (N.D. Miss. 1987); *Yarbrough v. Phipps*, 285 So. 2d 788, 790 (Miss. 1973).

42. MISS. CODE ANN. § 11-1-63(d) (Supp. 1995). The Act provides:

In any action alleging that a product is defective pursuant to paragraph (a) of this section, the manufacturer or seller shall not be liable if the claimant (i) had knowledge of a condition of the product that was inconsistent with his safety; (ii) appreciated the danger in the condition; and (iii) deliberately and voluntarily chose to expose himself to the danger in such a manner to register assent on the continuance of the dangerous condition.

Id.

43. MISS. CODE ANN. § 11-1-63(e) (Supp. 1995). The Act provides:

In any action alleging that a product is defective pursuant to paragraph (a)(i)2 of this section, the manufacturer or seller shall not be liable if the danger posed by the product is known or is open and obvious to the user or consumer of the product, or should have been known or open and obvious to the user or consumer of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons who ordinarily use or consume the product.

Id.

44. MISS. CODE ANN. § 11-1-63(f)(ii) (Supp. 1995). In order to prove a design defect, among other things, the plaintiff must prove that the product failed to perform as expected. *Id.* Thus, where a defect is open and obvious, the consumer would expect the product to function in a manner consistent with the defect.

45. See *Materials Transp. Co. v. Newman*, 656 So. 2d 1199, 1202 (Miss. 1995); *Tharp v. Bunge Corp.*, 641 So. 2d 20, 25 (Miss. 1994); and *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 256 n.4 (Miss. 1993).

46. MISS. CODE ANN. § 11-1-63(h) (Supp. 1995). The Act provides: "Nothing in this section shall be construed to eliminate any common law defense to an action for damages caused by a product." *Id.* While the Mississippi Supreme Court has never explicitly ruled that contributory negligence may be used as a defense to reduce the plaintiff's recovery in a strict products liability claim, most likely the court would find that comparative fault rules are applicable in such a case. See *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 290 (5th Cir. 1975). See also Harges, *supra* note 2, at 746-47. Misuse is also a common law defense in a products liability case. *Materials Transp. Co. v. Newman*, 656 So. 2d 1199, 1202 (Miss. 1995).

5. Indemnity

The Act sets forth the right of a nonmanufacturer-seller to claim indemnity from the manufacturer for litigation costs, reasonable expenses including attorney's fees, and damages awarded against the seller in a products liability claim.⁴⁷ However, the seller is not entitled to indemnity if the seller played a significant role in the design or manufacture of the aspect of the product that caused the damage, or altered the product in such a way that the alteration was a significant causal factor of the injury, or had knowledge of the defect, or made an express factual representation about that aspect of the product that caused the injury.⁴⁸ The seller must give prompt notice of the suit within thirty days of the filing of the complaint against the seller in order to maintain a claim for indemnity.⁴⁹

D. The Scope of This Article

This Article will explore, in two parts, the meaning and effect of the changes wrought by the new legislation and make suggestions for improvement or corrections to the legislation. *Part I* of this Article will address the threshold issues of what a product is, who is liable, who may sue, what interests are protected, and what the term "unreasonably dangerous" means. *Part II* will explore the categories of defects created by the Act, the liability of manufacturers and sellers for the various categories of defects, defenses available to products liability claims, and indemnity claims for sellers.

II. TERMS OF ART USED IN THE STATUTE

The Mississippi Products Liability Act of 1993 addresses the liability of manufacturers and sellers for damages to claimants caused by defective products that are unreasonably dangerous. The Act does not define the terms "product," "manufacturer," "seller," "claimant," or "unreasonably dangerous," yet each of the terms is important to the proper understanding and application of the Act. Since the legislature chose not to define these terms, the courts will likely interpret the terms in a manner that is consistent with the use of these terms in the common law of products liability in Mississippi. To the extent that the courts have not defined the terms through the existing case law, the courts must develop the definitions as cases arise, absent further legislative action to provide such definitions.

47. MISS. CODE ANN. § 11-1-63(g)(ii) (Supp. 1995). The Act provides:

The manufacturer of a product who is found liable for a defective product pursuant to Section 1(a) shall indemnify a product seller for the costs of litigation, any reasonable expenses, reasonable attorney's fees and any damages awarded by the trier of fact unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller had actual knowledge of the defective condition of the product at the time he supplied same; or the seller made an express factual representation about the aspect of the product which caused the harm for which recovery of damages is sought.

Id.

48. *Id.*

49. MISS. CODE ANN. § 11-1-63(g)(ii) (Supp. 1995).

A. What Is a Product?

Because the Act does not define the term "product," one must look to the common law of Mississippi to understand the term. However, the case law of Mississippi does not provide a comprehensive definition of the term. The Mississippi Supreme Court, like most courts, has shaped the concept of product on a case-by-case basis⁵⁰ and has not had occasion to comprehensively define the limits of the concept of product. Section 402A of the Restatement (Second) of Torts,⁵¹ which has been the source of much of the products liability law in Mississippi,⁵² also does not define the term product.

In general, "products liability law concerns . . . chattels and personal property, and deals with alleged design, manufacturing and warnings defects in such personal property."⁵³ However, American courts have not developed a universally accepted definition of product.⁵⁴ As reflected by Tentative Draft No. 2 of the Restatement (Third) of Torts: Products Liability, the courts have not restricted the term to include only personal property.⁵⁵ The Tentative Draft defines a product as "something distributed commercially for use or consumption,"⁵⁶ further explaining that "[m]ost but not necessarily all products are tangible personal property; most have been subjected to processing and fabricating prior to entering the stream of commerce; and most pass through a commercial chain of distribution before ultimate use and consumption."⁵⁷

One area of particular concern in the judicially developed concept of product involves the status of chattels that become incorporated into improvements to real property. Initially, as shown by *State Stove Manufacturing Co. v. Hodges*,⁵⁸ the Mississippi Supreme Court considered items attached to improvements to real estate (fixtures) to be products for purposes of assessing the liability of manufacturers.⁵⁹ Later cases, however, seem to have reversed course and now exclude installed fixtures from the concept of product, based only upon a statute

50. 1A LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 5.09 (1995) [hereinafter FRUMER & FRIEDMAN].

51. Section 402A, *supra* note 5.

52. *See, e.g., State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss.), *cert. denied*, 386 U.S. 923 (1966).

53. 1A FRUMER & FRIEDMAN, *supra* note 50, § 5.09[1] (footnotes omitted). The Model Uniform Product Liability Act defines product as "any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce" excluding human tissue and organs, including blood products. MODEL UNIFORM PRODUCT LIABILITY ACT, § 102(C), 44 Fed. Reg. 62714, 62717 (Dep't. Commerce 1979) [hereinafter MODEL ACT].

54. 1A FRUMER & FRIEDMAN, *supra* note 50, § 5.02.

55. RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 4 cmts. b & e, reporters note, cmt. e (Tentative Draft No. 2, 1995) [hereinafter TENTATIVE DRAFT] (pointing out the more recent trend among courts to treat sellers of improved real property as product sellers in a number of circumstances, such as mass-produced housing, and prefabricated buildings).

56. *Id.* § 4.

57. *Id.* Human blood and tissue and services are excluded from coverage of the TENTATIVE DRAFT. *Id.* § 4(b)-(c). In the past, courts were reluctant to impose strict liability on sellers of improvements to real property. Some courts, however, have extended the concept of product to include strict liability to include improvements to real property. *See id.*, reporters note, cmt. e. However, the majority rule is that a product incorporated into an improvement to real property does not lose its identity as a product for purposes of liability to the seller. *Id.*

58. 189 So. 2d 113 (Miss.), *cert. denied*, 386 U.S. 912 (1966).

59. *State Stove*, 189 So. 2d 113.

of repose that sets the time limit for actions based on deficiencies in construction of improvements to real property,⁶⁰ but which does not address any particular theory of liability in setting the time limit.⁶¹

In the 1966 case of *State Stove*, the Mississippi Supreme Court adopted Section 402A of the Restatement (Second) of Torts, in part.⁶² The case involved a hot water heater in the plaintiffs' home that exploded causing damage to the home and personal property in it.⁶³ The homeowners sued the manufacturer of the water heater and the contractors who built the home.⁶⁴ The court found that the facts did not support imposition of liability in this case, but, nevertheless, announced the adoption of Section 402A as it applies "to . . . manufacturer[s] and to . . . contractor[s] who build . . . and sell house[s] with . . . product[s] in [them]."⁶⁵ The court clearly considered the water heater, a fixture or improvement to real property, to be a product. Thus, from *State Stove*, one would conclude the term product included fixtures.

In 1966 the legislature enacted a statute providing a time limit for bringing actions for damage caused by patent deficiencies in the construction or improvement of real property.⁶⁶ This statute of repose does not specify the causes of action, but merely provides a limitation on the time within which a plaintiff could bring an action for injury following acceptance of the construction.⁶⁷ Nevertheless, apparently from this statute, as subsequently amended,⁶⁸ a rule evolved in the Mississippi cases that suppliers of component parts incorporated into real property are not subject to strict products liability.⁶⁹ This evolution has occurred despite the fact that the statute does not adopt or impose a cause of action for deficiencies in improvements to real property and despite the declaration of the Mississippi Supreme Court in *State Stove* that strict liability would apply to manufacturers of products and builder-vendors of homes containing products, presumably including those products incorporated into real property as fixtures.

60. MISS. CODE ANN. § 15-1-41 (Supp. 1984).

61. See *infra* notes 80-94, 126-30 and accompanying text.

62. *State Stove*, 189 So. 2d at 118.

63. *Id.* at 114.

64. *Id.*

65. *Id.* at 118.

66. Act of June 15, 1966, S.B. 1652, 1966 Miss. Laws ch. 397 (current version at MISS. CODE ANN. § 15-1-41 (1995)). As enacted in 1966, the statute stated in pertinent part:

No action to recover damages for injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of any patent deficiency in the design, planning, supervision or observation of construction, or construction of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury except by prior written agreement to the contrary, may be brought against any person, firm or corporation performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than ten (10) years after the written acceptance of such construction by the owner pursuant to the performance or furnishing of such services and construction.

Id.

67. *Id.*

68. MISS. CODE ANN. § 15-1-41 (1955). As subsequently amended, the statute now provides that it applies to any deficiency, including latent ones, see *Deville Furniture Co. v. Jesco, Inc.*, 423 So. 2d 1337, 1340-41 (Miss. 1982); that it does not apply to claims for wrongful death; and that the limitations period is now "six (6) years after the written acceptance or actual occupancy or use, which ever occurs first." *Id.*

69. See *infra* text accompanying notes 81-100.

In 1973, in the case of *Hamilton Fixture Co. v. Anderson*,⁷⁰ without reference to the 1996 statute of repose, the court again applied products liability rules to a claim involving a fixture, specifically one involving defective component parts of a heating and air conditioning system installed in a new home.⁷¹ The humidifier, manufactured by the defendant and installed with the central air and heat system of the plaintiffs' home, malfunctioned and caused property damage to the home.⁷² The supreme court approved the trial court's instructions based on the theory of strict liability in tort and its refusal to give negligence instructions requested by the defendant. No one raised the issue of whether the humidifier was a product as opposed to an improvement to real property.⁷³

The following year, in the case of *Oliver v. City Builders, Inc.*,⁷⁴ the court held that a builder-vendor is not liable under strict liability in tort or under products liability law to remote purchasers of a permanent structure on real estate.⁷⁵ The plaintiffs were remote purchasers of a house that developed cracks in the floor and walls six months after their purchase.⁷⁶ They alleged that the cracks resulted from faulty construction by the defendant contractors.⁷⁷ Justice Smith, writing for the court, with five justices specially concurring,⁷⁸ distinguished the claim in *Oliver* from claims such as in *State Stove*, in part because *Oliver* was "not a case where injury or damage has been caused by a defective [sic] manufactured product installed in a building."⁷⁹ In other words, the claim involved defective workmanship in the construction of a permanent structure, not defective products used in the construction. *Oliver* supports the proposition that buildings or permanent improvements to real property are not products under Mississippi law, but that fixtures installed in a building are nevertheless products.⁸⁰

70. 285 So. 2d 744 (Miss. 1973).

71. *Id.* at 747.

72. *Id.* at 745-46.

73. The house was completed in 1965, and the damages occurred in 1966. *Id.* at 745. The opinion does not disclose the date the suit was filed, but presumably it was filed timely under either the general statute of limitations, MISS. CODE ANN. § 722 (1942) (current version at MISS. CODE ANN. § 15-1-49 (1995)) or the statute of repose, Act of June 15, 1966, S.B. 1652, 1966 Miss. Laws ch. 397 (current version at MISS. CODE ANN. § 15-1-41 (1995)). Thus, whether the claim was governed by the general statute of limitations or the statute of repose was not at issue.

74. 303 So. 2d 466 (Miss. 1974).

75. *Id.* at 469.

76. *Id.* at 466.

77. *Id.*

78. *Id.* A majority of the court specially concurred in order to express the opinion that Justice Smith's opinion tended to leave little room for an implied warranty between the builder-vendor of a home and the first purchaser. *Id.* The application of implied warranty as a basis of liability for claims by the first purchaser of a new home was affirmed in *Brown v. Elton Chalk, Inc.*, 358 So. 2d 721 (Miss. 1978). In *Keyes v. Guy Bailey Homes, Inc.*, 439 So. 2d 670 (Miss. 1983), the court extended the builder-vendor's liability and held that a builder-vendor of a home may be found liable to remote purchasers for negligence or the breach of implied warranty without privity. *Id.* at 671. *Brown* and *Keyes* were not treated as products liability cases.

79. *Oliver v. City Builders*, 303 So. 2d 466, 468 (Miss. 1974).

80. This approach is consistent with that taken by a majority of courts. See TENTATIVE DRAFT, *supra* note 55, § 4 reporter's note, cmt. e. See also *Brown v. Williams*, 504 So. 2d 1188 (Miss. 1987). In *Brown*, the plaintiff complained that a piece of equipment called an elevator, used in the process of setting casing on an oil well, was defective and that the manufacturer was strictly liable for plaintiff's injuries. *Id.* at 1189. The court, applying Section 402A, affirmed the chancellor's findings that the manufacturer did not negligently design or negligently manufacture the product and that the manufacturer did not breach any duty to warn. *Id.* at 1191-92. The court also found that the plaintiff did not make out his case to support a claim based in strict products liability. *Id.* The court, however, did not discuss whether the elevator was a product or an improvement to real property. In a later case, *Holifield v. Pitts Swabbing Co.*, 533 So. 2d 1112 (Miss. 1988), the court decided that a wellhead of an oil well is not a product. *Id.* at 1115.

In *Smith v. Fluor Corp.*,⁸¹ the plaintiff, an oil refinery worker, sought to recover for injuries received in an explosion at the refinery.⁸² The plaintiff alleged that the contractor who built the plant “negligently and defectively designed, manufactured and installed” the heat exchanger and associated pipes and valves.⁸³ The defendants contended that since the explosion and injuries occurred more than ten years after the construction of the plant and the installation of the heat exchanger, the claim was time-barred.⁸⁴ The court agreed, finding that the heat exchanger was an improvement to real property under the statute, thus the claim was untimely.⁸⁵ The court did not discuss whether the appropriate theory of recovery was products liability, breach of warranty, or general negligence, because the plaintiff brought the claim under a negligence theory only.⁸⁶

Prior to the 1988 case of *Moore v. Jesco, Inc.*,⁸⁷ the court had not indicated that products liability claims did not cover defective chattels incorporated into improvements to real property, although the statute of repose governing claims for improvements to real property did cover materials used in construction of such improvements. *Oliver* implied that the court would not treat a claim for defective workmanship in the construction of a permanent structure as a products liability claim, because the buildings are not products, although it would apply products liability rules to products installed in buildings.⁸⁸ *Fluor Corp.* decided that the statute of repose for claims involving defective improvements to real property protects manufacturers of products incorporated into real property as improvements.⁸⁹ However, in what is arguably a misapplication of the statute of repose, the court in *Moore* made a leap beyond *Fluor Corp.* and held that component parts of an improvement to real property are not subject to products liability claims.⁹⁰

In *Moore*, the plaintiffs were poultry farmers who bought a number of steel buildings for use as chicken houses.⁹¹ Two of the defendants designed the structures that a third defendant constructed.⁹² The plaintiffs alleged that the defendants had defectively designed, manufactured, and constructed the buildings and had failed to warn.⁹³ The plaintiffs brought the claims on alternative theories of negligence, strict liability, breach of contract, and breach of warranties.⁹⁴ From the facts set forth in the court’s opinion, the plaintiffs did not make allegations

81. 514 So. 2d 1227 (Miss. 1987).

82. *Id.* at 1228-29.

83. *Id.* at 1228.

84. *Id.* at 1229. The defendants relied on the Act of April 19, 1972, H.B. 144, 1972 Miss. Laws, ch. 350 (providing an applicable time period of 10 years) (current version at MISS. CODE ANN. § 15-1-41 (1995) (providing a 6 year time period)).

85. *Smith v. Fluor Corp.*, 514 So. 2d 1227, 1230-31 (Miss. 1987).

86. *Id.* at 1228.

87. 531 So. 2d 815 (Miss. 1988).

88. *Oliver v. City Builders, Inc.*, 303 So. 2d 466, 468 (Miss. 1974).

89. *Fluor Corp.*, 514 So. 2d at 1230-31.

90. *Moore*, 531 So. 2d at 817.

91. *Id.* at 816.

92. *Id.*

93. *Id.*

94. *Id.*

that component parts were defectively designed or manufactured.⁹⁵ Instead, they contended that the overall design was inadequate and that there was a lack of workmanship in the construction.⁹⁶ The defendants moved for summary judgment since the buildings had been completed and occupied for more than 10 years prior to the suit, and thus, the statute of repose barred the claims.⁹⁷ The circuit court agreed and granted summary judgment for the defendants.⁹⁸

On appeal, the plaintiffs contended that the statute of repose did not protect the defendants as suppliers and materialmen.⁹⁹ The court disagreed and, relying on *Fluor Corp.*, held that the statute of repose protects suppliers of materials for use in improvements to real property and that an action for strict liability will not lie because such component parts are not products.¹⁰⁰

The *Moore* opinion, which addressed the applicable theory of liability in dicta because a decision on the theory of liability was not necessary to the decision, appears to conflict with earlier decisions.¹⁰¹ Moreover, *Fluor Corp.*, upon which *Moore* relied, did not state a rule with respect to the applicable theories of liability for claims involving improvements to real property. *Fluor Corp.* only held that the statute of repose applies to items of property classified as improvements to real property,¹⁰² and thus, claims against manufacturers or suppliers involving such items are subject to the statute. The court in *Moore* never indicated whether the plaintiffs complained that the individually manufactured component parts were defective in design or manufacture. Absent a contention by the plaintiffs, the court had no need to reach the issue of whether a plaintiff may bring a products liability claim against the manufacturer or seller of a component part used in the construction of an improvement to real property. Under the rule of *Fluor Corp.*, the court could apply the statute of repose to suppliers of component parts incorporated into an improvement to real property without limiting the theory of liability to negligence or breach of warranty.

If *Moore* truly bars plaintiffs from bringing products liability claims against suppliers of defective products incorporated into improvements to real property, the court has overruled *State Stove* in part because, under that case, strict products liability applied to fixtures.¹⁰³ If a water heater attached to the plumbing of

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 815.

99. *Id.* at 817.

100. *Id.*

101. *But see Wolfe v. Dal-Tile Corp.* 876 F. Supp. 116, 121 n.5 (S.D. Miss. 1995) (considering this rule to be a holding and not dicta, even though the holding was not necessary).

102. *Smith v. Fluor Corp.*, 514 So. 2d 1227, 1230 (Miss. 1987). Whether *Fluor Corp.* is a correct application of the statute of repose to suppliers is debatable as well. It is beyond the scope of this Article to fully explore the application of the statute of repose to protect manufacturers and sellers of items incorporated into improvements to real property, but one could easily conclude that such defendants are outside the scope of the statute. *See Grain Dealers Mut. Ins. Co., Inc. v. Chief Indus., Inc.*, 612 F. Supp. 1179 (N.D. Ind. 1985) (refusing to apply IND. CODE ANN. § 34-4-20-2 (Burns 1986), a statute of repose substantially the same in the scope of its protection as that of Mississippi, to a claim against a manufacturer of an item incorporated into an improvement to real property).

103. *See Wolfe v. Dal-Tile*, 876 F. Supp. 116, 121 n. 5 (S.D. Miss. 1995) (expressing doubt that the *Moore* court intended to make such a departure from the well-settled case law of Mississippi allowing claims against fixture manufacturers, and recognizing that the statute of repose does not compel such a result, but nevertheless following the *Moore* rule).

a house, such as in *State Stove*,¹⁰⁴ is a fixture and an improvement to real property, then under the reasoning of *Moore*, strict products liability is not applicable because the water heater is not a product, whether the defendant is the manufacturer, wholesaler, or builder-vendor.

The *Moore* court, without engaging in any analysis of the policy underlying its decision, abolished strict products liability for a wide range of products that become fixtures incorporated into buildings and other real property, even as to the manufacturers and sellers of those products who sold the products as chattels.¹⁰⁵ The opinion provides no insight as to the basis for the distinction between products and component parts incorporated into improvements to real property, particularly in determining the appropriate theory upon which to base a claim. The opinion fails to articulate any basis for concluding that the statute of repose in any way requires that a plaintiff's cause of action for injury caused by component parts of a building must be based only in negligence or warranty and bars the application of products liability theory to component parts after incorporation.

The lack of support for a conclusion that the statute of repose imposes a particular theory of liability can be demonstrated by the approach of other courts to the issue of which theories of liability are applicable to claims arising from the defective construction of buildings. Although courts have traditionally not imposed strict products liability rules on sellers of real estate,¹⁰⁶ some courts in other jurisdictions have treated buildings as products in the context of mass-produced homes¹⁰⁷ or prefabricated buildings.¹⁰⁸ Several other courts have treated other types of permanent improvements as products as well.¹⁰⁹ Nothing in the statute of repose dictates the theory of liability underlying a claim or bars Mississippi courts from considering permanent improvements to real property to be subject to the rules of products liability. Whether products liability rules should apply to buildings and fixtures or attachments should be decided on the basis of the policy underlying the purpose of products liability rules,¹¹⁰ not on the basis of a statute that neither expressly nor implicitly addresses the applicable theory or theories of liability.

104. *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss.), cert. denied, 386 U.S. 912 (1966). In *State Stove*, the court applied strict products liability rules to determine liability in a claim alleging that a defective water heater installed by the builder-vendor in the home purchased by the plaintiffs. *Id.*

105. Compare *Moore* with *Ferguson v. Modern Farm Sys., Inc.*, 555 N.E.2d 1379 (Ind. Ct. App. 1990). In *Ferguson*, the court treated a prefabricated ladder attached to a grain bin as a product, declining to apply the statute of repose for improvements to real property to bar the complaint. *Id.* The statute of repose involved, IND. CODE ANN. § 34-4-20-2 (Burns 1986), is essentially the same as Mississippi's. The Indiana court did not view the statute of repose as taking component parts manufactured for incorporation into real property out of the purview of products liability rules for defects in the product as manufactured. *Ferguson*, 555 N.E.2d at 1379.

106. TENTATIVE DRAFT, *supra* note 55, § 4 reporter's note cmt. e.

107. See, e.g., *Kreigler v. Eichler Homes, Inc.*, 74 Cal. Rptr. 749 (Cal. Ct. App. 1969), and *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314 (N.J. 1965).

108. See, e.g., *Bastian v. Wausas Homes, Inc.*, 620 F. Supp. 947 (N.D. Ill. 1985) (applying Illinois law).

109. See, e.g., *Patitucci v. Drelich*, 379 A.2d 297, 298 (N.J. Super. Ct. Law Div. 1977).

110. See *Trent v. Brasch Mfg. Co.*, 477 N.E.2d 1312, 1315 (Ill. Ct. App. 1985) (distinguishing, based on policy considerations, between a house, not a product, and attachments to it such as a heating and air conditioning system, a product).

The rule stated in *Moore* is a *non sequitur* to the extent that the rule is based either on the statute of repose or *Fluor Corp.*. The statute's exemption of wrongful death actions from the limitation further supports the view that the application of the statute of repose to manufacturers of component parts is a separate issue from the appropriate theory of recovery.¹¹¹ The *Moore* court seemed persuaded that because the statute is broad enough to cover claims against manufacturers and suppliers of component parts or fixtures installed in improvements to real property, such items cannot be considered products in determining the appropriate theory of liability. However, since the statute does not expressly govern wrongful death claims,¹¹² the question of how to treat such items in a wrongful death claim remains open. The exemption calls into serious question an interpretation that requires the imposition of a particular theory of liability by the statute. The statute and the prior cases simply do not support the court's conclusion that manufactured items that are fixtures or that are incorporated into improvements to real property are not products.¹¹³

Application of the *Moore* rule may lead to anomalous results. For example, a defective light fixture used in a recreational mobile home or camper would qualify as a defective product. If the plaintiff can show mismanufacture, the liability would be strict for the manufacturer and sellers of the fixture and of the vehicle.¹¹⁴ However, if the same defective fixture were permanently attached to the ceiling or wall of a house, strict products liability would not apply since the fixture would not be a product because it is an improvement to real property.¹¹⁵

While a fixture might be an improvement to real property for purposes of the statute of repose in claims against builders and designers of improvements to real property, the court should, nevertheless, treat a fixture as a product in determining the theory of liability against fixture manufacturers and sellers.¹¹⁶ The results of an artificial distinction between fixtures and products are inconsistent with the concepts and policies behind the strict liability theory adopted by Mississippi under the common law to the extent that it is retained under the Act.

In *State Stove*, the court had no problem in applying strict liability to manufacturers of fixtures for damages caused by defects in such fixtures, though attached to an improvement to real property.¹¹⁷ The court cited the seminal case recogniz-

111. MISS. CODE ANN. § 15-1-41 (1995).

112. *Id.*

113. In *Phipps v. Irby Construction Co.*, 636 So. 2d 353 (Miss. 1993), the court held that § 15-1-41 did not violate equal protection in exempting wrongful death actions from the statute of repose's time limits. Justice McRae, in dissenting, argued that a worker exposed to asbestos in a building would be barred by the statute of repose if the injury occurred and suit brought after the statutory period had passed, but a worker exposed to asbestos on a ship would not be affected by the statute of repose. *Id.* at 364. Whether this argument is successful in showing that the statute violates equal protection, the illustration does show the lack of principled distinction between the two cases without more careful analysis of the policy underlying the distinction.

114. See MISS. CODE ANN. § 11-1-63(a) (Supp. 1995).

115. *Cf.* *Phipps v. Irby Construction Co.*, 636 So. 2d 353, 354 (Miss. 1993) (citing a number of cases from other jurisdictions finding various pieces of machinery to be improvements to real property).

116. The majority rule in the United States is that a manufacturer of a product is liable for damages caused by a defect in the product even if the product is incorporated into an improvement to real property. TENTATIVE DRAFT, *supra* note 55, § 4 reporter's note cmt. e.

117. *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss.), *cert. denied*, 386 U.S. 912 (1966).

ing strict liability for manufacturers of products, *Greenman v. Yuba Power Products, Inc.*,¹¹⁸ in support of its decision to adopt Section 402A.¹¹⁹ In particular, the *State Stove* court relied on the language of *Greenman* that “[t]he purpose of such liability is to insure that the costs of injuries are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”¹²⁰ The reporters for the Tentative Draft have pointed out that as to manufacturing (or deviation) defects, several reasons have been advanced for the imposition of strict liability: (1) the difficulty of proving the existence of negligence of the manufacturer; (2) the disappointment of reasonable expectations of the product’s performance; and (3) the distribution of the burden of unavoidable loss through pricing mechanisms.¹²¹

The policies which underlie the imposition of strict liability for deviation defects in chattels generally apply equally to mass-manufactured fixtures. No reasoned basis for a distinction as to the theory of liability of the fixture manufacturer or seller exists simply because the fixture is incorporated into a chattel as opposed to a house. The defective fixtures are likely to be mass-manufactured and to cause loss of the same degree or worse as other items treated as products. The consumer’s expectations are not likely to be less than they are for other products, and proof of deviation defects is not likely to be any easier. The classification of an item as a fixture will not likely affect the distribution of losses in any significant way through the pricing mechanism. The new Act continues to require strict liability for deviation defects.¹²² Protection of manufacturers of mass-manufactured fixtures from strict liability simply on the basis of incorporation into an improvement to real property does not seem to rest on the promotion of any rational policy, and the statute of repose does not compel such a result.¹²³

Arguments certainly exist that those who construct improvements to real property and those who design, supervise, or observe such construction should not be subject to strict products liability rules.¹²⁴ Builders who construct one building at a time do not easily compare to mass manufacturers of products. Costs are less predictable on a project by project basis than for mass-produced products.¹²⁵ Buildings are less likely to be standardized, and the owner who hires the contractor is likely to have significant influence in design and construction.¹²⁶ Quality

118. 377 P.2d 897 (Cal. 1962).

119. *State Stove*, 189 So. 2d at 120.

120. *Id.* at 120 (quoting *Greenman*, 377 P.2d at 900-901).

121. TENTATIVE DRAFT, *supra* note 55, § 1 cmt. a.

122. MISS. CODE ANN. § 11-1-63(a)(i)(1) (Supp. 1995).

123. *See Wolfe v. Dal-Tile*, 876 F. Supp. 116, 121 n.5 (S.D. Miss. 1995) (expressing doubt that the *Moore* court intended to make such a departure from the well-settled case law of Mississippi allowing claims against fixture manufacturers, and recognizing that the statute of repose does not compel such a result, but nevertheless following the *Moore* rule).

124. *See Edie Lindsay, Comment, Strict Liability and the Building Industry*, 33 EMORY L. J. 175, 197-200 (1984) (examining the differences between improvements to real property and mass-produced products). Some courts, however have applied strict liability to builders of mass-produced housing. *E.g.*, *Schipper v. Levit & Sons, Inc.*, 207 A.2d 314 (N.J. Sup. Ct. 1965) (applying strict liability to a mass-builder for injuries caused by a defectively designed water distribution system).

125. *Lindsay, supra* note 124, at 197-98.

126. *Id.* at 189-90.

control is more difficult because of the nature of construction.¹²⁷ Soil conditions vary from site to site.¹²⁸ The relationship between the contractor and architect hired to do the job is more in the nature of a service contract than is the typical purchase of a mass-produced product.¹²⁹

However, these arguments are not persuasive when applied to makers of mass-produced fixtures that are defective when the manufacturer places them into the stream of commerce.¹³⁰ Mass producers of fixtures are more like mass producers of manufactured products than like building contractors or architects. The policies of loss distribution through pricing, avoidance of undue difficulty of proof of defect, and avoidance of disappointment of reasonable consumer expectations apply equally to manufacturers of fixtures. The language of the statute of repose does not address these policies and nothing in the statute bars the application of strict liability to manufacturers of fixtures produced for incorporation into improvements to real property.¹³¹

The federal courts have followed *Moore* in protecting fixture manufacturers from products liability claims, both by applying the statute of repose to protect manufacturers from untimely claims and by refusing to apply strict products liability rules to them when the products have been incorporated into an improvement to real property. In *Trust Company Bank v. United States Gypsum Co.*,¹³² the Fifth Circuit recognized that the effect given by the Mississippi Supreme Court to the statute of repose is to protect manufacturers of materials incorporated into improvements to real property.¹³³ In *Wolfe v. Dal-Tile Corp.*,¹³⁴ the federal district court held that the statute of repose protected the manufacturer of floor tile used in an improvement to real property only if the supplier provided the design, planning, or construction of an improvement to real property.¹³⁵ The court went further and, while soundly criticizing *Moore*, nevertheless applied it to find that the manufacturer was not subject to strict liability because the floor tile upon which the plaintiff slipped and fell was not a product, but an improvement to real property.¹³⁶

The comments to the Tentative Draft No. 2 of the Restatement (Third) of Torts: Products Liability recognize that in recent years courts have treated builder-vendors, manufacturers, and distributors of fixtures and appliances contained in a home as product sellers subject to product liability claims, even if the product has otherwise become a fixture or attachment to the improvement to real proper-

127. *Id.* at 188-89.

128. *Id.* at 189.

129. See PROSSER & KEETON, *supra* note 35, § 104A, at 724.

130. Lindsay, *supra* note 124, at 180 n.29.

131. In actuality, the statute does not bar the application of strict liability to anyone involved in the construction process should the court decide to impose strict liability. The statute does not address theories of liability. However, under current Mississippi common law, negligence and breach of implied warranty are the appropriate theories for recovery for defects in construction created by the builder-vendor of improvements to real property. *Keyes v. Guy Bailey Homes, Inc.*, 439 So. 2d 670, 673 (Miss. 1983). Presumably the same theories would apply to sellers or suppliers of component parts incorporated into improvements.

132. 950 F.2d 1144 (5th Cir. 1992).

133. *Id.* at 1151.

134. 876 F. Supp. 116 (S.D. Miss. 1995).

135. *Id.* at 120-121.

136. *Id.* at 121 n.5.

ty.¹³⁷ The comments also recognize that some courts have considered a building itself as a product when built as part of a mass housing project.¹³⁸ Especially as to the treatment of fixtures, if Mississippi continues to follow the approach of *Moore*, it will be outside the mainstream of American products liability law.

Certainly not all states treat component parts incorporated into real property as products after the incorporation occurs. Indiana, for example, statutorily defined the term product to mean "any item or good that is personalty at the time it is conveyed by the seller to another party."¹³⁹ As pointed out by Frumer and Friedman, "it is clear that the [Indiana] product liability act would not apply to a house . . . nor would it be applicable . . . to a . . . window frame that might have been personalty when sold to the home . . . builder, but clearly would not be when the house was sold to the home buyer."¹⁴⁰ Nevertheless, an item that is a product before installation remains a product for liability purposes after installation as to a seller or manufacturer who sold the product prior to its installation.¹⁴¹

As noted, Mississippi, unlike Indiana and a number of other states with products liability statutes,¹⁴² did not define the term "product" in its Products Liability Act. Likewise Mississippi's statute of repose for claims arising from improvements to real property did not define "product" for the purpose of determining what theories of liability plaintiffs may use. The definition of "product" ought still to be an open question in Mississippi, to be resolved in appropriate cases properly presented, argued, and considered, rather than decided by dicta without analysis and by deference to a statute which on its face does not address the issue.¹⁴³ Since the legislature has seen fit to codify Mississippi products liability law, the preferable course is for the legislature to carefully define "product" by amendment. This author suggests that the definition should include manufactured chattels or goods, including chattels or goods that form component parts of or that are incorporated into another product or improvement to real property.¹⁴⁴

137. TENTATIVE DRAFT, *supra* note 55, § 4 cmt. e. See also *id.*, reporters note cmt. e ("The 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 a manufacturer or contractor may be strictly liable for any damages proximately caused by the defect.").

138. *Id.*

139. IND. CODE ANN. § 33-1-1.5.2 (Burns 1992).

140. 1A FRUMER & FRIEDMAN, *supra* note 50, § 5.09[2].

141. *Sapp v. Morton Bldgs., Inc.*, 973 F.2d 539 (7th Cir. 1992) (applying the Indiana Product Liability Act, IND. CODE § 33-1-52 (West 1991)); *Ferguson v. Modern Farm Sys., Inc.*, 555 N.E.2d 1379 (Ind. Ct. App. 1990).

142. See, e.g., LA. REV. STAT. ANN. § 9:2800.53(3) (West 1991) (defining product as "corporeal movable that is manufactured for placement into trade or commerce, including a product that forms a component part of or that is subsequently incorporated into another product or an immovable"); TENN. CODE ANN. § 29-28-102(5) (1980) (defining product as "any tangible object or goods produced").

143. It is beyond the scope of this Article to fully flesh out the definition of product and the relationship of products liability to real estate. State courts have reached varying results in dealing with the issue. See 1A FRUMER & FRIEDMAN, *supra* note 50, § 5.09[2]-[3]. In *Abdul-Warith v. Arthur G. McKee & Co.*, 488 F. Supp. 306, 312 (E.D. Pa. 1980), the court held that whether an item is a fixture and attached to real property is not determinative of whether the item is a product for purposes of Section 402A.

144. Cf. LA. REV. STAT. ANN. § 9:2800.53(3) (West 1991).

Other questions also remain in the law of Mississippi about the scope of the term "product" in products liability law. Courts are divided as to whether a live animal is a product for this purpose¹⁴⁵—an issue that the Mississippi Supreme Court has not yet addressed. Processing and distributing blood and blood products are clearly outside the scope of products liability rules because the legislature has designated such activities as services, not sales.¹⁴⁶ However, the statute does not cover other tissues from human¹⁴⁷ or animal sources¹⁴⁸ and the court has not yet resolved whether these items may be treated as products.¹⁴⁹ There can be little doubt that "product" includes manufactured chattels or manufactured items of personalty, but whether the concept of product extends beyond such items is still largely open in Mississippi.

B. Who is a Manufacturer?

The Act governs liability of manufacturers and sellers of defective products.¹⁵⁰ The specific mention of both manufacturer and seller is a departure from the language of Section 402A, which only pertains to commercial sellers, including manufacturers.¹⁵¹ Part II of this Article will explore more fully whether the distinction between manufacturers and sellers in the new statute has significance for purposes other than indemnification.¹⁵² Despite an evident intent to distinguish between manufacturers and sellers, the Act did not define the term "manufacturer."

Not until 1995 did the Mississippi Supreme Court define the term "manufacturer" for the purposes of strict liability under Section 402A. In *Scordino v. Hopeman Brothers, Inc.*,¹⁵³ the plaintiffs, employees of a shipbuilder, sued a subcontractor who installed asbestos wall paneling (manufactured by others) in a ship under construction.¹⁵⁴ The plaintiffs alleged that their exposure to asbestos dust during the installation of the paneling caused lung damage.¹⁵⁵ The plaintiffs

145. Compare *Beyer v. Aquarium Supply Co.*, 404 N.Y.S.2d 778 (N.Y. Sup. Ct. 1977) (applying strict products liability to hamsters) with *Anderson v. Farmers Hybrid Cos.*, 408 N.E.2d 1194 (Ill. App. Ct. 1980) (finding that a gilt, an unbred female pig, is not a product) and *Whitmer v. Schneble*, 331 N.E.2d 115 (Ill. App. Ct. 1975) (finding that a dog is not a product). See also TENTATIVE DRAFT, *supra* note 55, § 4 cmt. b.

146. MISS. CODE ANN. § 41-41-1 (1993).

147. Besides blood products, several states have excluded human tissue and organs from the application of products liability law. E.g., IDAHO CODE § 6-1402 (1990); LA. REV. STAT. ANN. § 9:2800.52(3) (West 1991). See also TENTATIVE DRAFT, *supra* note 55, § 4(c).

148. See, e.g., *Two Rivers Co. v. Curtis Breeding Serv.*, 624 F.2d 1242 (5th Cir. 1980), *cert. denied*, 450 U.S. 920 (1981) (holding that under Texas law, bull semen used for artificial insemination is not a product).

149. For discussion of various treatments given to books and other printed material and other situations arguably covered by products liability law, see 1A FRUMER & FRIEDMAN, *supra* note 50, § 5.02.

150. MISS. CODE ANN. § 11-1-63(a) (Supp. 1995).

151. Section 402A, *supra* note 5, cmt. f.

152. As PART II of this Article will suggest, in dealing with liability for various categories of defects, the distinction between the two categories of defendants identified in the statute may be important. For example, the statute appears to mean that a seller is liable only if it knew or should have known of a danger presented by a defect in design regardless of what the manufacturer knew or should have known. MISS. CODE ANN. § 11-1-63(f)(i) (Supp. 1995). Moreover, to the extent that indemnification is at issue, the classification of a party as seller or manufacturer is significant. MISS. CODE ANN. § 11-63-1(g) (Supp. 1995).

153. 662 So. 2d 640 (Miss. 1995).

154. *Id.* at 642, 645.

155. *Id.* at 642.

contended that the subcontractor was strictly liable as the seller of the paneling for failure to warn of the dangers from the installation.¹⁵⁶ In deciding that the subcontractor was not a seller because it merely supplied materials in connection with a service, the court also stated that "it necessarily follows that [the subcontractor] is not a manufacturer."¹⁵⁷ In reaching this conclusion, the court defined a manufacturer as one who "produces goods as a principal part of its business and sells them either directly or for resale to the consuming public."¹⁵⁸

In general, under the Act, and consistent with the definition in *Scordino*, and as widely understood elsewhere, one would expect a manufacturer to be the person or enterprise that fabricates, constructs, or assembles a product for introduction into the stream of commerce and is in the business of doing so.¹⁵⁹ For example, as used in the Model Act, "[t]he term encompasses those product sellers who initiate and carry out the process of production. It also includes manufacturers of component parts . . . and those product sellers who rebuild or remanufacture products for resale 'in like new' condition."¹⁶⁰ States that have statutorily defined the term "manufacturer" have tended to define the term as "the designer, fabricator, producer, compounder, processor, assembler, . . . constructor, maker, remanufacturer, rebuild, refurbisher, reconitioner of a product, or a person or entity which 'otherwise prepares' a product, prior to its sale to a user or consumer."¹⁶¹ Presumably, the Mississippi legislature did not intend to change the requirement that a "manufacturer" be one who is in the business of manufacturing, as opposed to the parishioner who bakes a cake for sale at the occasional church bake sale. There is no reason to believe that the legislature intended to depart from the traditional application of strict products liability as applied by the Mississippi Supreme Court to only commercial sellers and manufacturers.¹⁶²

While Section 402A used the term "seller" as an inclusive term for persons in the chain of distribution, "providing for the potential liability of manufacturers and assemblers of completed products was the *raison d'être* of strict liability and the Restatement (Second) of Torts Section 402A."¹⁶³ Initially, in adopting Section 402A, the Mississippi Supreme Court restricted its application to manufacturers and to those sellers who do more than simply pass along new products without inspection.¹⁶⁴ However, it appears that in subsequent cases the court abandoned the limitation bringing Mississippi fully in line with Section 402A so that sellers (including retailers and wholesalers) are liable strictly for defective

156. *Id.*

157. *Id.* at 645.

158. *Id.*

159. See RESTATEMENT (SECOND) OF TORTS § 395, cmt. b (quoted in *Scordino v. Hopeman Brothers, Inc.*, 662 So. 2d 640, 645 (Miss. 1995)); Section 402A, *supra* note 5, cmt. f; TENTATIVE DRAFT, *supra* note 55, § 1 cmt. c.

160. MODEL ACT, *supra* note 53, § 102(B).

161. 1A FRUMER & FRIEDMAN, *supra* note 50, § 5.05.

162. See Section 402A, *supra* note 5, cmt. f; TENTATIVE DRAFT, *supra* note 55, § 1 cmt. c (also retaining this concept).

163. 1A FRUMER & FRIEDMAN, *supra* note 50, § 5.05.

164. Compare *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss.), *cert. denied*, 386 U.S. 912 (1966) (contractor-seller found to be strictly liable in connection with the sale and installation of a defective water heater) with *Sam Shainberg Co. v. Barlow*, 258 So. 2d 242 (Miss. 1972) (shoe retailer who sold shoes without inspection found not to be strictly liable). See *infra* text accompanying notes 237-46.

products whether or not acting as a mere sales conduit under the law prior to the Act.¹⁶⁵

In most cases, determining who is a manufacturer does not present serious problems in the application of the Act. However, some unresolved problems remain. For instance, the proper application of the Act to a seller who sells products as his own, although he did not actually manufacture the product, is not immediately clear. Prior to *Scordino*, the court had dealt only once with the issue of whether such a defendant was a manufacturer for purposes of strict products liability claims. In *Coca Cola Bottling Co. v. Reeves*,¹⁶⁶ flying glass injured the plaintiff when a soft drink bottle broke after it fell from a defective cardboard carton.¹⁶⁷ The court treated the bottler of the soft drink as the manufacturer of the carton on the basis that the bottler distributed the carton as the bottler's own.¹⁶⁸ The court reached this result in an effort to impose liability on a seller without expressly overruling the rule set forth in *Sam Shainberg Co. v. Barlow*,¹⁶⁹ a decision that provided that nonmanufacturer sellers are not strictly liable under products liability theory for defective products.¹⁷⁰ Whether the new Act would lead to the same result is an open question.

A straightforward application of Section 402A renders unnecessary such a rule treating sellers as manufacturers because, under Section 402A, all commercial sellers, including nonmanufacturers, are strictly liable for product defects.¹⁷¹ The courts must decide in future cases whether the Act includes as manufacturers those sellers who market products as their own.¹⁷² The absence of any definition of the term "manufacturer" leaves the issue open.

The indemnity provision of the Act suggests an answer to the question of how to treat the seller who markets a product as his own.¹⁷³ If the seller who markets a product as his own is not liable as a manufacturer, with the exception of when the seller plays a role in design or preparing warnings, the new Act represents a departure from the prior law as established by *Reeves*. Under the Act, the seller is entitled to recover indemnity from the manufacturer for costs of litigation when the seller is found liable for a defective product unless "the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm."¹⁷⁴ Consistently with the Act, the

165. See *infra* text accompanying notes 247-64.

166. 486 So. 2d 374 (Miss. 1986).

167. *Id.* at 375.

168. *Id.* at 378. The court followed *Swift & Co. v. Hawkins*, 164 So. 231 (Miss. 1935) which held that one who markets a chattel as his own is treated as the manufacturer when the product causes injury through a defect, even if the product is manufactured by another. *Swift* at 232.

169. 258 So. 2d 242 (Miss. 1972).

170. *Id.* at 245 (Miss. 1972). The *Shainberg* court refused to extend the rule of strict products liability to wholesalers and retailers. *Id.* at 244. See *infra* text accompanying notes 237-67, regarding the liability of retailers and wholesalers for products liability claims.

171. Section 402A, *supra* note 5, cmt. f.

172. Compare RESTATEMENT (SECOND) OF TORTS § 400 (1965) (treating sellers as manufacturers when the product is marketed as the seller's own product) with the MODEL ACT, *supra* note 53, § 102(B) (treating a seller as a manufacturer "only to the extent that it designs, produces, makes, fabricates, constructs, or remanufactures the product before its sale").

173. MISS. CODE ANN. § 11-1-63(g)(i) (Supp. 1995).

174. *Id.*

court should treat the seller as a manufacturer to the extent that the seller exercised control over that aspect of design, warning, or marketing which caused the injury. However, merely marketing a product as the seller's own does not provide a sufficient basis to treat the seller as a manufacturer with respect to any difference in duties owed by a seller to the consumer or user.¹⁷⁵

With reference to component part manufacturers, the Act does not require a different result from the law prior to the Act. The general rule in the United States is that component part manufacturers are liable for defects in their products.¹⁷⁶ Mississippi has followed this approach as well. As shown by *Detroit Marine Engineering v. McRee*,¹⁷⁷ component part manufacturers are liable in Mississippi to the injured party for defects in component parts supplied to the final assembler. In *Detroit Marine*, the court affirmed a judgment against the manufacturer-supplier of a defective steering mechanism installed in a boat by the manufacturer of the boat.¹⁷⁸ The parties did not raise any issue as to the component part manufacturer's liability as a manufacturer.¹⁷⁹ Treating a component part manufacturer as liable for injuries caused by defects in the component part is proper and consistent with the policies underlying both the Act and Section 402A.¹⁸⁰

C. The Status of Design Professionals

In dealing with other defendants in a product liability claim, the court may face a problem in resolving the liability exposure of a manufacturer's employees, such as engineers who design products.¹⁸¹ An interesting problem could arise in this connection: Assume that a manufacturer distributes a product that presents a danger that cannot be designed out of the product without substantially impairing the product's usefulness. Under this scenario, a manufacturer is not liable if the

175. As will be discussed in PART II of this Article, the language of the statute suggests that there may be a difference between the manufacturer and the nonmanufacturer seller with respect to liability for design and warning.

176. 1A FRUMER & FRIEDMAN, *supra* note 50, §5.06. However, if the component part is altered or substantially modified before reaching the user or consumer, the component part manufacturer is not liable. See TENTATIVE DRAFT, *supra* note 55, § 4 reporter's note cmt. b.

177. 510 So. 2d 462 (Miss. 1987).

178. *Id.* at 471.

179. Although the validity of *Hamilton Fixture Co. v. Anderson*, 285 So. 2d 744 (Miss. 1973) is in doubt as to strict tort liability for fixtures in a permanent structure, that case also illustrates that component part manufacturers are liable to consumers for defects in their components.

180. The liability of the component part manufacturer and the final assembler may be different depending on the facts. For example, a component part manufacturer who makes a part according to the design specifications supplied by the assembler of the final product may be liable only if the component part manufacturer knew or should have known of the danger (and the other conditions pertaining to failure to function as expected and feasible alternative design are met). MISS. CODE ANN. § 11-1-63(f)(i)-(ii) (Supp. 1995). It may be that the assembler who supplied the specifications had greater knowledge and is thus liable if it knew or should have known of the danger and there was a feasible alternative design. Similarly, with respect to warnings, the component part manufacturer may be relieved of any duty to warn when it would be reasonable for a person in such a position to not supply a warning independently, but rely on the assembler to provide proper warnings and instructions. MISS. CODE ANN. § 11-1-63(c)(ii) (Supp. 1995).

181. As to subcontractors who supply materials in connection with services, see *supra* text accompanying notes 153-58.

ordinary person in the community would recognize the danger of the design.¹⁸² However, as to the professional engineer who designed the product, a question remains as to his liability if, under a general negligence standard, a reasonable person would not design the particular product even in the absence of alternative designs because the risk of harm is too great. The term "manufacturer" does not in the normal use of the word include professional engineers or other product designers employed by the manufacturer. Thus, theoretically, the court could apply a general negligence standard to the engineer and find liability, though the Act would prohibit such a finding against the employer-manufacturer.¹⁸³

On the other hand, the court could apply by analogy¹⁸⁴ the provision that protects manufacturers against liability for products that cannot be made safer, but there is no requirement that it do so. Such an approach would be consistent with the underlying policy adopted by the legislature to bar liability for products for which there is no alternative design available that would leave the product's utility intact. Thus, the manufacturer's design employees should not be liable in negligence for defects in products when the employer-manufacturer cannot be held liable independently.

D. Who is a Seller?

1. Commercial Sellers

In using both the terms "manufacturer" and "seller," the legislature presumably intended to give distinct meanings to each word. Certainly the term "seller" includes those in the chain of distribution such as nonmanufacturer wholesalers and retailers,¹⁸⁵ while the term "manufacturer" includes those involved in the design and manufacture of the product itself. At least in part, the purpose of the distinction lies in the provisions of the statute by which sellers may obtain indemnity from manufacturers,¹⁸⁶ creating a need to distinguish them. As will be discussed in *Part II* of this Article, the ambiguity of the language of the statute suggests that other distinctions may also exist.¹⁸⁷

As with the term "manufacturer," the Act does not define the term "seller." Nothing in the Act, however, suggests that the legislature intended the Act to

182. MISS. CODE ANN. § 11-1-63(b) (Supp. 1995). The Act provides that "[a] product is not defective in design or formulation if the harm for which the claimant seeks to recover compensatory damages was caused by an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and which is recognized by the ordinary person with the ordinary knowledge common to the community."

Id.

183. Design professionals such as engineers and architects are not generally subject to strict liability rules because they provide a service. However, they are subject to the laws of negligence. 1A FRUMER & FRIEDMAN, *supra* note 50, § 5.13.

184. *Cf.* J. L. Teel Co. v. Houston United Sales, Inc., 491 So. 2d 851 (Miss. 1986) (applying warranty provisions of the Uniform Commercial Code by analogy to commercial lessors).

185. Whether the term "sellers" in the Act included others in the chain of distributions such as commercial lessors or bailors remains to be determined. *See infra* text accompanying notes 225-27.

186. MISS. CODE ANN. § 11-1-63(g)(i) (Supp. 1995).

187. For example, the Act undoubtedly makes the seller strictly liable for deviation defects, but it contains ambiguity on the issue of liability for warning or design defects, suggesting that the seller is liable for such defects only if negligent. *Compare* MISS. CODE ANN. § 11-1-63(a)(i) with (c)(i), (d) (Supp. 1995).

alter the scope of the traditional application of products liability rules in order to reach beyond commercial sellers to include occasional sellers. The difference between Section 402A and the Act is that the Act distinguishes between manufacturers and nonmanufacturer sellers.¹⁸⁸ Section 402A¹⁸⁹ and the American Law Institute's Tentative Draft,¹⁹⁰ limit the meaning of "seller" to commercial sellers—those in the business of selling. As set forth in the comments to Section 402A, manufacturers, retailers, wholesalers, restaurant operators, and others in the chain of distribution of a product should be considered sellers under Section 402A because they are in the business of selling.¹⁹¹ Mississippi has previously followed the approach of restricting strict products liability to those in the business of manufacturing or selling the products involved in the claims, as reflected in the case of *Alley v. Praschak Machine Co.*¹⁹²

In *Alley*, the court refused to extend products liability rules to persons who engage in only isolated sales and who are not in the business of selling the product involved.¹⁹³ The seller in that case was only in the business of assembling the type of industrial machinery involved in the plaintiff's injury, not in purchasing and reselling such machinery, and sold the product only as an accommodation to the purchaser.¹⁹⁴ According to the court, one who made an isolated sale of a product solely to aid the purchaser's bookkeeping was not a seller for purposes of strict products liability.¹⁹⁵ Thus, the court recognized the principle that, under Section 402A as applied in Mississippi, occasional sellers are outside the coverage of the section. The court, however, has not yet developed a clear boundary between the occasional seller and one in the business of selling.¹⁹⁶

The *Alley* court relied on the earlier case of *Pridgett v. Jackson Iron & Metal Co.*¹⁹⁷ In *Pridgett*, one of the defendants manufactured garden tools and acquired paint in fifty-five gallon drums for use in painting the tools.¹⁹⁸ The company stored the empty paint drums outside until it had accumulated 25 to 100 drums and then sold the drums to a scrap metal dealer, the other defendant.¹⁹⁹ The scrap metal dealer in turn sold the drums primarily to steel mills for reprocessing and made occasional sales of drums to customers for use as industrial trash cans.²⁰⁰ An employee of a company that purchased drums for use as trash cans was injured when one of the drums he was attempting to cut into two

188. See *supra* note 187, regarding the effects of the distinction between manufacturers and sellers.

189. Section 402A, *supra* note 5, cmt. f.

190. TENTATIVE DRAFT, *supra* note 55, § 1 cmt. c.

191. Section 402A, *supra* note 5, cmt. f.

192. 366 So. 2d 661 (Miss. 1979).

193. *Id.* at 666.

194. *Id.* at 664, 666.

195. *Id.* at 666.

196. The occasional seller who sells outside the normal course of business, such as an occasional sale of surplus equipment by a business, is not subject to the rules governing products liability claims. Section 402A, *supra* note 5, cmt. f; TENTATIVE DRAFT, *supra* note 55, § 1 cmt. c. The determination of whether a seller is a commercial seller under the rule is generally a question of law for the court. TENTATIVE DRAFT, *supra* note 55, § 1 cmt. c.

197. *Pridgett v. Jackson Iron & Metal Co.*, 253 So. 2d 837 (Miss. 1971).

198. *Id.* at 839.

199. *Id.*

200. *Id.*

sections with an acetylene torch exploded.²⁰¹ In affirming the trial court's directed verdict for the defendants, the supreme court held that the garden tool manufacturer was not a "manufacturer" for purposes of strict products liability.²⁰² The fact that the garden tool manufacturer's principal business was making tools persuaded the court that it should not treat the company as a manufacturer in relation to the disposition of empty paint drums to a scrap metal dealer.²⁰³

While courts generally treat the matter of whether a defendant is in the business of selling as an issue of law,²⁰⁴ nevertheless, they must resolve the issue on a case-by-case basis. *Pridgett* presents an interesting illustration of when product sales that are incidental to the seller's business are deemed to be within the coverage of Section 402A or the Act. In *Pridgett*, the tool manufacturer's sales of used drums were incidental to its business and, while apparently infrequent, were periodic and routine.²⁰⁵ The court found that the incidental nature of the sales was insufficient to make the tool manufacturer a "manufacturer" (seller) for the purposes of Section 402A.²⁰⁶ In contrast, the scrap dealer was in the business of selling scrap to steel mills for reprocessing, but made occasional sales of drums for industrial trash cans to others.²⁰⁷ Apparently, the court considered such sales as subject to Section 402A, at least for warning purposes.²⁰⁸ The key for the court lay in the nature of the seller's primary business.²⁰⁹ However, the lines are not sharp between incidental sales that are covered, because the seller is in the business of selling, and those which are not.

2. Sellers of Used Products

The Mississippi Supreme Court has never directly addressed whether sellers of used products are subject to strict liability under 402A. The court has dealt with

201. *Id.*

202. *Id.* at 840.

203. *Id.* There is no question that the defendant tool maker did not manufacture the drums. However, the court actually seemed to be trying to decide whether the defendant could be classified as a commercial seller of drums for purposes of Section 402A. Because the tool maker did more than simply pass the product on without inspection, arguably *Sam Shainberg Co. v. Barlow*, 258 So. 2d 242 (Miss. 1972) (refusing to apply strict liability to retailers and wholesalers who are merely sales conduits) would not apply. Likewise, the court apparently treated the scrap dealer as subject to Section 402A, though it clearly did not manufacture the drums either. *Pridgett v. Jackson Iron and Metal Co.*, 253 So. 2d 837, 839 (Miss. 1991). The plaintiff's theory was that the scrap dealer knew or should have known of the danger of cutting into the drums with an acetylene torch, but failed to warn under Section 402A. *Id.* at 843. The scrap dealer was requested to provide drums that "looked good," were not rusty and had "both ends in them." *Id.* at 842. Thus, because the seller was required to inspect and select the drums to be sold to the buyer, the seller acted as more than a mere conduit. As with the tool maker, *Shainberg* would appear to be inapplicable. In any event, the court need not have gone so far in its decision with respect to the strict liability of sellers based on the occasional nature of the sales. The court found other bases for nonliability which were better grounded. In particular the court found that the product "was not being used for the purpose for which it was manufactured or in the manner in which the manufacturer intended for it to be used." *Id.* Thus, the sellers were not liable under strict products liability. The evidence demonstrated that the product was not defective and that no warning was necessary because the employer of the plaintiff was aware of the danger and had instructed his employee as to the proper method of cutting the drum in two, which, if followed, would have avoided the injury. *Id.* The court also noted that its research failed to disclose cases in other jurisdictions which held that sellers of used products were subject to strict products liability. *Id.* at 840-41. See *infra* text accompanying notes 210-223.

204. TENTATIVE DRAFT, *supra* note 55, § 1 cmt. c.

205. *Pridgett*, 253 So. 2d at 840.

206. *Id.* at 840.

207. *Id.*

208. See *id.* at 841-42.

209. *Id.*

only one case, *Pridgett v. Jackson Iron & Metal Co.*,²¹⁰ involving the sale of allegedly defective used products.²¹¹ However, the court decided the issue in favor of one of the defendant sellers because it was only an occasional seller of the products involved.²¹² As to the other defendant, the plaintiff failed to prove the product was unreasonably dangerous for its intended use.²¹³

The court did point out that its research did not reveal any cases holding that sellers of used products were strictly liable for injuries caused by product defects, except under the doctrines of implied or express warranty.²¹⁴ Although the court did not hold that used product sellers may not be held strictly liable in products liability, its reference to a lack of authority for such a position serves as a strong indication that used product sellers, at least passive ones,²¹⁵ are likely to escape the application of strict products liability.²¹⁶ In taking such a position, Mississippi would follow the approach generally taken in other jurisdictions.²¹⁷

However, with respect to used product sellers who repair, recondition, or modify the product that they sell, the result may be different.²¹⁸ As noted by one court, "[w]hen . . . the product has undergone extensive repair, inspection and testing at the hands of the seller prior to resale, the policy considerations behind our adoption of strict liability favor its application."²¹⁹ Courts are likely to treat a seller who reconditions used products as a manufacturer for purposes of products liability law.²²⁰

The legislature gave no hint in the new Act as to how the courts should apply its provisions to sellers of used products. The language of the Act, on its face, does not bar application of the Act to used product sellers. However, given the apparent intent of the legislature to restrict the scope of strict products liability,²²¹ and the generally accepted view that strict products liability is not applicable to used products sellers, it is unlikely that the legislature intended to include passive sellers of used products within the scope of the Act.

210. *Id.* at 840.

211. *Id.*

212. *Id.*

213. *Id.* at 841.

214. *Id.* at 840-41. Courts have generally not applied strict products liability rules to used product sellers because such sellers are not in the normal chain of direct distribution and are generally far removed from any communication with the manufacturer of the product. Moreover, the buyer's expectations of the product are generally less than for new products, and the courts desire to keep strict liability within reasonable bounds. 1 MADDEN, *supra* note 25, §§ 3.26, 6.20.

215. The defendants in *Pridgett* apparently did not make any repairs to or modifications in the product involved. *Pridgett v. Jackson Iron & Metal Co.*, 253 So. 2d 837, 840, 842 (Miss. 1971).

216. Other commentators take the view that *Pridgett* did hold that used product sellers are not strictly liable, giving a somewhat broader reading to the court's comments citing cases from other jurisdictions holding that used product sellers are not subject to strict liability. See Frank L. Maraist & Rhessa H. Barksdale, *Mississippi Products Liability—A Critical Analysis*, 43 MISS. L.J. 139, 151 (1972).

217. 1A FRUMER & FRIEDMAN, *supra* note 50, § 5.07(5) ("Generally, the merely passive dealer in used goods will not be potentially liable in strict liability because to hold otherwise would require a complete and radical alteration of the nature of the market for used products." (footnote omitted)).

218. 1A FRUMER & FRIEDMAN, *supra* note 50, § 5.07(5).

219. *Kodiak Elec. Ass'n v. DeLaval Turbine, Inc.*, 694 P.2d 150, 154 n.6 (Alaska 1984).

220. See *Gentile v. MacGregor Mfg. Co.*, 493 A.2d 647 (N.J. Super. Ct. Law Div. 1985).

221. As PART II of this Article will demonstrate, the legislature has moved products liability law away from strict liability in the areas of warnings and design and toward a theory which reflects a fault-based approach. See MISS. CODE ANN. § 11-1-63(c)(i), (f)(i) (Supp. 1995). But see Harges, *supra* note 2, at 712.

An anomaly will occur, however, if passive used product sellers are outside the coverage of the Act. Actions based on expressed or implied warranties would remain available to used products purchasers against sellers for damages caused by a defective product. In contrast, such actions will not be available to new product purchasers, other than for damage to the product itself.²²² With respect to used product sellers who repair or modify used products, if such sellers are treated as manufacturers under the Act, implied warranty will not be available to recover damages caused by such repaired or modified defective products.

General negligence theory may also provide a basis of liability for passive sellers of used products, such as when an automobile dealer fails to reasonably inspect a used automobile.²²³ Such a theory is no longer available against new product sellers in a claim for damages caused by a defective product. The Act does not appear to permit theories other than those set forth in the statute.

3. Commercial Lessors and Bailors

Less certain is the intent of the legislature with regard to others in the business of supplying products to the marketplace, but who are not strictly entering into contracts of sale. The Act does not expressly address the status of commercial lessors and bailors in the context of products liability claims. The court may face the issue of what rules to apply to commercial lessors, bailors, or others in the commercial chain of product distribution. If the term "seller" as used by the Act does not include lessors and bailors, the court must develop common law rules in appropriate cases because the legislation does not preempt the field.²²⁴

The Mississippi Supreme Court has never dealt with the issue of products liability for commercial lessors and bailors, and Section 402A did not use the terms "lessor" or "bailor" in its treatment of sellers. However, a majority of states have interpreted the term "seller" as used in Section 402A to include lessors and bailors.²²⁵ Other states expressly have included lessors and bailors in the definition of the term "seller" in products liability statutes.²²⁶ An express inclusion of commercial product distributors would serve to avoid confusion as to the nature of the liability of those in the chain of distribution of products. However, until the legislature amends the Act, the courts must determine what rules should apply.

222. See *infra* text accompanying notes 275-80 and 318-23. The implied warranty of merchantability applies to the sales of used goods in Mississippi. *Beck Enterprises, Inc. v. Hester*, 512 So. 2d 672, 676 (Miss. 1987).

223. E.g., *Patton v. McHone*, 822 S.W.2d 608 (Tenn. Ct. App. 1991).

224. See *Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581 (Del. 1976).

225. 1A FRUMER & FRIEDMAN, *supra* note 50, § 5.08[2]. Section 1 of the TENTATIVE DRAFT includes within the scope of responsibility for damages caused by defective products "[o]ne engaged in the business of selling or otherwise distributing products." TENTATIVE DRAFT, *supra* note 55, § 1(a). Commercial lessors, bailors, and promoters are among those who otherwise distribute and come within the ambit of the rules of products liability. *Id.* § 5(b).

226. E.g., TENN. CODE ANN. § 29-28-102(7) (1980); TEX. CIV. PRAC. & REM. CODE ANN. § 82.001(3) (Supp. 1995) (defining seller as "a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof"). One question that arises in this context is whether lessors and bailors of used products should be treated like sellers of used products rather than as new product sellers. The issue has not been adequately addressed by the courts or commentators.

If the court chooses to follow a narrow or literal interpretation of the term "seller" in the Act, excluding nonseller commercial distributors from the Act's coverage, one would expect the court to follow an approach to such distributors in products liability claims similar to the approach that it has taken in claims against lessors for breaches of implied warranties. In claims for breach of implied warranties by lessors, the court has applied the sales articles of the Mississippi Uniform Commercial Code²²⁷ by analogy to leases that are functionally equivalent to sales.²²⁸

In dealing with products liability claims against lessors and other nonseller distributors, the court could choose, for instance, to find that since commercial lessors and bailors place products into the stream of commerce, the rules of liability for defects in such products ought to follow the same principles applicable by statute to sellers.²²⁹ Although the Act does not expressly include nonseller commercial distributors, the court should treat them as sellers by analogy for the purposes of products liability. Thus, nonseller commercial distributors should be liable on the same grounds as commercial sellers, even though not strictly covered by the Act. The same policies that the Act promotes as to sellers apply equally to nonseller commercial distributors.²³⁰ Such an approach would best promote the policies that the legislature has chosen to implement in the field of products liability law and would promote consistency and predictability in the law of products liability.

On the other hand, if the court were to find that the legislature did not intend to include lessors and bailors, the court would be free to continue to find liability applying rules of implied warranty, as it did in *Thompson v. Reilly*.²³¹ In *Thompson*, a minor sustained injuries while she was using a defective washing machine on the premises of the defendant's self-service laundry.²³² The supreme court, reversing a directed verdict for the defendant, found an implied warranty of fitness for the machine's intended use and a prima facie case of liability against the owner of the laundry.²³³ Thus, under the law prior to the Act, plaintiffs could bring claims for personal injury against commercial lessors under the theory of implied warranty, much as plaintiffs could bring such claims against sellers.²³⁴

If the court were to exclude commercial lessors and bailors from the Act's coverage, whether by using a narrow interpretation of the term "seller" or by refusing to apply the Act by analogy, implied warranty would survive as a cause of action against such lessors and bailors much as an implied warranty apparently

227. MISS. CODE ANN. §§ 75-2-101 to -725 (1972 & Supp. 1995).

228. *J.L. Teel Co. v. Houston United Sales, Inc.*, 491 So. 2d 851 (Miss. 1986).

229. See 1A FRUMER & FRIEDMAN, *supra* note 50, § 5.08.

230. For example, a consumer who leases an automobile is likely to have at least as much, if not more, reliance on the lessor as he would have on the dealer with respect to the freedom of the product from latent defects. See 1 MADDEN, *supra* note 25, § 3.25. Commercial lessors are in the chain of distribution and marketing, and thus, should be treated similarly to those who are actually selling. See 1 MADDEN, *supra* note 25, § 6.17.

231. 211 So. 2d 537, 540 (Miss. 1968).

232. *Id.* at 538.

233. *Id.* at 540.

234. Cf. MISS. CODE ANN. §§ 75-2-314, 75-2-315 (1972).

survives against sellers of used products.²³⁵ In contrast, under the language of the Act, product sellers are no longer liable for damages for breach of implied warranty, other than commercial damages to the product itself, because such a breach is not one of the grounds for liability in a products liability case.²³⁶ All in all, the use of analogy better serves the policies underlying the Act which the legislature apparently is seeking to promote. Analogizing commercial leases and bailments to sales promotes unity, consistency, and stability of the law of products liability.

E. The Liability of the Nonmanufacturer-Seller

When the Mississippi Supreme Court first adopted Section 402A in *State Stove Manufacturing Co. v. Hodges*,²³⁷ it limited the application of strict liability for defective products to manufacturers and sellers who install products.²³⁸ In the 1972 case of *Sam Shainberg Co. v. Barlow*,²³⁹ the court refused to extend strict liability to retailers and wholesalers who act as mere sales conduits.²⁴⁰ Instead, the court held that retailers and wholesalers have no duty to inspect and discover latent defects in merchandise purchased from reputable manufacturers and sold in the original condition as received from the manufacturer.²⁴¹

Despite the fact that Section 402A clearly stated a rule of strict liability for commercial sellers, whether manufacturer, wholesaler, or retailer,²⁴² the court considered such liability for nonmanufacturer-sellers to be unreasonable, illogical, and impractical.²⁴³ In particular, the court felt that to apply strict liability to nonmanufacturer sellers of products with latent defects would unfairly make such sellers the guarantors or insurers of many thousands of products for which they were merely "sales conduits."²⁴⁴ In 1975, shortly after *Shainberg*, came *Parker v. Ford Motor Co.*,²⁴⁵ in which the court continued to apply the rule of *Shainberg*, and barred strict liability claims for latent defects against nonmanufacturer-sellers.²⁴⁶

235. See *supra* text accompanying notes 222-23.

236. MISS. CODE ANN. § 11-1-63(a)(i) (Supp. 1995).

237. 189 So. 2d 113 (Miss.), *cert. denied*, 386 U.S. 912 (1966).

238. *Id.* at 118. See *supra* text accompanying notes 247-60 (In more recent years the court apparently has broadened the application of Section 402A to sellers.).

239. 258 So. 2d 242 (Miss. 1972) (a suit arising out of injuries caused by the defective heel of a shoe purchased from a retailer).

240. *Id.* at 244-45.

241. *Id.*

242. Section 402A, *supra* note 5, cmt. f. Comment f states:

The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. . . . The basis for the rule is the ancient one of 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.

Id.

243. *Shainberg*, 258 So. 2d at 246.

244. *Id.*

245. 331 So. 2d 923 (Miss. 1976) (involving a latent defect in the steering mechanism of a truck purchased by the plaintiff from the defendant retailer).

246. *Id.* at 925.

The Mississippi Supreme Court did not revisit the issue of nonmanufacturer liability again until 1986 in the case of *Coca Cola Bottling Co. v. Reeves*.²⁴⁷ In *Reeves*, the court held that "one who sells or distributes as his own a product manufactured by another is subject to liability the same as though he were a manufacturer."²⁴⁸ In reaching this conclusion, the court discussed what had become the "oft criticized decision" in *Shainberg*.²⁴⁹ The court noted that it had not considered the issue of nonmanufacturer-seller liability for nearly a decade.²⁵⁰ Upon reexamination of *Shainberg*, Justice Robertson, writing for the majority, concluded that the *Shainberg* decision was "anomalous, if not irrational," noting that Section 402A imposed strict liability on anyone engaged in the business of selling,²⁵¹ that *Shainberg* relied on an embarrassing misreading of a section of a leading treatise on products liability law,²⁵² and was out of step with the intent behind Section 402A.²⁵³

Despite the language virtually disowning *Shainberg*, the court distinguished that case from *Reeves* and declined to overrule it.²⁵⁴ The court distinguished *Reeves* from *Shainberg* because of the identification of the product in *Reeves* with the seller and the consumer's reliance upon the seller whose insignia was on the product.²⁵⁵ In contrast, in *Shainberg*, the court stated that there was an assumption that the consumer relied only on the manufacturer for the safety of shoes purchased from a retailer.²⁵⁶ Thus, while casting great doubt on *Shainberg*'s vitality, the court did not explicitly overrule it. The precise issue has not yet presented itself to the court since *Reeves*. Certainly the refusal to extend strict liability to sellers under Section 402A was out of step with the intent of the section and with the interpretation given by other American courts.

In the recent case of *Scordino v. Hopeman Brothers, Inc.*,²⁵⁷ the court faced an issue of whether to treat a subcontractor who installed asbestos paneling in a ship as a seller for purposes of strict liability.²⁵⁸ The court stated that "the applicability of the strict liability doctrine depends upon, among other things, whether the defendant is a manufacturer or seller in the business of selling a defective product."²⁵⁹ The court clearly considered sellers to be strictly liable in Mississippi under Section 402A, apparently without the qualifications of the *Shainberg* Doctrine. However, the case is distinguishable from *Shainberg* because the

247. 486 So. 2d 374 (Miss. 1986).

248. *Id.* at 378 (citing *Swift & Co. v. Hawkins*, 164 So. 231, 232 (Miss. 1935); and *Lovelace v. Astra Trading Corp.*, 439 F. Supp. 753, 757 (S.D. Miss. 1977)).

249. *Reeves*, 486 So. 2d at 378.

250. *Id.* at 379 n.3.

251. *Id.* at 379. According to the *Reeves* court, the *Shainberg* decision was not in keeping with the era of strict liability imposed on those in the chain of product distribution and that it was not necessary to extend protection from strict liability to retailers because of the availability of indemnity. *Id.* at 379 n.4.

252. *Id.* at n.5. The treatise was LOUIS R. FRUMER & MELVIN I. FRIEDMAN, *PRODUCTS LIABILITY* § 18.01 (1970).

253. *Reeves*, 486 So. 2d at 379 n.4.

254. *Id.* at 379.

255. *Id.* at 379-80.

256. *Id.* at 380.

257. 662 So. 2d 640 (Miss. 1995).

258. *Id.* at 641-42.

259. *Id.* at 643.

defendant, even if it had been found to be a seller, was a subcontractor involved in the installation of the product as opposed to merely being a sales conduit.²⁶⁰ Thus, while it is likely that the *Shainberg* Doctrine is no longer valid because of the pronouncements of *Reeves* and *Scordino*, the Mississippi Supreme Court still has not yet explicitly sounded the doctrine's death knell.

The federal district courts sitting in Mississippi, however, have decided three cases involving the nature of liability by nonmanufacturer-sellers since the *Reeves* decision.²⁶¹ In all three cases the court held that *Reeves*, while not explicitly overruling *Shainberg*, nevertheless destroyed its precedential value.²⁶² In the view of the federal district courts, the Mississippi Supreme Court in *Reeves* fully adopted Section 402A,²⁶³ so that under the common law of Mississippi, retailers and wholesalers are strictly liable for injuries caused by defective products. This writer agrees that *Shainberg* no longer represents the law of Mississippi as it stood prior to the enactment of the new statute.²⁶⁴

Having concluded that Mississippi law after the *Reeves* decision imposed strict liability on wholesalers and retailers for defective products, including those with manufacturing or deviation defects, one must then determine what the law is under the new statute. Under the new Act, the seller is strictly liable for deviation defects created by the manufacturer, as well as for defects that occur in the product while in the chain of distribution under the seller's control or the control of a predecessor in the chain.²⁶⁵ While this does not apparently represent a departure from the law prior to the effective date of the new statute, at least as interpreted by the federal courts, it does clarify the liability of nonmanufacturer-sellers as to deviation defects. Such a result is consistent with the current draft version of the new Restatement.²⁶⁶ Part II of this Article will address the liability of the nonmanufacturer-seller as to design and warning defects which is less clear than the liability for deviation defects.²⁶⁷

260. *Id.* at 642.

261. *Butler v. R. J. Reynolds Tobacco Co.*, 815 F. Supp. 982 (S.D. Miss. 1993); *Curry v. Sile Distributors*, 727 F. Supp. 1052 (N.D. Miss. 1990); and *Bounds v. Joslyn Mfg. & Supply Co.*, 660 F. Supp. 1063 (S.D. Miss. 1986).

262. *Butler*, 815 F. Supp. at 985; *Curry*, 727 F. Supp. at 1054; and *Bounds*, 660 F. Supp. at 1066 n.5.

263. *See, e.g., Butler*, 815 F. Supp. at 985.

264. *See Harges*; *supra* note 2, at 768.

265. MISS. CODE ANN. § 11-1-63(a) (Supp. 1995) provides that

[t]he manufacturer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller. . . . [t]he product was defective because it deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured to the same manufacturing specifications.

(emphasis added). Moreover, the legislature apparently intended this to be the case since it provided for an expanded right of indemnity from the manufacturers, recognizing that the seller may be held liable for defective products. The right of indemnity will be discussed in PART II of this Article.

266. TENTATIVE DRAFT, *supra* note 55, §1. In contrast, the MODEL ACT, *supra* note 53, § 105, provides for nonmanufacturer-seller liability only in the event the plaintiff proves negligence by the seller, or breach of express warranty by the seller, or the manufacturer is essentially judgment proof.

267. The portions of the Act setting forth the proof requirements for warning defects or design defects appear to require proof that the seller knew or should have known of the danger created by the defect in order for the plaintiff to recover from the seller. *See* MISS. CODE ANN. § 11-1-63(c)(i), (f)(i) (Supp. 1995).

F. Claimants and Interests Protected by the Act

1. Overview of the Interests Covered by the Act and Prior Common Law

After the adoption of Section 402A in Mississippi, and prior to the effective date of the Act, a plaintiff could bring an action in Mississippi for physical damage to person or property caused by a defective product under the theory of strict products liability,²⁶⁸ negligence,²⁶⁹ or breach of warranty.²⁷⁰ As to the latter theory, the supreme court, in *Coca-Cola Bottling Co. v. Reeves*,²⁷¹ criticized the tendency to bring product liability claims via warranty actions as creating "unnecessary legal complications."²⁷² Despite this criticism, plaintiffs have continued to bring actions for damages to person or property caused by unreasonably dangerous defective products under a warranty theory.²⁷³ Plaintiffs could also bring claims under the prior law for pure economic loss caused by defective products under a breach of warranty theory.²⁷⁴

The new Act appears to have made dramatic, and even drastic, changes in the law of products liability with regard to the kinds of protected interests of the injured party, called "the claimant,"²⁷⁵ and the theories available to assert those interests. The language of the Act is inclusive, addressing "any action for damages caused by a product except for commercial damage to the product itself."²⁷⁶ The Act remains otherwise silent as to the specific kinds of injury or harm that the legislature intended to cover, except that the Act specifically excludes commercial damage to the product itself.²⁷⁷ Presumably, then, the Act provides the exclusive theories for asserting claims for personal injury, death, property dam-

268. See, e.g., *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss.), *cert. denied*, 386 U.S. 912 (1966).

269. See *Hamilton Fixture Co. v. Anderson*, 285 So. 2d 744 (Miss. 1973) (recognizing that the adoption of strict products liability did not exclude claims alternatively based on negligence).

270. See, e.g., *R. Clinton Constr. Co. v. Bryant & Reaves, Inc.*, 442 F. Supp. 838 (N.D. Miss. 1977) (involving a claim for consequential damages caused by defective antifreeze and based on breach of express warranty); *Wilmoth v. Peaster Tractor Co.*, 544 So. 2d 1384 (Miss. 1989) (involving a claim of breach of implied warranty based on allegations of a defective brake or park lock of a tractor).

271. 486 So. 2d 374 (Miss. 1986).

272. *Id.* at 384.

273. See, e.g., *Toney v. Kawasaki Heavy Indus., Ltd.*, 975 F.2d 162 (5th Cir. 1992) (applying Mississippi law to a claim against a motorcycle manufacturer); *Lloyd v. John Deere Co.*, 922 F.2d 1192 (5th Cir. 1992) (applying Mississippi law to a claim against a tractor manufacturer); and *Wilmoth v. Peaster Tractor Co.*, 544 So. 2d 1384 (Miss. 1989) (involving a claim for injury from an allegedly defective tractor). Jeffrey Wittenberg suggests that plaintiffs have continued to use warranty theory as a products liability vehicle because the elimination of privity, the prohibition of disclaimers of implied warranty, and the limitations on disclaimers of liability in the Mississippi version of the *Uniform Commercial Code* continue to make the theory attractive. WITTENBERG, *supra* note 32, § 3-2. Moreover, warranty theory supplied an available theory for the application of strict liability to sellers. WITTENBERG, *supra* note 32, § 3-6.

274. See WITTENBERG, *supra* note 32, § 3-4 (citing generally MISS. CODE ANN. §§ 75-1-106, 75-2-711, 75-2-715 (1972)). See also PROSSER & KEETON, *supra* note 35, § 95A at 680 ("The Uniform Commercial Code is generally regarded as the exclusive source for ascertaining when a seller is subject to liability for damages if the claim is based on intangible economic loss not attributable to physical injury to person or harm to a tangible thing other than the defective product itself").

275. MISS. CODE ANN. § 11-1-63(a) (Supp. 1995).

276. MISS. CODE ANN. § 11-1-63 (Supp. 1995).

277. *Id.* The Act does not define "commercial damage to the product itself," but presumably the language means that damages caused by the product that adversely affect the product's monetary value are not within the scope of the Act's coverage. *Id.* Thus, the product owner would have to seek a remedy in the law of warranty or contract.

age, and economic loss caused by a defective product, except where the damage involved is commercial damage to the product itself.²⁷⁸

The descriptive title of the enacted bill does not specifically mention actions for property damage or economic loss, though it does specifically refer to actions for personal injury and death.²⁷⁹ This omission from the descriptive title enacted raises a question as to the intended scope of the Act's coverage with respect to the interests protected. However, in light of the absence of any language in the Act itself restricting the kinds of interests subject to the Act, coverage appears to be broad, rather than narrow. Thus, the Act appears to govern all claims for damages to person or property, except for commercial damage to the product itself, caused by defective products.

The impact of the Act on the law of implied and express warranty is particularly striking. None of the categories or theories for asserting a claim for damages caused by a defective product include implied warranty. Thus, the Act apparently abolishes implied warranty as a theory of recovery for damages caused by a defective product, even if the loss is purely economic.²⁸⁰ The Act classifies breach of express warranty as a defect, but a claimant may recover only if the breach resulted in an unreasonably dangerous condition to the user or consumer and the claimant justifiably relied on the warranty.²⁸¹

2. Personal Injury to Consumers and Users

The language of the Act leaves no doubt that one who actually uses or consumes a product may bring a suit for deviation defect, design defect, warning defect, or breach of express warranty for personal injury or wrongful death.²⁸² The Act specifically requires that the claimant prove that the product was "unreasonably dangerous to the user or consumer."²⁸³ This language is similar to that of Section 402A in its requirement that the defective condition be unreasonably dangerous to the user or consumer.²⁸⁴ However, in a claim for breach of an express warranty the claimants must also prove justifiable reliance on the warranty in electing to use the product.²⁸⁵

278. MISS. CODE ANN. § 11-1-63(a)(i) (Supp. 1995). In creating the categories of defect, the Act provides:

(a) The manufacturer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller:

(i) 1. The product was defective because it deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured to the same manufacturing specifications, or

2. The product was defective because it failed to contain adequate warnings or instructions, or

3. The product was designed in a defective manner, or

4. The product breached an express warranty or failed to conform to other express factual representations upon which the claimant justifiably relied in electing to use the product

Id.

279. Act of Feb. 18, 1993, H.B. 1270, 1993 Miss. Laws ch. 302 (stating that the purpose of the Act is, among other things, "to provide that the manufacturer or seller shall not be liable in an action for damages for personal injury or death if the claimant does not prove certain facts about the product.").

280. *But see* Harges, *supra* note 2, at 729, 732.

281. *Id.* The justifiable reliance requirement is an apparent departure from prior law. *See* U.C.C. § 2-313, official cmt. 3; and WITTENBERG, *supra* note 32, § 3-3.

282. WITTENBERG, *supra* note 32, § 3-3.

283. MISS. CODE ANN. § 11-1-63(a)(ii) (Supp. 1995).

284. Section 402A, *supra* note 5.

285. MISS. CODE ANN. § 11-1-63(a)(i)(4) (Supp. 1995).

3. Personal Injury to Bystanders

With respect to negligence in general, liability extends to any foreseeable plaintiff.²⁸⁶ The Mississippi Supreme Court has adopted a similar approach with respect to strict liability claims. As shown by *Coca Cola Bottling Co. v. Reeves*,²⁸⁷ under the law of Mississippi prior to the effective date of the Act, a nonuser bystander injured by a defective product could make a products liability claim for injuries. In *Reeves*, the court held that “the duty imposed by Restatement § 402A to the extent that same has been incorporated into the positive law of this state exists in favor of anyone who may reasonably be expected to be in the vicinity of the product’s probable use and to be endangered by it if it is defective.”²⁸⁸ Thus, strict products liability under the law prior to the Act applies in cases involving foreseeable bystanders as well as consumers and users.²⁸⁹ The court supported its adoption of this rule with the observation that “[t]he justness of allowing bystanders to recover on a strict products liability theory is demonstrably greater than is the case with almost any other potential plaintiff, for the bystander is less able to avoid the accident than almost any other.”²⁹⁰ The court reaffirmed the position in *Hall v. Mississippi Chemical Express, Inc.*,²⁹¹ and *Swan v. I.P., Inc.*²⁹²

Like Section 402A, the new Act does not mention the status of bystanders as claimants in products liability actions. The Act’s wording does not require that the claimant in a products liability action be a user or consumer of the product causing injury in order to recover. The Act refers to “claimant” without designating the status of the claimant. Nevertheless, under the literal language of the Act, the bystander must prove that the product was unreasonably dangerous to the user or consumer as a prerequisite to recovery.²⁹³

The Act is silent as to whether the bystander must be foreseeable or not. However, since the overall purpose of the Act appears to be to limit or restrict the

286. PROSSER & KEETON, *supra* note 35, § 100, at 703. The case of *Rose v. Mercury Marine*, 483 So. 2d 1351 (Miss. 1986), represents an example of this rule in Mississippi. In *Rose*, the plaintiff was struck while he was swimming by a boat. *Id.* at 1351. He alleged that the boat manufacturer negligently designed the boat and was responsible for injuries when the propeller of the boat cut him. *Id.* at 1352. The court allowed the claim to go forward, without discussion of the bystander status of the plaintiff. *Id.*

287. 486 So. 2d 374 (Miss. 1986) (a soft drink bottle shattered when it fell from a defective cardboard carton injuring a bystander).

288. *Id.* at 378.

289. This rule is generally followed in other jurisdictions. PROSSER & KEETON, *supra* note 35, § 100 at, 704.

290. *Reeves*, 486 So. 2d at 378 n.2.

291. 528 So. 2d 796 (Miss. 1988) (involving an unsuccessful claim by an injured oil refinery worker against a truck manufacturer in connection with the accidental ignition of escaped hydrocarbons at the refinery).

292. 613 So. 2d 846 (Miss. 1993) (involving injuries to a school teacher from fumes given off by products used in reroofing the school where the teacher worked). The federal courts applying Mississippi law have also have allowed bystanders to bring strict products liability claims. *See Batts v. Tow-Motor Forklift Co.*, 978 F.2d 1386 (5th Cir. 1992) (involving a personal injury claim that was unsuccessful because of open and obvious danger when a forklift backed into a bystander); *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506 (5th Cir. 1984) (former shipyard worker sought damages against asbestos manufacturers and sellers for injuries received from exposure to asbestos products used in shipbuilding); *Lovelace v. Astra Trading Corp.*, 439 F. Supp. 753 (S.D. Miss. 1977) (involving a claim for fire damage to the plaintiff’s home caused by an allegedly defective hair dryer purchased by his wife and used by his son).

293. MISS. CODE ANN. § 11-1-63 (a)(ii) (Supp. 1995) (“The defective condition rendered the product unreasonably dangerous to the user or consumer.”). *See infra* text accompanying notes 362-67, regarding whether a product is unreasonably dangerous if the danger involved is to a bystander rather than the user or consumer.

exposure of sellers and manufacturers to liability claims, the legislature is unlikely to have intended to extend the liability for injuries to unforeseeable bystanders. The Act does not seem to require such an extension. To the extent that the Act leaves gaps in its coverage, the courts should continue to apply the common law rule limiting liability to cases involving foreseeable persons.

4. Property and Economic Interests Protected by the Act

The language of the Act creates serious questions as to the basis of claims for property damage and pure economic losses²⁹⁴ arising out of the use or consumption of a defective product. The Act does not explicitly limit its application to personal injury or death claims. Rather, the Act simply refers to "any action for damages caused by a product."²⁹⁵ Thus, the Act's inclusive coverage apparently extends to claims involving property damage or pure economic loss as well as personal injury and wrongful death.²⁹⁶ The exclusion of coverage for claims arising from commercial damage to the defective product itself also indicates that the legislature likely intended to include claims for property damage within the Act.²⁹⁷

If the legislature intended that the Act only pertain to physical injury to a consumer or user, the exclusion of claims for damage to the product itself, without also excluding other property damage claims, would be unnecessary. The exclusion of claims for damage caused by a defective product to itself is consistent with the rule in several jurisdictions. A number of courts treat damage to the product itself as an economic loss for which recovery is not available in tort.²⁹⁸ However, the legislature created unnecessary confusion because the descriptive title of the bill expressed an intent to cover only personal injury and death claims and the Act itself omits any reference to unreasonable danger to property.

Although the interests covered by the Act appear to be broad, nevertheless, the Act does not provide a remedy for every harm caused by a defective product. The Act appears to limit claims to those involving products that pose unreasonable danger only to a user or consumer, as opposed to danger only to property.²⁹⁹ In contrast, Section 402A specifically included claims for products that are unreasonably dangerous to property.³⁰⁰ If the Act's coverage, as suggested by the

294. Pure economic losses are losses which are not associated with physical injury to the person or harm to tangible property other than the product itself. PROSSER & KEETON, *supra* note 35, § 95A, at 680.

295. MISS. CODE ANN. § 11-1-63 (Supp. 1995).

296. In the absence of a clear intention by the legislature to remove property damage as an item of recovery in a products liability action, Mississippi courts should allow plaintiffs to seek such damages in actions brought under the Act. Interpreting the Act as excluding liability for property damage other than to the product itself would be a major and unwarranted departure from the common law of products liability in Mississippi and would seriously impair the recognition of and protection historically given by the law to the property interests of Mississippi residents and businesses. Moreover, as shown in this discussion, the Act's language does not support such an approach.

297. *Id.*

298. 4A AMERICAN LAW OF PRODUCT LIABILITY 3D § 60.51 (Timothy E. Travers et al, eds., 1991); *see also* PROSSER & KEETON, *supra* note 35, § 101.

299. MISS. CODE ANN. § 11-1-63(a)(ii) (Supp. 1995). *See infra* text accompanying notes 368-372.

300. Section 402A, *supra* note 5 (providing that "[o]ne 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 ultimate user or consumer, or to his property"); TENTATIVE DRAFT, *supra* note 55, §§ 1(a), 6 (likewise explicitly providing for property damage claims). Mississippi's approach, if it excludes such property damage claims, is apparently unique.

descriptive title of the bill,³⁰¹ and arguably by the restriction of unreasonably dangerous to include only danger to the user or consumer,³⁰² extends to cover only personal injury or death claims, a question as to the appropriate basis for claims for property damage and pure economic loss remains.

The Act's apparent coverage of property damage is in line with the prior law. Traditionally, under a negligence theory or strict products liability theory as represented by Section 402A, a plaintiff may seek recovery for property damage, other than damage to the product itself,³⁰³ caused by a product that was unreasonably dangerous to property.³⁰⁴ Mississippi has followed the traditional approach in its application of Section 402A in allowing claims for damage to property in a products liability claim.³⁰⁵ The very first case in which the supreme court adopted Section 402A involved a claim for property damage.³⁰⁶ Of course, Section 402A explicitly included damage to property within its scope.³⁰⁷

The Act's apparent coverage of claims for pure economic loss caused by a product likely represents a significant departure from prior law. Courts have traditionally restricted claims for pure economic loss to breach of warranty or breach of contract claims.³⁰⁸ However, a substantial minority of jurisdictions have allowed negligence and strict liability claims for economic losses.³⁰⁹ Although the Mississippi Supreme Court has not previously addressed the application of a strict products liability theory to a claim for pure economic loss, it is likely that the court will follow the traditional approach.³¹⁰

The problem presented by the Act is that, read literally, it severely limits the claims of those who sustain property damage caused by defective products or who suffer economic loss caused by a defective product.³¹¹ The Act appears to limit claims caused by defective products to only those claims involving unreasonable danger to users or consumers, yet the Act purports to govern any claim for damages caused by defective product, except for commercial damages to the

301. Act of Feb. 18, 1993, H.B. 1270, 1993 Miss. Laws ch. 302.

302. MISS. CODE ANN. § 11-1-63(a)(ii) (Supp. 1995).

303. Courts are divided over whether recovery for loss of the product itself should be allowed under products liability theory. Some courts require such claims to be brought under contract theory subject to the provisions of the Uniform Commercial Code. 2 MADDEN, *supra* note 25, § 22.10.

304. Section 402A, *supra* note 5.

305. *Hamilton Fixture Co. v. Anderson*, 285 So. 2d 744 (Miss. 1973); *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss.), *cert. denied*, 386 U.S. 912 (1966). See also *William Cooper & Nephews, Inc. v. Pevey*, 317 So. 2d 406 (Miss. 1975). In *Pevey*, the court reversed a judgment for the plaintiff awarding damages for loss of cattle after being dipped in a cattle dip manufactured by the defendant. *Id.* at 409. The court, however, reversed on the basis that the plaintiff failed to carry his burden of proof as to the existence of the defect. *Id.* The right to recover for the loss of cattle as property was not at issue.

306. *State Stove*, 189 So. 2d 113 at 115.

307. Section 402A, *supra* note 5.

308. 2A FRUMER & FRIEDMAN, *supra* note 50, § 13.11; PROSSER & KEETON, *supra* note 35, § 101 ("[E]ven though marketing privacy can justifiably be disregarded, the manifested intent of each seller would usually be controlling as regards the scope of any guarantees related to the condition of the goods sold. Historically, therefore, the only tort action available to a disappointed purchaser suffering intangible commercial loss has been the tort action of deceit for fraud and the only contract action has been for breach of warranty, express or implied."). See also WITTENBERG, *supra* note 32, § 3-4. Cf. MODEL ACT, *supra* note 53, § 103.

309. 2A FRUMER & FRIEDMAN, *supra* note 50, § 13.11.

310. Cf. *Massey-Ferguson, Inc. v. Evans*, 406 So. 2d 15 (Miss. 1981) (affirming an award of consequential damages to a purchaser of a defective new grain drill and used combine in a breach of warranty action).

311. MISS. CODE ANN. § 11-1-63 (Supp. 1995).

product itself. On its face, the Act provides no remedy for claimants whose property is damaged by defective products that are unreasonably dangerous to property only. Proof of danger to a consumer's, user's, or bystander's property would not satisfy the literal requirements of the Act.³¹² For example, the rancher who used a drug intended only for livestock would have no claim for the death of his livestock caused by a deviation defect in the product because the defect did not endanger human life or health.³¹³ The danger presented by the defective product was to property, not to the user or consumer.

The lack of a remedy for damage to property traditionally available would thwart the purpose of tort law, including the law of negligence, to compensate for injuries caused by the fault of another. The elimination of a broad range of claims for property damages would likewise remove the deterrence provided by tort law to manufacturers against the marketing of unsafe products. The elimination of remedies for physical injury to property would likewise thwart the purposes of imposing strict products liability³¹⁴—to spread the risk through pricing, to provide incentives for manufacturers to develop safer products and for sellers to deal with reputable manufacturers, and to avoid disappointment of reasonable consumer expectations created by sellers and manufacturers.³¹⁵ The policies promoted by negligence law and strict liability should apply whether a product is unreasonably dangerous to humans or only their property.³¹⁶ To avoid serious injustice to persons whose property is damaged by defective products, the legislature should amend the Act to include within its scope products that are unreasonably dangerous to property as well as persons.

Because the Act purports to govern any claim for damages, other than commercial damages to the product itself, caused by a defective product,³¹⁷ a literal reading of the Act would also incorporate claims for pure economic loss. Such a reading would relegate implied warranty claims for pure economic loss to actions involving only real estate or used products and destroy much of the commercial usefulness of warranty law in Mississippi.³¹⁸ Most claims for pure eco-

312. See *infra* text accompanying notes 362-67.

313. Cf. *William Cooper & Nephews, Inc. v. Pevey*, 317 So. 2d 406 (Miss. 1975) (reversing the plaintiff's award for death of his cattle because the evidence did not support a finding that the cattle dipping solution was defective).

314. Traditional strict products liability survives only with respect to deviation defects under the Act. See MISS. CODE ANN. § 11-1-63 (Supp. 1995).

315. See TENTATIVE DRAFT, *supra* note 55, § 2 cmt. a.

316. See *id.* §§ 1-2. See also Section 402A(1), *supra* note 5.

317. MISS. CODE ANN. § 11-1-63 (Supp. 1995).

318. But see Harges, *supra* note 2, at 732.

conomic losses caused by new products would not exist.³¹⁹ For example, suppose a computer program contained on a compact disc does not function as intended or warranted and causes a business purchaser's vital computer operations to shut down resulting in economic losses including expenses to bring the operation back on line and the loss of profits from lost sales.³²⁰ A literal interpretation of the Act would lead a court to conclude that the purchaser of the defective disc has no breach of implied or express warranty action for consequential damages because, although there was damage and a breach of warranty, express or implied, the disc did not present an unreasonable danger to a consumer or user, but only to the property of the user or consumer.³²¹ The Act's apparent preemption of other theories of recovery bars any other remedy.³²² Ironically, plaintiffs with claims arising from defective used products or defective component parts incorporated into improvements to real property would retain a right to claim in warranty, while purchasers of other new chattels would not.³²³

Likewise, claims for property damage caused by breach of express warranty will fail absent proof of reasonable reliance and unreasonable danger to a consumer or user.³²⁴ Thus, express warranty may also become virtually meaningless for all damages caused by chattels sold by commercial sellers or manufacturers, except as to the product itself, or where the product causes personal injury or death. Again, ironically, plaintiffs who have express warranty claims against fixture manufacturers, used product sellers, or non-commercial sellers for property damage caused by defective items will fare better than those whose property is damaged by products sold by commercial sellers. Since fixtures are not products under the current jurisprudential definition of product,³²⁵ and the term "sellers" has not traditionally included those who make only occasional sales,³²⁶ or used

319. Presumably only pure economic claims based on commercial loss to the product itself survive as warranty claims under the new Act. See MISS. CODE ANN. §§ 11-1-63, 75-2-715 (Supp. 1995). As amended, MISS. CODE ANN. § 75-2-715 provided with respect to claims for consequential damages from breach of warranty:

(2) Except as otherwise provided in House Bill No. 1270 [Laws, 1993, ch. 302], consequential damages resulting from the seller's breach include:

(a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) Injury to person or property proximately resulting from any breach of warranty."

MISS. CODE ANN. § 75-2-715 (Supp. 1995).

Thus, taken together the two sections lead to the conclusion that claims may no longer be based on implied warranty for any damages caused by a product other than to itself.

320. Cf. *Massey-Ferguson, Inc. v. Evans*, 406 So. 2d 15 (Miss. 1981) (affirming an award of consequential damages for crop loss to a purchaser of a defective new grain drill in a breach of warranty action).

321. As noted *supra* in the text accompanying notes 308-9, courts traditionally have considered claims for pure economic loss, such as illustrated by the hypothetical, to be breach of warranty or contract claims, restricting products liability claims to those involving physical injury to person or property, other than the product itself. Historically, the courts have excluded economic losses that are not a direct result of harm to the plaintiff's person or property from the coverage of tort law. TENTATIVE DRAFT, *supra* note 55, § 6 cmt. d, reporter's note cmt. d.

322. See MISS. CODE ANN. § 75-2-715 (Supp. 1995) (incorporating the provisions of an Act Feb. 18, 1993, H.B. 1270, 1993 Miss. Laws, ch. 302).

323. See *supra* text accompanying notes 214-15.

324. See MISS. CODE ANN. § 11-1-63(a)(i)(4), (ii) (Supp. 1995).

325. See *supra* text accompanying notes 90-97.

326. See *supra* text accompanying notes 193-96.

product sellers,³²⁷ the Act does not affect express warranty claims against fixture sellers or manufacturers and occasional sellers.

Even with the recognition that the Act allows for the recovery of property damages, a serious problem remains with respect to property damage caused by defects in products that present an unreasonable danger to property only.³²⁸ The problem of how to treat claims for economic losses also remains. The court faces the prospect of adopting a literal interpretation that gives patently undesirable results not likely contemplated by the legislature, or of adopting an interpretation that clearly ignores the actual language of the Act and the traditional meanings ascribed to the terms used in the Act.

In a number of ways the Act represents a dramatic change in the law of Mississippi, although the legislature did not likely intend to totally revolutionize warranty law and tort law relating to property damage and pure economic loss caused by defective products. However, to avoid such a revolution, the courts must avoid a literal application of the Act by reading into the law restrictions on the kinds of interests covered by the Act and expanding the scope of the Act with respect to the availability of physical property damage. Thus, the court has three alternative readings of the Act:

(1) A literal reading that would make the Act the exclusive basis upon which to make any claim for damages other than to the product itself caused by a defective product; eliminating claims for pure economic loss and claims for damage caused by products which are dangerous only to property;

(2) A reading which would limit the claims covered by the Act to personal injury and death claims (consistent with the title of the bill), leaving the common law of torts to govern property damage claims, and warranty law to govern pure economic loss,³²⁹ or

(3) A reading that would apply the Act in such a way as to include within the reach of the Act claims for physical injury only (personal injury, death, and damage to property, other than commercial damage to the product itself), but exclude purely economic losses.³³⁰

327. See *supra* text accompanying notes 210-23.

328. See *supra* text accompanying notes 354-72.

329. This reading would presumably leave all property damage and economic loss claims in the realm of warranty, contract law, negligence, or even Section 402A as limited to property claims only. In a warranty action, a plaintiff could recover both incidental and consequential damages. MISS. CODE ANN. § 75-2-715 (Supp. 1995). In such an event, the plaintiff must recognize the effect of the statute of limitations applicable to such claims. Generally, the Mississippi Uniform Commercial Code bars claims for injuries that occur more than six years after the seller tenders the product to the buyer. MISS. CODE ANN. § 75-2-725 (Supp. 1995) (However, under § 75-2-725(2), the time period may be extended under some circumstances.). This result may be particularly harsh to a bystander who suffers property damage caused by a defective product tendered by the seller more than six years prior to the injury. For property damage claims arising from damage caused by a defective product, the statute of limitations pertaining to warranty claims may effectively function as a six year statute of repose.

330. This reading would either require the definition of unreasonably dangerous to expand beyond the literal reading of danger "to user or consumer" to include danger to the user's or consumer's property or result in a reading that would limit claims for property damage to those involving a product that was unreasonably dangerous to a person, as opposed to property. This would be unduly restrictive and unjust. See *infra* text accompanying notes 339-57.

While the court, under canons of statutory construction, may ameliorate the apparent harshness of a literal application of the Act to avoid an unintended consequence,³³¹ the best solution to the problem created by the language of the Act is for the legislature to amend the Act to clearly delineate the Act's coverage. This author suggests that the legislature add a statement expressly providing that the Act covers claims for damages arising from any physical injury to a user, consumer, reasonably foreseeable bystander, or property, other than the product itself. A failure to adequately provide for property damage claims and economic loss caused by defective products may lead to serious injustice in the tort and warranty law of Mississippi.

5. Punitive Damages

In connection with the 1993 reform of the law of products liability, the legislature also enacted legislation governing actions for punitive damages.³³² A full discussion of the changes to the law of punitive damages is beyond the scope of this Article; however, the new statute does affect products liability actions involving punitive damage claims.³³³ The new statute sets forth the evidentiary and procedural requirements for a punitive damages claim.³³⁴

With respect to products liability claims, the statute provides that a court may not hold a nonmanufacturer-seller liable for punitive damages unless (1) "the seller [had] substantial control over that aspect of the design, testing, manufacture, packaging or labeling" of the defective product that caused injury; or (2) the seller's "[alteration] or [modification] was a substantial factor in causing" the injury; or (3) the seller "had actual knowledge of the defective condition of the product at the time" he supplied it; or (4) "the seller made an express factual representation about the aspect of the product which caused" the injury.³³⁵ In essence, the punitive damages statute simply provides that a seller cannot be vicariously liable for punitive damages in connection with the wrongful conduct of a manufacturer.

G. What is Unreasonably Dangerous Under the Act?

1. Consumer Expectation or Risk-Utility?

The Act does not define the term "unreasonably dangerous." The initial version of the bill defined the term as "dangerous to an extent beyond that which would be contemplated by the ordinary person who uses or consumes the product

331. See *Evans v. Boyle Flying Service, Inc.*, 93-CA-00523-SCT, 1996 WL 515589 (Miss. Sep. 12, 1996); *McCullen v. State*, 63 So. 2d 856, 861 (Miss. 1953).

332. MISS. CODE ANN. § 11-1-65 (Supp. 1995).

333. For a fuller discussion of the availability of punitive damages in a products liability claim, see Harges, *supra* note 2, at 733-52.

334. MISS. CODE ANN. § 11-1-65 (Supp. 1995). The statute requires that the claimant prove by clear and convincing evidence that the defendant acted with actual malice or with willful, wanton, or reckless disregard for the safety of others, or committed actual fraud. *Id.* The trier of fact may consider an award of punitive damages only after compensatory damages have been awarded and after the court has determined that punitive damages may be submitted to the trier of fact after a separate evidentiary hearing before the trier of fact. The statute provides specific matters which the trier of fact must consider in considering an award of punitive damages. *Id.* The court must review any punitive damage award for reasonableness.

335. MISS. CODE ANN. § 11-1-65(g) (Supp. 1995).

with the ordinary knowledge common to the community as to its characteristics."³³⁶ The final bill, as enacted, dropped this definition, leaving to the courts the job of defining the term.³³⁷

Under the law of Mississippi prior to the Act, the term "unreasonably dangerous" had two meanings. Initially, the court understood the term in light of what has been called the consumer expectation test.³³⁸ Under this approach, as set forth in the Comments to Section 402A, a product is unreasonably dangerous if the product is "in a condition not contemplated by the consumer."³³⁹ Under this test, an open and obvious danger of a defect would bar recovery because the product is not more dangerous than expected by the consumer.³⁴⁰ However, in the case of *Sperry-New Holland v. Prestage*,³⁴¹ the court explicitly adopted another approach, the risk-utility test, to determine when a product is unreasonably dangerous.³⁴² Under this test, a product is unreasonably dangerous if "a reasonable person would conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product."³⁴³

The shift from the consumer expectation test to the risk-utility test apparently resulted in part from the court's concern that the former test would bar recovery totally in cases where a danger was open and obvious to the consumer.³⁴⁴ Under the risk-utility test, consumer expectation or awareness of danger is but one of several factors to be weighed in evaluating whether the defective product is unreasonably dangerous.³⁴⁵ The court concluded that the risk-utility test best protects both the seller and the consumer.³⁴⁶ The manufacturer need not produce an absolutely safe product, only a reasonably safe one, regardless of the claimant's awareness of the danger.³⁴⁷ The test affords protection to the consumer because obviousness of the danger is only one factor to consider in deter-

336. Act of Feb. 18, 1993, H.B. 1270, § 1(b)(i), H11.H93R1102 (1993).

337. Act of Feb. 18, 1993, H.B. 1270, 1993 Miss. Laws ch. 302.

338. *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113, 121 (Miss.), *cert. denied*, 386 U.S. 912 (1966) ("Ordinarily the phrase 'defective condition' means that the article has something wrong with it, that it did not function as expected."); *Ford Motor Co. v. Matthews*, 291 So. 2d 169, 172 (Miss. 1974) (quoting with approval *State Stove* and Section 402A, cmt. g).

339. Section 402A, *supra* note 5, cmt. g.

340. *See Melton v. Deere & Co.*, 887 F.2d 1241 (5th Cir. 1989).

341. 617 So. 2d 248 (Miss. 1993). The court asserted that the shift had already occurred in the cases of *Hall v. Mississippi Chem. Exp., Inc.*, 528 So. 2d 796 (Miss. 1988) and *Whitley v. City of Meridian*, 530 So. 2d 1341 (Miss. 1988). However, *Prestage* was the first Mississippi case directly facing the issue and clearly articulating the shift to a different standard. *See Batts v. Tow-Motor Forklift Co.*, 153 F.R.D. 103 (N.D. Miss. 1994) (calling the adoption of the risk utility test in *Hall* and *Whitley* the "best kept secret in Mississippi jurisprudence" prior to the announcement in *Prestage*).

342. *Prestage*, 617 So. 2d at 256.

343. *Id.* at 254.

344. In *Prestage*, the defendant argued that the danger was open and obvious and that the application of the consumer expectation test would absolutely bar recovery by the plaintiff. *Id.* at 251-52. *See also Harges, supra* note 2, at 710 ("[I]t is apparent that the risk-utility test is more favorable to the plaintiff.").

345. *Prestage*, 617 So. 2d at 256 n.3.

346. *Id.* at 256.

347. *Id.*

mining whether the danger is unreasonable.³⁴⁸ Thus, under the risk-utility test, if the danger of the product outweighs its usefulness, a plaintiff may recover, even if aware of the danger.³⁴⁹

At first glance, it would seem that the courts are free to apply the risk-utility analysis in determining when a defective condition is unreasonably dangerous. The Act does not overtly require a return to the consumer expectation test. Certainly this appears to be true with reference to deviation defects and claims involving breach of express warranty. The Act presumably continues to look to the common law of Mississippi in defining the term.³⁵⁰

However, in claims involving warnings, the language of the Act goes a long way toward reinstating the consumer expectation test. The Act explicitly reinstated the open and obvious defense as an absolute bar to recovery in cases of alleged warning defects, legislatively overruling *Prestage* as it applies to warning defect cases.³⁵¹ Specifically, the Act provided that in such cases the defendant is not liable "if the danger posed by the product is known or is open and obvious to the user or consumer of the product, or should have been known or open and obvious to the user or consumer of the product."³⁵² Thus, in warnings cases, consumer expectation of the risk of harm from an open and obvious danger is a matter that the defense must raise.

Moreover, in design cases, the Act also seems to resurrect the consumer expectation test. In such cases, however, the plaintiff bears the burden of proof. The Act requires the claimant to prove that "the product failed to function as expected,"³⁵³ implying that the consumer expectation test is a *sine qua non* in design defect cases.³⁵⁴ Thus, except in cases involving deviation defects or breach of express warranty cases, the vitality of the *Prestage* court's adoption of the risk-utility test is in doubt.

348. *Id.* at 256 n.3. The court cites seven factors, citing John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L. J. 825, 837-38 (1973):

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole. (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury. (3) The availability of a substitute product which would meet the same need and not be as unsafe. (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility. (5) The user's ability to avoid danger by the exercise of care in the use of the product. (6) The user's anticipated awareness of the dangers inherent in the product . . . , or of the existence of suitable warnings or instructions. (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id.

349. *Prestage*, 617 So. 2d at 254.

350. Although the court decided *Prestage* only after the new legislation was passed, the court in *Prestage* asserted that it had already shifted to the risk-utility test in 1988. *Id.* at 256. Thus, in all likelihood, the court will interpret the term unreasonably dangerous as used in the statute in light of the risk-utility analysis, at least in cases involving deviation defects or breach of express warranty. *See id.* at 256. *See also* Harges, *supra* note 2, at 713.

351. MISS. CODE ANN. § 11-1-63(e) (Supp. 1995).

352. *Id.*

353. MISS. CODE ANN. § 11-1-63(f)(ii) (Supp. 1995).

354. The language of the Act is strongly reminiscent of the court's language in *Ford Motor Co. v. Matthews*, 291 So. 2d 169, 172 (Miss. 1974), stating that a defective condition exists when the product "did not function as expected." *Id.* at 172. PART II of this Article will explore defenses in more detail, including the open and obvious defense.

2. Unreasonably Dangerous to Users or Consumers

The Act requires the claimant to prove that the product contained a defective condition and that this condition rendered the product unreasonably dangerous to the user or consumer.³⁵⁵ The Act provided for four categories of defective condition: (1) deviation defects,³⁵⁶ (2) failures to contain adequate warnings or instructions,³⁵⁷ (3) defective designs,³⁵⁸ and (4) breaches of express warranty.³⁵⁹ In cases involving deviation defects or breaches of warranty, the fact that a product has a defect does not necessarily make the product unreasonably dangerous. The Act requires the plaintiff to prove the existence of a defect,³⁶⁰ and that the defect was unreasonably dangerous.³⁶¹ Thus, mere proof of a deviation defect or breach of express warranty does not establish that the product was unreasonably dangerous to the consumer or user.

In cases involving design or warning defects, the Act takes a slightly different approach. In such cases, a product's defectiveness is understood in light of the unreasonable danger to the user or consumer.³⁶² Thus, the existence of a defective condition of a product in a warning case depends on the existence of a danger because of the inadequacy of the warnings or instructions, and this danger must rise to the level of unreasonably dangerous for the defendant to be liable. Likewise in a design case, the design must present a danger in order for it to be considered a defective design and the danger must be unreasonable for liability to attach.

3. Unreasonably Dangerous to Bystanders

The language of the statute requires that a bystander must prove that the product is unreasonably dangerous to the consumer or user.³⁶³ If interpreted literally, this language could pose a problem to the bystander-claimant. In most cases, a product that presents a risk to the bystander will present similar risks to the user or consumer. However, the risks may not always overlap or be the same. A product could conceivably not pose an unreasonable danger to the consumer or user, while, nevertheless, posing an unreasonable danger to bystanders. For example, suppose that a bystander plaintiff suffered injuries from fumes from a product

355. MISS. CODE ANN. § 11-1-63 (Supp. 1995).

356. MISS. CODE ANN. § 11-1-63(a)(i)(1) (Supp. 1995) ("The product was defective because it deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured to the same manufacturing specifications . . .").

357. MISS. CODE ANN. § 11-1-63(a)(i)(2) (Supp. 1995) ("The product was defective because it failed to contain adequate warnings or instructions . . .").

358. MISS. CODE ANN. § 11-1-63(a)(i)(3) (Supp. 1995) ("The product was designed in a defective manner . . .").

359. MISS. CODE ANN. § 11-1-63(a)(i)(4) (Supp. 1995) (The product breached an express warranty or failed to conform to other express factual representations upon which the claimant justifiably relied in electing to use the product . . .").

360. MISS. CODE ANN. § 11-1-63(a)(i) (Supp. 1995) ("The manufacturer or seller . . . shall not be liable if the claimant does not prove . . . that . . . the product was defective . . .").

361. MISS. CODE ANN. § 11-1-63(a)(ii) (Supp. 1995) (requiring that the claimant prove "[t]he defective condition rendered the product unreasonably dangerous to the user or consumer").

362. MISS. CODE ANN. § 11-1-63(a)(ii), (c)(i), (f)(i) (Supp. 1995).

363. MISS. CODE ANN. § 11-1-63(a)(ii) (Supp. 1995).

used in reroofing a building.³⁶⁴ If the manufacturer had warned the users of the product, the employees of the roofing contractor, of the danger of inhaling the fumes, the employees could have taken adequate precautions to avoid injury to themselves, such as wearing appropriate breathing masks. However, the bystander would not know of the danger at all and remain unprotected. Under a literal reading of the Act, if the manufacturer sufficiently warned the consumer or user of necessary precautions for the consumer's or user's personal safety, but did not adequately warn or instruct for the protection of bystanders, the manufacturer may escape liability altogether for injuries to a bystander.

The court, thus, faces a dilemma in applying the Act to a bystander if the bystander does not encounter the same risks as the user or consumer. The language of the Act tracks the language of Section 402A, which the supreme court extended to include bystanders.³⁶⁵ However, the American Law Institute deliberately chose to express no opinion as to the status of bystanders.³⁶⁶ The difference is that Section 402A is intended as a statement of the common law and does not limit the development of common law rules when the language of the Restatement proves inadequate. Thus, the supreme court properly went further than the literal language of the Restatement in including bystanders as covered by the rule expressed in Section 402A. However, the same flexibility is not present when interpreting and applying statutes. The language of the Act may serve to limit the remedies available to an injured bystander.

One could argue that courts should broadly interpret the terms "user" and "consumer" to include bystanders. While this does some violence to the language,³⁶⁷ it certainly is consistent with the law of most states, including Mississippi, prior to the Act, to include bystanders within the protection of products liability rules.³⁶⁸ It seems unlikely that the legislature intended to depart from this protection. However, if the legislature intended to continue to extend protection to bystanders, the Act does not adequately reflect this intent.

4. Unreasonably Dangerous to Property

The relationship of the Act to property damage claims, as discussed with reference to damages, is unclear.³⁶⁹ The literal language would appear to exclude risks posed to property by a defective product from the concept of unreasonably dangerous. The language of the Act refers only to unreasonable danger to the user or consumer.³⁷⁰ This stands in contrast to the general rule pertaining to recovery of property damage in tort claims, including products liability claims.³⁷¹

364. *Cf. Swan v. I.P., Inc.*, 613 So. 2d 846 (Miss. 1993) (involving injuries to a school teacher from fumes given off by products used in reroofing the school where the teacher worked). *Cf. also Scordino v. Hopeman Bros., Inc.*, 662 So. 2d 640 (Miss. 1995) (involving allegations of injuries to shipyard employees exposed to asbestos dust during the installation of asbestos paneling by a subcontractor).

365. *Coca-Cola Bottling Co. v. Reeves*, 486 So. 2d 374 (Miss. 1986).

366. Section 402A, *supra* note 5, caveat.

367. One must stretch the ordinary understanding of consumer or user to include bystanders within the scope of such terms.

368. *Cf. TENTATIVE DRAFT, supra* note 55, § 2.

369. *See supra* text accompanying notes 294-316.

370. MISS. CODE ANN. § 11-1-63(a)(ii) (Supp. 1995).

371. 2 MADDEN, *supra* note 25, § 22.10.

Section 402A explicitly refers to unreasonable danger to property.³⁷² Tentative Draft No. 2 of the Restatement (Third) of Torts: Products Liability retains this concept as well.³⁷³

The omission of property in reference to an unreasonable danger presented by a product is regrettable. If the court interprets the Act literally with reference to unreasonable danger to a consumer or user, the Act dramatically alters the law of Mississippi with respect to property damage claims and seriously limits the right of injured parties to seek redress. This is particularly so if the Act is preemptive with respect to other theories of liability for defective products that cause only property damage. The omission confuses the issue of what is an unreasonably dangerous condition under the Act. The best resolution, absent an amendment by the legislature, is for the courts to interpret the unreasonably-dangerous-to-the-user-or-consumer requirement as including within its scope unreasonable danger to the user's or consumer's property as well.

III. Conclusion

The Products Liability Act of 1993 made significant changes in the law of Mississippi, though it did not necessarily improve, stabilize, or clarify the law as intended. Clearly the Act gives greater protection to sellers and manufacturers than under Section 402A as applied by the Mississippi Supreme Court.³⁷⁴ However, the new law is not as clear as it should be in matters of terminology or definition. Moreover, the Act's language could lead to harsh consequences for those suffering from economic loss or property damage caused by defective products. Bystanders may have significantly less protection of their interests in freedom from harm caused by defective products. However, the full impact of the Act will not be evident until the court has had the opportunity to interpret the various provisions of the new law.

In the meantime, the legislature should revisit products liability law to eliminate confusion and inequities in the current Act. In particular, the legislature should define the term "product," and extend the Act's coverage of sellers to include commercial product suppliers who are not technically sellers. Consideration should be given to precise declaration of the status of used product sellers as well, especially with reference to negligence and warranty claims. The legislature should expressly extend coverage to claims of bystanders for injuries caused by defective products by including danger to bystanders in the concept of unreasonably dangerous. The legislature should also reinstate the availability of physical property damage claims by including danger to property in the concept of unreasonably dangerous. The legislature should return claims for pure economic damages to the law of warranty where courts have historically placed such claims. Amendments to the Act could go a long way to avoiding unnecessary confusion, difficulty, and possible injustices in interpreting and applying the Act by the legal community and courts.

372. Section 402A, *supra* note 5.

373. TENTATIVE DRAFT, *supra* note 55, §§ 1, 2, 6.

374. PART II of this Article will address in more detail the Act's changes with reference to the requirements of proving the existence of the various categories of defects and the defenses available.