December 14, 1989

TO: The House Judiciary and Labor Relation Committee Members

FROM: William F. Caruthers

RE: Proposed Product Liability Legislation

As one of the 1.7 million members of the Pennsylvania American Association of Retired Persons (AARP) and a former member of their State Legislative Committee, I urge you to block the passage of proposed product liability legislation, specifically House Bill 916.

For the past four years, the Pennsylvania SLC has opposed the passage of such legislation. This legislation denies senior citizens access to the courts and encourages manufacturers to act less responsibly in the sale of their products and shifts the burden and costs onto the injured party who is less able to pay these costs.

Many of the senior members of our society live on a limited fixed income and are engaged in a constant struggle to make ends meet. Reliability on cost-saving generic drugs has been a necessity for survival on their limited incomes.

Now the scandal at the FDA has shattered the public's complacency about generic drugs. Two of the companies that make generic drugs have been caught cheating in their efforts to get their drugs approved, and nearly a dozen more are under investigation. Meanwhile, the pharmaceutical industry is attempting to remove the only quality control check free of governmental budgetary constraints--the civil justice system and product liability in particular.

Two leaders in the pharmaceutical industry, Merck and SmithKline Bechman Corporations have joined with the tobacco industry and others to form the Pennsylvania Task Force on Product Liability. The Task Force's goal is to limit a manufacturers' responsibility for the defective products they produce. The ability to bring a legal action against the manufacturer of a defective product provides victims' compensation and serves to deter the deliberate negligence of a manufacturer. One must question the wisdom of reducing the civil responsibility of an industry whose members uses bribery to obtain government approval.

For the consumer the scandal raises serious doubts about the industry that provides one-third of all the drugs Americans swallow, sip and inject into their bodies. Obviously, this is especially true for older citizens of this Commonwealth.

The generic drug issue is only one of many under this legislation which would reek havoc to the already minimal lifestyles of a large percentage of your constituency. You, as distinguished members of the General Assembly, are the ones who have the knowledge and the ability, as well as the responsibility, to protect all the people of Pennsylvania.

I remain confident that our trust and our confidence are in very capable and compassionate hands.

C. Neither A nor B is liable to C in an action fo egligence.

2. A, a re dealer, sells to B a hot water bag purchased from a reputable manufacturer. A believes the bag to be in perfect condition, although he has not inspected it, but the bag is defective in that the stopper will not screw in securely. As a result of this defect, C, the minor son of B, is severely scalded by hot water that leaks out of the bag. A is not liable to B C in an action for negligence.

e. In many situations the seller who receives his goods from a reputable source of supply receives it with the firm conviction that it is free from defects; and where a chattel is of a type which is perfectly safe for use in the absence of defects, the seller who sells it with the reasonable belief that it is safe for use and represents it to be safe for use does not act negligently. Frequently, the manufacturer's literature and salesmen and his past record of sending the seller perfectly made chattels create a reasonable belief in the seller' mind that the particular chattel he is selling is made perfectly. When the seller reasonably believes that the chattel is safe, his representation in good faith to t eff nei fra ulent, reckless, or negligent.

Illustration:

A, a retail dealer, sells to B a defective gas heater, obta ed from a reputable manufacturer which A believes to be in perfect condition, although he has not inspected it. In making the sale, and in response to B's inqui , A says, "This heater can be used with perfect safety." heater when used emits poisonou fumes, injuring B. A is not liable to B in an action for negligence.

TOPI CT LIABILITY

§ 402 A. Special Liability of Seller of Product for P ysical Harm to ser or Consumer

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

thereby caused to the ultimate user or consumer, or to his property, if

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

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

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

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

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

See Reporter's Notes.

Caveat:

The Institute expresses no opinion as to whether the rules stated in this Section may not apply

(1) to harm to persons other than users or consumers;

(2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or

(3) to the seller of a component part of a product to be assembled.

Comment:

a. This Section states a special rule applicable to sellers of products. The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product. The Section is inserted in the Chapter dealing with the negligence liability of suppliers of chattels, for convenience of reference and comparison with other Sections dealing with negligence. The rule stated here is not exclusive, and does not preclude liability based upon the alternative ground of negligence of the seller, where such negligence can be proved.

b. History. Since the early days of the common law those engaged in the business of selling food intended for human consumption have been held to a high degree of responsibility for their products. As long ago as 1266 there were enacted special criminal statutes imposing penalties upon victualers, vintners,

brewers, butchers, cooks, and other persons who supplied "corrupt" food and drink. In the earlier part of this century this ancient attitude was reflected in a series of decisions in which the courts of a number of states sought to find some method of holding the seller of food liable to the ultimate consumer even though there was no showing of negligence on the part of the seller. These decisions represented a departure from, and an exception to, the general rule that a supplier of chattels was not liable to third persons in the absence of negligence or privity of contract. In the beginning, these decisions displayed considerable ingenuity in evolving more or less fictitious theories of liability to fit the case. The various devices included an agency of the intermediate dealer or another to purchase for the consumer, or to sell for the seller; a theoretical assignment of the seller's warranty to the intermediate dealer; a third party beneficiary contract; and an implied representation that the food was fit for consumption because it was placed on the market, as well as numerous others. In later years the courts have become more or less agreed upon the theory of a "warranty" from the seller to the consumer, either "running with the goods" by analogy to a covenant running with the land, or made directly to the consumer. Other decisions have indicated that the basis is merely one of strict liability in tort, which is not dependent upon either contract or negligence.

Recent decisions, since 1950, have extended this special rule of strict liability beyond the seller of food for human consumption. The first extension was into the closely analogous cases of other products intended for intimate bodily use, where, for example, as in the case of cosmetics, the application to the body of the consumer is external rather than internal. Beginning in 1958 with a Michigan case involving cinder building blocks, a number of recent decisions have discarded any limitation to intimate association with the body, and have extended the rule of strict liability to cover the sale of any product which, if it should prove to be defective, may be expected to cause physical harm to the consumer or his property.

c. On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which

it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

d. The rule stated in this Section is not limited to the sale of food for human consumption, or other products for intimate bodily use, although it will obviously include them. It extends to any product sold in the condition, or substantially the same condition, in which it is expected to reach the ultimate user or consumer. Thus the rule stated applies to an automobile, a tire, an airplane, a grinding wheel, a water heater, a gas stove, a power tool, a riveting machine, a chair, and an insecticide. It applies also to products which, if they are defective, may be expected to and do cause only "physical harm" in the form of damage to the user's land or chattels, as in the case of animal food or a herbicide.

e. Normally the rule stated in this Section will be applied to articles which already have undergone some processing before sale, since there is today little in the way of consumer products which will reach the consumer without such processing. The rule is not, however, so limited, and the supplier of poisonous mushrooms which are neither cooked, canned, packaged, nor otherwise treated is subject to the liability here stated.

f. Business of selling. 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. It is not necessary that the seller be engaged solely in the business of selling such products. Thus the rule applies to the owner of a motion picture theatre who sells popcorn or ice cream, either for consumption on the premises or in packages to be taken home.

The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam or a pound of sugar. Nor does it apply to the owner of an

automobile who, on one occasion, sells it to his neighbor, or even sells it to a dealer in used cars, and this even though he is fully aware that the dealer plans to resell it. 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. This basis is lacking in the case of the ordinary individual who makes the isolated sale, and he is not liable to a third person, or even to his buyer, in the absence of his negligence. An analogy may be found in the provision of the Uniform Sales Act, § 15, which limits the implied warranty of merchantable quality to sellers who deal in such goods; and in the similar limitation of the Uniform Commercial Code, § 2–314, to a seller who is a merchant. This Section is also not intended to apply to sales of the stock of merchants out of the usual course of business, such as execution sales, bankruptcy sales, bulk sales, and the like.

g. Defective condition. The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

Safe condition at the time of delivery by the seller will, however, include proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner.

h. A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he

See Appendix for Reporter's Notes, Court Citations, and Cross References

may be required to give adequate warning of the danger (see Comment *j*), and a product sold without such warning is in a defective condition.

The defective condition may arise not only from harmful ingredients, not characteristic of the product itself either as to presence or quantity, but also from foreign objects contained in the product, from decay or deterioration before sale, or from the way in which the product is prepared or packed. No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole. Where the container is itself dangerous, the product is sold in a defective condition. Thus a carbonated beverage in a bottle which is so weak, or cracked, or jagged at the edges, or bottled under such excessive pressure that it may explode or otherwise cause harm to the person who handles it, is in a defective and dangerous condition. The container cannot logically be separated from the contents when the two are sold as a unit, and the liability stated in this Section arises not only when the consumer drinks the beverage and is poisoned by it, but also when he is injured by the bottle while he is handling it preparatory to consumption.

i. Unreasonably dangerous. The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries

and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

j. Directions or warning. In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.

But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. Again the dangers of alcoholic beverages are an example, as are also those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart.

Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

k. Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and

warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

l. User or consumer. In order for the rule stated in this Section to apply, it is not necessary that the ultimate user or consumer have acquired the product directly from the seller, although the rule applies equally if he does so. He may have acquired it through one or more intermediate dealers. It is not even necessary that the consumer have purchased the product at all. He may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser. The liability stated is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant.

"Consumers" include not only those who in fact consume the product, but also those who prepare it for consumption; and the housewife who contracts tularemia while cooking rabbits for her husband is included within the rule stated in this Section, as is also the husband who is opening a bottle of beer for his wife to drink. Consumption includes all ultimate uses for which the product is intended, and the customer in a beauty shop to whose hair a permanent wave solution is applied by the shop is a consumer. "User" includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased.

See Appendix for Reporter's Notes, Court Citations, and Cross References

Illustration:

1. A manufactures and packs a can of beans, which he sells to B, a wholesaler. B sells the beans to C, a jobber, who resells it to D, a retail grocer. E buys the can of beans from D, and gives it to F. F serves the beans at lunch to G, his guest. While eating the beans, G breaks a tooth, on a pebble of the size, shape, and color of a bean, which no reasonable inspection could possibly have discovered. There is satisfactory evidence that the pebble was in the can of beans when it was opened. Although there is no negligence on the part of A, B, C, or D, each of them is subject to liability to G. On the other hand E and F, who have not sold the beans, are not liable to G in the absence of some negligence on their part.

m. "Warranty." The liability stated in this Section does not rest upon negligence. It is strict liability, similar in its nature to that covered by Chapters 20 and 21. The basis of liability is purely one of tort.

A number of courts, seeking a theoretical basis for the liability, have resorted to a "warranty," either running with the goods sold, by analogy to covenants running with the land, or made directly to the consumer without contract. In some instances this theory has proved to be an unfortunate one. Although warranty was in its origin a matter of tort liability, and it is generally agreed that a tort action will still lie for its breach, it has become so identified in practice with a contract of sale between the plaintiff and the defendant that the warranty theory has become something of an obstacle to the recognition of the strict liability where there is no such contract. There is nothing in this Section which would prevent any court from treating the rule stated as a matter of "warranty" to the user or consumer. But if this is done, it should be recognized and understood that the "warranty" is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales.

The rule stated in this Section does not require any reliance on the part of the consumer upon the reputation, skill, or judgment of the seller who is to be held liable, nor any representation or undertaking on the part of that seller. The seller is strictly liable although, as is frequently the case, the consumer does not even know who he is at the time of consumption.

See Appendix for Reporter's Notes, Court Citations, and Cross References

The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to "buyer" and "seller" in those statutes. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by the Uniform Act. The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands. In short, "warranty" must be given a new and different meaning if it is used in connection with this Section. It is much simpler to regard the liability here stated as merely one of strict liability in tort.

n. Contributory negligence. Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Comment on Caveat:

o. Injuries to non-users and non-consumers. Thus far the courts, in applying the rule stated in this Section, have not gone beyond allowing recovery to users and consumers, as those terms are defined in Comment *l*. Casual bystanders, and others who may come in contact with the product, as in the case of employees of the retailer, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery. There may be no essential reason why such plaintiffs should not be brought within the scope of the protection afforded, other than that they do not have the same reasons for expecting such pro-

tection as the consumer who buys a marketed product; but the social pressure which has been largely responsible for the development of the rule stated has been a consumers' pressure, and there is not the same demand for the protection of casual strangers. The Institute expresses neither approval nor disapproval of expansion of the rule to permit recovery by such persons.

p. Further processing or substantial change. Thus far the decisions applying the rule stated have not gone beyond products which are sold in the condition, or in substantially the same condition, in which they are expected to reach the hands of the ultimate user or consumer. In the absence of decisions providing a clue to the rules which are likely to develop, the Institute has refrained from taking any position as to the possible liability of the seller where the product is expected to, and does, undergo further processing or other substantial change after it leaves his hands and before it reaches those of the ultimate user or consumer.

It seems reasonably clear that the mere fact that the product is to undergo processing, or other substantial change, will not in all cases relieve the seller of liability under the rule stated in this Section. If, for example, raw coffee beans are sold to a buyer who roasts and packs them for sale to the ultimate consumer, it cannot be supposed that the seller will be relieved of all liability when the raw beans are contaminated with arsenic, or some other poison. Likewise the seller of an automobile with a defective steering gear which breaks and injures the driver, can scarcely expect to be relieved of the responsibility by reason of the fact that the car is sold to a dealer who is expected to "service" it, adjust the brakes, mount and inflate the tires, and the like, before it is ready for use. On the other hand, the manufacturer of pigiron, which is capable of a wide variety of uses, is not so likely to be held to strict liability when it turns out to be unsuitable for the child's tricycle into which it is finally made by a remote buyer. The question is essentially one of whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes. No doubt there will be some situations, and some defects, as to which the responsibility will be shifted, and others in which it will not. The existing decisions as yet throw no light upon the questions, and the Institute therefore expresses neither approval nor disapproval of the seller's strict liability in such a case.

See Appendix for Reporter's Notes, Court Citations, and Cross References

q. Component parts. The same problem arises in cases of the sale of a component part of a product to be assembled by another, as for example a tire to be placed on a new automobile, a brake cylinder for the same purpose, or an instrument for the panel of an airplane. Again the question arises, whether the responsibility is not shifted to the assembler. It is no doubt to be expected that where there is no change in the component part itself, but it is merely incorporated into something larger, the strict liability will be found to carry through to the ultimate user or consumer. But in the absence of a sufficient number of decisions on the matter to justify a conclusion, the Institute expresses no opinion on the matter.

§ 402 B. Misrepresentation by Seller of Chattels to Consumer

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and

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

See Reporter's Notes.

Caveat:

The Institute expresses no opinion as to whether the rule stated in this Section may apply

(1) where the representation is not made to the public, but to an individual, or

(2) where physical harm is caused to one who is not a consumer of the chattel.

Comment:

a. The rule stated in this Section is one of strict liability for physical harm to the consumer, resulting from a misrepresentation of the character or quality of the chattel sold, even though the misrepresentation is an innocent one, and not made fraudulently or negligently. Although the Section deals with misrepresentation, it is inserted here in order to complete the

rules dealing with the liability of suppliers of chattels for physical harm caused by the chattel. A parallel rule, as to strict liability for pecuniary loss resulting from such a misrepresentation, is stated in § 552 D.

b. The rule stated in this Section differs from the rule of strict liability stated in § 402 A, which is a special rule applicable only to sellers of products for consumption and does not depend upon misrepresentation. The rule here stated applies to one engaged in the business of selling any type of chattel, and is limited to misrepresentations of their character or quality.

c. History. The early rule was that a seller of chattels incurred no liability for physical harm resulting from the use of the chattel to anyone other than his immediate buyer, unless there was privity of contract between them. (See § 395, Comment *a.*) Beginning with Langridge v. Levy, 2 M. & W. 519, 150 Eng. Rep. 863 (1837), an exception was developed in cases where the seller made fraudulent misrepresentations to the immediate buyer, concerning the character or quality of the chattel sold, and because of the fact misrepresented harm resulted to a third person who was using the chattel. The remedy lay in an action for deceit, and the rule which resulted is now stated in § 557 A.

Shortly after 1930, a number of the American courts began, more or less independently, to work out a further extension of liability for physical harm to the consumer of the chattel, in cases where the seller made misrepresentations to the public concerning its character or quality, and the consumer, as a member of the public, purchased the chattel in reliance upon the misrepresentation and suffered physical harm because of the fact misrepresented. In such cases the seller was held to strict liability for the misrepresentation, even though it was not made fraudulently or negligently. The leading case is Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. 2d 409, 88 A.L.R. 521 (1932), adhered to on rehearing, 168 Wash. 465, 15 P. 2d 1118, 88 A.L.R. 527, second appeal, 179 Wash. 123, 35 P. 2d 1090 (1934), in which the manufacturer of an automobile advertised to the public that the windshield glass was "shatterproof," and the purchaser was injured when a stone struck the glass and it shattered. In the beginning various theories of liability were suggested, including strict liability in deceit, and a contract resulting from an offer made to the consumer to be bound by the representation, accepted by his purchase.

See Appendix for Reporter's Notes, Court Citations, and Cross References

d. "Warranty." The theory finally adopted by most of the decisions, however, has been that of a non-contractual "express warranty" made to the consumer in the form of the representation to the public upon which he relies. The difficulties attending the use of the word "warranty" are the same as those involved under § 402 A, and Comment *m* under that Section is equally applicable here so far as it is pertinent. The liability stated in this Section is liability in tort, and not in contract; and if it is to be called one of "warranty," it is at least a different kind of warranty from that involved in the ordinary sale of goods from the immediate seller to the immediate buyer, and is subject to different rules.

e. Sellers included. The rule stated in this Section applies to any person engaged in the business of selling any type of chattel. It is not limited to sellers of food or products for intimate bodily use, as was until lately the rule stated in § 402 A. It is not limited to manufacturers of the chattel, and it includes wholesalers, retailers, and other distributors who sell it.

The rule stated applies, however, only to those who are engaged in the business of selling such chattels. It has no application to anyone who is not so engaged in business. It does not apply, for example, to a newspaper advertisement published by a private owner of a single automobile who offers it for sale.

f. Misrepresentation of character or quality. The rule stated applies to any misrepresentation of a material fact concerning the character or quality of the chattel sold which is made to the public by one so engaged in the business of selling such chattels. The fact misrepresented must be a material one, upon which the consumer may be expected to rely in making his purchase, and he must justifiably rely upon it. (See Comment *j*.) If he does so, and suffers physical harm by reason of the fact misrepresented, there is strict liability to him.

Illustration:

1. A manufactures automobiles. He advertises in newspapers and magazines that the glass in his cars is "shatterproof." B reads this advertising, and in reliance upon it purchases from a retail dealer an automobile manufactured by A. While B is driving the car, a stone thrown up by a passing truck strikes the windshield and shatters it, injuring B. A is subject to strict liability to B.

See Appendix for Reporter's Notes, Court Citations, and Cross References

g. Material fact. The rule stated in this Section applies only to misrepresentations of material facts concerning the character or quality of the chattel in question. It does not apply to statements of opinion, and in particular it does not apply to the kind of loose general praise of wares sold which, on the part of the seller, is considered to be "sales talk," and is commonly called "puffing"—as, for example, a statement that an automobile is the best on the market for the price. As to such general language of opinion, see § 542, and Comment *d* under that Section, which is applicable here so far as it is pertinent. In addition, the fact misrepresented must be a material one, of importance to the normal purchaser, by which the ultimate buyer may justifiably be expected to be influenced in buying the chattel.

h. "To the public." The rule stated in this Section is limited to misrepresentations which are made by the seller to the public at large, in order to induce purchase of the chattels sold, or are intended by the seller to, and do, reach the public. The form of the representation is not important. It may be made by public advertising in newspapers or television, by literature distributed to the public through dealers, by labels on the product sold, or leaflets accompanying it, or in any other manner, whether it be oral or written.

Illustrations:

2. A manufactures wire rope. He issues a manual containing statements concerning its strength, which he distributes through dealers to buyers, and to members of the public who may be expected to buy. In reliance upon the statements made in the manual, B buys a quantity of the wire rope from a dealer, and makes use of it to hoist a weight of 1,000 pounds. The strength of the rope is not as great as is represented in the manual, and as a result the rope breaks and the weight falls on B and injures him. A is subject to strict liability to B.

3. A manufactures a product for use by women at home in giving "permanent waves" to their hair. He places on the bottles labels which state that the product may safely be used in a particular manner, and will not be injurious to the hair. B reads such a label, and in reliance upon it purchases a bottle of the product from a retail dealer. She

uses it as directed, and as a result her hair is destroyed. A is subject to strict liability to B.

i. Consumers. The rule stated in this Section is limited to strict liability for physical harm to consumers of the chattel. The Caveat leaves open the question whether the rule may not also apply to one who is not a consumer, but who suffers physical harm through his justifiable reliance upon the misrepresentation.

"Consumer" is to be understood in the broad sense of one who makes use of the chattel in the manner which a purchaser may be expected to use it. Thus an employee of the ultimate purchaser to whom the chattel is turned over, and who is directed to make use of it in his work, is a consumer, and so is the wife of the purchaser of an automobile who is permitted by him to drive it.

j. Justifiable reliance. The rule here stated applies only where there is justifiable reliance upon the misrepresentation of the seller, and physical harm results because of such reliance, and because of the fact which is misrepresented. It does not apply where the misrepresentation is not known, or there is indifference to it, and it does not influence the purchase or subsequent conduct. At the same time, however, the misrepresentation need not be the sole inducement to purchase, or to use the chattel, and it is sufficient that it has been a substantial factor in that inducement. (Compare § 546 and Comments.) Since the liability here is for misrepresentation, the rules as to what will constitute justifiable reliance stated in §§ 537–545 A are applicable to this Section, so far as they are pertinent.

The reliance need not necessarily be that of the consumer who is injured. It may be that of the ultimate purchaser of the chattel, who because of such reliance passes it on to the consumer who is in fact injured, but is ignorant of the misrepresentation. Thus a husband who buys an automobile in justifiable reliance upon statements concerning its brakes, and permits his wife to drive the car, supplies the element of reliance, even though the wife in fact never learns of the statements.

Illustration:

4. The same facts as in Illustration 2, except that the harm is suffered by C, an employee of B, to whom B turns over the wire rope without informing him of the representations made by A. The same result.