BYU Law Review

Volume 2005 | Issue 2 Article 4

5-1-2005

The Effects of Judicial Immunization of Passive Sellers in Sanns v. Butterfield Ford and a Proposal for the Shifting Nature of Fault

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I. INTRODUCTION: THE TENSION IN STRICT LIABILITY BETWEEN INNOCENT CONSUMERS AND INNOCENT SELLERS

"A manufacturer is strictly liable . . . when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[1] The purpose of strict products liability is to place the cost of injury resulting from dangerous products on the producers of those products because consumers "are powerless to protect themselves" against such products.[2] Proponents of strict products liability argue that in an "increasingly complex and mechanized society"[3] there exists an "economic and social need"[4] to protect innocent consumers from the costs of dangerous products.

The policy of strict products liability has extended into the realm of nonmanufacturing parties. Strict products liability, as explained in the widely accepted definition in the *Restatement (Second) of Torts*, Section 402A,[5] holds nonmanufacturing parties strictly liable for consumer injuries in equal proportion with the manufacturers. Justice Traynor, in *Vandermark v. Ford Motor Co.*,[6] enunciated the policy for holding nonmanufacturing parties strictly liable, reasoning that the policy affords the consumer the greatest possible protection and that it creates an added incentive for retailers to offer safe products to the public.[7]

Despite the strong policy considerations for extending liability to protect innocent consumers from bearing the costs of dangerous products, the idea of holding nonmanufacturing parties strictly liable has

1. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1963).

2. *Id.* at 901.

3. Daly v. Gen. Motors Corp., 575 P.2d 1162, 1166 (Cal. 1978).

4. *Id*.

5. RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter RESTATEMENT]; see *infra* note 36 for the text of Section 402A.

6. 391 P.2d 168 (Cal. 1964).

7. *Id*. at 171–72.

met some resistance. During the 1970s and 1980s, a vast majority of legislatures around the country adopted liability-reform statutes designed to mitigate the reach of liability doctrines such as joint and several liability.[8] Many jurisdictions passed legislation designed specifically to protect nonmanufacturing parties from the harsh effects of strict products liability.[9] Thus, two forces—one designed to extend liability and the other designed to limit liability—supported opposing goals as jurisdictions sought to define the application of strict liability principles.

Like most jurisdictions in the United States, Utah was caught up in both movements and had, until recently, left unresolved the tension between extending and limiting strict liability. The combination of the Utah Supreme Court's espousal of Section 402A in *Ernest W. Hahn, Inc. v. Armco Steel Co.*[10] and the Utah legislature's passage of the Liability Reform Act (LRA)[11] in 1986 left Utah courts to determine the extent to which nonmanufacturing parties such as distributors and retailers could be strictly liable for harm caused by dangerous products. For years, both the Utah Supreme Court and the Utah Court of Appeals were silent on this issue, as no strict liability case presented these courts with a clear opportunity for examining exactly how the LRA and Section 402A interacted.[12] Fortunately, this opportunity recently presented itself in *Sanns v. Butterfield Ford*[13] in which the appellate court ruled in favor of limiting liability.

In *Sanns*, the court of appeals examined a situation in which a consumer sought to hold strictly liable a manufacturer and a passive seller—a party who did nothing more than pass an unaltered and uninspected product from a manufacturer to a consumer.[14] The court ultimately held that the LRA limited the liability of passive sellers under Section 402A.[15] The effects of this holding are significant: the decision makes strict liability in passive seller situations more akin to traditional

8. *See, e.g.*, Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 210–11, 220–22 (1990).

9. *See infra* Part II.B.2.

10. 601 P.2d 152 (Utah 1979).

11. UTAH CODE ANN. §§ 78-27-37 to -43 (2004).

12. As will be seen in Part II.C, both the Utah Supreme Court and the Utah Court of Appeals had one opportunity after passage of the LRA to dismiss a passive seller from a strict liability cause of action, yet both courts failed to do so. *See* House v. Armour of Am., Inc., 929 P.2d 340 (Utah 1996), *aff'g* 886 P.2d 542 (Utah Ct. App. 1994).

13. 2004 UT App. 203, 94 P.3d 301.

14. *See infra* Part II.B.1.b; *see also Sanns*, 2004 UT App. 203, ¶ 21.

15. *Sanns*, 2004 UT App. 203, ¶¶ 11–21.

tort theories, such as negligence and culpability, than to Section 402A strict liability principles.

Viewed in its entirety, the *Sanns* decision created more problems than it solved. Not only did it depart from a majority of jurisdictions by judicially immunizing passive sellers from suit in strict liability, but it failed to describe how its uncertain standard should be applied in future strict liability cases. In effect, *Sanns* sacrificed the interests of harmed consumers to the interests of sellers. To correct these negative consequences and to ensure fairness to both innocent consumers and innocent sellers, Utah courts should adopt a shifting definition of fault that balances the requirements of the LRA with the demands of strict liability jurisprudence. The first step in this examination would define fault as *any* theory of liability, which would continue to allow all potential tortfeasors "who may have caused"[16] the harm to be brought into a cause of action. The second step would define fault as culpability, which would necessitate an examination of culpability among *all* potential tortfeasors and then a distribution of fault to only those tortfeasors a trier of fact found culpable.[17]

Part II of this Note discusses the nature of strict liability as espoused in Section 402A, with particular emphasis on the definition of "seller" for purposes of strict liability. This Part also describes the development of Utah's strict liability standard, Utah's conception of comparative fault, and the basic principles of the Liability Reform Act. Part III explains how the *Sanns* court departed from the majority of other jurisdictions by judicially immunizing passive sellers from strict liability under Section 402A. Part IV criticizes the court for this unfortunate departure and discusses the aforementioned shifting definition of fault that satisfies both the policy of allowing the recovery of innocent consumers while limiting such recovery from innocent sellers. Part V summarizes the Note and states a brief conclusion.

II. PARTIES SUBJECT TO SECTION 402A STRICT LIABILITY AND THE DEVELOPMENT OF STRICT LIABILITY IN UTAH JURISPRUDENCE

Before *Sanns v. Butterfield Ford*, Utah courts clearly adhered to the concept of strict liability espoused in Section 402A,[18] which includes passive sellers in its definition of parties that can be strictly liable in

16. § 78-27-41(1).

17. *See infra* Part IV.B.

18. *See* Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979).

tort.[19] Utah courts were further legislatively obligated to adhere to the fault apportionment principles of the Liability Reform Act, which prohibited courts from holding a defendant liable for more than its share of "fault."[20] What remained unclear before *Sanns* was how these concepts interacted.

A. Strict Liability's Place in Tort Law

Strict liability is a doctrine designed to provide injured victims a remedy at law when the victim is not in privity with the tortfeasor and when traditional principles of recovery, such as negligence and breach of warranty, are unavailable as a means of relief. Simply put, strict liability is liability imposed upon a party regardless of the amount of care it may have taken to prevent injury to another.[21]

The basic distinction between strict liability and negligence is that strict liability is liability without fault.[22] Whereas negligence requires the plaintiff to show that the tortfeasor failed to adhere to an ordinary level of care so as to avoid harm to another party, strict liability "is imposed even though a person has committed no legal fault consisting of violation of common law or statutory duty."[23] As one commentator explained in comparing strict liability and negligence, "Strict liability looks at the [cause of harm] itself . . . whereas negligence looks at the act of the [tortfeasor] and the court determines if the [tortfeasor] exercised ordinary care."[24]

A further distinction between strict liability and negligence is that strict liability is a much rarer cause of action than negligence. While a harmed party can seek to impose negligence in practically any tort action, courts typically recognize strict liability only in limited cases involving either inherently dangerous products[25] or "ultrahazardous

19. *See infra* Part II.B.1.b.

20. §§ 78-27-38 to -39.

21. *See, e.g.*, 65 C.J.S. *Negligence* § 172 (2000); 63 AM. JUR. 2D *Products Liability* § 545 (1996).

22. *See* 65 C.J.S. *Negligence* § 172 (2000).

23. *Id.*; *see also* David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 750 (noting that the "commonsense distinction" between strict liability and negligence is that negligence is "based on fault" and strict liability is "no-fault liability").

24. 63 AM. JUR. 2D *Products Liability* § 545 (1996).

25. *See, e.g.*, Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1962) (applying strict liability against the manufacturer of a dangerous tool); Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979) (applying strict liability to a steel structure that collapsed).

activities for which negligence is an inadequate deterrent or remedy."[26]

A particular form of strict liability that deals exclusively with inherently dangerous products is strict products liability—a doctrine that holds the manufacturer and the seller of a product strictly liable for their dangerous products.[27] The California Supreme Court, in *Brown v. Superior Court*,[28] explained that strict products liability "eliminates the necessity for the injured party to prove that the manufacturer of the product which caused injury was negligent. It focuses not on the conduct of the manufacturer but on the product itself, and holds the manufacturer liable if the product was defective."[29]

The purpose of strict products liability is "to [e]nsure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons."[30] Commentators have noted that consumers typically no longer have "the means or sufficient skill to investigate for [themselves] the soundness of a product"[31] and that "[c]onsumers no longer approach products warily, but accept them on faith, relying on the reputation of the manufacturer or the trademark."[32] Thus, strict products liability allows an injured consumer to recover damages from the manufacturer of a dangerous product, regardless of the manufacturer's negligence.[33]

Yet despite the absence of a negligence requirement in cases of strict products liability, strict products liability has never been equated to a concept of absolute liability whereby a manufacturer would become an

26. 65 C.J.S. *Negligence* § 172 (2000); *see, e.g.*, Luthinger v. Moore, 190 P.2d 1 (Cal. 1948) (imposing strict liability for the release of poisonous gas); Langlois v. Allied Chem. Corp., 249 So. 2d 133 (La. 1971) (imposing strict liability for poisonous gas in quantity in a dangerous place); RESTATEMENT, *supra* note 5, § 519 (explaining strict liability in cases of "abnormally dangerous activit[ies]").

27. *See infra* Part II.B.1.

28. 751 P.2d 470 (Cal. 1988).

29. *Id*. at 474.

30. *Greenman*, 377 P.2d at 901.

31. 63 AM. JUR. 2D *Products Liability* § 520 (1996).

32. *Id*.

33. *See* Aalco Mfg. Co. v. City of Espanola, 618 P.2d 1230, 1231 (N.M. 1980) (stating that strict products liability "allow[s] an injured consumer to recover against a seller or manufacturer without the requirement of proving ordinary negligence"); *see also* Bachner v. Pearson, 479 P.2d 319, 325–26 (Alaska 1970) (explaining that strict products liability is based on a defect in the product rather than on negligent conduct); People *ex rel.* Gen. Motors Corp. v. Bua, 226 N.E.2d 6, 15–16 (Ill. 1967) (holding that in cases of strict products liability, negligence does not need to be proved).

insurer of consumer safety.[34] The doctrine of strict products liability is meant to place "the product supplier in the role of a guarantor of the product's safety, but it does not make the supplier an insurer against all injuries caused by the product."[35] These principles of strict products liability are exemplified in the widely accepted *Restatement (Second) of Torts*, Section 402A.[36]

B. Section 402A, Passive Sellers, and Passive Seller Immunization

The doctrine of strict products liability was first introduced into American jurisprudence by Justice Traynor in *Greenman v. Yuba Power Products, Inc.*,[37] in which for the first time a manufacturer was held liable for its products absent a showing of negligence.[38] This decision served as the basis of Section 402A, which has been adopted by a majority of jurisdictions in the United States and has formed the foundation of their strict products liability doctrine.[39] The practical effect

34. *See* Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301, 1302 (Utah 1981) ("But strict liability in tort is not the equivalent of making the manufacturer or seller absolutely liable as an insurer of the product and its use."); Daly v. Gen. Motors Corp., 575 P.2d 1162, 1166 (Cal. 1978) ("From its inception, . . . strict liability has never been, and is not now, *absolute* liability. As has been repeatedly expressed, under strict liability the manufacturer does not thereby become the insurer of the safety of the product's user.").

35. 63 AM. JUR. 2D *Products Liability* § 522 (1996).

36. RESTATEMENT, *supra* note 5, § 402A , reads as follows:

> (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.

37. 377 P.2d 897 (Cal. 1962).

38. As one commentator has noted, *Greenman* "was the first time a majority opinion had bypassed legal fiction and imposed strict liability for injuries resulting from a defective product." Charles E. Cantú, *Distinguishing the Concept of Strict Liability for Ultra-Hazardous Activities from Strict Products Liability Under Section 402A of the Restatement (Second) of Torts: Two Parallel Lines of Reasoning That Should Never Meet*, 35 AKRON L. REV. 31, 41 (2001).

39. *See* O.S. Stapley Co. v. Miller, 447 P.2d 248 (Ariz. 1968); Hiigel v. Gen. Motors Corp., 544 P.2d 983 (Colo. 1975); Wachtel v. Rosol, 271 A.2d 84 (Conn. 1970); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); Stewart v. Budget Rent-A-Car Corp., 470 P.2d 240 (Haw. 1970); Rindlisbaker v. Wilson, 519 P.2d 421 (Idaho 1974); Suvada v. White Motor Co., 210 N.E.2d 182 (Ill. 1965); Cornette v. Searjeant Metal Prod., Inc., 258 N.E.2d 652 (Ind. Ct. App. 1970); Hawkeye-

of Section 402A is that an injured consumer no longer must prove negligence or privity of contract in order to recover from a manufacturer. Section 402A affords neither manufacturers nor sellers protection from strict liability when a product is unreasonably dangerous and causes harm to the consumer.

1. Section 402A

Section 402A sets out a general test for determining whether a party can be held strictly liable for damages caused by a product that is "unreasonably dangerous to the user or consumer."[40] Section 402A "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."[41] The basic elements of a Section 402A cause of action are as follows: (1) one who is engaged in the business of selling (2) sells any product (3) in a defective condition (4) that is unreasonably dangerous (5) to the user or consumer or his property.[42] These elements illustrate that the focus of Section 402A in determining liability is on the product rather than on the defendant's

Sec. Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970); Brooks v. Dietz, 545 P.2d 1104 (Kan. 1976); Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1966); Adams v. Buffalo Forge Co., 443 A.2d 932 (Me. 1982); Phipps v. Gen. Motors Corp., 363 A.2d 955 (Md. 1976); McCormack v. Hankscraft Co., 154 N.W.2d 488 (Minn. 1967); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969); Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 513 P.2d 268 (Mont. 1973); Kohler v. Ford Motor Co., 191 N.W.2d 601 (Neb. 1971); Gen. Elec. Co. v. Bush, 498 P.2d 366 (Nev. 1972); Buttrick v. Arthur Lessard & Sons, Inc., 260 A.2d 111 (N.H. 1969); Stang v. Hertz Corp., 497 P.2d 732 (N.M. 1972); Johnson v. Am. Motors Corp., 225 N.W.2d 57 (N.D. 1974); Temple v. Wean United, Inc., 364 N.E.2d 267 (Ohio 1977); Kirkland v. Gen. Motors Corp., 521 P.2d 1353 (Okla. 1974); Heaton v. Ford Motor Co., 435 P.2d 806 (Or. 1967); Webb v. Zern, 220 A.2d 853 (Pa. 1966); Ritter v. Narragansett Elec. Co., 283 A.2d 255 (R.I. 1971); Hatfield v. Atlas Enters. Inc., 262 S.E.2d 900 (S.C. 1980); Engberg v. Ford Motor Co., 205 N.W.2d 104 (S.D. 1973); Ford Motor Co. v. Lonon, 398 S.W.2d 240 (Tenn. 1966); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967); Zaleskie v. Joyce, 333 A.2d 110 (Vt. 1975); Ulmer v. Ford Motor Co., 452 P.2d 729 (Wash. 1969); Dippel v. Sciano, 155 N.W.2d 55 (Wis. 1967); Ogle v. Caterpillar Tractor Co., 716 P.2d 334 (Wyo. 1986); *see also* 63 AM. JUR. 2D *Products Liability* § 525 (1996) ("The great majority of American jurisdictions have adopted strict liability in the version represented by the Restatement of Torts 2d § 402A.").

40. RESTATEMENT, *supra* note 5, § 402A(1).

41. *Id.* cmt. a.

42. *Id.* § 402A(1).

conduct.[43] Although a thorough examination of each of these elements is beyond the scope of this Note,[44] a more careful examination of the first element will demonstrate that Section 402A's definition of seller clearly calls for the strict liability of passive sellers.

a. "One who sells." The first prong of the strict products liability test in Section 402A states, "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."[45] In clarifying this language, the comments to Section 402A make it abundantly clear that any professional seller can be subject to strict products liability: "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 [and] to any wholesale or retail dealer or distributor . . . ."[46] In fact, the only practical limitation in the language of Section 402A is that it excludes the "occasional seller of food or other such products who is not engaged in that activity as part of his business."[47] This limitation clearly does not exclude a passive seller such as a distributor or a retailer.[48]

b. Passive sellers. Section 402A's extension of strict liability to passive sellers is a sweeping expansion of liability. "Passive seller" is a term used to describe nonmanufacturing parties along the chain of distribution; typical examples of a passive seller include parties such as

43. *See* Frank J. Cavico, Jr., *The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products*, 12 NOVA L. REV. 213, 217 (1987) (stating that Section 402A's "central focus is on the product, not the conduct of the defendant").

44. For a more complete examination of the individual elements in Section 402A, see 63 AM. JUR. 2D *Products Liability* §§ 556–633 (1996); Lynn S. Davies, Comment, *Strict Products Liability in Utah Following* Ernest W. Hahn, Inc. v. Armco Steel Co., 1980 UTAH L. REV. 577, 580–87; Robert A. McConnell, Comment, *Survey of Utah Strict Products Liability Law: From* Hahn *to the Present and Beyond*, 1992 BYU L. REV. 1173, 1173–87 (dealing specifically with how Utah courts have interpreted each element of Section 402A).

45. RESTATEMENT, *supra* note 5, § 402A(1).

46. *Id.* cmt. f (emphasis added).

47. *Id*.

48. *See* 63 AM. JUR. 2D *Products Liability* § 560 (1996) (noting that "the application of strict liability does not hinge on technical limitation of the terms 'manufacturer' or 'seller' as used in Restatement of Torts 2d § 402A").

wholesalers, distributors, and retailers.[49] Justice Traynor first enunciated the rationale for holding a passive seller strictly liable in the landmark decision *Vandermark v. Ford Motor Co.*[50] in which a dealer who had done nothing more than sell a defective product to a plaintiff was held strictly liable. *Vandermark*—which predated the publication of Section 402A by one year[51]—held that it is permissible to hold passive sellers strictly liable because "[r]etailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products."[52] *Vandermark* further reasoned that holding passive sellers strictly liable "affords maximum protection to the injured plaintiff and works no injustice to the [passive seller]" because passive sellers and manufacturers "can adjust the cost of such protection between them in the course of their continuing business relationship."[53] Other courts have reasoned that the sellers have the opportunity to seek contribution and indemnification from manufacturers further up the chain of distribution.[54] This rationale, however, has been criticized in that it "generates wasteful legal costs" because of the time and expense involved in forcing passive sellers to engage in another lawsuit to seek indemnification from the manufacturer.[55]

On the whole, the language of Section 402A includes passive sellers as strictly liable parties, and most courts have agreed with the policy behind this rule.[56] Recognizing the harsh realities of the judicially adopted doctrine of strict products liability and the inherent waste of

49. See Cavico, *supra* note 43, at 218–23 for a discussion on holding retailers, wholesalers, and distributors strictly liable. *See also* Sanns v. Butterfield Ford, 2004 UT App. 203, ¶ 21, 94 P.3d 301, 307 (implying that a passive seller is a seller who "[does] not participate in the design, manufacture, engineering, testing, or assembly of the [product]").

50. 391 P.2d 168 (Cal. 1964).

51. Cavico, *supra* note 43, at 217–18.

52. *Vandermark*, 391 P.2d at 171.

53. *Id*. at 171–72.

54. *See, e.g.*, Kelly v. Hanscom Bros. Inc., 331 A.2d 737, 740 (Pa. 1974); Duncan v. Cessna Aircraft Corp., 665 S.W.2d 414, 432 (Tex. 1984). For a more detailed analysis of underlying policy considerations both for and against holding passive sellers strictly liable in tort, see Cavico, *supra* note 43, at 215–33. Cavico emphasizes the contribution/ indemnification rationale, stating that the "imposition of strict tort liability upon non-manufacturers is based on the significant rationale that retailers and wholesalers are entitled to indemnity from the manufacturer." *Id*. at 229.

55. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1, cmt. e (1998).

56. Cavico, *supra* note 43, at 218 ("A great majority of states have followed the *Vandermark* principle." (emphasis added)).

contribution and indemnification suits, many states began to enact legislation designed to curb the effects of Section 402A on passive sellers.

2. The legislative immunization of passive sellers

Because passive sellers fall within the definition of strict liability in Section 402A, the most common way to protect such sellers from Section 402A liability is to statutorily exempt them from strict liability suits. Many states began to enact product liability reform statutes by the end of the 1970s,[57] and many of these product liability reform measures specifically exempted passive sellers from suit in strict liability.[58] By legislatively immunizing passive sellers from the harsh demands of Section 402A, these statutes necessarily subordinated the doctrines of Section 402A to the legislative protections for passive sellers: to the extent that passive sellers complied with the specific statutory requirements of the jurisdiction, they were immune from strict products liability.[59]

57. *See id.* at 237–40.

58. Certain states enacted legislation prohibiting an action in strict products liability unless the seller is either the manufacturer of the product or participated in the manufacture of the product. *See, e.g.*, GA. CODE ANN. § 51-1-11.1 (2004); IND. CODE § 34-20-2-3 (2004); NEB. REV. ST. § 25-21,181 (2004); S.D. CODIFIED LAWS ANN. § 20-9-9 (Michie 2004). Other states have adopted a different legislative approach by prohibiting strict products liability actions against passive sellers unless no remedy at law exists against the manufacturer. *See, e.g.*, DEL. CODE ANN. tit. 18, § 7001 (2004); IDAHO CODE § [6-1407](4)(a), (b) (Michie 2004); 735 ILL. COMP STAT. 5/2-621(a)-(c) (2004); IOWA CODE § 613.18 (2004); KAN. STAT. ANN. § 60-3306(d), (e) (2003); KY. REV. STAT. ANN. § 411.340 (Michie 2004); MD. CODE ANN., CTS. & JUD. PROC. § 5-405 (2004); MINN. STAT. ANN. § 544.41 (West 2004); MO. ANN. STAT. § 537.762 (West 2004); N.C. GEN. STAT. ANN. § 99B-2 (2004); N.D. CENT. CODE § 28-01.3-04 (2004); OHIO REV. CODE ANN. § 2307.78 (Anderson 2004); TENN. CODE ANN. § 29-28-106 (2004); WASH. REV. CODE § 7-72.040(2)(a), (b) (2004). In an examination of the different types of statutory protections for passive sellers of goods in 1987, Frank J. Cavico Jr. identifies four different types of statutes: (1) indemnification statutes that require, under certain circumstances, the manufacturer to indemnify the seller; (2) "sealed container statutes" that protect sellers when the defective product was sold in its original sealed container, or more liberally, if the product was sold in its original condition; (3) absolute bars that "absolutely exempt[] the non-manufacturer from strict tort product liability"; and (4) partial bars that typically protect the seller if the manufacturer is in existence and is "able to satisfy judgment." Cavico, *supra* note 43, at 237–40.

59. It is important to note that the rationale behind most of these enactments was not only to curb the burdensome effects of bringing passive sellers into a claim of strict liability, but also to reduce the time and expense of forcing passive sellers to engage in costly and lengthy contribution and indemnification suits against the manufacturer to recover any losses associated with being held jointly and severally liable for a product's defects. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1, cmt. e (1998), which explains the rationale for these legislative enactments as follows:

While many legislatures enacted passive seller immunization statutes to mitigate the effects of Section 402A, a significant number of jurisdictions that had adopted Section 402A enacted no such measure.[60] Because Section 402A contains no protection for passive sellers, those jurisdictions that have enacted no passive seller exemption to strict liability have necessarily continued to subject passive sellers to the strict liability doctrines of Section 402A. Prior to *Sanns*, Utah was such a jurisdiction.

C. Utah's Strict Liability Jurisprudence

Although Utah explicitly adopted Section 402A as its basis for strict liability, no Utah court ever explicitly stated that a passive seller could be held strictly liable in Utah. Yet before *Sanns*, there was every indication that passive sellers could be liable under Section 402A.[61]

> Legislation has been enacted in many jurisdictions that, to some extent, immunizes nonmanufacturing sellers or distributors from strict liability. The legislation is premised on the belief that bringing nonmanufacturing sellers or distributors into products liability litigation generates wasteful legal costs. Although liability in most cases is ultimately passed on to the manufacturer who is responsible for creating the product defect, nonmanufacturing sellers or distributors must devote resources to protect their interests. In most situations, therefore, immunizing nonmanufacturers from strict liability saves those resources without jeopardizing the plaintiff's interests. To assure plaintiffs access to a responsible and solvent product seller or distributor, the statutes generally provide that the nonmanufacturing seller or distributor is immunized from strict liability only if: (1) the manufacturer is subject to the jurisdiction of the court of plaintiff's domicile; and (2) the manufacturer is not, nor is likely to become, insolvent.

Id.

60. *See, e.g.*, Smith v. Fiat-Roosevelt Motors, Inc., 556 F.2d 728 (5th Cir. 1977) (applying Florida law and holding that an importer of a car could be subject to strict liability for a dangerous car); Oser v. Wal-Mart Stores, Inc., 951 F. Supp. 115 (S.D. Tex. 1996) (holding that a retail seller is subject to strict liability for a defective shopping bag that caused injury to the plaintiff); Curry v. Sile Distribs., 727 F. Supp. 1052 (N.D. Miss. 1990); Vandermark v. Ford Motor Co., 391 P.2d 168, 171 (Cal. 1964) (rejecting defendant's assertion that strict liability applies only to manufacturers and applying strict liability to retailers); Cottom v. McGuire Funeral Serv., Inc., 262 A.2d 807, 809 (D.C. 1970); Lawrence v. Brandell Prods., Inc., 619 So. 2d 427 (Fla. Dist. Ct. App. 1993); Giuffrida v. Panasonic Indus. Co., 607 N.Y.S.2d 72 (1994); Moss v. Polyco, Inc., 522 P.2d 622, 626–27 (Okla. 1974); Berkebile v. Brantley Helicopter Corp., 337 A.2d 893, 898 n.3 (Pa. 1975); s*ee also* M. STUART MADDEN, PRODUCTS LIABILITY § 3.19 (2d ed. 1988) ("Decisions in most jurisdictions have held that the doctrine of strict tort liability may be applied against the ordinary retailer in products liability cases."); Cavico, *supra* note 43, at 218 (explaining that a great majority of jurisdictions have applied the principles of *Vandermark* in ruling that retailers can be held strictly liable in tort).

61. One of the most troubling aspects of the *Sanns* decision is that, without discussing Section 402A, the court ruled that passive sellers could not be held strictly liable. In the section of the opinion dealing with the strict liability of Butterfield Ford, the court mentions Section 402A only once in a string citation. *See* Sanns v. Butterfield Ford, 2004 UT App. 203, ¶ 15, 94 P.3d 301, 306. See *infra* Part IV.A.2 for a full examination of the court's treatment of Section 402A.

Utah adopted Section 402A as its basis for strict liability in *Ernest W. Hahn, Inc. v. Armco Steel Co.*[62] In *Hahn*, the Utah Supreme Court stated that a "manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[63]

A short time later, the court held that comparative fault principles would play a part in strict liability analysis. Comparative fault is the principle that allows for a comparison between the culpability of the defendants and the culpability of the plaintiffs in a tort action to ensure that the defendants are liable only to the extent of their culpability.[64] Comparative fault assumes that an appropriate distribution of fault and damages requires such a comparison of fault between defendants and plaintiffs.[65] In *Mulherin v. Ingersoll-Rand Co.*,[66] the court followed the logic and the policy of *Hahn*[67] while extending Utah's strict liability doctrine to include comparative principles.[68] Notably, the court allowed the concept of culpability to play a part in strict liability analysis.[69]

62. 601 P.2d 152, 155–59 (Utah 1979) (internal quotation marks omitted). The *Hahn* decision traces the development of the strict liability doctrine back to *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), in which, for the first time, a court found that absent privity between a manufacturer of a product and the product's user, a manufacturer could still be liable to the user if the product was negligently made and the resulting defect could cause serious harm to the user. *Hahn*, 601 P.2d at 156. Utah adopted the *MacPherson* standard in *Hooper v. Gen. Motors Corp.*, 260 P.2d 549 (Utah 1953). For the language of Section 402A, see *supra* note 36.

63. *Hahn*, 601 P.2d at 156 (quoting Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1962)) (internal quotation marks omitted).

64. 63A AM. JUR. 2D *Products Liability* § 1428 (1996).

65. The LRA contains a comparative fault provision: "A person seeking recovery may recover from any defendant or group of defendants whose fault, combined with the fault of persons immune from suit, *exceeds the fault of the person seeking recovery* . . . ." UTAH CODE ANN. § 78-27-38(2) (2004) (emphasis added).

66. 628 P.2d 1301 (Utah 1981).

67. Like the majority in *Hahn*, the *Mulherin* majority declared the policy for strict liability and the inclusion of comparative principles in strict liability as follows: "strict liability in tort is not the equivalent of making the manufacturer or seller absolutely liable as an insurer of the product and its use." *Id.* at 1302.

68. For a discussion on the common law development from an "all-or-nothing" contributory negligence theory to comparative fault standards under which the plaintiff's actions could potentially mitigate recovery, see Lee A. Wright, Comment, *Utah's Comparative Apportionment: What Happened to the Comparison?*, 1998 UTAH L. REV. 543, 554–59. In *House v. Armour of America, Inc.*, 929 P.2d 340 (Utah 1996), the Utah Supreme Court stressed that since *Mulherin*, "subsequent Utah court decisions have departed from the strict all-or-nothing rule." *Id.* at 344.

69. *Mulherin*, 628 P.2d at 1304 ("Other courts have rejected the application of comparative fault principles to strict liability claims because culpable conduct is not at issue in strict liability, only causation. We find this unpersuasive." (footnote omitted)). See *infra* Part IV.B for further analysis of this point in cases involving the strict liability of passive sellers.

Although affirmative defenses to strict products liability exist, those defenses are "not a complete bar to any recovery from defendants on the basis of strict liability, but should be applied according to comparative principles."[70]

Despite the adoption of Section 402A in *Hahn* and the clarification in *Mulherin* that comparative principles were a part of the strict liability analysis, application of Section 402A was not as easy as the *Hahn* court may have initially thought. One of the continuing difficulties of Section 402A was defining who a seller is for strict liability purposes.

Although Utah courts never explicitly stated that Section 402A applied against passive sellers in Utah, before *Sanns* there was every indication that this was the case. Utah courts have applied strict products liability to various types of "sellers," including defective steel joist manufacturers,[71] winch manufacturers,[72] airplane manufacturers,[73] drug manufacturers,[74] water tank manufacturers,[75] and bullet-resistant vest manufacturers and distributors.[76] While applying a strict products liability analysis to this broad variety of sellers, Utah courts have been reluctant to classify other entities such as "residential subdividers,"[77] component parts manufacturers (when the component parts were subsequently integrated into a larger product),[78] and "compounding pharmacist[s]"[79] as sellers because these entities and the facts of their

70. *Mulherin*, 628 P.2d at 1303.

71. Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 152–59 (Utah 1979).

72. *Mulherin*, 628 P.2d at 1301–04.

73. Berry v. Beech Aircraft Corp., 717 P.2d 670, 673–74 (Utah 1985).

74. Grundberg v. Upjohn Co., 813 P.2d 89, 91–95 (Utah 1991). One should note that in *Upjohn* the court accepted and expanded comment k to Section 402A and held that "all FDA-approved prescription medications" are "unavoidably unsafe," which characterization precludes an application of strict products liability against the manufacturer of the FDA-approved drug. *Id.* at 90 (internal quotation marks omitted).

75. Interwest Constr. v. Palmer, 923 P.2d 1350, 1355–57 (Utah 1996).

76. House v. Armour of Am., Inc., 929 P.2d 340 (Utah 1996), *aff'g* 886 P.2d 542 (Utah Ct. App. 1994). This case is especially relevant for purposes of this Note as it allows a strict liability claim against both a retailer and a manufacturer. The appellate court stated that "[s]trict liability may extend not only to the dealer and retail seller of the product, but to the manufacturer of the product and the manufacturers of its component parts." *House*, 886 P.2d at 553 (internal quotations omitted) (quoting Oak Grove Investors v. Bell & Gossett Co., 668 P.2d 1075, 1080 (Nev. 1983)).

77. Loveland v. Orem City Corp., 746 P.2d 763, 770–72 (Utah 1987).

78. *House*, 886 P.2d at 553; Schafir v. Harrigan, 879 P.2d 1384, 1388 (Utah Ct. App. 1994); Maack v. Res. Design & Constr., Inc., 875 P.2d 570, 581–82 (Utah Ct. App. 1994).

79. Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2003 UT 43 ¶¶ 20–36, 79 P.3d 922. The court defined a "compounding pharmacist" as one who "combines, mixes, or alters ingredients to create a medication tailored to the needs of an individual patient." *Id.* ¶ 25 (internal quotations

individual cases simply did not lend themselves well to a Section 402A analysis.

It is clear from these cases that the final manufacturers of dangerous products could always be brought into a claim under a theory of strict liability in Utah because they fit well within the definition of seller in Section 402A.[80] Less clear is whether passive sellers such as distributors were likewise vulnerable to Section 402A liability because distributors were rarely defendants in strict liability cases in Utah.[81] In fact, in each instance that a Utah court examined a claim of strict liability against a manufacturer *and* a passive retailer, the court was silent on whether the passive retailer was properly included in the claim.[82]

For example, *House v. Armour of America* is one of the few Utah cases that explicitly dealt with a claim alleging strict liability against both a manufacturer and a retailer.[83] In *House*, the court presumed that retailers *could* be brought under a claim of strict liability in accordance with the prevailing Section 402A view.[84] The trial court granted summary judgment for three separate defendants—the final manufacturer of a bullet-resistant vest, the manufacturer of a component of the vest, and the retailer who sold the vest.[85] Upon its review, the appellate court reversed the summary judgment for both the final manufacturer and the retailer, but it upheld the summary judgment for the component part manufacturer.[86] In upholding the grant of summary judgment to the

omitted) (quoting Thompson v. W. States Med. Ctr., 535 U.S. 357, 360 (2002)). The court determined that compounding was within the statutory definition of pharmacist activity and therefore the pharmacist who engaged in compounding was not engaging in manufacturing for purposes of strict products liability. *Id.* ¶ 33.

80. *See supra* notes 71–79 and accompanying text.

81. The court in *Mulherin* noted in dicta that strict liability holds "manufacturers *and sellers* responsible for the injuries caused by their products." Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301, 1303 (Utah 1981) (emphasis added).

82. *See* House v. Armour of Am., Inc., 929 P.2d 340 (Utah 1996), *aff'g* 886 P.2d 542 (Utah Ct. App. 1994); Raithouse v. Saab-Scandia of Am., Inc., 784 P.2d 1158 (Utah 1989); Dowland v. Lyman Prods. for Shooters, 642 P.2d 380 (Utah 1982).

83. *See House*, 886 P.2d at 544–45.

84. *See id.* at 546–47. Because the Utah Supreme Court's decision in *House* affirmed the appellate court's decision and referred repeatedly to that decision, this Note will refer both to the appellate court and Supreme Court decisions to fully analyze the strict liability issue involved in the case. *See e.g.*, *House*, 929 P.2d at 342 (stating "[w]e agree with the court of appeals on all issues and affirm").

85. *House*, 886 P.2d at 544–45.

86. *Id.* at 553–55. It is not entirely clear from the appellate court's decision in *House* whether both the final manufacturer and the retailer were being examined underneath the rubric of strict liability because the court includes a section dealing with the retailer's breach of warranty of fitness

component part manufacturer, the court stressed that although "[s]trict liability may extend not only to the dealer *and retail seller of the product*, but to the manufacturer of the product and the manufacturers of its component parts,"[87] the component part manufacturer cannot be liable when it "does not take part in the design or assembly of the final system or product."[88]

In *House*, both the appellate court and the Utah Supreme Court had every opportunity to dismiss from a suit in strict products liability a passive retailer who had done nothing more than "engage[] in the business of selling law enforcement supplies such as bullet resistant vests," yet both courts refused to do so.[89] This failure to dismiss the passive seller strongly suggests that both the Utah Supreme Court and the Utah Court of Appeals accepted without question or analysis Section 402A's standard of allowing passive sellers in suits of strict liability.[90]

D. The Liability Reform Act

While both the appellate court and the supreme court recognized in *House* that passive sellers were subject to Section 402A suits, the courts did not consider how strict liability principles were affected by Utah's Liability Reform Act.[91] Consequently, whether strict liability principles

for a particular purpose. *See id*. at 545–55. However, the Utah Supreme Court's decision in *House* focused solely on the strict liability claim and upheld the appellate court's reversal of summary judgment for the final manufacturer and the retailer. *House*, 929 P.2d at 342.

87. *House*, 886 P.2d at 553 (quoting Oak Grove Investors v. Bell & Gossett Co., 668 P.2d 1075, 1080 (Nev. 1983) (emphasis added) (internal quotation marks omitted)).

88. *Id.* (quoting Koonce v. Quaker Safety Prod. & Mfg., 798 F.2d 700, 715 (5th Cir. 1986)).

89. *Id*. at 545.

90. Similar to *House*, the Utah Supreme Court also implied that passive sellers may be included as a defendant in strict liability in *Raithous v. Saab-Scandia of America, Inc.*, 784 P.2d 1158 (Utah 1989). In that case, the Utah Supreme Court examined a strict products liability claim involving an incident in which a car caught fire and in which the manufacturer, the American distributor, and the local dealer were codefendants in the cause of action. Although the crux of the court's analysis focused on the applicable statute of limitations, the court made no indication that it was improper to bring the sellers in the chain of distribution into the action under a theory of strict liability. *See id.* at 1160–62; *see also* McConnell, *supra* note 44, at 1175–76 (stating that the Utah Supreme Court "has implicitly acknowledged that non-manufacturing sellers can be held liable under a strict products liability theory").

91. UTAH CODE ANN. §§ 78-27-37 to -43 (2004). The passage of the LRA in 1986 was part of a nationwide tort reform movement that sought to ameliorate the harshness of certain common law principles such as joint and several liability. *See* Brad C. Betebenner, *The Liability Reform Act: An Approach to Equitable Application*, 13 J. CONTEMP. L. 89, 91–93 (1987); Sanders & Joyce, *supra* note 8, at 210–11, 220–22. The author stands in the debt of Mr. David N. Wolf, an attorney with Snell & Wilmer LLP in Salt Lake City, who argued the *Sanns* case before the Utah Court of Appeals on behalf of Butterfield Ford and who provided the author with the briefs from the appeal and with

could be justified in light of the LRA's abrogation of joint and several liability remained unclear.

Although the LRA reforms tort liability in Utah, it includes *no* express immunization for passive sellers from strict liability suits such as those found in passive seller immunization statutes.[92] Instead, the LRA focuses solely on fault apportionment while abolishing the concept of joint and several liability in an effort to ensure "basic fairness."[93] To achieve this fairness, the LRA prohibits joint and several liability among multiple tortfeasers. The LRA states that "[n]o defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant."[94] It further limits the amount a plaintiff can recover from any one defendant by providing that "the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant."[95] Finally, the LRA precludes the practice of contribution suits.[96]

Nonetheless, the LRA's efforts to ensure fairness in fault apportionment is handicapped by a definition of fault[97] that is anything

numerous helpful suggestions regarding the application of the LRA to strict products liability jurisprudence. The information regarding the tort reform movement in the 1980s was introduced to the author by Mr. Wolf and by the brief on behalf of Butterfield Ford. *See* Brief of the Appellee at 15–17, Sanns v. Butterfield Ford, 2004 UT App. 203, 94 P.3d 301 (No. 20030497-CA) (on file with author) [hereinafter *Butterfield Ford Brief*]. Between 1985 and 1988, forty-eight jurisdictions passed acts restructuring tort liability, and thirty of those states reformed joint and several liability principles. *See* Sanders & Joyce, *supra* note 8, at 210 n.13, 220–22.

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

93. 46th Utah Leg., Gen. Sess. (Sen. CD No. 63, 6) (Feb. 12, 1986). As one senator observed during debate on the bill, "[t]he defendant ought to be on the hook only for its own percentage of damages, but ought not be the guarantor for everyone else's damages." *Id*., *quoted in Butterfield Ford Brief*, *supra* note 91, at 18.

94. § 78-27-38(3).

95. § 78-27-40(1).

96. § 78-27-40(2). Contribution suits are "a method for tortfeasors forced to pay damages greater than their proportion of fault to recover from other joint tortfeasors in a separate action." Nat'l Serv. Indus., Inc. v. B.W. Norton Mfg. Co., 937 P.2d 551, 554 (Utah Ct. App. 1997); *see also* Bruyner v. Salt Lake County, 551 P.2d 521, 522 (Utah 1976) (Ellett, J., dissenting); RESTATEMENT (SECOND) OF TORTS § 886A (1977).

97. § 78-27-37(2). The language defining fault is as follows:

> "Fault" means any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all its degrees, comparative negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification, or abuse of a product.

but clear.[98] For example, although the LRA is not designed as a measure to protect passive sellers or even as a measure designed to deal with strict liability, during passage of the bill the legislature debated whether the LRA would have any affect on Utah's concept of strict liability and whether strict liability could be considered "fault" for purposes of the bill.[99] In defining fault for purposes of the application of the LRA, the plain language of the statute includes both strict liability and products liability as types of fault,[100] but the language contains no guidance concerning how the LRA affects these strict liability principles.[101]

Id.

98. The *Sanns* court noted that the inclusion of strict liability is one of the major confusions in the LRA's definition of fault: "The legislature's inclusion of 'strict liability' in defining 'fault' is confusing and somewhat problematic . . . ." Sanns v. Butterfield Ford, 2004 UT App. 203, ¶ 14 n.5, 94 P.3d 301.

99. Some of the explanation of the LRA given by then Assistant Attorney General Steve Sorenson during the debate is particularly relevant to this Note:

> [The LRA] is a comparative negligence statute. The law does not, or the bill does not . . . change the substantive law of strict liability or breach of warranty at all. What it says is if you have multiple defendants, one of whom is guilty of negligence, one of whom is guilty of strict liability, the jury in apportioning fault, apportions fault between those parties regardless of the theory on which the party is liable. This is an issue with which the Supreme Court struggled in the, I think it's the *Mulherin* case, a couple of years ago, and really hasn't known how to handle it, so we think that's a good clarification that if you have difference [sic] defendants guilty on different theories of liability, nonetheless that's all considered fault for the purpose of apportioning damages by the jury.

46th Utah Leg., Gen. Sess. (Sen. CD No. 63, 6) (Feb. 12, 1986) (statement of Assistant Attorney General Steve Sorenson).

100. § 78-27-37(2). For the complete text of the LRA's definition of "fault," see *supra* note 97. In *Sanns*, the court explained that the confusion created by including strict liability in the definition of fault is due to the fact that "unlike negligence, strict liability does not require an examination of a party's fault. Strict liability is 'the breach of an *absolute* duty to make something safe.'" *Sanns*, 2004 UT App. 203, ¶ 14 n.5 (quoting BLACK'S LAW DICTIONARY 926 (7th ed. 1999)).

101. Although strict liability is included in the LRA's definition of fault, before *Sanns* it was unclear how this inclusion was to be interpreted. This was one of the main points of argument for both parties in the *Sanns* case. Butterfield Ford argued that the statute should be read with emphasis on the first clause (any actionable "breach of legal duty, act, or omission proximately causing or contributing to injury or damages"), which mandated some culpable conduct on the part of the defendant before the defendant could be apportioned fault under the LRA. *Butterfield Ford Brief*, *supra* note 91, at 25–26 (quoting UTAH CODE ANN. § 78-27-37(2)). Sanns, on the other hand, argued that such an interpretation of the statute would render strict liability nothing more than negligence and that emphasis should be given to the fact that strict liability was included in the list of possible ways of being at fault for purposes of fault apportionment. Reply Brief of the Appellant at 6–12, Sanns v. Butterfield Ford, 2004 UT App. 203, 94 P.3d 301 (No. 20030497-CA) (on file with author) [hereinafter *Sanns Brief*]. Sanns further argued as follows:

> The LRA no more abolished strict products liability for a passive retailer than it abolished liability for any other tortfeasor whose liability was previously governed by principles of

A few cases dealing with the application of the LRA foreshadowed what was to come in *Sanns* and shed some light on how the LRA interacts with principles such as comparative fault and multiple tortfeasors. First, in *S.H. v. Bistryski*[102] the Utah Supreme Court ruled that "[b]y including 'strict liability' in the definition of fault, the legislature clearly intended comparative fault principles to be applied to strict liability claims."[103] The court thereby recognized that the comparative principles of *Mulherin* would continue under the LRA.[104]

In *National Service Industries, Inc. v. B.W. Norton Manufacturing Co.*,[105] the Utah Court of Appeals took occasion to explain the application of the LRA against multiple tortfeasors. In a lengthy review of the doctrines, similarities, and differences of indemnification and contribution, the court concluded that both rest on a "common foundation" that "attempt[s] to ensure that parties are not held unfairly liable to an extent greater than their degree of fault."[106] Because the doctrines are so similar, the court ruled that the LRA's ban on contribution suits likewise prohibits indemnification suits.[107] The court recognized that the LRA's ban on joint and several liability is entirely inconsistent with suits that seek redistribution of fault because the LRA mandates the fault be properly apportioned in the first place.[108] This

> joint and several liability, contribution or indemnity. At most, it simply changed the way in which liability is to be apportioned in the case of multiple tortfeasors.

Id. at 10.

102. 923 P.2d 1376 (Utah 1996).

103. *Id*. at 1380.

104. *See* Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301, 1304 (Utah 1981); *supra* notes 64–70 and accompanying text.

105. 937 P.2d 551 (Utah Ct. App. 1997).

106. *Id*. at 554.

107. *Id*. at 555; *cf.* RESTATEMENT (SECOND) OF TORTS § 886A cmt. l (1977) ("In a state following comparative contribution, or contribution according to the comparative fault of the parties, contribution may tend to merge with indemnity, and the technical distinctions of indemnity may become less important. . . . The eventual outcome is likely to be a single remedy based on comparative fault."). The court explained that the abrogation of contribution and indemnification necessitated the joining of all potentially liable defendants into the cause of action: "we recognize that prohibiting subsequent apportionment suits essentially requires joint tortfeasor codefendants to raise cross-claims against each other in the underlying tort action or else such claims may be lost. As such, cross-claims for apportionment among joint tortfeasor codefendants are mandatory." *Nat'l Serv.*, 937 P.2d at 556.

108. *Nat'l Serv.*, 937 P.2d at 555 (reasoning that the ban on contribution suits "comports with the overall statutory scheme which abolishes joint and several liability and renders tortfeasors liable only to the extent of their own proportion of fault").

logic resonated with the *Sanns* court and, as will be seen, dictated much of its holding.

Before *Sanns*, comparative fault principles continued to function under the LRA and neither contribution nor indemnification suits were allowed. The stage was set to determine the exact definition of fault within the meaning of the LRA and to examine whether passive sellers could be included in such a definition. If passive sellers were included, this would, in effect, determine whether the LRA could function as an indirect immunization of passive sellers from strict liability in contravention of Section 402A.

III. *SANNS V. BUTTERFIELD FORD*

A. The Facts of Sanns

On December 7, 2000, Sanns was a passenger in a 1999 Ford Econoline E-350 van and was injured when the driver of the van lost control, causing the van to roll over several times near American Fork, Utah.[109] The van was owned by the Utah Department of Corrections, and at the time of the accident, Sanns was acting in his capacity as a prison guard.[110] Sanns brought an action alleging claims of strict liability, breach of warranty, and negligence against both Ford, the manufacturer of the van, and Butterfield Ford, the distributor of the van.[111] Butterfield Ford immediately made a motion for summary judgment, which it ultimately won.[112] While the case against Ford was removed to the

109. Sanns v. Butterfield Ford, 2004 UT App. 203, ¶ 2, 94 P.3d 301; *Butterfield Ford Brief*, *supra* note 91, at 4–5.

110. *Sanns*, 2004 UT App. 203, ¶ 2.

111. *Id.* ¶ 3.

112. It is worth reciting the appellate court's explanation of the trial court's reasoning in granting Butterfield Ford's motion for summary judgment.

> The court found that (i) Sanns failed to present any credible evidence to show that Butterfield Ford was anything but a passive distributor of the van; (ii) Butterfield Ford did not design, manufacture, test, assemble, package, alter, or ship the vehicle; (iii) the fact that Butterfield Ford acknowledged that a van has a higher center of gravity than a sports car does not create a genuine issue of material fact that the dealer knew of any design defects in the van; and (iv) the [LRA] does not permit a cause of action for strict liability against a purely passive distributor where the fault complained of arises out of a design or manufacturing defect, and where the manufacturer/designer of the product is a named party in the action.

Id.

United States District Court,[113] Sanns appealed the trial court's grant of summary judgment on behalf of Butterfield Ford to the Utah Court of Appeals.

In his appeal, Sanns argued that the trial court was wrong in finding that Butterfield Ford was not negligent in its sale of the van[114] and "in holding that a passive retailer can no longer be liable in strict products liability under Utah law."[115] Sanns argued that the LRA did not alter the doctrine of strict products liability. Instead, the LRA recognized strict liability claims but altered how liability is to be apportioned when multiple tortfeasors are named in an action.[116] Thus, the appellate court was left to decide how to interpret the LRA in actions involving a strict liability claim against a purely passive distributor.

B. The Logic of Sanns

The *Sanns* court ultimately held that passive sellers cannot be brought under a claim of strict liability because if they could be found strictly liable, they might be found liable to a degree greater than their culpability without ability to seek contribution or indemnification from more liable parties.[117] The court reasoned that such a scenario is unacceptable under the LRA and thereby found that the LRA contained an indirect immunization for passive sellers.[118]

Implicit in this holding is that—despite its assertions to the contrary—the court equated the LRA's definition of fault, particularly strict liability fault, to a concept of culpability. The court began by noting that the LRA "does not prohibit a factfinder from assigning liability to a party under a claim for strict liability" because strict liability is included in the definition of fault.[119] While stating that "[t]he . . . inclusion of

113. *Id*. ¶ 3 n.1; *Butterfield Ford Brief*, *supra* note 91, at 4. One of Butterfield Ford's contentions to the appellate court was that Butterfield Ford was included in the action solely to destroy diversity jurisdiction and thereby preclude Ford from removing the case to federal court. *Id*. at 27.

114. *Sanns*, 2004 UT App. 203, ¶ 6. Because the negligence aspect of the decision is beyond the scope of this Note, it will not be discussed further, other than to note that the court had little difficulty in dismissing this claim. It agreed with the trial court that Butterfield Ford was a passive retailer and as such "did not owe a duty to its customers to warn them of a manufacturing defect that it did not know of itself." *Id.* ¶ 9.

115. *Sanns Brief*, *supra* note 101, at 1.

116. *Id*. at 1–2.

117. *See Sanns*, 2004 UT App. 203, ¶ 14.

118. *See id.* ¶¶ 15–19.

119. *Id*. ¶ 14.

'strict liability' in defining fault is confusing and somewhat problematic,"[120] the court declared that it refused to liken strict liability to a concept of culpability:

> The use of strict liability in this statutory definition should be viewed only as a cause of action subject to the [LRA], rather than changing the traditional use of the term fault to somehow include strict liability, a liability concept that is unconcerned with fault in the usual sense of culpability.[121]

The essence of this interpretation is that strict liability can indeed be included as a means of assigning liability under the LRA. For example, when a plaintiff brings one defendant into the action under a claim of negligence, the plaintiff would *not* be prohibited from bringing another defendant into the action under a theory of strict liability.[122]

Despite these assertions that strict liability does not equate to culpability, the court's subsequent analysis demonstrates otherwise. The court next examined whether claims of strict liability are viable against multiple tortfeasors and began this examination by recognizing that "under general tort law principles, as between an injured buyer of a product and the seller of the product, the seller must bear the liability."[123] However, as the court noted, the LRA makes this analysis more nuanced: "this traditional principle [of tort law] conflicts with the clear language and intent of the [LRA],"[124] which prohibits recovery from a defendant in excess of its fault.[125] The court noted that many jurisdictions have expressly immunized passive sellers from strict liability suits and focused on those jurisdictions that have legislatively prohibited strict liability claims against a passive seller "unless the product manufacturer is unreachable or unable to satisfy the

120. *Id.* ¶ 14 n.5.

121. *Id.*

122. *Cf.* S.H. v. Bistryski, 923 P.2d 1376, 1382–83 (Utah 1996) (applying the LRA to assign comparative liability to the defendant under a theory of strict liability and to the plaintiff under a theory of negligence).

123. *Sanns*, 2004 UT App. 203, ¶ 15. It is important to note that this is actually the only time in the court's decision that it refers to Section 402A, and it does so almost as an aside in a string citation. As will later be demonstrated, this is one of the major weaknesses of the court's analysis. *See infra* Part IV.A.2.

124. *Sanns*, 2004 UT App. 203, ¶ 15.

125. UTAH CODE ANN. § 78-27-38(3) (2004) ("No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant . . . .").

judgment."[126] Although the court was drawn to this form of passive seller immunization, it admitted that the LRA contained no such exclusion for passive sellers.[127] Despite the absence of a direct passive-seller immunization in the LRA, the court proceeded to examine the LRA to determine whether it could indirectly contain such an exclusion.

The court ultimately held that the abrogation of joint and several liability and contribution and indemnification suits in the LRA amounted to an indirect immunization of passive sellers from strict liability. The court explained that the elimination of joint and several liability does not preclude a comparison of fault among multiple defendants brought under various theories of liability[128] because the basic purpose of the LRA is fairness in the sense that no one defendant should be liable for more than its degree of fault.[129] Second, the court indicated that the elimination of joint and several liability eradicated the need for contribution and indemnification suits because there is no possibility of being held liable to a degree greater than one's fault.[130] Thus, all potential defendants should be brought into the suit to be apportioned their degree of fault—which, as has been shown, could be under a theory of strict liability—and because no one defendant will be apportioned an unfair degree of liability, there remains no ability to seek either contribution or indemnification.

With that, the court affirmatively rejected Sanns' assertion that "to the extent the retailer is held liable for the harm caused by the defective product, it may have a claim for indemnity against the manufacturer."[131]

126. *Sanns*, 2004 UT App. 203, ¶ 16. The court focuses on statutes from Idaho, Illinois, Kansas, and Washington, which all adopted rules to prohibit recovery from a passive seller unless recovery against a manufacturer is not feasible. See *supra* note 58 for a more thorough list of these types of statutes.

127. *Sanns*, 2004 UT App. 203, ¶ 16 (stating Utah had no "explicit statutory exclusion" protecting passive sellers from strict liability).

128. *Id*. ¶ 18; s*ee also, e.g.*, Red Flame, Inc. v. Martinez, 2000 UT 22, ¶ 10, 996 P.2d 540 (finding that the LRA applies to strict liability in the Dramshop Liability Act); S.H. v. Bistryski, 923 P.2d 1376, 1382–83 (Utah 1996).

129. *See supra* notes 92–96 and accompanying text.

130. *Sanns*, 2004 UT App. 203, ¶¶ 19–20. In recounting this principle, the court relies heavily on its previous ruling in *Nat'l Serv. Indus. v. B.W. Norton Mfg. Co.*, 937 P.2d 551, 554–55 (Utah Ct. App. 1997), in which it stated that "there remains no need for suits to redistribute loss among joint tortfeasors because no party will in any case be liable for more than its degree of fault in the underlying tort action." *Id*. at 555. It will be recalled that the LRA expressly abolishes contribution suits. *See* UTAH CODE ANN. § 78-27-40(2) (2004).

131. *Sanns*, 2004 UT App. 203, ¶ 19 (internal quotations omitted). Indemnification and contribution based in contract, agreement, or statute are still acceptable under the LRA. *See* § 78-27-43.

By rejecting this assertion, the court held that a passive seller cannot be sued under a theory of strict liability "with the idea that it may later seek indemnification or contribution from another."[132] The court reasoned that the possibility of a passive seller being found unfairly liable—with no possibility of seeking indemnification from the culpable party—precludes the inclusion of a passive seller under a claim of strict liability when the culpable party is already included in the suit. Thus, the court judicially created a passive seller exemption to Section 402A by utilizing the demands of the LRA.

IV. THE PROBLEMS AND UNCERTAINTIES OF *SANNS* AND A PROPOSAL FOR THE SHIFTING NATURE OF FAULT

The *Sanns* court's reasoning is anything but straightforward, and in the end, the court determined that the LRA subordinates Section 402A. Most simply, there are two principles driving the LRA—(1) no defendant can be liable for more than "the proportion of fault attributed to that defendant" under the LRA;[133] and (2) there is no possibility of contribution or indemnification suits to seek restitution for a finding of liability to an extent greater than one's degree of fault.[134] Because a passive seller could potentially be found liable for more than its share of fault and because such a passive seller would have no opportunity for indemnification, the court reasoned that a passive seller cannot be included in a strict liability claim. Although the court was not entirely clear, it appeared to hold that the manufacturer must be a party to the suit in order for the exclusion of the passive seller to take effect. This holding is clearly an attempt to adopt the type of legislative immunization that

132. *Sanns*, 2004 UT App. 203, ¶ 20.

133. § 78-27-38(3).

134. The court's final summation of its reasoning is worth noting:

> The strict liability "fault" in this case, if any, lies with the manufacturer, not with Butterfield Ford, the passive retailer. The [LRA] eliminated all aspects of joint and several liability, which means strict liability cannot be apportioned to Butterfield Ford, a passive seller, and also to Ford. Further, if Butterfield Ford were imposed with some or all of the fault actually belonging to Ford, Butterfield Ford no longer has the option of seeking indemnification or contribution from Ford in a subsequent suit. Therefore, as long as Ford is present in the suit, there remains no reason to require Butterfield Ford to incur the time and expense of defending this action, and consequently the trial court was correct to dismiss Butterfield Ford.

Sanns, 2004 UT App. 203, ¶ 21 (citation omitted).

protects passive sellers when a manufacturer is able to satisfy the judgment.[135]

However, this attempt simply created more problems than it solved. The court's usurpation of legislative prerogative was unnecessary and gave rise to a number of potential problems that could drastically limit the ability of consumers to recover for damages caused by defective products. These problems could have been avoided by balancing the demands of the LRA with the doctrines of Section 402A and expanding comparative fault principles through the concept of shifting fault. Shifting fault refers to a two-step definition of fault: in the first step, fault is any theory of liability that allows a potential tortfeasor to be brought into a cause of action; in the second step, fault is equated to culpability to ensure a proper awarding of damages according to comparative fault principles. This approach to strict liability obviates the negative realities of *Sanns* while providing adequate remedies to harmed consumers and effective protection for innocent sellers.

A. The Problems of Sanns

Being overly concerned with protecting innocent sellers, the *Sanns* court was blind to the effects its decision could have on consumers' remedies at law for damages caused by dangerous products. The major harmful effects of the decision stem from the ill-advised judicial immunization of passive sellers from Section 402A and are twofold: (1) the summary dismissal of Section 402A could portend the end of strict liability as a valid theory of liability; and (2) the silence on future application of the decision leaves harmed consumers without guidance as to when and under what theory of liability to join sellers, which consequently leaves consumers vulnerable to sanctions for improperly joining sellers in a cause of action.

1. The legislature never intended to immunize passive sellers from strict liability suits

The court's judicial immunization of passive sellers from strict liability, based only on the elimination of joint and several liability, is extraordinary, unique, and unsupported by anything in the legislative history of the LRA. The decision is directly contrary to Utah courts'

135. *See supra* note 58.

traditional policy of allowing the legislature to make the law[136] and could have major ramifications on the ability of harmed consumers to recover against sellers.

Many jurisdictions have created an express immunization for passive sellers from strict liability, and by so doing, have limited the effects of Section 402A. However, each of these jurisdictions has done so legislatively.[137] Therefore, *Sanns* is unique because it created judicially what others states have done only legislatively. The very reason that many jurisdictions have sought to immunize passive sellers from strict liability is that they found the practice unjust[138] and wasteful.[139] The *Sanns* court was apparently drawn to rules in states that prohibit recovery against a passive seller when the manufacturer is subject to the cause of action[140] and attempted to create a similar rule.

136. *See* Matheson v. Ferry, 641 P.2d 674, 684 (Utah 1982) (Howe, J., concurring) (citing Stanton v. Stanton, 517 P.2d 1010 (Utah 1974)).

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

138. As one commentator noted, "The application of strict liability to the non-negligent retailer and wholesaler has been criticized by one judge as 'heavy-handed to the point of injustice.'" Cavico, *supra* note 43, at 227 (quoting Bailey v. Montgomery Ward & Co., 431 P.2d 108, 117–18 (Ariz. Ct. App. 1967) (Molloy, J., dissenting)). The commentator goes on to summarize expert testimony before Congress regarding the strict liability of passive sellers:

> The strict tort liability application to non-manufacturers has ultimately "produced a product liability system which is badly out of balance, and utterly lacking in equity and common sense. It no longer fairly adjudicates claims based on responsibility. Rather it has become a convenient mechanism to pay damages whenever someone is injured."

Id. at 228 (quoting *The Nature and Causes of the Product Liability Problem*: *Hearings Before the House Subcomm. on Consumer Prot. and Fin. of the Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 353–54 (1979) (statement of William C. McCamant, Vice Chairman of the Board, National Association of Wholesaler-Distributors)).

139. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1, cmt. e (1998) ("[B]ringing nonmanufacturing sellers or distributors into products liability litigation generates wasteful legal costs. Although liability in most cases is ultimately passed on to the manufacturer who is responsible for creating the product defect, nonmanufacturing sellers or distributors must devote resources to protect their interests."). As explained by one commentator: "Once made a defendant, the non-manufacturer becomes involved in two lawsuits: one to defend against the plaintiff's claim which involves the manufacturer's product; the other to obtain indemnity from the responsible manufacturer." Cavico, *supra* note 43, at 229. This process forces the passive seller to expend large amounts of money in seeking restitution, which in the end harms the passive seller because it is not indemnified for funds spent seeking indemnification. *Id*.

140. *See supra* notes 58–60 and accompanying text. The rule adopted by the *Sanns* court mirrors the rules in jurisdictions that prohibit recovery against a passive seller when the manufacturer is named in the suit. *Compare Sanns*, 2004 UT App. 203, ¶ 21 (holding that "as long as [the manufacturer] is present in the suit, there remains no reason to require [the passive seller] to incur the time and expense of defending this action"), *with* 735 ILL. COMP. STAT. ANN. 5/2-621 (2004) (stating "[i]n any product liability action based on any theory or doctrine commenced or maintained against a defendant or defendants other than the manufacturer, that party shall upon

However, the court's holding in *Sanns* that the abrogation of joint and several liability necessarily created a passive-seller exemption to strict liability is unprecedented. In his brief to the appellate court, Sanns pointed out that "in every jurisdiction in which a passive retailer is not liable as a matter of law, it is because the jurisdiction's product liability act expressly so provides."[141] *Sanns* further explained that "[i]n no jurisdiction . . . has the mere abolition of joint and several liability been held to immunize a passive retailer from strict products liability."[142] Viewed in this light, the court's decision is a novel application of a liability reform measure that was not directed at passive sellers in a strict liability suit.

Furthermore, the decision is directly contrary to legislative intent: no direct evidence indicates that the legislature ever intended to eliminate strict liability even in cases when a passive seller is found strictly liable.[143] Had the legislature so intended, it could have followed the lead of other legislatures and passed a measure granting passive sellers direct immunization from strict liability suits. The legislature merely sought to assure that defendants would be liable only to the extent of their fault.[144] By ignoring the legislative purpose of the LRA, the *Sanns* court sidestepped traditional judicial practice in Utah requiring courts to "defer

answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage").

141. *Sanns Brief*, *supra* note 101, at 23.

142. *Id.*; *see e.g.*, ALASKA STAT. § 09.17.900 (Lexis 2000); ARIZ. REV. STAT. ANN. § 12-2506(F)(2) (West 2003); 735 ILL. COMP. STAT. ANN. 5/2-1116(b) (West Supp. 2003); IOWA CODE ANN. § 668.1(1) (West 1998); MICH. COMP. LAWS ANN. § 600.6304(8) (West 2000); MINN. STAT. ANN. § 604.01 subd. 1a (West 2000); MISS. CODE ANN. § 85-5-7(1) (Lexis 1999); MONT. CODE ANN. § 27-1-705(8) (2001); N.D. CENT. CODE §§ 32-03.2-01 & -02 (1996); WASH. REV. CODE § 4.22.015 (2002); WYO. STAT. ANN. § 1-1-109(a)(iv) (Lexis 2003). These statutes each include in their definition of fault the term "strict liability." Not one of these jurisdictions has used its comparative fault statutes to immunize a passive seller from strict liability; rather, those that have immunized passive sellers have done so expressly in their products liability statutes. *See Sanns Brief*, *supra* note 101, at 22–23.

143. 46th Utah Leg., Gen. Sess. (Sen. CD No. 63, 6) (Feb. 12, 1986) (statement of Assistant Attorney General Steve Sorenson) ("The [LRA] does *not* . . . change the substantive law of strict liability . . . ." (emphasis added)).

144. "It is the basic fairness concept we're driving at. The defendant ought to be on the hook only for its own percentage of damages, but ought not be the guarantor for everyone else's damages." Sullivan v. Scoular Grain Co., 853 P.2d 877, 880 (Utah 1993) (internal quotations omitted) (quoting 46th Utah Leg., Gen. Sess. (Sen. CD No. 63, 6) (Feb. 12, 1986) (statement of Assistant Attorney General Steve Sorenson)), *superceded by statute in part as stated in* Anderson v. United Parcel Serv., 2004 UT 57, ¶ 13, 96 P.3d 903, 907. See *supra* notes 97–101 and accompanying text for an explanation that, in the context of the LRA, strict liability is a form of fault.

to the legislature to make laws"[145] and became the first court in the United States to judicially create a passive seller exemption based upon a statutory abrogation of joint and several liability.[146] As the following discussion will demonstrate, this sidestep of legislative intent could have great impact on tort liability in Utah.

2. The court's dismissal of Section 402A

Sanns' judicially created passive-seller exemption can further be seen as a general renunciation of Section 402A strict liability principles and a movement back to liability solely based upon culpability. This renunciation is likely to act as a restriction on the theories of liability under which a harmed consumer can join potential defendants in a products liability action.

With all of the ambiguity and subtlety of the *Sanns* decision, there remains one aspect of the decision that is truly vexing: the absence of a Section 402A analysis.[147] As this Note has shown, Section 402A has guided Utah courts' strict liability analyses since the adoption of the principle in *Hahn* and continuing with the LRA.[148] The novel situation facing the *Sanns* court was that it had the express opportunity to decide how the strict liability principles of Section 402A, which allow the inclusion of passive sellers under a theory of strict liability,[149] juxtaposed with the fault principles of the LRA, which eliminated the joint and several liability of multiple tortfeasors.[150] Without analysis of Section 402A or its place in Utah jurisprudence, the court subordinated the principles underlying Section 402A to the demands of the LRA and, by so doing, created a judicial immunization for passive sellers.[151] This

145. Matheson v. Ferry, 641 P.2d 674, 684 (Utah 1982) (Howe, J., concurring) (citing Stanton v. Stanton, 517 P.2d 1010 (Utah 1974)).

146. *See supra* notes 137–40 and accompanying text.

147. As has been previously noted, the court mentions Section 402A only once, and that mention occurs in a string cite. *See* Sanns v. Butterfield Ford, 2004 UT App. 203, ¶ 15, 94 P.3d 301.

148. *See supra* notes 71–79 and accompanying text.

149. *See supra* Part II.B.

150. *See supra* Part II.D.

151. Butterfield Ford incorrectly argued to the court that Section 402A was entirely superceded by the LRA:

> In light of (i) the express language of the [LRA] prohibiting a defendant from being held liable for any damages in excess of its proportionate share of fault, (ii) the purpose of the Act to eliminate the very unfairness created by Section 402A, and (iii) the abolishment of joint and several liability and separate actions for contribution or indemnification, the principles set forth in Section 402A cannot be reconciled with the [LRA].

logic raises the strong possibility that this ruling can be seen as a renunciation of strict liability principles and a movement back to pure negligence principles when liability is based solely on culpability.

At a minimum, this movement back towards culpability means that in cases involving a manufacturer and a passive distributor, only those parties who are *culpable* are liable. The *Sanns* court walked a fine line in trying to distinguish strict liability from culpability and, in the end, failed. Although the court stressed early in its strict liability analysis that "strict liability in this statutory definition should be viewed only as a cause of action subject to the [LRA], rather than changing the traditional use of the term fault to somehow include strict liability,"[152] it later conceded that "[t]he strict liability 'fault' in this case, if any, lies with the manufacturer, not with Butterfield Ford, the passive retailer."[153]

Such logic can succeed only if strict liability no longer connotes an absolute duty and instead equates to culpability. By thus combining these principles, the court implicitly rejected the doctrines of Section 402A in cases involving a passive seller and a manufacturer. Section 402A allows "[o]ne who sells any product in a defective condition"[154] to be sued under a theory of strict liability, but this principle cannot be reconciled with the *Sanns* decision, which allows only a manufacturer to be subjected to strict products liability.[155] Thus, in the process of creating a judicial immunization for passive sellers from strict liability, the *Sanns* court implicitly rejected the doctrine of Section 402A with respect to passive sellers and equated strict liability with culpability.

Butterfield Ford Brief, *supra* note 91, at 21. This argument fails because Utah courts continued to rely on Section 402A following the passage of the LRA and because the legislative history of the LRA demonstrates that it was never intended to supercede or supplant the doctrine of strict liability:

> The [LRA] does not . . . change the substantive law of strict liability . . . . [I]f you have multiple defendants, one of whom is guilty of negligence, one of whom is guilty of strict liability, the jury in apportioning fault, apportions fault between those parties regardless of the theory on which the party is liable.

46th Utah Leg., Gen. Sess. (Sen. CD No. 63, 6) (Feb. 12, 1986) (statement of Assistant Attorney General Steve Sorenson).

152. Sanns v. Butterfield Ford, 2004 UT App. 203, ¶ 14 n.5, 94 P.3d 301.

153. *Id.* ¶ 21.

154. RESTATEMENT, *supra* note 5, § 402A(1).

155. The court stresses that "[t]he strict liability 'fault' in this case, if any, lies with the manufacturer, not with Butterfield Ford, the passive retailer." *Sanns*, 2004 UT App. 203, ¶ 21. This language contradicts the language in Section 402A allowing any seller to be included in a claim of strict liability; therefore, this sentence would be more appropriate—and more revealing of the court's actual intention—were it to say: "[t]he [negligence or culpability] in this case, if any, lies with the manufacturer, not with Butterfield Ford, the passive retailer." *Id.*

Were it otherwise, both Butterfield Ford and Ford could have remained in the suit under a theory of strict liability to allow a jury to apportion fault between them.[156] Under the general approach espoused by Utah courts, an analysis of fault involves two steps: first, parties are brought into the action under *any* theory of liability—negligence, breach of warranty, strict liability, product liability, etc.—without an examination of their culpability; [157] second, the parties present their defenses to the jury so the jury can apportion fault *after* weighing their respective culpability in accordance with the provisions of the LRA. In contrast, under the standard adopted by *Sanns*, in strict liability cases involving a passive seller and a manufacturer, the analysis is simply a one-step process: only the culpable party is allowed in the suit.[158] For purposes of fault apportionment in strict products liability cases, fault under the LRA is equivalent to culpability.

The concomitant effect of this general renunciation of strict liability is that harmed consumers are limited to theories of negligence and breach of warranty when trying to bring parties into a cause of action. As this Note has shown, however, strict liability exists to cover those situations when negligence and breach of warranty are insufficient to remedy the harmed consumer.[159] *Sanns* thus created the possibility that harmed consumers could be left without remedy if they cannot successfully pursue negligence or warranty actions.[160]

156. This is what a jury does when strict liability is alleged against one party and negligence against another. *See* S.H. v. Bistryski, 923 P.2d 1376, 1382–83 (Utah 1996). See *infra* Part IV.B for a full explanation of how comparative fault could be extended to combine the principles of the LRA and Section 402A.

157. *Mulherin* typifies this approach in that it explains that the trier of fact should engage in an examination of comparative fault after the action has begun. *See* Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301, 1303–04 (Utah 1981).

158. This is the exact principle that Butterfield Ford argued to the *Sanns* court. *See Butterfield Ford Brief*, *supra* note 91, at 26.

> The [LRA] and its purposes clearly contemplate some form of culpable conduct on the part of the defendant. . . . [Fault] requires some "breach," "act" or "omission." . . .
>
> This is not to say that sellers or distributors of products can never be at fault under the [LRA] for damages caused by the products they sell or distribute. If a seller or distributor of a product breaches some duty or engages in some culpable conduct which contributed to the plaintiff's injuries, the seller or distributor could potentially be at fault under the [LRA]. However, where there is no evidence of any breach of legal duty or culpable act or omission on the part of a seller or distributor, the [LRA] does not support a claim against such a defendant.

Id.

159. *See supra* text accompanying notes 21–29.

160. *See supra* note 155. If a product were to harm a consumer, but the manufacturer was not

3. The court provided no guidelines detailing how its holding is to be applied

Further, the *Sanns* court failed to provide any guidance on future application of its novel holding. Indirect immunization of passive sellers without proper guidance from the court will lead to confusion among both parties and courts as they attempt to apply the *Sanns* rule. Such confusion coupled with the general renunciation of strict liability principles described above[161] could greatly impact the ability of harmed consumers to receive adequate compensation from liable parties. Two uncertainties that are particularly conspicuous will demonstrate the foreseeable effects of *Sanns* on future strict products liability actions: (1) whether a passive seller may be joined in a products liability suit, and (2) whether a passive seller can be strictly liable when the manufacturer is not present in the suit.

a. Joining a passive seller in a products liability suit. The *Sanns* court provided little guidance as to who is a *prima facie* passive seller and obfuscated how future harmed consumers will bring potentially liable parties into the cause of action. The only language in *Sanns* that defines a passive seller designates a passive seller as one that "[does] not participate in the design, manufacture, engineering, testing, or assembly of the [product]."[162] A plausible interpretation of the *Sanns* decision is that future harmed consumers could bear the burden of determining whether a potential defendant had engaged in any of these activities and is, therefore, a passive seller immune from suit. More specifically, the burden is likely to come in the form of costs and attorneys fees awarded to a passive seller brought into the strict liability suit or in the form of Rule 11 sanctions against the plaintiff for failing to conduct an inquiry

negligent and breached no warranty, *Sanns* would likely allow the manufacturer to be brought into the cause of action under a theory of strict liability because it manufactured the product, which would constitute culpable conduct. *See Sanns*, 2004 UT App. 203, ¶ 21. There is no logical distinction then to exclude passive sellers from claims of strict liability because their culpable conduct consisted of selling the product. The policy of strict liability to promote safe products is aimed at both manufacturers and sellers. *See supra* notes 50–55 and accompanying text. Thus, the *Sanns* decision is inherently self-contradictory in that it would continue to allow strict liability to bring a nonnegligent manufacturer into a cause of action but not a nonnegligent seller, despite the fact that the policy of strict liability applies to both entities with equal force.

161. *See supra* Part IV.A.2.

162. *Sanns*, 2004 UT App. 203, ¶ 21.

reasonable under the circumstances[163] to determine if a seller was passive. Because the *Sanns* court provided no guidance on this issue, future passive sellers brought into a strict liability claim are very likely to seek such awards and sanctions against plaintiffs whenever they are brought into an action under a theory of strict liability; the threat of sanctions in turn is very likely to mitigate consumers' willingness to pursue strict liability claims against sellers regardless of the sellers' passivity.

Compare this burden with the approaches adopted in other jurisdictions that have enacted passive seller immunization in cases where a manufacturer is subject to suit. In the majority of these jurisdictions, the passive seller must establish its passivity after being brought into the suit, and it must certify that the manufacturer is subject to suit and is solvent.[164] This rule necessarily protects harmed consumers in these jurisdictions from the threat of costs and sanctions.

163. UTAH R. CIV. P. 11(b). "Rule 11 requires the plaintiff's attorney to certify that 'the allegations and other factual contentions have evidentiary support or . . . are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Robinson v. Morrow, 2004 UT App. 285, ¶ 24 n.3, 99 P.3d 341 (quoting UTAH R. CIV. P. 11(b)(3)); *see also* Morse v. Packer, 2000 UT 86, ¶ 28, 15 P.3d 1021 (explaining when Rule 11 sanctions are appropriate); Griffith v. Griffith, 959 P.2d 1015, 1022 (Utah Ct. App. 1998) (awarding sanctions when the claim was "founded on innuendo and suspicion"), *aff'd*, 1999 UT 78, 985 P.2d 255.

164. *See, e.g.*, DEL. CODE ANN. tit. 18, § 7001(c) (2004) (stating that the passive seller exemption is not available if the *seller* cannot "identify the manufacturer through reasonable effort"); IDAHO CODE § [6-1407](4)(a), (b) (Michie 2004); 735 ILL. COMP. STAT. ANN. 5/2-621(a)-(c) (2004) ("In any product liability action based on any theory or doctrine commenced or maintained against a defendant or defendants other than the manufacturer, that party shall upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage."); KAN. STAT. ANN. § 60-3306(d), (e) (2003) ("A product seller shall not be subject to liability in a product liability claim arising from an alleged defect in a product, *if the product seller establishes* that: (d) the manufacturer of the defective product or product component is subject to service of process either under the laws of the state of Kansas or the domicile of the person making the product liability claim . . . ." (emphasis added)); MD. CODE ANN. CTS. & JUD. PROC. § 5-405 (2004) (placing the burden on the seller to establish that it was indeed a passive seller); MINN. STAT. ANN. § 544.41 (West 2004) ("In any product liability action based in whole or in part on strict liability in tort commenced or maintained against a defendant other than the manufacturer, that party shall upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage."); MO. REV. STAT. § 537.762 (2004) (stating that it is the passive seller that must make a motion for dismissal after being brought into the suit); N.D. CENT. CODE § 28-01.3-04 (2004) ("In any products liability action maintained against a seller of a product who did not manufacture the product, the *seller shall* upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing the personal injury, death, or damage to property." (emphasis added)). *But cf.* IOWA CODE § 613.18(3) (2004) (dividing the burden between both the passive seller and plaintiff by allowing the process of discovery to reveal the manufacturer); N.C. GEN. STAT. § 99B-2 (2004) (prohibiting the

Furthermore, the potential of costs and sanctions imposed upon the harmed consumer conflicts with the express language of the LRA, which allows plaintiffs to join "any person . . . who *may have caused or contributed* to the injury or damage for which recovery is sought, for the purpose of having determined their respective proportions of fault."[165] The purpose of the LRA is to allow harmed parties to bring all defendants who may have caused the harm into the cause of action, allowing both sides to present their case to the jury, which then apportions fault appropriately.[166] Contrary to the LRA's policy, the threat of costs and sanctions most likely requires that the harmed consumer conduct much of this analysis beforehand or be subject to potential costs and sanctions.

b. Strict liability when no manufacturer is subject to suit. The second uncertainty is whether a passive seller can be subject to strict liability when the manufacturer is unable to satisfy judgment. The language of *Sanns* implies, but does not explicitly state, that the passive seller is immune from strict liability *only* when a manufacturer is a party to the suit.[167] Further, when the manufacturer cannot satisfy judgment, the court failed to state whether the passive seller should be sued under a strict liability claim or under another theory, such as breach of warranty or negligence. As discussed above, most jurisdictions that protect passive sellers from strict liability have enacted specific rules requiring that the passive seller certify the manufacturer is solvent and subject to suit in that jurisdiction.[168] The *Sanns* decision again falls short and fails to explain not only who should certify whether the manufacturer is subject to suit but also whether the passive seller can be strictly liable when no manufacturer is present.[169]

commencement of an action against a passive seller unless the manufacturer is not subject to the suit or the seller is not passive); OHIO REV. CODE ANN. § 2307.78 (Anderson 2004) (placing the burden on the plaintiff rather than the seller); TENN. CODE ANN. § 29-28-106 (2004) (disallowing action against a passive seller unless the manufacturer is not subject to suit); WASH. REV. CODE § 7-72.040(2)(a), (b) (2004) (stating conditions under which the passive seller is liable).

165. UTAH CODE ANN. § 78-27-41(1) (2004) (emphasis added).

166. *See* §§ 78-27-38 to -39.

167. *Sanns*, 2004 UT App. 203, ¶ 21 ("*[A]s long as* [the manufacturer] is present in the suit, there remains no reason to require [the passive seller] to incur the time and expense of defending this action, and consequently the trial court was correct to dismiss [the passive seller]." (emphasis added)).

168. *See supra* note 164 and accompanying text.

169. The logic of the court's holding is further complicated by the fact that the manufacturer, Ford, was *not* a party to the action when the appellate court announced its decision. Although

These uncertainties further demonstrate that the *Sanns* court went out of its way to protect potentially innocent sellers at the expense of the rights of innocent consumers to compensation. Such uncertainties exemplify why Utah's standard is normally to allow the legislature to make the law.[170]

B. A More Balanced Approach to Strict Liability Analysis: The Shifting Definition of Fault

This Note has already hinted at an approach that can satisfy the LRA without creating an indirect judicial immunization of passive sellers, without dismissing Section 402A's doctrine of strict liability, and without potentially subjecting the harmed consumer to costs and sanctions—a two-step examination of fault that extends comparative fault principles into the realm of passive sellers.[171] By remedying the harms of the *Sanns* decision, the proposed two-part approach to fault provides for the fair treatment of both innocent consumers and innocent sellers.

Although the *Sanns* court initially stressed that strict liability is not fault in the sense that it requires no culpability, it later implicitly equated fault with culpability.[172] By so doing, the court dismissed the application of Section 402A for passive sellers. However, by splitting the fault analysis into a two-step process, it is possible to maintain at least a semblance of Section 402A and to satisfy the demands of the LRA without the burdens and complications of creating an indirect passive seller immunization. This division is essentially a shifting definition of fault: first, fault is defined as any theory of liability consistent with the LRA under which a plaintiff can join a potential defendant to the cause

initially brought in the same action as Butterfield Ford, Ford had removed its case to the United States District Court for the District of Utah and was "seeking to consolidate it with two other cases pending in the district court involving the same accident." *Sanns* 2004 UT App. 203, ¶ 3 n.1. Thus, Ford was not "present in the suit," *id.* ¶ 21, as the *Sanns* court asserted, but had removed its suit to a federal district court. This created a situation in which the plaintiff would have no recourse against the passive seller because of the *Sanns* decision, and in which the plaintiff did not have the opportunity of having a Utah court decide the merits of the claim against the manufacturer. This scenario begs the question of whether all that is required to absolve passive sellers from strict liability is that the manufacturer is somewhere subject to suit regardless of where that is.

170. *See supra* Part IV.A.1 and text accompanying notes 141–46.

171. *See supra* text accompanying notes 156–58.

172. *See supra* Part III.B and Part IV.A.2.

of action; second, fault is equated to culpability for purposes of liability apportionment.

The first step in this analysis is to allow the plaintiff to join any party who may have contributed to the plaintiff's damages under *any* theory of liability consistent with the LRA.[173] This could include a theory of strict liability for a passive seller and a manufacturer and would be done without any examination of culpability. Fault under this approach is most appropriately defined simply as a possible theory of liability under which a plaintiff can join a defendant in a tort action.[174]

For example, in the *Sanns* case, Sanns would be allowed to bring both Butterfield Ford and Ford into the action under a theory of strict liability. This is consistent not only with Utah's doctrine of strict liability according to Section 402A, which allows a seller "of any product in a defective condition"[175] to be brought into a strict liability action, but also with prior Utah decisions that allow strict liability claims under the LRA.[176] This step further satisfies the LRA's requirement that all parties "who may have caused"[177] the damages are brought into the initial tort action.

The second step involves a true application of the fault apportionment principles of the LRA and extends the *Mulherin* comparative fault principle into the realm of passive seller liability. In this step, fault is identified solely as *culpability* in order to correctly apportion damages: any nonculpable party, such as a truly passive seller, could not be apportioned fault consistent with the language of the LRA.[178] Here, the plaintiff is required to present its case before the trier

173. UTAH CODE ANN. § 78-27-37(2) (2004) lists the following as viable theories of liability: "negligence in all its degrees, comparative negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification, or abuse of a product."

174. Allowing the joining of any party is particularly important considering the Utah Supreme Court's ruling in *Field v. Boyer Co.*, 952 P.2d 1078 (Utah 1998), which limited application of comparative fault principles to plaintiffs, defendants, and persons immune from suit. *Id.* at 1080–82; s*ee also* Wright, *supra* note 68, at 575–77 (explaining the effects of the *Field* decision). Thus, by immunizing passive sellers from Section 402A strict liability, *Sanns* completely precluded application of comparative fault principles because the passive seller cannot be a party to the strict liability suit.

175. RESTATEMENT, *supra* note 5, § 402A(1).

176. *See, e.g.*, S.H. v. Bistryski, 923 P.2d 1376, 1382–83 (Utah 1996) (apportioning fault under Utah's strict liability dog-bite statute).

177. § 78-27-41(1).

178. § 78-27-38(3) ("No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant . . . .").

of fact in an effort to establish the culpability of each party. In turn, each defendant is given the opportunity to state its affirmative defenses. A passive seller, for example, is allowed to affirmatively establish its passivity.[179] The court would apportion damages according to the percentage of culpability for which the trier of fact found each party liable.

The judge could grant a passive seller a motion for summary judgment and dismiss the passive seller from the suit if the seller could establish that there is no question of material fact regarding its passivity.[180] The judge as a matter of law would be free to dismiss the seller because the judge would be prohibited from apportioning a non-culpable party any fault.[181] If there remained a question of material fact regarding the seller's passivity, the case would proceed to trial to allow the trier of fact to compare the culpability among the parties.

For example, in *Sanns* the two-step approach to fault would require Butterfield Ford to establish its passivity, *after* becoming party to the suit. If Butterfield Ford could do so, the court would be prohibited from apportioning any degree of fault to Butterfield Ford.

179. Most likely, factors the *Sanns* court listed as characteristics of a passive seller would be characteristics the potentially passive seller would seek to establish before the court. The factors include actions such as not participating in the "design, manufacture, engineering, testing, or assembly" of the final product. Sanns v. Butterfield Ford, 2004 UT App. 203, ¶ 21, 94 P.3d 301.

180. The Utah Supreme Court has explained the summary judgment standards as follows:

> Summary judgment allows the parties to pierce the pleadings to determine whether a material issue of fact exists that must be resolved by the fact finder. The party moving for summary judgment must establish a right to judgment based on the applicable law as applied to an undisputed material issue of fact.

Lamb v. B & B Amusements Corp. 869 P.2d 926, 928 (Utah 1993) (internal citations omitted). Of particular interest to the present analysis is the fact that the burden of establishing passivity remains on the seller throughout the proceedings thereby curing the problems described *supra* in Part IV.A.3.a.

181. The determination of whether a seller is a passive seller depends on the facts of each case, but each determination would involve application of a legal standard, most likely a standard similar to that indirectly articulated by the *Sanns* court. *See supra* note 162 and accompanying text. Thus, a passive seller could establish its passivity on a motion for summary judgment and be dismissed from the suit before going to trial. The application of a legal standard to the facts of each case creates an unusual standard for appellate review:

> The application of a legal standard, once articulated . . . involves varying degrees of discretion depending on the standard in question. If the application of the standard is extremely fact sensitive, then the reviewing court should generally give the trial court considerable discretion in determining whether the facts of a particular case come within the established rule of law.

Chen v. Stewart, 2004 UT 82, ¶ 20, 100 P.3d 1177 (citations omitted).

Admittedly, this process—the second step in particular—deviates from the concept of strict liability as an absolute duty that is separate from any notion of culpability, as Section 402A mandates;[182] however, it deviates less from this concept than the *Sanns* ruling does in that it first allows a strict liability claim to bring defendants into the action. Furthermore, equating strict liability with a concept of culpability after bringing all potentially liable parties into the action is consistent with the comparative principles of strict liability set out in *Mulherin* and *Bistryski*. In these cases the Utah Supreme Court affirmed that strict liability does not equate to absolute liability and that culpable conduct can be a factor even in strict liability cases.[183] Since *Mulherin*, Utah courts have compared the relative "fault" of plaintiffs and defendants in strict liability cases,[184] and this second step simply extends this comparison into the realm of passive sellers and manufacturers.

Thus, comparative fault in a strict liability action under this approach connotes not only a comparison of the relative fault of plaintiffs and defendants[185] but also a comparison of the relative fault *among* the defendants. In explaining why a comparison of "proportion of fault" is appropriate in cases involving strict liability, the *Bistryski* court stated:

> By including "strict liability" in the definition of fault, the legislature clearly intended comparative fault principles to be applied to strict liability claims, and nothing in the language of the [LRA] suggests that a defendant . . . who is strictly liable should pay damages in excess of his or her *proportion of fault*. Thus, although [such defendants] are strictly liable for damages, . . . the percentage of those damages which the [defendant] must pay is determined by the comparative fault provisions of the [LRA]. The fault of another party may have contributed to the injury and may preclude finding [the defendant] responsible for 100% of the damages arising out of such injuries.[186]

The *Sanns* court's equation of strict liability with culpability is not entirely inconsistent with this language, yet the equation nonetheless

182. *See supra* Part II.B.

183. *See* Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301, 1304 (Utah 1981) ("Other courts have rejected the application of comparative fault principles to strict liability claims because culpable conduct is not at issue in strict liability, only causation. *We find this unpersuasive*." (emphasis added)).

184. *See, e.g.*, Interwest Constr. v. Palmer 923 P.2d 1350, 1356–57 (Utah 1996); S.H. v. Bistryski, 923 P.2d 1376, 1382–83 (Utah 1996).

185. This is the traditional understanding of comparative fault exemplified by *Mulherin*. *See Mulherin*, 628 P.2d at 1302–04.

186. *Bistryski*, 923 P.2d at 1380 (emphasis added).

fails. By prohibiting plaintiffs from even bringing a *potentially* passive seller into a strict liability action without the threat of sanctions, the *Sanns* court effectually precluded an examination of the "proportion of fault" for which a potentially passive seller might be liable.[187] The two-step approach to fault cures this defect because it first allows all potentially liable defendants into the action, consistent with LRA and Section 402A, and then, consistent with *Mulherin* and *Bistryski*, examines the comparative/proportional fault of each defendant. Thus, equating strict liability to a concept of culpability is appropriate only after all potentially liable defendants are brought into a suit and each defendant has the opportunity to establish its "proportion of fault."[188]

Thus, the two-step approach remedies the negative consequences of *Sanns*' judicial immunization of passive sellers because passive sellers can still be brought into the action under a theory of strict liability.[189] Accordingly, the two-step approach to fault cures the *Sanns* court's summary dismissal of Section 402A by allowing all potentially liable parties into the action—the effect of which is the continuing viability of strict liability as a cause of action.

Furthermore, and most importantly, under the two-step approach to fault, the harmed consumer can bring any party into the action without fear of costs and sanctions being imposed upon it, so long as the joined defendant "may have caused or contributed" to the harm.[190] The LRA standard of joining potential defendants would control over the higher "reasonable investigation" standard of Rule 11 sanctions.[191] Thus, the harmed consumer must simply assure that the theory under which it is pursuing the defendant is a viable theory of liability within the context of the LRA. Moreover, the shifting-fault approach does not result in confusion when no manufacturer can satisfy the judgment. Passive

187. Thus, the *Sanns* court ignored the very real possibility that some sellers may consider themselves passive but in reality may have done something to affect the product before selling it to the end consumer. Such a seller may be ninety-five percent passive but nonetheless liable for five percent of damages. The *Sanns* analysis presents a binary analysis in which a seller is either passive or not passive; this analysis simply does not withstand scrutiny in every situation.

188. *Bistryski*, 923 P.2d at 1380. Equating strict liability to culpability *after* allowing strict liability to bring any potential defendant into an action is the fundamental difference between the *Sanns* court's treatment of Section 402A and the two-step approach's treatment of Section 402A. Furthermore, this is the reason it is acceptable to treat strict liability as culpability in the second step of the fault analysis.

189. *See supra* Part IV.A.1.

190. UTAH CODE ANN. § 78-27-41(1) (2004).

191. UTAH R. CIV. P. 11(b); *see supra* Part IV.A.3.a and note 163.

sellers could be brought into the cause of action under any viable LRA theory of liability—regardless of whether a manufacturer is present in the suit—and damages would be apportioned following an examination of each defendant's "proportion of fault."[192] Hence, there is no uncertainty in trying to correctly define who and under what circumstances a party can be a passive seller and thus be immune from strict liability. By continuing to allow all potential tortfeasors into the action, subject only to the requirements of the LRA, this approach to fault guarantees that innocent consumers will not be left without remedy—a definite risk under the *Sanns* analysis given the resultant uncertainties of the decision.[193]

Finally, the shifting-fault approach satisfies all of the concerns the *Sanns* court raised regarding application of strict liability against passive sellers. The court was primarily concerned with two issues: (1) the fairness of fault apportionment under the LRA, and (2) the eradication of contribution and indemnification suits.[194] The court was especially concerned that if Butterfield Ford were in some manner apportioned fault, it would have no redress in the form of indemnification from Ford. Under the two-step approach to fault, the "basic fairness"[195] that the LRA was aiming for is satisfied because the plaintiff can bring all potential defendants into the action, yet each defendant will be liable only to the extent of its fault. If a passive seller can establish its passivity, it is precluded from damage apportionment. Thus, there is no need for contribution or indemnification suits in contravention of the LRA and Utah case law.[196] Ultimately, this approach is not only fair to harmed consumers, but it is equally fair to innocent sellers.

V. CONCLUSION

The court in *Sanns* faced a truly difficult issue: how to satisfy the demands of the LRA with the demands of Section 402A strict liability.

192. *Bistryski*, 923 P.2d at 1380.

193. *See supra* Part IV.A.

194. Sanns v. Butterfield Ford, 2004 UT App. 203, ¶¶ 17–20, 94 P.3d 301.

195. Sullivan v. Scoular Grain Co., 853 P.2d 877, 880 (Utah 1993) (internal quotations omitted) (quoting 46th Utah Leg., Gen. Sess. (Sen. CD No. 63, 6) (Feb. 12, 1986)), *superceded by statute in part as stated in* Anderson v. United Parcel Serv., 2004 UT 57, ¶ 13, 96 P.3d 903, 907.

196. *See* UTAH CODE ANN. § 78-27-40(2) (2004) (prohibiting contribution suits); Nat'l Serv. Indus., Inc. v. B.W. Norton Mfg. Co., 937 P.2d 551, 554–56 (Utah Ct. App. 1997) (equating indemnification suits to contributions suits and thus prohibiting such suits because "there remains no need for suits to redistribute loss among joint tortfeasors because no party will in any case be liable for more than its degree of fault in the underlying tort action").

The LRA's prohibition of joint and several liability along with its demand that no defendant be apportioned a degree of liability greater than its degree of fault presented the court with a circuitous opportunity to judicially create an immunization from strict liability in tort for passive sellers. The *Sanns* court's decision to judicially create a passive seller immunization from strict liability is troublesome because it goes against the legislative intent of the LRA, it dismisses Section 402A without analysis or comment, and it leaves unresolved how the decision is to be applied in future cases. In short, the decision diminishes the ability of harmed consumers to receive adequate compensation in favor of providing an overly broad protection for sellers.

A two-step approach to fault obviates these negative realities of the *Sanns* decision while successfully balancing the demands of Utah's strict liability jurisprudence with the abrogation of joint and several liability in the LRA. By applying different definitions of fault at different stages of the trial, fault apportionment becomes a two-step process that satisfies Section 402A's doctrine of bringing any seller into a strict liability action and achieves the equity in damage apportionment mandated by the LRA. The two-step approach highlights Utah's acceptance of comparative fault principles and extends these principles into the realm of the LRA's fault apportionment evaluations involving passive sellers. The definitive advantage of the two-step approach to fault is the resultant equity to both harmed consumers and innocent defendants.

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