

Louisiana Law Review

Volume 49
Number 3 *January 1989*

Article 2

1-1-1989

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A PRIMER ON THE LOUISIANA PRODUCTS LIABILITY ACT

*John Kennedy**

“Products liability” means the liability in tort of a manufacturer for personal injury and property damage caused by his product. Every state recognizes such liability in one form or another. Louisiana’s products liability doctrine began in 1971 with the Louisiana Supreme Court’s decision in *Weber v. Fidelity & Casualty Insurance Co. of New York*.¹

Weber is a watershed case for several reasons but it is best known for establishing the elements of a modern products liability cause of action in our state. The *Weber* court held:

A manufacturer of a product which involves a risk of injury to the user is liable to any person, whether the purchaser or a third person, who without fault on his part, sustains an injury caused by a defect in the design, composition, or manufacture of the article, if the injury might reasonably have been anticipated. However, the plaintiff claiming injury has the burden of proving that the product was defective, i.e., unreasonably dangerous to normal use, and that the plaintiff’s injuries were caused by reason of the defect.²

Weber has been interpreted to mean that a products liability plaintiff, in order to recover from a manufacturer, must prove by a preponderance

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The author of this article, along with former professor H. Alston Johnson III, drafted the Louisiana Products Liability Act. During the session in which the legislature enacted the new legislation, the author worked for its passage as Special Counsel to Governor Buddy Roemer.—Ed.

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1. 259 La. 599, 250 So. 2d 754 (1971). See, e.g., Plant, Comparative Negligence and Strict Tort Liability, 40 La. L. Rev. 403, 403 (1980); Robertson, Manufacturers’ Liability for Defective Products in Louisiana Law, 50 Tul. L. Rev. 50, 51-57 (1975).

2. 259 La. at 602-03, 250 So. 2d. at 755.

of the evidence that (1) the plaintiff's harm was caused by a condition of the manufacturer's product, (2) this condition existed at the time the product left its manufacturer's control, and (3) this condition made the product unreasonably dangerous to normal use.³

Since *Weber* was handed down the issue receiving the most attention in Louisiana products liability litigation and literature has been the appropriate meaning of "unreasonably dangerous."⁴ This concern is well-

3. See, e.g., *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 113 (La. 1986); *Bell v. Jet Wheel Blast*, 462 So. 2d 166, 168 (La. 1985).

Weber is also regarded as the genesis of Louisiana's products liability doctrine as we know it today because in *Weber* the Louisiana Supreme Court introduced a new and additional standard of liability in products tort cases in the form of strict products liability and made it available as a theory of recovery to plaintiffs even if they were not purchasers of the suspect product. See *Weber v. Fidelity & Casualty Ins. Co. of New York*, 259 La. at 603, 250 So. 2d at 756 ("If the product is proven defective by reason of its hazard to normal use, the plaintiff need not prove any particular negligence by the maker in its manufacture or processing; for the manufacturer is presumed to know of the vices in the things he makes, whether or not he has actual knowledge of them."); *id.* at 602, 250 So. 2d at 755 ("A manufacturer of a product which involves a risk of injury to the user is liable to any person, whether the purchaser or a third person"); *supra* note 2 and accompanying text and *infra* note 125. Adoption of this rule of law substantially facilitated recovery, because under pre-*Weber* jurisprudence a products liability plaintiff had to rely exclusively on the theories of negligence or breach of implied warranty as to the fitness of the product and neither was completely responsive to the needs of all plaintiffs. See, e.g., Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 *Vand. L. Rev.* 593, 593-96 (1980); Keeton, *Products Liability—Proof of the Manufacturer's Negligence*, 49 *Va. L. Rev.* 675, 676-77 (1963); Krauskopf, *Products Liability*, 32 *Mo. L. Rev.* 459, 463 (1967); Robertson, *supra* note 1, at 51-53; Wade, *On the Nature of Strict Liability for Products*, 44 *Miss. L.J.* 825, 825-27 (1973); Note, *DeBattista v. Argonaut-Southwest Insurance Co.: The Meaning of "Unreasonable Danger" in Louisiana Products Liability*, 42 *La. L. Rev.* 1453, 1454 (1982). As a result of *Weber* Louisiana's products liability doctrine is sometimes mistakenly referred to as a "strict" products liability doctrine, see, e.g., *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 113 (La. 1986) and authorities cited therein, when in truth we employ both strict liability and negligence as standards of culpability depending upon what type of product defect is at issue. See *infra* notes 138-39, 166-68, 222-24 and 236-39 and accompanying text.

4. The term "unreasonably dangerous" has a common law heritage:

The history of strict liability in Louisiana indicates the requirement that a defective product must be "unreasonably dangerous" came into our jurisprudence due to the pervasive influence of section 402A of the Restatement (Second) of Torts after its publication in 1965. Louisiana's law in the products liability area has been described by commentators as closely approximating that of common law states following the Restatement (Second) of Torts § 402A. . . . This view has also been taken by federal courts interpreting Louisiana law.

DeBattista v. Argonaut-Southwest Ins. Co., 403 So. 2d 26, 30 (La. 1981) (citing *Perez v. Ford Motor Co.*, 497 F.2d 82 (5th Cir. 1974); *Welch v. Outboard Marine Corp.*, 481 F.2d 252 (5th Cir. 1973); *Andrus, Strict Liability Under Civil Code Articles 2317, 2318 and 2321: An Initial Analysis*, 25 *La. B.J.* 105 (1977); Robertson, *supra* note 1). See,

placed, because the “unreasonably dangerous” cognomen is meant to express the degree of product deficiency that gives rise to legal liability.⁵ As such, it is the basis for delictual “fault” under Civil Code article 2315, the foundation on which all legal theories of products liability in tort rest and the essence of a products liability cause of action.⁶

The debate in our state over how properly to define “unreasonably dangerous,” and how thereby to fashion a products liability system that is at the same time both workable and fair, has been earnest, rich and spirited. That debate has also been largely confined to the bench, the bar, and the academic community.⁷ In 1988, however, the Louisiana

e.g., *Hastings v. Dis Tran Prod., Inc.*, 389 F. Supp. 1352 (W.D. La. 1975); *Kent v. Gulf States Util. Co.*, 418 So. 2d 493, 501 (La. 1982) (Dennis, J., concurring with additional reasons); Restatement (Second) of Torts § 402A comment i (1965); Wade, *supra* note 3, at 833.

The actual term used in the Restatement is “defective condition unreasonably dangerous.” Restatement (Second) of Torts § 402A (1965). Restatement redactors included the word “defective” to make certain it was understood that something had to be wrong with the product. See *id.* § 402A comment i; Birnbaum, *supra* note 3, at 598-99; Wade, *supra* note 3, at 830. “Defective” and “unreasonably dangerous” may be regarded as synonymous in their Restatement use. See Restatement (Second) of Torts § 402A comments e, g-i (1965); Wade, *supra* note 3, at 831-33; *infra* notes 89 and 90 and accompanying text.

5. See, e.g., Restatement (Second) of Torts § 402A comments g, h, i and k (1965).

6. See, e.g., La. Civ. Code art. 2315 (“Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.”); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 113-15 (La. 1986); *Bell v. Jet Wheel Blast*, 462 So. 2d 166, 168 (La. 1985); *Entrevia v. Hood*, 427 So. 2d 1146, 1147-50 (La. 1983); *Chappuis v. Sears Roebuck and Co.*, 358 So. 2d 926, 929-30 (La. 1978). See also *Loescher v. Parr*, 324 So. 2d 441, 445-58 (La. 1975); *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 1074-84, 249 So. 2d 133, 136-40 (1971); Malone, *Ruminations on Liability for the Acts of Things*, 42 La. L. Rev. 979 (1981); Palmer, *A General Theory of the Inner Structure of Strict Liability: Common Law, Civil Law, and Comparative Law*, 62 Tul. L. Rev. 1303 (1988).

7. See, e.g., *Brown v. Sears Roebuck and Co.*, 516 So. 2d 1154 (La. 1988) (Cole, J., concurring in denial of rehearing); *id.*, 514 So. 2d 439 (La. 1987) (original opinion); *id.* at 445 (Calogero, J., concurring); *id.* (Cole, J., concurring); *id.* at 446 (Marcus, J., dissenting); *Bloxom v. Bloxom*, 512 So. 2d 839 (La. 1987); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986); *id.* at 119 (Watson, J., concurring); *id.* at 120 (Marcus, J., dissenting); *Winterrowd v. Travelers Indem. Co.*, 462 So. 2d 639 (La. 1985); *id.* at 643 (Lemmon, J., concurring); *id.* at 644 (Blanche, J., dissenting); *Bell v. Jet Wheel Blast*, 462 So. 2d 166 (La. 1985); *id.* at 173 (Watson, J., concurring); *id.* at 174 (Dixon, C.J., concurring); *id.* at 175 (Marcus, J., dissenting); *id.* (Blanche, J., dissenting); *Hunt v. City Stores*, 387 So. 2d 585 (La. 1980); *id.* at 590 (Blanche, J., dissenting); *id.* at 591 (Marcus, J., dissenting); *Quattlebaum v. Hy-Reach Equip., Inc.*, 452 So. 2d 578 (La. App. 1st Cir.), writs denied, 458 So. 2d 474, 483 (La. 1984); *Lanclos v. Rockwell Int'l Corp.*, 470 So. 2d 924 (La. App. 3d Cir. 1984); J. Henderson & A. Twerski, *Products Liability Problems and Process* 606-18 (1988); Crawford, *Developments in the Law, 1985-1986—Torts*, 47 La. L. Rev. 485 (1986); Crowe, *The Fishbone in the Pelican's Throat or “The Same Damn Place You Got That Battleship,”* 19 Loy. L. Rev. 357 (1973);

Legislature joined the discussion by passing Act 64 of its Regular Session, which creates the Louisiana Products Liability Act (LPLA).⁸

The LPLA is easily the most significant development in Louisiana products liability law since the *Weber* opinion. Among other changes, the statute "establishes the exclusive theories of liability for manufacturers for damage caused by their products"⁹ and in doing so explains in detail how a product may be unreasonably dangerous. The LPLA will not, of course, end the dialogue over a suitable interpretation of the "unreasonably dangerous" precept. Nor should it. But in a civil law jurisdiction where the legislature is the premier source of law,¹⁰ the LPLA will supersede all prior jurisprudence that is inconsistent with its provisions. This means Louisiana now has a new and controlling definition of "unreasonably dangerous" as a result of the LPLA.

The purpose of this article is to explain the LPLA. Part I of the article will summarize the act's legislative history. Part II will discuss the scope of the act and Part III will analyze a cause of action under

Grimley, Louisiana Products Liability Law Reconsidered in Halphen: A Question of Knowledge, 34 La. B.J. 194 (1986); Kennedy, The Case Against Piecemeal Application of Comparative Fault to Strict Liability, 35 La. B.J. 17 (1987); Note, *supra* note 3.

8. 1988 La. Acts No. 64 (enacting Chapter 3 of Code Title V of Code Book III of Title 9 of Louisiana Revised Statutes to be comprised of La. R.S. 9:2800.51-.59). See La. R.S. 9:2800.51, as enacted by 1988 La. Acts No. 64. In 1982 the legislature also enacted a statute pertaining to how a product may be unreasonably dangerous, but only to address a single narrow concern. See La. R.S. 9:2797 (Supp. 1988); *infra* note 61 and accompanying text.

9. La. R.S. 9:2800.52, as enacted by 1988 La. Acts No. 64. See Kennedy, Highlights, for Lawyers, of the 1988 Regular Legislative Session, 36 La. B.J. 165, 165-69 (1988).

10. In deciding the issue before us the lower courts did not follow the process of referring first to the code and other legislative sources but treated language from a judicial opinion as the primary source of law. This is an indication that the position of the decided case as an illustration of past experience and the theory of the individualization of decision have not been properly understood by our jurists in many instances. Therefore, it is important that we plainly state that, particularly in the changing field of delictual responsibility, the notion of *stare decisis*, derived as it is from the common law, should not be thought controlling in this state. The case law is invaluable as previous interpretation of the broad standard of Article 2315, but it is nevertheless secondary information.

Ardoin v. Hartford Accident and Indem. Co., 360 So. 2d 1331, 1334 (La. 1978) (footnote omitted). See, e.g., *Turner v. New Orleans Pub. Serv. Inc.*, 476 So. 2d 800, 803-05 (La. 1985); *Bell v. Jet Wheel Blast*, 462 So. 2d 166, 169-73 (La. 1985); *Holland v. Buckley*, 305 So. 2d 113, 119 (La. 1974); *Miami Corp. v. State*, 186 La. 784, 173 So. 315 (1936); *Barham, Methodology of the Civil Law in Louisiana*, 50 Tul. L. Rev. 474 (1976); *Barham, A Renaissance of the Civilian Tradition in Louisiana*, 33 La. L. Rev. 357 (1973); *Daggett, Dainow, Hebert & McMahon, A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 Tul. L. Rev. 12 (1937); *Morrow, Louisiana Blue Print: Civilian Codification and Legal Method for State and Nation*, 17 Tul. L. Rev. 351 (1943); *Stone, Tort Doctrine in Louisiana*, 17 Tul. L. Rev. 159 (1942).

the LPLA, the theories of liability sanctioned by the LPLA and their concomitant descriptions of how a product may be unreasonably dangerous. Part IV of the article examines the LPLA's effective date provision. Finally, Part V will offer some thoughts from a drafter's perspective on the purpose of the statute.

I. THE LEGISLATIVE HISTORY OF THE LPLA

Efforts have been made for a number of years in Louisiana to pass a statute that codifies morally correct and analytically sensible theories of products liability. These efforts date back at least to 1983 when the Louisiana Legislature first considered, but failed to pass, products liability legislation drafted by the Louisiana Law Institute. The Law Institute's legislation was patterned to a large extent after the United States Department of Commerce's Model Uniform Product Liability Act. Both the Model Act and the Law Institute bill influenced the content of Act 64 of the 1988 Regular Session, although the LPLA is not the mirror image of either.¹¹

Act 64 began as Senate Bill 684 by Senators Hainkel and Bares and Representatives Gomez, Dimos and Adley.¹² As Governor Buddy Roe-

11. The Law Institute legislation was House Bill 711 of the 1983 Regular Session of the Louisiana Legislature. See La. H.R. 711, Reg. Sess. (1983) (original bill) (copy on file with the Louisiana House of Representatives Administrative Services, Post Office Box 94183, Baton Rouge, Louisiana 70804) [hereinafter LLIB]. As indicated in the text, the Law Institute based the LLIB on the Model Uniform Product Liability Act proposed by the United States Department of Commerce in 1979 for voluntary use by the states. See, e.g., Model Uniform Product Liability Act, Introduction (1979), reprinted in 44 Fed. Reg. 62714 (1979) [hereinafter UPLA]; LLIB § 2800.5 comment (a). One commentator has described the UPLA this way:

The UPLA had its genesis in the Final Report of the Federal Interagency Task Force on Product Liability, which concluded that one of the primary causes of the product liability problem was the "uncertainties in the tort-litigation" system. The basic philosophy underlying the UPLA is to shift the cost of accidents from an injured claimant to a defendant product seller "when there is a logical and articulated rationale for deeming [the latter] . . . 'responsible' for the claimant's injuries." The UPLA clearly eschews a no-fault (absolute liability) compensation system and adopts rules of liability based on a notion of fault or blameworthiness.

Birnbaum, *supra* note 3, at 639-40, citing UPLA, Introduction, *supra*. For an informative analysis of the UPLA, see Schwartz, The Uniform Product Liability Act—A Brief Overview, 33 Vand. L. Rev. 579 (1980).

Because both the UPLA and the LLIB influenced the content of the LPLA, this article will cite the provisions of both and their comments when such provisions and comments are consistent with or are pertinent to the provisions of the LPLA. Nevertheless, it is important to appreciate that the LPLA is not at all identical to either the UPLA or the LLIB.

12. La. S. 684, Reg. Sess. (1988) (original bill) (copy on file with the Louisiana Senate Administrative Services, Post Office Box 94183, Baton Rouge, Louisiana 70804).

mer's floor leaders, they introduced the bill on the Governor's behalf and as a part of the Governor's legislative package. The author of this article, along with former professor H. Alston Johnson III, the Chairman of the Governor's Advisory Committee on Tort, Insurance and Worker's Compensation Law Revision, drafted Senate Bill 684 at the Governor's request and with his supervision.

After it was introduced, Senate Bill 684 was assigned to the Senate Committee on Judiciary A.¹³ The Judiciary A Committee conducted a hearing on the bill on May 17, 1988, at which time proponents of the legislation offered some fifty amendments that were developed as a result of extensive and on-going meetings between the Governor's advisors and those who would be affected by the legislation. The committee adopted these amendments without objection. Opponents of Senate Bill 684 also offered numerous amendments, all of which seemed designed either to temper or totally thwart the bill's effect and all of which the committee declined to accept.¹⁴ The Judiciary A Committee reported Senate Bill 684 favorably as amended to the full Senate at the conclusion of the hearing by a vote of 4 to 2.¹⁵

The full Senate considered Senate Bill 684 on May 25, 1988. Opponents to the legislation again attempted to amend the bill during floor debate but the Senate defeated the amendment by a vote of 21 to 17.¹⁶ After additional floor debate, proponents of Senate Bill 684 agreed to accept three amendments to the bill in exchange for the opponents' commitment to drop their opposition to the legislation both in the Senate and in the House of Representatives.¹⁷ The Senate adopted these amendments without objection and then passed Senate Bill 684 by a vote of 37 to 1.¹⁸

13. La. Senate Journal, 50 (May 2, 1988).

14. Minutes of Comm. on Jud. A, La. Senate, May 17, 1988, p. 24. Senator Hainkel, a member of the Judiciary A Committee, offered the proponents' amendments, which the committee adopted unanimously. No member of the committee wished to offer the opponents' amendments and, therefore, a formal vote on the opponents' amendments was unnecessary.

15. *Id.* at 26.

16. La. Senate Journal, 5 (May 25, 1988).

17. These amendments changed the circumstances under which the seller of a product of an alien manufacturer may become a manufacturer under the LPLA, shifted the burden of proof for the LPLA's defective design provisions on knowledge and feasibility and the statute's inadequate warning provision on knowledge from the claimant to the manufacturer and modified the LPLA's effective date provision. See La. Senate Journal, 40 (May 25, 1988); *infra* notes 41-46, 157-63, 218-21 and 245-47 and accompanying text. Compare La. R.S. 9:2800.53(1)(d), 2800.56, 2800.57, as enacted by 1988 La. Acts No. 64, and 1988 La. Acts No. 64, § 2, with La. S. 684, §§ 1, 2, Reg. Sess. (1988) (engrossed bill) (copy on file with Louisiana Senate Administrative Services, Post Office Box 94183, Baton Rouge, Louisiana 70804).

18. La. Senate Journal, 40-41 (May 25, 1988).

Senate Bill 684 next went to the House of Representatives. There it was assigned to the House Committee on Civil Law and Procedure,¹⁹ which conducted a hearing on the legislation on June 7, 1988. The Committee adopted no amendments and voted 11 to 3 to report the bill favorably to the full House.²⁰

The House of Representatives considered Senate Bill 684 on June 13, 1988. After defeating an amendment to the bill by a vote of 86 to 13, the House passed the legislation by a vote of 97 to 5.²¹ Governor Roemer signed Senate Bill 684 on June 21, 1988 and it became Act 64 of the 1988 Regular Session.²²

II. THE SCOPE OF THE LPLA

A. *Theories of Liability*

To understand the LPLA one must appreciate its scope. As explained above, the LPLA "establishes the exclusive theories of liability for manufacturers for damage caused by their products."²³ There are four such theories available under the act, each of which will be discussed in more detail below. The point now in terms of the act's scope is that a products liability plaintiff may no longer recover in Louisiana from a manufacturer on the basis of any theory of tort liability that is not set forth in the LPLA.²⁴ Stated otherwise, the LPLA, which retains the "unreasonably dangerous" requirement of prior law, is now the sole source of meaning for the term.

B. *The Meaning of "Manufacturer"*

Section 2800.53 of the LPLA is devoted to definition of terms.²⁵ Many of the terms used in the act and their definitions influence the act's scope. An example is "manufacturer" and its meaning.

The LPLA applies only to manufacturers. A manufacturer, according to section 2800.53(1) of the statute, is "a person or entity who is in

19. La. House of Rep. Journal, 4 (May 27, 1988).

20. Minutes of Comm. on Civil Law & Procedure, La. House of Rep., June 7, 1988, p. 3.

21. La. House of Rep. Journal, 20 (June 13, 1988).

22. After final passage in the House and before being sent to the Governor, Senate Bill 684 was returned to the Senate for its concurrence in a technical amendment made by the Legislative Bureau on June 8, 1988, after Senate Bill 684 left the House Committee. The Senate concurred in this technical amendment on June 14, 1988 by a vote of 32 to 1. La. Senate Journal, 21 (June 14, 1988).

23. La. R.S. 9:2800.52, as enacted by 1988 La. Acts No. 64. See supra note 9 and accompanying text.

24. Id. § 2800.52, as enacted by 1988 La. Acts No. 64.

25. Id. § 2800.53, as enacted by 1988 La. Acts No. 64.

the business of manufacturing a product for placement into trade or commerce."²⁶ "Manufacturing a product" means "producing, making, fabricating, constructing, designing, remanufacturing, reconditioning or refurbishing a product."²⁷

Section 2800.53(1) thus establishes a two-prong test for the determination of manufacturer status. First, one must be in the manufacturing business. The drafters included this requirement merely to exempt, for reasons of policy, the person who makes a product for his own use or who occasionally enters into a private sale of a product.²⁸ Second, in order to be a manufacturer under the LPLA one must do something to the product that influences it in a meaningful and creative way.²⁹ The ramifications of this requirement are more considerable.

The second prong of the manufacturer test means the LPLA does not apply to those who cultivate, grow, harvest or otherwise produce products in their natural state, such as farmers, ranchers and fishermen, and so as to leave no doubt sections 2800.52(3)-(6) of the statute expressly exclude such persons.³⁰ The exclusion only applies, however, if these

26. *Id.* § 2800.53(1), as enacted by 1988 La. Acts No. 64.

27. *Id.*

28. The rule [of seller liability] does not . . . apply to the occasional seller of food or other such products who is not engaged in that activity as part of his business. Thus it does not apply to the housewife, who on one occasion, sells to her neighbor a jar of jam or a pound of sugar. Nor does it apply to the owner of an automobile who, on one occasion, sells it to his neighbor, or even sells it to a dealer in used cars, and this even though he is fully aware that the dealer plans to resell it. The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who produce such goods. This basis is lacking in the case of the ordinary individual who makes the isolated sale, and he is not liable to a third person, or even to his buyer, in the absence of his negligence. An analogy may be found in the provision of the Uniform Sales Act, § 15, which limits the implied warranty of merchantable quality to sellers who deal in such goods; and in the similar limitation of the Uniform Commercial Code, § 2-314, to a seller who is a merchant.

Restatement (Second) of Torts § 402A comment f (1965). See UPLA § 102(A) and comment (A); LLIB § 2800.2(A) and comment (a).

29. See UPLA § 102(B) and comment (B); LLIB § 2800.2(A) and comment (a).

30. La. R.S. 9:2800.52(3)-(6), as enacted by 1988 La. Acts No. 64. These provisions state that the LPLA does not apply to:

(3) Producers of natural fruits and other raw products in their natural state that are derived from animals, fowl, aquatic life or invertebrates, including but not limited to milk, eggs, honey and wool.

(4) Farmers and other producers of agricultural plants in their natural state.

(5) Ranchers and other producers of animals, fowl, aquatic life or invertebrates in their natural state.

producers do not process their product. For example, the commercial shrimper who catches his shrimp, chills and then sells his catch is not a manufacturer under the LPLA. But the shrimper who cooks the shrimp and then sells them is, because he has changed the character of the product.³¹ Products liability in tort traditionally has not been applied in Louisiana (or elsewhere) to producers of unprocessed natural products and the LPLA thus preserves pre-LPLA law in this respect.³²

The second prong also means the LPLA will not affect retailer liability in most instances. This is so because the average retailer (called a "seller" in the statute³³) acts as a conduit only. He simply sells a product manufactured by another. Most sellers who are products liability defendants, therefore, will continue to be judged according to the same standard that applied before the LPLA was enacted. Basically, this is the standard of negligence.³⁴ A seller may nonetheless become a manufacturer by satisfying the manufacturer test if he "exercises control over or influences a characteristic of the design, construction or quality of the product" and this characteristic causes damage.³⁵ In such event, the seller will be subject to the LPLA's criteria for culpability.

There are two exceptions to section 2800.53(1)'s manufacturer test. That is, in two instances the LPLA's manufacturer classification attaches

(6) Harvesters and other producers of fish, crawfish, oysters, crabs, mollusks or other aquatic animals in their natural state.

Id.

31. See LLIB § 2800.1(5)-(8) and comment (e).

32. See *Scheider v. Sahrman*, 8 Utah 2d 35, 39, 327 P.2d 822, 824 (1958); *Schultz v. Benson Lumber Co.*, 6 Cal. 2d 688, 692-94, 59 P.2d 100, 102-03 (1936); LLIB § 2800.1(5)-(8) and comment (e); Wade, *supra* note 3, at 848. Louisiana's law of redhibition will continue to govern the liability of such producers of unprocessed natural products as it did under pre-LPLA law and jurisprudence. See La. Civ. Code arts. 2520-48.

33. See La. R.S. 9:2800.53(2), as enacted by 1988 La. Acts No. 64 ("Seller" means a person or entity who is not a manufacturer and who is in the business of conveying title to or possession of a product to another person or entity in exchange for anything of value.').

34. "Finally, it is settled in Louisiana that the non-manufacturing seller of a defective product is not responsible for damages in tort absent a showing that he knew or should have known that the product sold was defective." *Jones v. Employers Mut. Liab. Ins. Co.*, 430 So. 2d 357, 359 (La. App. 3d Cir. 1983). See, e.g., *Mollett v. Penrod Drilling Co.*, 826 F.2d 1419, 1428 (5th Cir. 1987); *Spillers v. Montgomery Ward & Co.*, 294 So. 2d 803, 807-08 (La. 1974); *Harris v. Atlantic Stove Works, Inc.*, 428 So. 2d 1040, 1043 (La. App. 1st Cir.), writ denied, 434 So. 2d 1106 (1983); *Cobb v. Insured Lloyds*, 387 So. 2d 13, 20 (La. App. 3d Cir.), writ denied, 394 So. 2d 615 (1980); *Reeves v. Great Atl. & Pac. Tea Co.*, 370 So. 2d 202, 209 (La. App. 3d Cir.), writs denied, 371 So. 2d 835, 372 So. 2d 568 (1979); *Robertson*, *supra* note 1, at 73-75; *infra* note 125 and accompanying text.

35. La. R.S. 9:2800.53(1)(b), as enacted by 1988 La. Acts No. 64. See UPLA § 102(B) and comment (B); LLIB § 2800.2(A)(2) and comment (c). This same rule applies to wholesalers and distributors. See UPLA § 102(B) and comment (B).

even if the test is not satisfied. Both exceptions apply to sellers and both apply for reasons of policy.

The first exception is found in section 2800.53(1)(a) of the act, which provides that a seller "who labels a product as his own or who otherwise holds himself out to be the manufacturer of the product" is a manufacturer.³⁶ Manufacturer status applies in those circumstances even if the seller has not otherwise modified the product or influenced one of its characteristics because the seller by his own actions has suggested that he is responsible for the product's nature and as a result has induced the consumer reasonably to rely on that assertion in purchasing the product.³⁷ The Louisiana Supreme Court reached a similar conclusion in 1978 in *Chappuis v. Sears Roebuck and Co.*³⁸ and to that extent *Chappuis* remains good law. *Chappuis* also held, though, that a seller is a manufacturer if he is a "professional vendor" who, because of his "size, volume and merchandising practices," is capable of "controlling the quality of . . . [his] merchandise."³⁹ The LPLA does not have such

36. La. R.S. 9:2800.53(1)(a), as enacted by 1988 La. Acts No. 64. See *supra* note 28 and accompanying text.

37. The same policy underlies the Louisiana doctrine of detrimental reliance. See, e.g., La. Civ. Code art. 1967 ("A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. . . ."). See also Herman, *Detrimental Reliance in Louisiana Law—Past, Present, and Future(?)*: The Code Drafter's Perspective, 58 Tul. L. Rev. 707, 720 (1984).

38. 358 So. 2d 926, 930 (La. 1978). In finding the defendant Sears liable the *Chappuis* court said that "[t]he responsibility of Sears is the same as that of a manufacturer" because Sears "held the product out to the public as its own." *Id.* (citing *Penn v. Inferno Mfg. Corp.*, 199 So. 2d 210 (La. App. 1st Cir.), writ denied, 251 La. 27, 202 So. 2d 649 (1967). See, e.g., *Molett v. Penrod Drilling Co.*, 826 F.2d 1419, 1428 (5th Cir. 1987); *Ashland Oil, Inc. v. Miller Oil Purchasing Co.*, 678 F.2d 1293, 1312 (5th Cir. 1982); *Toups v. Sears Roebuck and Co.*, 507 So. 2d 809, 818 (La. 1987); *Rowell v. Carter Mobile Homes, Inc.*, 500 So. 2d 748, 752 (La. 1987); *Spillers v. Montgomery Ward & Co.*, 294 So. 2d 803, 807 (La. 1974); *Chastant v. SBS-Harolyn Park Venture, Inc.*, 510 So. 2d 1341, 1344 (La. App. 3d Cir.), writ denied, 513 So. 2d 825 (1987); *Landry v. State Farm Fire & Casualty Co.*, 504 So. 2d 171, 173 (La. App. 3d Cir. 1987); *Rutherford v. Coca-Cola Bottling Co.*, 501 So. 2d 1082, 1084-85 (La. App. 2d Cir. 1987); *Picolo v. Flex-A-Bed, Inc.*, 466 So. 2d 652, 654 (La. App. 5th Cir.), writ denied, 467 So. 2d 1134 (1985); *Reeves v. Great Atl. & Pac. Tea Co.*, 370 So. 2d 202, 209 n.3 (La. App. 3d Cir.), writs denied, 371 So. 2d 835, 372 So. 2d 568 (1979); *Benard v. Bradley Automotive*, 365 So. 2d 1382, 1385 n.3 (La. App. 2d Cir. 1978); *Fairburn v. Montgomery Ward & Co.*, 349 So. 2d 1280, 1282 (La. App. 1st Cir. 1977) (original opinion); UPLA § 102(B) and comment (B); LLIB § 2800.2(A)(1) and comment (b). See generally *Restatement (Second) of Torts* § 402A and comment f (1965); *Crawford, The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Torts*, 39 La. L. Rev. 687, 687-93 (1979); *Crowe, supra* note 7; *Morrow, Warranty of Quality: A Comparative Survey*, 14 Tul. L. Rev. 529, 539 (1940).

39. *Chappuis v. Sears Roebuck and Co.*, 358 So. 2d at 930. See, e.g., *Shortess v.*

a provision and that portion of *Chappuis* is therefore overruled.⁴⁰

The second exception to the manufacturer test is provided in section 2800.53(1)(d). A seller is a manufacturer, according to this section, if he is in the business of importing or distributing "the product of an alien manufacturer" for resale and "the seller is the alter ego of the alien manufacturer."⁴¹ A product of an alien manufacturer is "a product that is manufactured outside the United States by a manufacturer who is a citizen of another country or who is organized under the laws of another country."⁴² Section 2800.53(1)(d) directs the court to consider the following factors in determining whether the seller is the alien manufacturer's alter ego:

whether the seller is affiliated with the alien manufacturer by way of common ownership or control; whether the seller assumes or administers product warranty obligations of the alien manufacturer; whether the seller prepares or modifies the product for distribution; or any other relevant evidence.⁴³

Thus, the seller-importer or seller-distributor of an alien manufacturer's product who is the alien manufacturer's alter ego becomes subject to the LPLA as a manufacturer even if the seller had nothing to do with the manufacturing process.

This exception to the manufacturer test is justified because as the alien manufacturer's alter ego a qualifying seller has, in effect, held himself out to be the manufacturer of the product.⁴⁴ The exception is further defensible because such a seller may be the only defendant available to the plaintiff if the alien manufacturer, because of his foreign status, is not subject to service of process or is immune from enforcement of a judgment. In those circumstances the seller-importer or seller-distributor who is the alien manufacturer's alter ego should bear the loss, not the consumer plaintiff.⁴⁵ Furthermore, a version of the rule

Touro Infirmary, 520 So. 2d 389, 391 (La. 1988); *James v. P.K. Smith Chevrolet-Olds, Inc.*, 444 So. 2d 1372, 1376 (La. App. 2d Cir. 1984); *Jones v. St. Charles Steel Fabricators, Inc.*, 422 So. 2d 448, 451-52 (La. App. 4th Cir. 1982); *supra* note 38.

40. See La. R.S. 9:2800.53(1)(a), (b), as enacted by 1988 La. Acts No. 64; *supra* notes 35 and 36 and accompanying text.

41. La. R.S. 9:2800.53(1)(d), as enacted by 1988 La. Acts No. 64.

42. *Id.*

43. *Id.* See LLIB § 2800.2(A)(4) and comment (e).

44. See *supra* notes 36-38 and accompanying text.

45. See, e.g., UPLA § 105 and comment. Additionally, in those instances where an alien manufacturer is made a defendant, a court might find that the substantive products law of the alien manufacturer's domicile applies under conflicts of law rules and the foreign law may be less protective of the consumer than the LPLA. In such event, the claimant could sue the seller-importer or seller-distributor who is the alien manufacturer's alter ego separately under the LPLA.

articulated in section 2800.53(1)(d) already applies in redhibition claims in Louisiana as a result of the Louisiana Supreme Court's decision in *Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.*⁴⁶ There is no compelling reason why the rule ought not to apply in products liability disputes as well.

The final point about the meaning of "manufacturer" under the LPLA is that the term also includes a "manufacturer of a product who incorporates into the product a component or part manufactured by another manufacturer."⁴⁷ This provision is found in section 2800.53(1)(c) and it codifies the law in Louisiana before the LPLA.⁴⁸ The provision

46. 262 La. 80, 88-90, 262 So. 2d 377, 380-81 (1972). Consider the court's interpretation of *Media Production* in *Martin v. Henderson*, 505 So. 2d 192 (La. App. 3d Cir. 1987), also a redhibition case:

In the cited case M B N A assumed total responsibility for marketing in the United States the cars made by a foreign corporation not authorized to do business in this country. M B N A had sole responsibility for selling, servicing and establishing franchise dealerships and its name appeared on the Dealers Claims Policies and Procedures Manual, the owner's service policy, and the owner's automobile manual. It operated a vehicle distribution center, inspected, adjusted and prepared the automobiles for placement in the hands of a dealer for sale. In the case *sub judice* the record establishes only that appellant purchased diesel fuel from the manufacturer, stored it and sold it at retail locations. The evidence does not indicate the existence of any manufacturer not subject to service of process. Nor does it appear that appellant was a sole distributor of the product of any refiner or that appellant made any inspections or adjustments or conducted any additional activity calculated to ready the product for sale. Under the facts presented in this particular case, there is no basis for holding that appellant occupied the "status of a manufacturer."

505 So. 2d at 195-96. See, e.g., *Aizpurua v. Crane Pool Co.*, 449 So. 2d 471, 472 (La. 1984); *Chastant v. SBS-Harolyn Park Venture*, 510 So. 2d 1341, 1344 (La. App. 3d Cir.), writ denied, 513 So. 2d 825 (1987); *Martin v. Henderson*, 505 So. 2d 192, 195-96 (La. App. 3d Cir. 1987); *Rutherford v. Coca Cola Bottling Co. of Shreveport, Inc.*, 501 So. 2d 1082, 1084 (La. App. 2d Cir. 1987); *Smith v. Ly*, 498 So. 2d 128, 131 (La. App. 5th Cir. 1986); *LaBrono v. Gene Ducote Volkswagen, Inc.*, 391 So. 2d 1360, 1363 n.1 (La. App. 4th Cir. 1980), *aff'd*, 403 So. 2d 723 (1981); *Cobb v. Insured Lloyds*, 387 So. 2d 13, 20 (La. App. 3d Cir.), writ denied, 394 So. 2d 615 (1980); *Hoychick v. Gulf States Toyota, Inc.*, 386 So. 2d 681, 683 (La. App. 3d Cir.), writ denied, 393 So. 2d 748 (1980); *Moran v. Willard E. Robertson Corp.*, 372 So. 2d 758, 761 (La. App. 4th Cir. 1979); *Reeves v. Great Atl. & Pac. Tea Co.*, 370 So. 2d 202, 211 (La. App. 3d Cir.), writs denied, 371 So. 2d 835, 372 So. 2d 568 (1979); *Perrin v. Read Imports, Inc.*, 359 So. 2d 738, 740 (La. App. 4th Cir. 1978); LLIB § 2800.2(A)(4) and comment (e); *Barham, Redhibition: A Comparative Comment*, 49 Tul. L. Rev. 376, 381-82 (1975); *Crawford, The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Torts*, 33 La. L. Rev. 206, 208-10 (1973); *Note, Sales—Implied Warranty—Wholesale Distributor Liable for Retail Price of Defective Foreign Automobile*, 47 Tul. L. Rev. 473, 474-77 (1973).

47. La. R.S. 2800.53(1)(c), as enacted by 1988 La. Acts No. 64. See LPLA § 2800.2(A)(3) and comment (d). See generally UPLA § 102(B) and comment (B).

48. See, e.g., *LeBouef v. Goodyear Tire & Rubber Co.*, 623 F.2d 985, 990-91 (5th Cir. 1980); *Spillers v. Montgomery Ward & Co.*, 294 So. 2d 803, 807 (La. 1974).

applies if the manufacturer constructs his product entirely by assembling components or parts manufactured by others or if only a portion of the product is made up of such components or parts.⁴⁹ The provision is also consistent with section 2800.53(1)'s manufacturer test.⁵⁰

C. *The Meaning of "Claimant"*

A products liability plaintiff is called a "claimant" in the LPLA. "Claimant" and its meaning also tell on the act's scope. According to section 2800.53(4), a claimant is "a person or entity who asserts a claim under this Chapter against the manufacturer of a product or his insurer for damage caused by the product."⁵¹ What is not included in this definition is as significant as what is. There is no requirement that the claimant be in contractual privity with the manufacturer in order to recover.⁵² Nor does section 2800.53(4) require the claimant to be a product user.⁵³ The absence of both of these conditions is consistent with pre-LPLA Louisiana case law and traditional products liability doctrine.⁵⁴

D. *The Meaning of "Product"*

Predictably, the meaning of "product" is important to the scope of the LPLA as well. A product, according to section 2800.53(3), is "a corporeal movable that is manufactured for placement into trade or

49. As under pre-LPLA case law, the assembling manufacturer would be deemed a manufacturer even if the component or part were labeled as having been manufactured by another. See, e.g., *Marshall v. Beno Truck Equip., Inc.*, 481 So. 2d 1022, 1031 (La. App. 1st Cir. 1985), writ denied, 482 So. 2d 620 (1986). Additionally, the manufacturer of the component or part is also a manufacturer under the LPLA but only as to the component or part. See La. R.S. 9:2800.53(1) (definition of "manufacturing a product"), (3), as enacted by 1988 La. Acts No. 64; UPLA § 102(B), (C) and comments (B), (C); LLIB § 2800.2(A)(3), (B) and comments (d), (f); supra notes 27 and 29 and accompanying text. This rule also codifies prior law. See, e.g., *Spillers v. Montgomery Ward & Co.*, 294 So. 2d 803, 807 (La. 1974); *Marshall v. Beno Truck Equip., Inc.*, 481 So. 2d 1022, 1031 (La. App. 1st Cir. 1985), writ denied, 482 So. 2d 620 (1986); Wade, supra note 3, at 848.

50. See La. R.S. 9:2800.53(1), as enacted by 1988 La. Acts No. 64 (definition of "manufacturing a product"); supra notes 27 and 29 and accompanying text.

51. La. R.S. 9:2800.53(4), as enacted by 1988 La. Acts No. 64. See UPLA § 102(E); LLIB § 2800.2(C).

52. See UPLA § 103(B) and comment (B).

53. See UPLA § 102(E) and comment (E).

54. See, e.g., *Hebert v. Brazzel*, 403 So. 2d 1242, 1244 (La. 1981); *Weber v. Fidelity & Casualty Ins. Co. of New York*, 250 So. 2d 754, 755 (La. 1971); Restatement (Second) of Torts § 402A and comment 1 (1965) (no contractual privity required); UPLA § 102(E) and comment (E). The Restatement does not address the issue of whether a claimant must be a product user.

commerce."⁵⁵ The term also includes "a product that forms a component part of or that is subsequently incorporated into another product or an immovable."⁵⁶

Civil Code article 471 defines corporeal movables as "things, whether animate or inanimate, that normally move or can be moved from one place to another."⁵⁷ Consequently, almost all goods, wears and merchandise sold in the normal course of business are products under the LPLA.⁵⁸ So, too, are their component parts.

Buildings, land and other immovable property are not products under the act⁵⁹ (though section 2800.53(3) provides that corporeal movables incorporated into an immovable are, in spite of their designation as immovables in the Civil Code⁶⁰). Human blood, blood components, human organs, human tissue and approved animal tissue to the extent they are governed by Louisiana Revised Statutes 9:2797 also are not products because section 2800.53(3) expressly excludes them.⁶¹

Section 2800.53(3)'s definition means further that professional and certain nonprofessional services are not products and for this reason sections 2800.52(1) and (2) of the statute specifically exempt those who provide such services from the LPLA's coverage.⁶² Sections 2800.52(1)

55. La. R.S. 9:2800.53(3), as enacted by 1988 La. Acts No. 64. See UPLA § 102(C) and comment (C); LLIB § 2800.2(B) and comment (f).

56. La. R.S. 9:2800.53(3), as enacted by 1988 La. Acts No. 64. See UPLA § 102(C) and comment (C); LLIB § 2800.2(B) and comment (f).

57. La. Civ. Code art. 471.

58. This would include water, natural gas and electricity. See UPLA § 102(C) and comment (C); LLIB § 2800.2(B) and comment (f).

59. See La. Civ. Code arts. 462-70. But movable dwellings such as mobile homes and campers would be products. See *supra* notes 55-57 and accompanying text.

60. See La. Civ. Code arts. 462-67; *supra* note 56 and accompanying text.

61. See La. R.S. 9:2800.53(3), as enacted by 1988 La. Acts No. 64. La. R.S. 9:2797 (Supp. 1988) provides:

Strict liability or liability of any kind without negligence shall not be applicable to physicians, dentists, hospitals, hospital blood banks, or nonprofit community blood banks in the screening, processing, transfusion, or medical use of human blood and blood components of any kind and the transplantation or medical use of any human organ, human tissue, or approved animal tissue which results in transmission of viral diseases or any infectious agent undetectable by appropriate medical scientific and laboratory tests.

The legislature passed this statute in 1982 to overrule the Louisiana Supreme Court's decision in *DeBattista v. Argonaut-Southwest Ins. Co.*, 403 So. 2d 26 (La. 1981), that a hospital and blood bank were strictly liable in products liability for dispensing blood contaminated with hepatitis virus. See Johnson, 1981 Legislative Developments Affecting Torts and Workers' Compensation, 29 La. B.J. 105, 105-06 (1981).

62. La. R.S. 9:2800.52(1), (2), as enacted by 1988 La. Acts No. 64. The exclusion applies even if the professional or qualifying nonprofessional service results in a product. *Id.* The providers of such services are, of course, still liable under other theories of law, such as malpractice. See, e.g., *Fauchaux v. Alton Ochsner Medical Found. Hosp. &*

and (2) are perhaps unnecessary because a service clearly is not a corporeal movable, but the LPLA's drafters decided to include this explicit exclusion so as to avoid any confusion or uncertainty. Providers of professional and nonprofessional services are exempt so long as the essence of the relationship between the professional and nonprofessional, as the case may be, and the consumer is a service—the furnishing of judgment or skill—and not the sale of a product.⁶³ Thus, for example, the pharmacist who fills a prescription is not a manufacturer under the LPLA but the same pharmacist who sells photographic film labeled as his own is. Similarly, the florist who prepares a bouquet is not a manufacturer but he becomes one when he sells clay planters he himself has made.⁶⁴

Section 2800.53(3)'s definition of a product basically comports with prior law and traditional notions of products liability.⁶⁵ This is also true of the section's exclusions.⁶⁶

E. *The Meaning of "Damage"*

The definition of "damage" is obviously important to the scope of any products liability statute but none more so than the LPLA. The LPLA's definition is broad. "Damage," according to section 2800.53(5), "means all damage caused by a product, including survival and wrongful death damages, for which Civil Code articles 2315, 2315.1 and 2315.2 allow recovery."⁶⁷ This was the law in Louisiana even before the LPLA for products liability in tort.⁶⁸

Clinic, 468 So. 2d 720, 721 (La. App. 5th Cir.), rev'd on other grounds, 470 So. 2d 878 (1985); UPLA § 102(A) and comment (A); LLIB § 2800.1(3), (4) and comment (e).

63. See La. R.S. 9:2800.52(1), (2), as enacted by 1988 La. Acts No. 64; UPLA § 102(A) and comment (A); LLIB § 2800.1(3), (4) and comment (e). Note that section 2800.52(2) pertaining to providers of nonprofessional services contains the qualifying phrase "where the essence of the service is the furnishing of judgment or skill" while section 2800.52(1) pertaining to providers of professional services does not. Compare La. R.S. 2800.52(1), as enacted by 1988 La. Acts No. 64, with id. § 2800.52(2), as enacted by 1988 La. Acts No. 64. This is so because the essence of a professional service is always the furnishing of judgment or skill but that is not true in every instance for a nonprofessional service. Hence, the qualifying phrase was thought necessary for section 2800.52(1).

64. See UPLA § 102(A) and comment (A); LLIB § 2800.1(3), (4) and comment (e).

65. See, e.g., CNG Producing Co. v. Columbia Gulf Transmission Corp., 709 F.2d 959, 963 (5th Cir. 1983); Carney v. Marathon Oil, 632 F. Supp. 1037, 1040-41 (W.D. La. 1986); Philippe v. Browning Arms Co., 395 So. 2d 310, 318 (La. 1980); Weber v. Fidelity & Casualty Ins. Co. of New York, 259 La. 599, 603-11, 250 So. 2d 754, 756-58 (1971).

66. *Id.*

67. La. R.S. 9:2800.53(5), as enacted by 1988 La. Acts No. 64. See UPLA § 102(F) and comment (F); LLIB § 2800.1(1) and comment (c), § 2800.2(D) and comment (g). Civil Code article 2315.1 pertains to the survival action and Civil Code article 2315.2 to the action for wrongful death.

68. See, e.g., Harris v. Bardwell, 373 So. 2d 777, 784 (La. App. 2d Cir. 1979).

However, section 2800.53(5) also expands the definition of "damage" to include "damage to the product itself and economic loss arising from a deficiency in or loss of use of the product only to the extent that Section 3 of Chapter 6 of Title VII of Book III of the Civil Code, entitled 'Of the Vices of the Thing Sold,' does not allow recovery for such damage or economic loss."⁶⁹ In other words, the LPLA governs products liability in tort and recovery under the statute will normally be limited to recovery for personal injury and damage to property other than the product itself, which properly are the subject of a products liability tort claim. Recovery for damage to the product itself or economic loss arising from a deficiency in or loss of use of the product will normally not be compensable under the LPLA, because those items of damage properly are the subject of a claim in redhibition for breach of implied warranty. If, however, a claimant cannot proceed in redhibition for some reason, he can recover his damages in redhibition under the LPLA.⁷⁰ The logical corollary of these rules is that the LPLA was not meant to and indeed does not affect Louisiana's law of redhibition, with one exception: a claimant can recover under the LPLA for damage to the product itself and economic loss when for some reason he cannot proceed in redhibition. This exception in effect expands the action in redhibition.⁷¹

Section 2800.53(5)'s definition of "damage" additionally provides that attorneys' fees are not recoverable under the LPLA.⁷² This represents a change from prior law. In *Philippe v. Browning Arms Co.*,⁷³ the Louisiana Supreme Court held that a products liability plaintiff who had sued in tort for personal injury and not in redhibition for pecuniary damages could nonetheless recover attorneys' fees under redhibition ar-

69. La. R.S. 9:2800.53(5), as enacted by 1988 La. Acts No. 64. The citation in the quoted excerpt from section 2800.53(5) is to the Civil Code articles on redhibition. See La. Civ. Code arts. 2520-48. Compare UPLA § 102(F) and comment (F), § 103(A) and comment (A) ("harm" includes damage to the product itself but not direct or consequential economic loss), with LLIB § 2800.1(1) and comments (a), (c), § 2800.2(D) and comment (g) (substantially the same as LPLA section 2800.53(5)).

70. For example, an action in redhibition requires a "sale" and, consequently, a consumer who acquired a product by donation would not be entitled to sue in redhibition. See, e.g., La. Civ. Code art. 2520; *Gulf States Util. Co. v. Ecodyne Corp.*, 635 F.2d 517, 520 (5th Cir. 1981). In such event, the consumer could recover under the LPLA for damage to the product itself and economic loss caused by a deficiency in or loss of use of the product. See Kennedy, *supra* note 9, at 170 n.9.

71. See *supra* note 70. Thus, for instance, the LPLA does not affect a seller's right of indemnity against a manufacturer under redhibition article 2531 of the Civil Code. See La. Civ. Code art. 2531.

72. La. R.S. 9:2800.53(5), as enacted by 1988 La. Acts No. 64. See Kennedy, *supra* note 9, at 170 n.13; UPLA § 102(F) and comment (F); LLIB § 2800.2(D) and comment (g).

73. 395 So. 2d 310, 314 (La. 1981) (on rehearing).

article 2545 of the Civil Code⁷⁴ because "the right and the extent of recovery by the purchaser of a thing against the seller or manufacturer is governed by the codal articles [on redhibition] providing for responsibility in the seller-purchaser relationship, as applied through C. C. art. 2315."⁷⁵ The LPLA overrules this portion of the *Philippe* decision.

The claimant who has suffered pecuniary damages may, of course, still recover attorneys' fees simply by suing separately in redhibition or by cumulating an action in redhibition with his products claim under the LPLA. In the latter case, the claimant could recover attorneys' fees attributable to the action in redhibition but not those fees incurred as a result of the LPLA claim.⁷⁶ Only, as explained above, when the claimant is forced to proceed solely under the LPLA because recovery in redhibition is not available to him will attorneys' fees not be recoverable at all, and those instances will be relatively rare.

F. *Miscellaneous Exclusions*

There are three additional exclusions in the LPLA that bear upon its scope. First, by providing in section 2800.52 of the act that "[c]onduct or circumstances that result in liability under this Chapter are 'fault' within the meaning of Civil Code Article 2315,"⁷⁷ the drafters of the LPLA intended to insure that the statute would not affect Louisiana

74. Civil Code article 2545 provides that "[t]he seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of price and repayment of the expenses, *including reasonable attorneys' fees*, is answerable to the buyer in damages." La. Civ. Code art. 2545 (emphasis added).

75. *Philippe v. Browning Arms Co.*, 395 So. 2d at 314. See, e.g., *Franklin v. Able Moving & Storage Co.*, 439 So. 2d 489, 491 (La. App. 1st Cir. 1983); *Storey v. Lambert Limbs & Braces, Inc.*, 426 So. 2d 676, 678 (La. App. 1st Cir. 1982), writ denied, 433 So. 2d 152 (1983).

76. [T]he term "damage" must be studied carefully to understand the impact of the Act [LPLA] on the action in redhibition. The Act does not purport to capture the action in redhibition against a manufacturer when rescission of the sale or diminution of the price is sought. That relief is not encompassed within the term "damage" as used in the Act. Neither does the Act suppress the redhibition action for damage to the product itself or economic loss arising from a deficiency in the product. Thus, if the plaintiff bought a dump truck with defective brakes and in an ensuing crash suffered personal injuries, total loss of the truck, and loss of his hauling contracts, he would claim under the Act against the manufacturer for his personal injuries, and would cumulate with that claim an action in redhibition against the manufacturer for the loss of the truck itself, the economic loss of his hauling contracts, and for attorney fees under the redhibition claim. His vendor could be added as a defendant in redhibition for such relief as would be appropriate, depending on the good or bad faith of the seller.

Crawford, Louisiana Products Liability Act, 36 La. B.J. 173, 173 (1988).

77. La. R.S. 9:2800.52, as enacted by 1988 La. Acts No. 64. See LLIB § 2800.1.

legal doctrines pertaining generally to tort litigation, such as prescription, legal interest, solidary liability, contribution, indemnity, subsequent remedial measures, affirmative defenses and comparative fault, to name but a few, as they apply in a products liability setting.⁷⁸

Nor is the LPLA meant to prejudice any legal doctrine not addressed in or inconsistent with the act that is peculiar to products liability in tort. For example, products law on the "useful safe life" of a product (such as it is) is not affected.⁷⁹ The same is true of our jurisprudence on seller (retailer) liability⁸⁰ and on the liability of a manufacturer who has manufactured a product according to the specifications or standards of another.⁸¹

The final exception is for worker's compensation claims. The LPLA "does not apply to the rights of an employee or his personal representatives, dependents or relations against a manufacturer who is the employee's employer or against any officer, director, stockholder, partner or employee of such manufacturer or principal as limited by R.S. 23:1032."⁸² Thus, the Louisiana Worker's Compensation Act will govern the compensation of an employee who is injured in the course of his employment by a product manufactured by his employer, just as it did under pre-LPLA law.⁸³

III. LPLA THEORIES OF LIABILITY

A. *Elements of the Cause of Action*

Section 2800.54 of the LPLA establishes the elements of a cause of action under the statute. The claimant has the burden of proving each element.⁸⁴ A cause of action under the LPLA is substantially the same as the products liability cause of action it has replaced, the elements

78. See Kennedy, *supra* note 9, at 165; LLIB § 2800.1 and comment (b).

79. See, e.g., *Scott v. White Trucks*, 699 F.2d 714, 717 (5th Cir. 1983); *Insurance Co. of N.A. v. Atlas Constr. Co.*, 368 So. 2d 1247, 1249 (La. App. 4th Cir. 1979); *Tri-State Ins. Co. v. Fidelity & Casualty Ins. Co.*, 364 So. 2d 657, 660 (La. App. 2d Cir.), writ denied, 365 So. 2d 248 (1978); *Foster v. Marshall*, 341 So. 2d 1354, 1361 (La. App. 2d Cir.), writ denied, 343 So. 2d 1077 (1977).

80. See *supra* notes 33-46 and accompanying text.

81. See, e.g., *Peak v. Cantey*, 302 So. 2d 335, 339 (La. App. 1st Cir. 1979); *Rotolo v. Stewart*, 127 So. 2d 24, 28 (La. App. 1st Cir. 1961).

82. La. R.S. 9:2800.52, as enacted by 1988 La. Acts No. 64. See UPLA § 114 and comment; LLIB § 2800.1(2) and comment (d).

83. The Louisiana Worker's Compensation Act is codified at Louisiana Revised Statutes 23:1021-379 (1985 & Supp. 1988).

84. La. R.S. 9:2800.54(D), as enacted by 1988 La. Acts No. 64. This, of course, comports with prior law. See, e.g., *supra* notes 1-3 and accompanying text.

of which are articulated in *Weber* and its progeny.⁸⁵ But there are differences, as will become apparent momentarily.

Section 2800.54(A) is the starting point for understanding the LPLA cause of action. It provides:

The manufacturer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arose from a reasonably anticipated use of the product by a claimant or another person or entity.⁸⁶

The elements set forth in section 2800.54(A), therefore, are:

1. The defendant is the manufacturer of the product.
2. The claimant's damage was proximately caused by a characteristic of the product.
3. This characteristic made the product unreasonably dangerous.
4. The claimant's damage arose from a reasonably anticipated use of the product by the claimant or someone else.⁸⁷

The first element—manufacturer status—has already been discussed. The second element is the requirement of causation. Causation under the LPLA and under prior law are identical.⁸⁸ Element three also preserves prior law to the extent of requiring that the product be unreasonably dangerous (as defined in the LPLA) in order for there to be liability. However, prior law's concept of "defective" does not appear in the third element, section 2800.54(A) or anywhere in the LPLA. This is a change in our law.

Weber and the case law construing it used "defective" to mean "unreasonably dangerous to normal use."⁸⁹ Section 2800.54(A) substi-

85. See supra notes 1-3 and accompanying text.

86. La. R.S. 9:2800.54(A), as enacted by 1988 La. Acts No. 64. See UPLA § 104; LLIB § 2800.3(A).

87. La. R.S. 9:2800.54, as enacted by 1988 La. Acts No. 64.

88. The LPLA does not change the duty/risk analysis of proximate cause or the notion of cause-in-fact as articulated in Louisiana case law. See, e.g., *Hill v. Lundin & Assoc., Inc.*, 256 So. 2d. 620, 622-23 (La. 1972); *Dixie Drive It Yourself Sys. v. American Beverage Co.*, 137 So. 2d 298, 302-08 (La. 1962); *Carroll v. Newton, Inc.*, 477 So. 2d 719, 724-25 (La. App. 3d Cir.), on reh'g, 477 So. 2d 728, writ denied, 478 So. 2d 530 (1985); *Winterrowd v. Traveler's Indem. Co.*, 452 So. 2d 269, 273 (La. App. 2d Cir. 1984), writ granted, 457 So. 2d 1185, writ denied, 457 So. 2d 1195, aff'd, 462 So. 2d 639 (1985); *Harris v. Atlanta Stove Works, Inc.*, 428 So. 2d 1040, 1042 (La. App. 1st Cir.), writ denied, 439 So. 2d 1108 (1983); *Oates v. Catalytic, Inc.*, 433 So. 2d 328, 332 (La. App. 3d Cir. 1983); *Gibson v. Faubion Trucklines, Inc.*, 427 So. 2d 68, 70 (La. App. 4th Cir. 1983); *Cobb v. Insured Lloyds*, 387 So. 2d 13, 19 (La. App. 3d Cir.), writ denied, 394 So. 2d 615 (1980); LLIB § 2800.3(A) and comment (c).

89. See supra notes 1-4 and accompanying text.

tutes the concept of "reasonably anticipated use" for "normal use," so as to avoid confusion and promote clarity and precision, the drafters of the LPLA decided not to use "defective" in the statute.⁹⁰ This may have been a mistake. "Defective" is a comfortable and convenient term to those who work in the products liability field and the wiser course probably would have been to retain both "defective" and "unreasonably dangerous" in the LPLA and employ them interchangeably and synonymously. This article will do that, with apologies to the legislature.

The fourth element of an LPLA cause of action set forth in section 2800.54(A) also departs from prior law but only in one respect. This, as mentioned, is by substituting "reasonably anticipated use" for "normal use." The purpose of both terms is to express the types of product uses and misuses by a consumer that a manufacturer must take into account when he designs a product, drafts instructions for its use and provides warnings about the product's dangers in order that the product not be unreasonably dangerous.⁹¹ Pre-LPLA case law subverted this purpose by assigning multiple definitions to "normal use," such as "foreseeable use,"⁹² "foreseeable misuse,"⁹³ "not limited to intended use,"⁹⁴ "reasonably foreseeable use,"⁹⁵ "intended foreseeable use,"⁹⁶ "probable use,"⁹⁷ use "which the manufacturer may reasonably expect,"⁹⁸ "lawful use,"⁹⁹ "normal application,"¹⁰⁰ use "broader than operation exactly in accordance with the manufacturers instructions"¹⁰¹ and "foreseeably dangerous use,"¹⁰² which caused considerable confusion. Some of our courts also recruited "normal use" as a conceptual vehicle to determine the scope of a manufacturer's responsibility for

90. The LLIB uses "unreasonably dangerous" but not "defective." See LLIB § 2800.3(A) and comment (d). The UPLA uses "unreasonably unsafe" in place of "unreasonably dangerous" and employs "defective" as a generic term to refer to its four types of unreasonably unsafe products. See UPLA § 104 and comment.

91. See, e.g., *Bloxom v. Bloxom*, 512 So. 2d 839, 841 (La. 1987); LLIB § 2800.3(A)(1) and comment (f).

92. *Quattlebaum v. Hy-Reach Equip., Inc.*, 453 So. 2d 578, 584 (La. App. 1st Cir.), writs denied, 458 So. 2d 474, 483 (1984).

93. *Bloxom*, 512 So. 2d at 843.

94. *Branch v. Chevron Int'l Oil Co., Inc.*, 681 F.2d 426, 429 (5th Cir. 1982).

95. *LeBouef v. Goodyear Tire & Rubber Co.*, 623 F.2d 985, 989 (5th Cir. 1980).

96. *Whitacre v. Halo Optical Prods., Inc.*, 501 So. 2d 994, 999 (La. App. 2d Cir. 1987).

97. *Perkins v. Emerson Elec. Co.*, 482 F. Supp. 1347, 1353 (W.D. La. 1980).

98. *Id.*

99. *Id.*

100. *Winterrowd v. Travelers Indem. Co.*, 452 So. 2d 269, 273 (La. App. 2d Cir. 1984), *aff'd*, 462 So. 2d 639 (1985).

101. *Cobb v. Insured Lloyds*, 387 So. 2d 13, 17-18 (La. App. 3d Cir.), writ denied, 394 So. 2d 615 (1980).

102. *Frey v. Travelers Ins. Co.*, 271 So. 2d 56, 59 (La. App. 4th Cir. 1972), writ denied, 273 So. 2d 840 (1973).

post-manufacture changes (such as modifications or repairs) made to the product by the consumer or others¹⁰³ and to address the issue of manufacturer culpability when the product was improperly maintained or sustained normal wear and tear,¹⁰⁴ both of which allowed the question of causation to creep into and dominate the "normal use" analysis.¹⁰⁵ By appearances other courts even went so far as to treat product misuse, which as a negative of "normal use" is something the plaintiff must prove did not occur, as a defense that the defendant must prove.¹⁰⁶ For these reasons the concept of "normal use" has been criticized.¹⁰⁷

"Reasonably anticipated use," it is submitted, is a better choice. The term is defined in section 2800.53(7) as "a use or handling of a

103. See, e.g., *Scott v. White Trucks*, 699 F.2d 714, 716 (5th Cir. 1983); *Thornhill v. Black Sivalls & Bryson, Inc.*, 394 So. 2d 1189, 1191 (La. 1981); *Norris v. Bell Helicopter Textron*, 495 So. 2d 976, 980-81 (La. App. 3d Cir.), writ denied, 499 So. 2d 85 (1986); *Stevens v. Rex Chainbelt, Inc.*, 349 So. 2d 948, 949 (La. App. 1st Cir.), writ denied, 351 So. 2d 164 (1977); *St. Pierre v. Gabel*, 351 So. 2d 821, 823-24 (La. App. 1st Cir. 1977); *Landry v. E.A. Caldwell, Inc.*, 280 So. 2d 231, 235 (La. App. 1st Cir. 1973); *Frey v. Travelers Ins. Co.*, 271 So. 2d 56, 59 (La. App. 4th Cir. 1972), writ denied, 273 So. 2d 840 (1973).

104. See, e.g., *Scott v. White Trucks*, 699 F.2d 714 (5th Cir. 1983); *Chappuis v. Sears Roebuck & Co.*, 358 So. 2d 926 (La. 1978); *Simon v. Ford Motor Co.*, 282 So. 2d 126, 130 (La. 1973); *Davis v. Reliance Elec. Co.*, 351 So. 2d 1238, 1240 (La. App. 1st Cir. 1977), writ denied, 353 So. 2d 1334 (La. 1980); *Tri-State Ins. Co. v. Fidelity & Casualty Ins. Co.*, 364 So. 2d 657, 659 (La. App. 2d Cir.), writ denied, 365 So. 2d 248 (1978); *Foster v. Marshall*, 341 So. 2d 1354, 1361 (La. App. 2d Cir.), writs denied, 343 So. 2d 1067, 1077 (1977).

105. The modifications, repairs or improper maintenance were analyzed as "intervening or superceding causes" that interrupted the causal chain. See, e.g., *Scott v. White Trucks*, 699 F.2d 714, 717-18 (5th Cir. 1983); *Norris v. Bell Helicopter Textron*, 495 So. 2d 976, 977 (La. App. 3d Cir.), writ denied, 499 So. 2d 85 (1986); *St. Pierre v. Gabel*, 351 So. 2d 821, 824 (La. App. 1st Cir. 1977); *Foster v. Marshall*, 341 So. 2d 1354, 1361 (La. App. 2d Cir.), writs denied, 343 So. 2d 1067, 1077 (1977); *Landry v. E.A. Caldwell, Inc.*, 280 So. 2d 231, 236 (La. App. 1st Cir. 1973).

106. See, e.g., *Bell v. Jet Wheel Blast*, 462 So. 2d 166, 172 (La. 1985); *Harris v. Atlanta Stove Works*, 428 So. 2d 1040, 1043-44 (La. App. 1st Cir.), writ denied, 434 So. 2d 1106 (1983); *Deville v. Calcasieu Parish Gravity Drainage Dist. #5*, 422 So. 2d 631, 633-35 (La. App. 3d Cir. 1982); *Avoyelles Country Club v. Walter Kidde & Co.*, 338 So. 2d 379, 382-83 (La. App. 3d Cir. 1976). Misuse, if proven by the defendant, rebuts the "normal use" element of the plaintiff's case and thus is properly analyzed as a defensive doctrine. See, e.g., *Woods v. International Harvester Co.*, 697 F.2d 635, 637-38 (5th Cir. 1983); *LeBouef v. Goodyear Tire & Rubber Co.*, 623 F.2d 985, 988-89 (5th Cir. 1980); *Jones v. Menard*, 559 F.2d 1282, 1285 n.4 (5th Cir. 1976); *Khoder v. AMF, Inc.*, 539 F.2d 1078, 1081 (5th Cir. 1976); *Perkins v. Emerson Elec. Co.*, 482 F. Supp. 1347, 1353 (W.D. La. 1980); *Robertson, Ruminations on Comparative Fault, Duty-Risk Analysis, Affirmative Defenses, and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana*, 44 La. L. Rev. 1341, 1374-82 (1984); *Wade*, supra note 3, at 846-47.

107. See, e.g., *Comment, Design Defects: Are Consumer Expectations Unrealistic?*, 45 La. L. Rev. 1313, 1315-24 (1985); *LLIB § 2800.3 comments (e)-(g)*. See also *Crawford, Developments in the Law, 1986-1987—Torts*, 48 La. L. Rev. 507, 511-15 (1988).

product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances."¹⁰⁸ The standard for determining a reasonably anticipated use, therefore, is objective (an ordinary person in the same or similar circumstances) and, like "normal use," what constitutes a reasonably anticipated use is to be ascertained from the point of view of the manufacturer at the time of manufacture.¹⁰⁹ "Reasonably anticipated use," however, should prove to be superior to "normal use" in discouraging the fact-finder from using hindsight because of the words "reasonably anticipated."

"Reasonably anticipated use" will also be more effective than "normal use" in conveying the important message that the manufacturer is not responsible for accounting for every conceivable foreseeable use. It is foreseeable that a consumer might use a soft drink bottle for a hammer, might attempt to drive his automobile across water or might pour perfume on a candle to scent it.¹¹⁰ If he does, however, the manufacturer of the product should not be and under the LPLA is not liable because the uses in the illustrations are not the sort that a manufacturer should reasonably expect of an ordinary consumer.

Finally, "reasonably anticipated use" is preferable because, unlike "normal use," the LPLA term does not address the issue of post-manufacture changes to the product or improper maintenance. (Another section of the LPLA, to be explained below, does that.) "Reasonably anticipated use" is thus narrower than "normal use," making the new terminology more manageable and less likely to be abused analytically.¹¹¹ For all of these reasons, the drafters of the LPLA believed that "reasonably anticipated use" would serve the same purpose as "normal use" but do so more efficiently.

Consider next section 2800.54(B). It, too, is important in understanding an LPLA cause of action. This section defines, at least in part, the meaning of "unreasonably dangerous" as that term is used in section 2800.54(A). According to section 2800.54(B), a product may be unreasonably dangerous in only four ways—"if and only if":

1. The product is unreasonably dangerous in construction or composition as provided in section 2800.55 of the LPLA;
2. The product is unreasonably dangerous in design as provided in section 2800.56;

108. La. R.S. 9:2800.53(7), as enacted by 1988 La. Acts No. 64. See UPLA § 103(G); LLIB § 2800.2(F)(1).

109. See UPLA § 103(G) and comment (G); LLIB § 2800.2(F)(1) and comment (i); supra note 91 and accompanying text.

110. See UPLA § 103(G) and comment (G); LLIB § 2800.2(F)(1) and comment (i).

111. See supra notes 103-06 and accompanying text.

3. The product is unreasonably dangerous because an adequate warning has not been provided as provided in section 2800.57; or
4. The product is unreasonably dangerous because it does not conform to an express warranty of the manufacturer about the product as provided in section 2800.58.¹¹²

A fifth way—"unreasonably dangerous per se" fashioned in 1986 by the Louisiana Supreme Court in *Halphen v. Johns-Manville Sales Corp.*¹¹³—is not included and to that extent (and others, as will be seen below) *Halphen* is overruled. "A product is unreasonably dangerous per se," according to *Halphen*, "if a reasonable person would conclude that the danger-in-fact of the product . . . outweighs the utility of the product."¹¹⁴ Both danger-in-fact and utility are to be determined at the time of trial. Accordingly, it is immaterial under the *Halphen* per se rule that the product's danger was unforeseeable and as a result unpreventable at the time of manufacture and sale and the only benefits of the product that may be considered are those that actually inure, not those anticipated or perceived when the product was first marketed.¹¹⁵ New Jersey is the only state besides Louisiana fully to adopt per se liability, and New Jersey, unlike Louisiana, limits its per se rule to asbestos.¹¹⁶ Louisiana courts, including the Louisiana Supreme Court, have exhibited a noticeable reluctance to impose per se liability¹¹⁷ and the doctrine has been sharply criticized.¹¹⁸ For these reasons, to be

112. La. R.S. 9:2800.54(B), as enacted by 1988 La. Acts No. 64. See UPLA § 104 and all comments; LLIB § 2800.3(B) and comment (a).

113. 484 So. 2d 110 (La. 1986).

114. *Id.* at 114.

115. *Id.*

116. See *Feldman v. Lederle Laboratories*, 97 N.J. 429, 435-55, 479 A.2d 374, 387-88 (1984); *Beshada v. Johns-Manville Prod. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982); *J. Henderson & A. Twerski*, *supra* note 7, at 617-18. Court decisions eschewing the per se rule include, e.g., *Rexrod v. American Laundry Press Co.*, 674 F.2d 826, 832 (10th Cir.), writ denied, 459 U.S. 862, 103 S. Ct. 137 (1982) (Kansas law); *Brady v. Melody Homes Mfg.*, 121 Ariz. 253, 589 P.2d 896 (Ct. App. 1978); *Woodill v. Parke Davis & Co.*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980); *Ortho Pharmaceutical Corp. v. Chapman*, 180 Ind. App. 33, 388 N.E.2d 541 (1979); *Prestis v. Yale Mfg. Co.*, 421 Mich. 670, 365 N.W.2d 176 (1984); *Fowler v. General Elec. Co.*, 40 N.C. App. 301, 252 S.E.2d 862 (1979).

117. See, e.g., *Brown v. Sears Roebuck and Co.*, 516 So. 2d 1154, 1155 (La. 1988); *Bloxom v. Bloxom*, 512 So. 2d 839, 843 (La. 1987); *Madden v. Saik*, 511 So. 2d 855, 857 (La. App. 4th Cir.), writ denied, 514 So. 2d 131 (1987); *Short v. Otis Elevator Co.*, 502 So. 2d 1100, 1102 (La. App. 4th Cir. 1987).

118. See *J. Henderson & A. Twerski*, *supra* note 7, at 614-18; *Crawford*, *supra* note 7, at 488-91; *Grimley*, *supra* note 7, at 198-99, 200; *infra* notes 175-98 and accompanying text.

explored in more detail below, unreasonably dangerous per se was not included in section 2800.54(B) as a theory of liability.

Breach of implied warranty, or redhibition, is also not included in section 2800.54(B) as a way of proving that a product is unreasonably dangerous, which means that redhibition is no longer available as a theory of liability when a claimant seeks recovery for personal injury.¹¹⁹ This is also a change from prior law. Under prior law, a plaintiff could sue in redhibition for personal injury and recover attorneys' fees under redhibition article 2345 of the Civil Code.¹²⁰ The LPLA does not provide for recovery of attorneys' fees, as has been discussed, and it would have been anomalous indeed for the legislature to have prohibited such recovery and then allowed the prohibition to be frustrated by including redhibition as a theory of liability. Redhibition as a theory of recovery for personal injury was left out for this reason.¹²¹ A claimant who has sustained personal injury may, of course, proceed under the LPLA for those injuries and at the same time sue in redhibition for his pecuniary loss either by filing separate actions or by cumulating the action in redhibition with the LPLA claim. In such event, the claimant would be entitled to recover attorneys' fees but only those fees attributable to the action in redhibition.¹²²

Some have suggested that section 2800.54(B) and the LPLA as a whole also abolish negligence as a theory of liability.¹²³ This is correct in the sense that a general theory of products liability based on negligence no longer exists after the LPLA. Neither, however, does a general theory of strict products liability or a general theory of recovery founded on breach of warranty. Section 2800.54 of the LPLA consolidates all of these previously separate theories into one cause of action providing for the four exclusive ways that a product may be unreasonably dangerous under Louisiana law.¹²⁴ Moreover, as will become apparent below, two

119. See Crawford, *supra* note 76, at 175, 177; Guerry, *Louisiana Products Liability Act*, La. Advoc. at 7 (Aug. 1988); Kennedy, *supra* note 9, at 170 n.9; Maraist, *Special Report—Products Liability*, La. Ass'n Defense Counsel Newsletter at 1 (July 15, 1988); UPLA § 109(D) and comment (D), § 102(F) and comment (F), § 103(A) and comment (A), § 104 and comment; LLIB § 2800.1(1) and comments (a), (c), § 2800.2(D) and comment (g), § 2800.3 and comment (a).

120. See *supra* notes 73-75 and accompanying text.

121. Redhibition was also excluded as a theory of recovery for personal injury because the LPLA imposes liability for defective design and failure to warn adequately on the basis of manufacturer negligence and, as a form of strict liability, redhibition could be used to circumvent these provisions. See *infra* notes 166-68, 222-24 and 236-39 and accompanying text.

122. See *supra* notes 72-76 and accompanying text.

123. See Crawford, *supra* note 76, at 173; Guerry, *supra* note 119, at 6.

124. See UPLA § 102(D) and comment (D), § 102(F) and comment (F), § 103(A) and comment (A), § 104 and comment; LLIB § 2800.1(1) and comment (a), § 2800.2(D) and comment (g), § 2800.3 and comment (a).

of the four ways—defective design and inadequate warning—are predicated on a negligence standard. Another—defective construction or composition—sounds in strict liability. The fourth—breach of express warranty—is rooted both in strict liability and warranty principles.¹²⁵

125. Negligence in Louisiana is the creation, maintenance or failure to guard against an unreasonable risk of foreseeable harm. See, e.g., *Gilbeau v. Liberty Mut. Ins. Co.*, 338 So. 2d 600, 602 (La. 1976); *Mills v. Ganucheau*, 416 So. 2d 361, 365 (La. App. 4th Cir. 1982); *Musso v. St. Mary Parish Hosp. Serv. Dist.*, 345 So. 2d 129, 130 (La. App. 1st Cir.), writ denied, 347 So. 2d 262 (1977); *Helminger v. Cook Paint and Varnish Co.*, 230 So. 2d 623, 628-29 (La. App. 3d Cir. 1970); Restatement (Second) of Torts § 282 (1965); W. Prosser, *The Law of Torts* § 31 (4th ed. 1971); Comment, *Does Louisiana Really Have Strict Liability Under Civil Code Articles 2317, 2318, and 2321?*, 40 La. L. Rev. 207, 210 & n.35 (1979); *infra* note 148. Negligence has also been called the breach of a duty owed to another to protect him from an unreasonable risk of foreseeable harm. See, e.g., *Callais v. Allstate Ins. Co.*, 334 So. 2d 692, 700 (La. 1976) (on rehearing); *Hill v. Lundin & Assoc., Inc.*, 260 La. 542, 548, 256 So. 2d 620, 622 (1972); *Dixie Drive It Yourself Sys. v. American Beverage Co.*, 242 La. 471, 486-93, 137 So. 2d 928, 304-06 (1962); *Traders & Gen. Ins. Co. v. Robison*, 289 So. 2d 178, 184 (La. App. 1st Cir. 1973); Johnson, *Comparative Negligence and the Duty/Risk Analysis*, 40 La. L. Rev. 319, 327-32 (1980); *infra* note 148. Regardless of which definition one prefers, the plaintiff who sues in negligence seeks to impugn the defendant's conduct and must prove that the defendant knew or, based on the standard of a reasonable man, should have known of the risk that caused the plaintiff's harm and that the defendant could have prevented the risk. See, e.g., *Entrevia v. Hood*, 427 So. 2d 1146, 1150 (La. 1983); *Kent v. Gulf States Util. Co.*, 418 So. 2d 493, 497 (La. 1982); *id.* at 501 (Dennis, J., concurring with additional reasons); *Hunt v. City Stores, Inc.*, 387 So. 2d 585, 588-89 (La. 1980); Barham, *The Viability of Comparative Negligence as a Defense to Strict Liability in Louisiana*, 44 La. L. Rev. 1171, 1178-79 (1984); Wade, *supra* note 3, at 841, 850.

Strict liability, on the other hand, is something more than negligence and a heightened standard of negligence (such as *res ipsa loquitur* or a higher duty of care) and something less than absolute liability (i.e., that of an insurer). Kennedy, *supra* note 7, at 22 n.12; Malone, *supra* note 6, at 996-98; Plant, *supra* note 1, at 403 n.1; Robertson, *supra* note 106, at 1374-82. The Louisiana Supreme Court has said that the fundamental distinction in Louisiana between negligence and strict liability is "the fact that the inability of a defendant to know or prevent the risk is not a defense in a strict liability case but precludes a finding of negligence." *Entrevia*, 427 So. 2d at 1150. See, e.g., the authorities cited in the paragraph above following *Entrevia*. The Louisiana Supreme Court's abbreviated definition of strict liability will be used for the purposes of this article but one should be aware, as is the court, see *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 116-19 (La. 1986); *Entrevia*, 427 So. 2d at 1147-50, that the role, scope and effect of strict liability are actually more complicated than such a short-hand explanation implies. For an incisive and thought-provoking perspective on the meaning of strict liability, see Palmer, *supra* note 6.

The charge that negligence as a theory of liability was omitted from the LPLA may have originated, at least in part, from the fact that the LPLA does not contain certain language that appears in the sections on "unavoidably dangerous product" and "economic or technological feasibility" in the products liability legislation proposed by the Louisiana Law Institute. This language provides that a manufacturer could be liable notwithstanding the provisions of those sections if he "acted unreasonably in manufacturing the product at all." LLIB §§ 2800.8(B)(1), 2800.9(1). Such language is also in the Model Uniform

Consequently, negligence is still an integral part of Louisiana products liability law, but it now exists as a component of the LPLA cause of action rather than as an independent theory of liability.

The final section pertaining to an LPLA cause of action is section 2800.54(C). It requires the claimant to prove that the characteristic of the product that rendered the product unreasonably dangerous in construction or composition existed at the time the product left its manufacturer's control in order for liability to attach. If the claimant contends that the product was defective in design or because of an inadequate warning, this section requires him to show that the characteristic that rendered the product unreasonably dangerous in those respects existed at the time the product left its manufacturer's control or resulted from a reasonably anticipated alteration or modification of the product.¹²⁶ These limitations do not apply to breach of express warranty by a manufacturer. A product is unreasonably dangerous when the product fails to conform to an express warranty made at any time by the manufacturer.¹²⁷

Product Liability Act in its section on "unavoidable dangerous aspects of products." UPLA § 106(B)(1). Three responses seem appropriate. First, the LLIB and UPLA language does not create a general negligence theory of liability. Rather, the language is tied to the LLIB and UPLA sections on unavoidably dangerous products and the LLIB section on design and warning feasibility as an exception to the general rule of nonliability under those sections. See UPLA § 102(A) and comment (D), § 102(F) and comment (F), § 103(A) and comment (A), § 104 and comment, § 106(B)(1) and comment; LLIB § 2800.1(1) and comment (a), § 2800.2(D) and comment (g), § 2800.3 and comment (a), § 2800.8(B)(1) and comments (a)-(c), § 2800.9(1) and comments (a)-(d). Second, the LPLA does not contain a section devoted exclusively to unavoidably dangerous products so there is no need in the LPLA for the LLIB and UPLA language in that regard. Third, while it is true that the LPLA does have a provision on manufacturer knowledge and design feasibility (to be discussed in more detail below) that is akin in concept to the LLIB section on design and warning feasibility, the language at issue is not included in the LPLA section because it was felt that the language might be mistaken for *Halphen's* unreasonably dangerous per se liability, which the LPLA overrules. Louisiana had not adopted per se liability when the Law Institute drafted its legislation, so the Institute did not have to grapple with the similarity issue.

126. La. R.S. 9:2800.54(C), as enacted by 1988 La. Acts No. 64. See UPLA § 104(A)-(C); LLIB § 2800.3(A)(2). The UPLA considers alteration or modification of a product under the model statute's provisions on comparative fault. Section 112(D) of the UPLA provides that when the "product seller" (which includes the manufacturer) proves that an alteration or modification of the product by the claimant or a third party has caused the claimant's harm, the claimant's damages are to be reduced to the extent the alteration or modification was a cause of the harm. Nevertheless, section 112(D) does not apply when, among other conditions, the alteration or modification was "reasonably anticipated conduct" and the product was defective because its warnings or instructions were inadequate as to the alteration or modification. UPLA § 112(D) and comment. See *id.* § 102(E) and comment (G) (definition of "reasonably anticipated conduct").

127. See La. R.S. 9:2800.58, as enacted by 1988 La. Acts No. 64; *infra* note 231 and accompanying text.

Section 2800.54(C) does not change prior law,¹²⁸ except for its use of the construct "reasonably anticipated alteration or modification." As explained, in design and warning cases a claimant must prove that the suspect product was unreasonably dangerous when it left the manufacturer's control or that its unreasonable danger resulted from a reasonably anticipated alteration or modification of the product. Section 2800.53(8) defines "reasonably anticipated alteration or modification" as "a change in a product that the product's manufacturer should reasonably expect to be made by an ordinary person in the same or similar circumstances, and also means a change arising from ordinary wear and tear."¹²⁹

The function of the "reasonably anticipated alteration or modification" concept is to express the types of post-manufacture changes that might be made or happen to a product that a manufacturer must consider when he designs the product, drafts instructions for its use and provides warnings about the product's dangers in order that the product not be unreasonably dangerous.¹³⁰ Pre-LPLA case law struggled to achieve this

128. See, e.g., *Scott v. White Trucks*, 699 F.2d 714, 716-18 (5th Cir. 1983); *Hebert v. Outboard Marine Corp.*, 638 F. Supp. 1166, 1170-71 (E.D. La. 1986); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 113-15 (La. 1986); *Joseph v. Bohn Ford, Inc.*, 483 So. 2d 934, 940-41 (La. 1986); *Philippe v. Browning Arms Co.*, 395 So. 2d 310, 318-19 (La. 1980); *Weber v. Fidelity & Casualty Ins. Co.*, 259 La. 599, 602-07, 250 So. 2d 754, 755-57 (La. 1971); *Pitre v. Ecko Housewares Co.*, 521 So. 2d 563, 565-66 (La. App. 4th Cir. 1988); *Rutherford v. Coca Cola Bottling Co.*, 501 So. 2d 1082, 1083-85 (La. App. 2d Cir. 1987); *Fontenot v. F. Hollier & Sons*, 478 So. 2d 1379, 1383-85 (La. App. 3d Cir. 1985); *Harris v. Bardwell*, 373 So. 2d 777, 780 (La. App. 2d Cir. 1979); *Reeves v. Great Atl. & Pac. Tea Co.*, 370 So. 2d 202, 206-09 (La. App. 3d Cir. 1979); *Stevens v. Rex Chainbelt, Inc.*, 349 So. 2d 948, 949 (La. App. 1st Cir.), writ denied, 351 So. 2d 164 (1977); *Hunt v. Ford Motor Co.*, 341 So. 2d 614, 618 (La. App. 2d Cir. 1977). Comment g to Restatement section 402A also provides:

The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective the burden is not sustained.

Restatement (Second) of Torts § 402A comment g (1965).

129. La. R.S. 9:2800.53(8), as enacted by 1988 La. Acts No. 64. See UPLA §§ 102(G), 112(D); LLIB § 2800.2(F)(2).

130. See, e.g., *Chappuis v. Sears Roebuck and Co.*, 358 So. 2d 926, 929-30 (La. 1978); *Hines v. Remington Arms Co.*, 522 So. 2d 152, 155-56 (La. App. 3d Cir. 1988); *Norris v. Bell Helicopter Textron*, 495 So. 2d 976, 977-78 (La. App. 3d Cir. 1986); *Marshall v. Beno Truck Equip., Inc.*, 481 So. 2d 1022, 1030-31 (La. App. 1st Cir.), writ denied, 482 So. 2d 620 (1985); *Winterrowd v. Traveler's Indem. Co.*, 452 So. 2d 269, 277 (La. App. 2d Cir. 1984); *Williams v. Airport Appliance & Floor Covering, Inc.*, 445 So. 2d 764, 770 (La. App. 2d Cir.), writs denied, 477 So. 2d 1070, 477 So. 2d 1072 (1984); *Amoco Underwriters of the Audubon Ins. Co. v. American Radiator & Standard Corp.*, 329 So. 2d 501, 504 (La. App. 1st Cir. 1976); LLIB § 2800.3 comment (f). See also *supra* note 91 and accompanying text.

objective through the notion of "normal use," which proved confusing, analytically unwieldy and generally unsatisfactory, as pointed out above.¹³¹ "Normal use" has been changed in the LPLA to the narrower "reasonably anticipated use" and "reasonably anticipated alteration or modification" has been chosen as the means to address the issue of manufacturer responsibility for post-manufacture changes.

Like the test for reasonably anticipated use, the standard for determining what constitutes a reasonably anticipated alteration or modification is an objective one that is not to be applied with the benefit of hindsight but, rather, from the manufacturer's point of view at the time of manufacture.¹³² "Reasonably anticipated alteration or modification" as a juridical concept also shares the other advantages and virtues, discussed above, of "reasonably anticipated use."¹³³

Those seeking an understanding of the LPLA should also be aware that section 2800.53(8) provides conclusively that "reasonably anticipated alteration or modification" cannot include the following:

- (a) Alteration, modification or removal of an otherwise adequate warning provided about a product.
- (b) The failure of a person or entity, other than the manufacturer of a product, reasonably to provide to the product user or handler an adequate warning that the manufacturer provided about the product, when the manufacturer has satisfied his obligation to use reasonable care to provide the adequate warning by providing it to such person or entity rather than to the product user or handler.
- (c) Changes to or in a product or its operation because the product does not receive proper care and maintenance.¹³⁴

These are changes over which even the most conscientious manufacturer has no control and, as a practical matter, they cannot be compensated for in the design or manufacturing process.

To sum up, sections 2800.54(A), (B) and (C) provide that the elements of a products liability cause of action under the LPLA are:

1. The defendant is the manufacturer of the product.

131. See *supra* notes 91-107 and accompanying text.

132. See La. R.S. 9:2800.53(8), as enacted by 1988 La. Acts No. 64; UPLA § 102 comment (G), § 112 comment; LLIB § 2800.3 comment (f); *supra* note 109 and accompanying text.

133. See *supra* notes 108-11 and accompanying text.

134. La. R.S. 9:2800.53(8), as enacted by 1988 La. Acts No. 64. See LLIB § 2800.2(F)(2)(a)-(c) and comment (i).

2. The claimant's damage was proximately caused by a characteristic of the product.
3. This characteristic made the product unreasonably dangerous in one or more of four ways: unreasonably dangerous in construction or composition; unreasonably dangerous in design; unreasonably dangerous because of an inadequate warning; or unreasonably dangerous because of nonconformity to a manufacturer's express warranty.
4. The characteristic that rendered the product unreasonably dangerous in construction or composition must have existed at the time the product left its manufacturer's control. The characteristic that rendered the product unreasonably dangerous in design or warning must have existed then or have resulted from a later reasonably anticipated alteration or modification of the product. These limitations do not apply to a product that is unreasonably dangerous because of nonconformity to a manufacturer's express warranty.
5. The claimant's damage arose from a reasonably anticipated use of the product by the claimant or someone else.

B. *Unreasonably Dangerous in Construction or Composition*

The next step toward an understanding of the LPLA is a consideration of each of the four ways a product may be unreasonably dangerous under the statute. The first way is found in section 2800.55, which enunciates the meaning of "unreasonably dangerous in construction or composition."

According to section 2800.55, a product is unreasonably dangerous in construction or composition "if, at the time the product left its manufacturer's control, the product deviated in a material way from the manufacturer's specifications or performance standards for the product or from otherwise identical products manufactured by the same manufacturer."¹³⁵ In other words, a product is defective in construction or composition when a mistake in the manufacturing process results in a substandard product. The deviation brought about by the mistake, however, must be material¹³⁶ and it must cause the claimant's damage.

135. La. R.S. 9:2800.55, as enacted by 1988 La. Acts No. 64; LLIB § 2800.4. Judge Traynor referred to this as the "deviation-from-the-norm" test. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 *Tenn. L. Rev.* 363, 367 (1965).

136. One commentator offers this point of view: "The . . . deviation must be material. If the automobile ashtray were bulky and the driver diverted his attention from the road to open it and crashed because of the diverted attention, would such be a material deviation? That decision would seem to be for the trier of fact." Crawford, *supra* note 75, at 175.

Further, the existence of the deviation is determined and its extent is measured by the manufacturer's own standards, not the standards of his industry as a whole.¹³⁷

LPLA liability for a defect in construction or composition is strict liability. The claimant does not have to prove manufacturer negligence, i.e., that the manufacturer knew or should have known of the product deviation and could have prevented it.¹³⁸ Strict liability for manufacturing defects is defensible because:

The argument that plaintiffs would be tremendously disadvantaged by having to prove negligence on the part of the manufacturer was originally posited in connection with early manufacturing defect cases. Indeed, it is probably true that a plaintiff would find it enormously difficult and sometimes even impossible to prove the negligent conduct that led to the soda bottle with the hairline fracture that ultimately exploded and caused plaintiff's injuries. At some particular moment in time on an otherwise uneventful day, a worker on the assembly line might have been distracted and careless or some slight malfunction in the plant equipment may have damaged a few bottles that somehow managed to slip through the quality-control check points undetected. To be sure, manufacturing defects are an inevitable by-product of mass production, which may or may not even be attributable to negligence. Because of the random and unpredictable nature of the occurrence of a manufacturing flaw, however, a plaintiff cannot be expected to be able to pinpoint the negligence, if any, that was involved. Manufacturing defects are almost always, by definition, accidents, and so in these cases the goal of deterrence is not as prominent as the need for compensating the victims of these assemblyline errors.¹³⁹

137. See Klein, "Old Products": The Admissibility of State of the Art Evidence in Product Liability Cases, 9 J. Prod. Liab. 233, 234 (1986); Wade, *supra* note 3, at 841; Note, *supra* note 3, at 1461 n.29; UPLA § 104 comment (A).

138. See Restatement (Second) of Torts § 402A comment a (1965); UPLA § 104 comment (A); LLIB § 2800.4 comment; Wade, *supra* note 3, at 841; *supra* note 125 and accompanying text.

139. Birnbaum, *supra* note 3, at 647-49. The UPLA also imposes strict liability for products unreasonably dangerous in construction or composition for the following reasons:

[S]trict liability for defective construction can be absorbed within the existing liability insurance system. There is a degree of predictability with regard to these defective products that is not found with respect to products that are defective in design or to failure to warn. Strict liability for defective construction has also been predicated on Section 402A of the "Restatement" and implied warranty claims under commercial law. These sources support the position that consumers have the right to expect that projects are free from construction defects.

UPLA § 104 comment.

Section 2800.55 does not change Louisiana law. *Weber*, for example, was a mismanufacturing case and *Weber* would be decided the same way under section 2800.55, as would most other pre-LPLA cases involving such defects.¹⁴⁰ Defect in construction or composition is, in fact, the oldest products liability theory and the one receiving most (some would say exclusive) attention in section 402A of the Restatement (Second) of Torts.¹⁴¹ To that extent, then, section 2800.55 codifies mainstream products liability law.

C. *Unreasonably Dangerous in Design*

Sections 2800.56 and 2800.59(A) of the LPLA explain how a product may be unreasonably dangerous in design. Section 2800.56 sets forth the initial requirements. According to that section, a product is defective

140. The product at issue in *Weber* was cattle dip, which was defective because it contained excessive amounts of arsenic as a result of a flaw or misstep in the manufacturing process. See *Weber v. Fidelity & Casualty Ins. Co. of New York*, 259 La. 599, 606-11, 250 So. 2d 754, 756-58 (1971). For other Louisiana cases involving products that were unreasonably dangerous in construction or composition, see, e.g., *Scott v. White Trucks*, 699 F.2d 714, 716-24 (5th Cir. 1983); *Charlie Hairston Aircraft, Inc. v. Beech Aircraft Corp.*, 457 F. Supp. 364, 367 (W.D. La. 1978); *Robertson v. Gulf S. Beverage, Inc.*, 421 So. 2d 877, 878-80 (La. 1982); *Hebert v. Brazzel*, 403 So. 2d 1242, 1244-45 (La. 1981); *LaBrono Gene Ducote Volkswagen, Inc.*, 403 So. 2d 723, 726-27 (La. 1981); *DeBattista v. Argonaut-Southwest Ins. Co.*, 403 So. 2d 26, 29-32 (La. 1981); *Spillers v. Montgomery Ward & Co., Inc.*, 294 So. 2d 803, 805-07 (La. 1974); *Brumley v. Firestone Tire & Rubber Co.*, 459 So. 2d 572, 574-76 (La. App. 3d Cir. 1984); *McClinton v. Reid*, 417 So. 2d 128, 129-31 (La. App. 3d Cir. 1982); *Holden v. Clearview Dodge Sales, Inc.*, 416 So. 2d 335, 338-39 (La. App. 4th Cir.), writ denied, 421 So. 2d 248 (1982); *Goodlow v. City of Alexandria*, 407 So. 2d 1305, 1308-09 (La. App. 3d Cir. 1981); *Philippe v. Browning Arms Co.*, 375 So. 2d 151, 152-55 (La. App. 2d Cir. 1979), aff'd, 395 So. 2d 210 (1980); *Cain v. Handy City, Inc.*, 367 So. 2d 1217, 1220 (La. App. 1st Cir.), writ denied, 370 So. 2d 578 (1979); *Daniels v. Albach Co.*, 365 So. 2d 898, 900 (La. App. 4th Cir. 1978); *Tri-State Ins. Co. of Tulsa, Ok. v. Fidelity & Casualty Ins. Co. of New York*, 364 So. 2d 657, 660-61 (La. App. 2d Cir.), writ denied, 365 So. 2d 248 (1978); *Morgan v. Sheen*, 348 So. 2d 101, 101-02 (La. App. 4th Cir.), writ denied, 351 So. 2d 163 (1977); *Madden v. Louisiana Power and Light Co.*, 334 So. 2d 249, 252-54 (La. App. 4th Cir. 1976); *Loyacano v. Continental Ins. Co.*, 283 So. 2d 302, 303-06 (La. App. 4th Cir. 1973).

The Louisiana Supreme Court in *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986), said that "[a] product is unreasonably dangerous in construction or composition if at the time it leaves the control of its manufacturer it contains an unintended abnormality or condition which makes the product more dangerous than it was designed to be." *Id.* at 114 (citing, e.g., *Weber v. Fidelity & Casualty Ins. Co. of New York*, supra). The definition of a manufacturing defect in LPLA section 2800.55 is worded differently but the LPLA and *Halphen* appear to be saying the same thing. See *Grimley*, supra note 7, at 199. The LPLA definition will control, in any event.

141. Restatement (Second) of Torts § 402A and comments a-q (1965); Wade, supra note 3, at 830-32; UPLA § 104 comment (A).

in design "if, at the time the product left its manufacturer's control":¹⁴²

- (1) There existed an alternative design for the product that was capable of preventing the claimant's damage; and
- (2) The likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on the utility of the product.¹⁴³

To recover under the theory that a product is unreasonably dangerous in design a claimant must prove the elements articulated in section 2800.56 in addition to the elements contained in section 2800.54 that pertain generally to all claims. There are three such elements in section 2800.56 and the claimant must show they existed at the time the product left its manufacturer's control.

The first element the claimant must prove is that another way to design the product existed at the time the manufacturer placed his product on the market. "Existed" does not mean that the alternative design must have been manufactured and in actual use when the manufacturer distributed his product. Nor does it mean that the alternative design must have been feasible, i.e., could have been employed even if was not, at that time. But "existed" does mean that the alternative design must at least have been conceived at the time the product left its manufacturer's control, because one of the purposes of the first element of section 2800.56 (when read with section 2800.59(A), to be discussed below) is to show that the manufacturer had a realistic choice as to design.¹⁴⁴

142. For the purpose of defective design liability under both sections 2800.56 and 2800.59(A), "at the time the product left its manufacturer's control", and synonymous variations of that expression used in those sections and in this article, mean that point in time when the manufacturer distributed or marketed the first product in the product line to which the product that actually caused the claimant's damage belongs. Such terminology does not refer to the point in time when the manufacturer distributed or marketed the specific product that caused the claimant's damage. See, e.g., Henderson, *Coping With the Time Dimension in Products Liability*, 69 Calif. L. Rev. 919 (1981); Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. Rev. 734, 753-54 (1983); UPLA § 104(B) and comment (B); LLIB § 2800.5 and comments (a)-(c).

143. La. R.S. 9:2800.56, as enacted by 1988 La. Acts No. 64. Compare *id.* with UPLA § 104(B) and LLIB § 2800.5.

144. See Schwartz, *Foreword: Understanding Products Liability*, 67 Calif. L. Rev. 435, 468 (1979) ("[O]ne simply cannot talk meaningfully about a risk-benefit defect in a product design until and unless one has identified some design alternative (including any design omission) that can serve as the basis for a risk-benefit analysis."); *infra* notes 147-56 and accompanying text. Evidence that the alternative design had been reduced to writing or to the form of a drawing at the time the challenged product left its manufacturer's control should be sufficient to satisfy the "existed" requirement.

The second element the claimant must prove is that the alternative design identified by the claimant was capable of preventing his damage.¹⁴⁵ "Capable" does not mean that the alternative design definitely or completely would have prevented the damage. It does mean, however, that the alternative design would have been significantly less likely than the chosen design to cause the damage for which the claimant has filed suit or that the alternative design would have significantly reduced such damage.¹⁴⁶

The third element in section 2800.56 that the claimant must prove is that, at the time the product left its manufacturer's control, the likelihood that the product as designed would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting the alternative design identified by the claimant and the adverse effect, if any, this different way of designing the product would have had on the product's utility.¹⁴⁷ The third element codifies prior law and has come to be known as the "risk-utility balancing test" under pre-LPLA products jurisprudence.¹⁴⁸

The LPLA version of the balancing test requires the claimant first to demonstrate the probability and magnitude of the damage for which the claimant seeks to recover. This is the "risk side" of the test and

145. The LLIB also uses "capable," see LLIB § 2800.5, while the UPLA uses the phrase "would have prevented." See UPLA § 104(B).

146. A design omission may be an alternative design under section 2800.56(1) if it would have been capable of preventing the claimant's damage. Proof by a claimant that an alternative *product* existed at the time of distribution that was capable of preventing the claimant's damage may also satisfy the claimant's burden under section 2800.56(1), depending upon how similar the alternative product is to the challenged product both in character and in the extent to which the alternative product would meet the same needs and desires as the challenged product. This determination should be made on a case-by-case basis. The greater the similarity the greater the likelihood that proof of such an alternative product will suffice. This is so because, as indicated in the text, one of the purposes of section 2800.56(1) is to demonstrate that the manufacturer had a realistic choice as to design. See Klein, *supra* note 137, at 238; Wade, *supra* note 3, at 837.

147. See UPLA § 104 comment (B); LLIB § 2800.5 comments (a)-(c).

148. See, e.g., *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 114-15, 114 n.2 (La. 1984); *Hunt v. City Stores, Inc.*, 387 So. 2d 585, 588 (La. 1980); *Crawford*, *supra* note 7, at 486; *Grimley*, *supra* note 7, at 200; Note, *supra* note 3, at 1458-60, 1467. The risk-utility balancing test is also used under Louisiana law in negligence cases and in cases of relational responsibility strict liability arising under Louisiana Civil Code articles 2317-22. See, e.g., *Entrevia v. Hood*, 427 So. 2d 1146, 1148-50 (La. 1983); *Hunt*, 387 So. 2d at 588; *supra* note 125. Risk and utility are additionally considered under our law in cases of strict liability for ultrahazardous activities but the magnitude of the risk in an ultrahazardous activity is deemed to be so great that, as a matter of policy, the party engaged in the ultrahazardous activity is liable regardless of the utility of the activity. See, e.g., *Perkins v. FIE Corp.*, 762 F.2d 1250, 1254-68 (5th Cir. 1985); *Hebert v. Gulf States Util. Co.*, 426 So. 2d 111, 114 n.6 (La. 1983); *Kent v. Gulf States Util. Co.*, 418 So. 2d 493, 498 n.7 (La. 1982).

the focus here is solely on the risk of such damage posed at the time of distribution by the design chosen for the product. The risk of the alternative design is irrelevant at this point.¹⁴⁹ Section 2800.56(2) provides that a warning, if it is adequate, must be considered in evaluating the likelihood of the claimant's damage if the manufacturer has exercised reasonable care in providing the warning.¹⁵⁰

Next the balancing test requires the claimant to show that the risk (as defined above) of the product as designed was greater than both the burden on the manufacturer at the time of distribution of preventing the risk by using the alternative design identified by the claimant *and* the adverse effect, if any, at that time that the alternative design would have had on the product's utility. This is the "utility side" of the test and its function is to assess the utility or benefit of the chosen design by comparing it to the alternative design.¹⁵¹ The following factors are relevant in making this assessment:

149. See, e.g., *Zumo v. R.T. Vanderbilt Co.*, 527 So. 2d 1074, 1078 (La. App. 1st Cir. 1988); *Crochet v. Pritchard*, 509 So. 2d 501, 503 (La. App. 3d Cir. 1987) (article 2317 case); *Jurovich v. Catalanotto*, 506 So. 2d 662, 665 (La. App. 5th Cir.), writ denied, 508 So. 2d 87 (1987); *Bloxom v. Bloxom*, 494 So. 2d 1297, 1302 (La. App. 2d Cir. 1986) rev'd on other grounds, 512 So. 2d 839 (1987); *Aguillard v. Langlois*, 471 So. 2d 1011, 1013 (La. App. 1st Cir. 1985) (article 2317 case).

150. La. R.S. 9:2800.56(A)(2), as enacted by 1988 La. Acts No. 64. See UPLA § 104(B)(2)(a); LLIB § 2800.5. This does not mean a manufacturer will be able in every instance to escape liability for a defectively designed product merely by providing a warning. The warning must be adequate, which means it must substantially reduce the likelihood of the claimant's damage to the point that the product is no longer unreasonably dangerous. See UPLA § 104 comment (B); *infra* notes 114-224 and accompanying text. This rule codifies prior Louisiana law. See *Reed v. John Deere*, 569 F. Supp. 371, 376 (M.D. La. 1983); *Dalton v. Tulane Toyota, Inc.*, 526 F. Supp. 575, 578 (E.D. La. 1981), rev'd on other grounds, 703 F.2d 137 (5th Cir. 1983); *LeBouef v. Goodyear Tire & Rubber Co.*, 451 F. Supp. 253, 257 (W.D. La. 1979); *Tenneco Oil Co. v. Chicago Bridge and Iron Co.*, 495 So. 2d 1317, 1323 (La. App. 4th Cir.), writ denied, 497 So. 2d 1015 (1986); *LaJaunie v. Metropolitan Property & Liab. Ins. Co.*, 481 So. 2d 1357, 1362 (La. App. 1st Cir. 1985) (article 2317 case); *Cobb v. Insured Lloyds*, 387 So. 2d 13, 19 (La. App. 3d Cir. 1980). See also *Perkins v. Emerson Elec. Co.* 482 F. Supp. 1347, 1353 (W.D. La. 1980); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 114-15 (La. 1986); *Thomas v. Black and Decker (US), Inc.*, 502 So. 2d 157, 163 (La. App. 3d Cir. 1987).

151. The greater the risk the greater must be the chosen design's utility in order for the design not to be unreasonably dangerous. As risk increases, either through increased likelihood of the claimant's damage being sustained or increased magnitude of such damage, the amount of the chosen design's utility must increase proportionately in order to justify the risk. However, consistent with prior law, section 2800.56(2) expresses no requirement as to an amount or margin by which the chosen design's risk must exceed its utility in order for the product to be found unreasonably dangerous or, conversely, by which the chosen design's utility must exceed its risk in order for the product not to be found unreasonably dangerous. See *Miller v. Southern Farm Bureau*, 189 So. 2d 463, 464 (La. App. 3d Cir.), writ denied, 190 So. 2d 912 (1966); *Goff v. Carlino*, 181 So. 2d 426, 428 (La. App. 3d Cir. 1965), writ denied, 183 So. 2d 653 (1966); Restatement (Second) of Torts § 293 comment b (1965).

1. The moral, social and economic utility of the product as designed to the consuming public, including but not limited to the chosen design's usefulness and the benefits derived from all of its uses.
2. The effects, both adverse and beneficial, of the alternative design on the utility of the product (as defined in (1) above).
3. The new or additional risks created by the alternative design.
4. The extent to which the alternative design would have prevented or eliminated the risk of the claimant's damage caused by the chosen design or other risks of the chosen design.¹⁵²

The feasibility of the alternative design is also a relevant factor. "Feasibility" of a particular design means its scientific, technological, economic and practical feasibility and will include such nonexclusive considerations as whether the design could be produced and, if so, mass produced, whether it is efficient and reliable and whether it could be manufactured, distributed, sold, used and maintained at an economically practical cost.¹⁵³ Section 2800.56 does not, however, require the claimant

152. See, e.g., *Goode v. Herman Miller, Inc.*, 811 F.2d 866, 869 (5th Cir. 1987); *Perkins v. FIE Corp.*, 762 F.2d 1250, 1259 (5th Cir. 1985); *Hagens v. Oliver Mach., Inc.*, 576 F.2d 97, 100 (5th Cir. 1978); *Landry v. State*, 495 So. 2d 1284, 1287-88 (La. 1986); *Entrevia v. Hood*, 427 So. 2d 1146, 1149-50 (La. 1983) (article 2317 case); *Hunt v. City of Stores, Inc.*, 387 So. 2d 585, 588 (La. 1980); *Duncan v. State Farm Ins. Co.*, 499 So. 2d 632, 634 (La. App. 4th Cir.), writ denied, 503 So. 2d 21 (1987); *Schneider v. Sears Roebuck and Co.*, 496 So. 2d 1258, 1259 (La. App. 5th Cir. 1986); *May v. Lafayette Parish Police Jury*, 487 So. 2d 503, 504-05 (La. App. 3d Cir.), writ denied, 489 So. 2d 1276 (1986); *Thompson v. Tuggle*, 486 So. 2d 144, 150 (La. App. 3d Cir.), writ denied, 489 So. 2d 919 (1986); *Baker v. Sewage and Water Bd.*, 466 So. 2d 720, 723 (La. App. 4th Cir. 1985); *Thompson v. Ewin*, 457 So. 2d 303, 306 (La. App. 3d Cir. 1984); *Bizette v. State Farm Ins. Co.*, 454 So. 2d 197, 199 (La. App. 1st Cir.), writ denied, 459 So. 2d 539 (1984); *McGee v. McClure*, 442 So. 2d 625, 626 (La. App. 1st Cir. 1983); *Guilyot v. Del-Gulf Supply, Inc.*, 362 So. 2d 816, 818 (La. App. 4th Cir.), writ denied, 365 So. 2d 243 (1978); *Clark v. Sears Roebuck and Co.*, 254 So. 2d 62, 64 (La. App. 3d Cir. 1971); *Goff v. Carlino*, 181 So. 2d 426, 428 (La. App. 3d Cir. 1965), writ denied, 183 So. 2d 653 (1966); *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 432, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237 (1978) (Factors include "the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design."); *Buccery v. General Motors Corp.*, 60 Cal. App. 3d 533, 548, 132 Cal. Rptr. 605, 614 (1976) ("[A]ny product so designed that it causes injury when used or misused in a foreseeable fashion is defective if the design features which caused the injury created a danger which was readily preventable through the employment of existing technology at a cost consonant with the economical use of the product."); *Prentis v. Yale Mfg. Co.*, 421 Mich. 670, 365 N.W.2d 176, 182-86 (1984); UPLA § 104 comment (B); LLIB § 2800.5 comment (b); Klein, *supra* note 137, at 237-39; Wade, *supra* note 3, at 837 (factor (7) therein not applicable to LPLA).

153. See UPLA § 104 comment (B); LLIB § 2800.5 comment (b); Klein, *supra* note 137, at 234; *supra* note 152; *infra* notes 157-65 and accompanying text.

to show that the alternative design was feasible. Rather, as will be explained below, the manufacturer is entitled to judgment in his favor if he proves that the alternative design was not feasible at the time the product left his control.¹⁵⁴

The risk-utility balancing test, either alone or in combination with another test for liability, is the overwhelming choice throughout the United States both by courts and commentators as the way to determine design liability.¹⁵⁵ This approval substantially influenced the decision to use the risk-utility test in the LPLA. Support for the test arises in part from the fact that most jurisdictions (including Louisiana, as a result of the LPLA) and products liability scholars have arrived at the conclusion that a manufacturer should not be held liable solely because his product's design incorporates less than all the safety features or devices that were available when the product was first marketed or that became available at some later time. Liability should attach instead only if the chosen design was unreasonably dangerous when the product left its manufacturer's control, a judgment that is made by comparing the design's risk with its utility.

For example, some clothes irons are designed to shut off automatically if not used continuously, thereby reducing the danger of fire if an iron is left unattended while in use. The clothes iron with an automatic shut-off feature undoubtedly is safer than an iron without. Under the

154. Thus, considering the factors set forth above in the text, "[i]f an alternatively designed product which would have prevented the harm while preserving its usefulness could have been produced with a slight increase in cost, it is likely that the product is unreasonably unsafe in design," but "the manufacturer need not incorporate safety features that render a product incapable of performing some or all of the very functions that create its public demand." UPLA § 104 comment (B). See *Thibault v. Sears Roebuck and Co.*, 395 A.2d 843, 846 (N.H. 1978) (trier of fact in balancing risk against utility must consider whether the alternative design would have reduced the risk without significantly and adversely impacting the product's utility and cost of manufacture).

155. See, e.g., *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1987); *Prentis v. Yale Mfg. Co.*, 421 Mich. 670, 365 N.W.2d 176 (1984); *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743 (Tex. 1980); J. Henderson & A. Twerski, *supra* note 7, at 617; Birnbaum, *supra* note 3 *passim*; Elfin, *The Changing Philosophy of Products Liability and the Proposed Model Uniform Product Liability Act*, 19 *Am. Bus. L.J.* 267 (1981); Epstein, *Products Liability: The Search for the Middle Ground*, 56 *N.C.L. Rev.* 643 (1978); Henderson, *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 *Minn. L. Rev.* 773 (1979); Hoenig, *Product Designs and Strict Tort Liability: Is There a Better Approach?*, 8 *Sw. U.L. Rev.* 109 (1976); Keeton, *Products Liability-Design Hazards and the Meaning of Defect*, 10 *Cumb. L. Rev.* 293 (1979); Klein, *supra* note 137, at 237-39; Powers, *The Persistence of Fault in Products Liability*, 61 *Tex. L. Rev.* 777 (1983); Twerski, *A Moderate and Restrained Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 *U. Mich. J.L. Ref.* 575 (1985). For a survey and discussion of ways to determine defective design other than the method used in the LPLA and their merits, see *Prentis*, 421 Mich. 670, 364 N.W.2d 176 (1984); Birnbaum, *supra* note 3.

LPLA and other mainstream jurisprudence, however, that circumstance alone does not mean the featureless iron is defective in design unless its risk is greater than its utility. The automatic shut-off feature, being a safer alternative design, is a factor that must be considered in balancing risk and utility if the feature existed when the featureless iron was first marketed but the existence of a safer alternative design is not the only factor that matters.

Another example is automobile brakes. Clearly, a computerized anti-lock braking system will prevent many injuries that ordinary hydraulic brakes will not. But the anti-lock feature must have existed as an alternative design when the automobile manufacturer decided to use ordinary hydraulic brakes and the risk of an ordinary hydraulic braking system must outweigh its utility before the manufacturer is liable under the LPLA and the majority rule.

The point is that it is almost always possible to design a product more safely. Yet it does not follow, *a priori*, that a less safe design is or should be considered to be unreasonably dangerous unless the design fails to pass muster under the risk-utility balancing test.¹⁵⁶

The other part of the LPLA pertaining to defective design is section 2800.59(A). It provides:

A. Notwithstanding R.S. 9:2800.56, a manufacturer of a product shall not be liable for damage proximately caused by a characteristic of the product's design if the manufacturer proves that, at the time the product left his control:

(1) He did not know and, in light of then-existing reasonably available scientific and technological knowledge, could not have known of the design characteristic that caused the damage

156. So long as the resulting product is not unreasonably dangerous, a manufacturer may lawfully adopt a design that incorporates less than all available safety features, or that incorporates safety features that are less effective than others that may be available. Thus an automobile with ordinary hydraulic brakes is not deficient in design because it is not equipped with more efficient computerized brakes. Neither the existing jurisprudence nor this Chapter requires a manufacturer to market only the safest possible product. The availability of a variety of products with differing levels of quality and safety, and corresponding differences in price, is desirable, so long as the resulting products are not unreasonably dangerous.

LLIB § 2800.05 comment (c). See e.g., *Barker v. Lull Eng'g Co.*, 20 Cal 3d 413, 431-34, 573 P.2d 443, 455-57, 143 Cal. Rptr. 225, 237-39 (1978); *Prentis v. Yale Mfg. Co.*, 421 Mich. 670, 686-91, 365 N.W.2d 176, 183-86 (1984); *Birnbaum*, supra note 3, at 643-49; infra notes 180-83 and accompanying text. See also *Chappuis v. Sears Roebuck and Co.*, 358 So. 2d 926, 930 (La. 1978) ("Absolute liability upon a manufacturer whose product is useful, traditional, but which might become dangerous in some circumstances must be distinguished from the obligation here involved. There may be many tools or other products which become dangerous for normal use in certain conditions.').

or the danger of such characteristic; or

(2) He did not know and, in light of then-existing reasonably available scientific and technological knowledge, could not have known of the alternative design identified by the claimant under R.S. 9:2800.56(1); or

(3) The alternative design identified by the claimant under R.S. 9:2800.56(1) was not feasible, in light of then-existing reasonably available scientific and technological knowledge or then-existing economic practicality.¹⁵⁷

An appreciation of the relationship between sections 2800.56 and 2800.59(A) is critical to an understanding of the LPLA's defective design provisions. Section 2800.59(A) creates four affirmative defenses to section 2800.56 design liability.¹⁵⁸ Notwithstanding section 2800.56, a manufacturer is not liable according to section 2800.56(A) if he proves that at the time of distribution (1) he did not know and, in light of then-existing reasonably available scientific and technological knowledge, could not have known of the damage-causing design characteristic or (2) its danger, (3) he did not know and, in light of then-existing reasonably available scientific and technological knowledge, could not have known of the alternative design identified by the claimant in his case-in-chief, or (4) the alternative design was not feasible, based on then-existing reasonably available scientific and technological knowledge or then-existing economic practicality.¹⁵⁹ Such defenses—particularly the defense that the alternative design was not feasible—are sometimes called “state of the art” defenses.¹⁶⁰

157. La. R.S. 9:3800.59(A), as enacted by 1988 La. Acts No. 64. Compare *id.* with UPLA § 106; LLIB § 2800.9.

158. Although nothing in the LPLA requires the manufacturer to plead the provisions of section 2800.59(A) as affirmative defenses under article 1005 of the Louisiana Code of Civil Procedure, these provisions are affirmative defenses nonetheless because each “raises new matter which, assuming the allegations in the petition to be true, constitutes a defense to the action and will have the effect of defeating plaintiff's demand on its merits.” *Webster v. Rushing*, 316 So. 2d 111, 114 (La. 1975). See, e.g., *Modicut v. Bremer*, 398 So. 2d 570, 571 (La. App. 1st Cir. 1980); *Trahan v. Ritterman*, 368 So. 2d 181, 184 (La. App. 1st Cir. 1979); *Langhans v. Hale*, 345 So. 2d 1226, 1229 (La. App. 1st Cir. 1977); *Solomon v. Hickman*, 213 So. 2d 96, 97 (La. App. 1st Cir. 1968); *Williams v. Fisher*, 79 So. 2d 127, 128 (La. App. 1st Cir. 1955). Moreover, article 1005 contains the omnibus recital “and any other matter constituting an affirmative defense.” See La. Code Civ. P. art. 1005; *Webster*, 316 So. 2d at 114. This author did not mean to imply or suggest in another forum that the provisions of section 2800.59(A) are not affirmative defenses. See *Kennedy*, *supra* note 9, at 170 n.11.

159. The manufacturer does not have to prove that all possible alternative designs were unknowable or not feasible but only the alternative design or designs identified by the claimant pursuant to section 2800.56. To require otherwise would unfairly force the manufacturer to prove a negative. See *Schwartz*, *supra* note 144, at 468-69.

160. See, e.g., *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 748 (Tex. 1980);

Another way of expressing the relationship between sections 2800.56 and 2800.59(A) would be to say that the LPLA requires manufacturer knowledge of the claimant's suggested alternative design, the suspect product's damage-causing design characteristic and its danger as well as alternative design feasibility at the time the product was first marketed as a prerequisite to liability for defective design. But the manufacturer has the burden of proof on these knowledge and feasibility issues.

The justification for placing the burden of proof on the manufacturer as to knowledge and feasibility is fairness. The manufacturer should be expected to shoulder the burden as to feasibility because he ordinarily will be more familiar with the manufacturing and design process than the claimant and therefore in a preferred position to know about the technical matters involved in evaluating the feasibility of a particular design. The same may be said for the burden of proof as to knowledge. Who better than the manufacturer can show what scientific and technological knowledge was reasonably available to him at the time of distribution about the claimant's suggested alternative design and the dangerous characteristic of the suspect product's design?¹⁶¹

These perfectly legitimate concerns notwithstanding, it probably makes little difference as a practical matter who has the burden of proof on these issues:

Conceptually, shifting the burden of proof to the defendant undoubtedly lessens the plaintiff's burden; but pragmatically, this is not as dramatic a benefit as it might seem at first blush. In practice, defendants have typically come forward with sufficient evidence of complicated technological factors under a risk-utility test to convince the jury that trade-offs were in fact made in designing the product, thus tipping the balance in favor of utility and diminished risk.¹⁶²

J. Henderson & A. Twerski, *supra* note 7, at 618-27; Klein, *supra* note 137, at 240-41; Wade, *supra* note 142, at 750-51 & authorities cited in n.66 therein.

161. See *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 432-33, 573 P.2d 443, 455-56, 143 Cal. Rptr. 225, 237-38 (1978); Birnbaum, *supra* note 3, at 605-07; Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 Stan. L. Rev. 5, 12 (1959); Schwartz, *supra* note 144, at 468. See also *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J. concurring). Other states also provide that the defendant manufacturer has the burden of proving state of the art. See, e.g., *Bell Bonfils Memorial Blood Bank v. Hansen*, 665 P.2d 118, 126 n.14 (Colo. 1983); *Ariz. Rev. Stat. Ann.* § 12-683(1) (1982); Klein, *supra* note 137, at 240-41, 246-74. Additionally, Dean Wade favors placing the burden of proving the absence of knowledge and knowability as well as nonfeasibility on the manufacturer. See Wade, *supra* note 142, at 760-61. One commentator suggests, however, that "[t]he majority of jurisdictions assert that it is a plaintiff's burden to establish that a design was defective and unreasonably dangerous in light of the state of the art at the time the product was marketed." Klein, *supra* note 137, at 240. See *id.* at 246-74.

162. Birnbaum, *supra* note 3, at 606-07.

In other words, competent defense counsel will always attempt to prove his client's product design is not defective regardless of how the burden of proof is allocated and he will, every time, introduce the most compelling evidence possible on the knowledge and feasibility issues in attempting to do so.¹⁶³

Note finally with respect to section 2800.59(A) that the standard for knowledge under subsections (1) and (2) and in part for feasibility under subsection (3), which is "in light of then-existing reasonably available scientific and technological knowledge," is meant to be rigorous, reflecting the degree of scientific and technological knowledge that experts had at the time the product was distributed. But such information also must have been "reasonably available" to the manufacturer. A cheaper, safer alternative design, for example, that had been discovered at the time of initial sale but whose existence was not yet known to anyone but its creator is not reasonably available.¹⁶⁴ Furthermore, "economically practicality," which is the other standard for feasibility under subsection (3), means marketplace economics and not the particular financial circumstances of the defendant manufacturer. Whether the manufacturer could price the alternatively designed product so it would be competitive in the commercial world is a legitimate consideration in terms of economic practicality, but what the cost of the alternatively designed product would do to the manufacturer's bottom line or how it might affect the value of his common stock are not relevant when economic practicality is at issue.¹⁶⁵

163. Placement of the burden of proof on the defendant will not mean that plaintiff's counsel can relax. The competent plaintiff's attorney will himself gather and master the complicated and technical evidence necessary to try to convince the trier of fact that the manufacturer possessed or should have possessed the requisite knowledge and that the manufacturer could have feasibly adopted a safer design, if only to attempt to rebut the defendant's case completely. *Id.* at 609.

164. The standard for knowledge and feasibility in section 2800.59(A) is similar to, though not exactly the same as, the standard set forth in *Halphen*, which is "the standard of knowledge, skill and care . . . of an expert, including the duty to test, inspect, research and experiment commensurate with the danger." *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 115 (La. 1986). See UPLA § 106 comment; *infra* note 172 and accompanying text. It is also important to understand that industry custom or usage or governmental regulatory or licensing standards do not necessarily satisfy section 2800.59(A)'s knowledge and feasibility standard. They may but only if they reflect expert knowledge and skill. See, e.g., *Poland v. Beard-Poulan*, 483 F. Supp. 1256, 1262 (W.D. La. 1980); *Perkins v. Emerson Elec. Co.*, 482 F. Supp. 1347, 1352-53 (W.D. La. 1980); *Leonard v. Albany Mach. & Supply Co.*, 339 So. 2d 458, 463 (La. App. 1st Cir. 1976), writ denied, 341 So. 2d 419 (1977); *Leathem v. Moore*, 265 So. 2d 270, 276 (La. App. 1st Cir. 1972); *Carreter v. Colson Equip. Co.*, 499 A.2d 326, 329 (Pa. Super. Ct. 1979); *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 746 (Tex. 1980); *id.* at 753 (Campbell, J., dissenting); UPLA § 107 comment; LLIB § 2800.9 comment (b); Klein, *supra* note 137, at 234-35.

165. See, e.g., UPLA § 107 comment; LLIB § 2800.9 comment (c); *supra* note 153 and accompanying text.

Two questions remain regarding the LPLA's defective design provisions. The first is the standard of liability under the LPLA for defective design. By now it should be obvious that the standard is negligence. Sections 2800.56 and 2800.59(A), read together, require proof of both manufacturer knowledge of the purported design defect and the manufacturer's ability to prevent the defect as predicates to liability.¹⁶⁶ Moreover, the cornerstone of LPLA defective design liability is substantially the same risk-utility balancing test so often used to judge the reasonableness of a defendant's conduct in negligence actions.¹⁶⁷ It would be a mistake, therefore, to suggest that the product is on trial in an LPLA design case. Sections 2800.56 and 2800.59(A) are concerned with the manufacturer's conduct and manufacturer liability under the LPLA will turn on the reasonableness of that conduct as evidenced by the quality of the design chosen by the manufacturer when he made the product.¹⁶⁸

166. See *supra* notes 125 and 138 and accompanying text.

167. In both negligence and strict liability cases, the probability and magnitude of the risk are to be balanced against the utility of the thing. The distinction between the two theories of recovery lies in the fact that the inability of a defendant to know or prevent the risk is not a defense in a strict liability case but precludes a finding of negligence.

Hunt v. City Stores, Inc., 387 So. 2d 585, 588 (La. 1980). Stated otherwise, [w]hen a jury decides that the risk of harm outweighs the utility of a particular design (that the product is not as safe as it should be), it is saying that in choosing the particular design and cost trade-offs, the manufacturer exposed the consumer to greater risk of danger than he should have. Conceptually and analytically, this approach bespeaks negligence.

Birnbaum, *supra* note 3, at 610. See, e.g., *Entrevia v. Hood*, 427 So. 2d 1146, 1148-50 (La. 1983); *Prentis v. Yale Mfg. Co.*, 421 Mich 670, 687, 365 N.W.2d 176, 184 (1984) (citing *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947)) ("The risk utility test is merely a detailed version of Judge Learned Hand's negligence calculus."); Restatement (Second) of Torts §§ 291-93, 520 (1965); J. Henderson & A. Twerski, *supra* note 7, at 615-17; Wade, *supra* note 3, at 834-35, 837-38; Comment, *supra* note 125, at 214; Comment, *Fault of the Victim: The Limits of Liability Under Civil Code Articles 2317, 2318 and 2321*, 38 La. L. Rev. 995, 1013 (1978); *supra* notes 125 and 148 and accompanying text.

168. The law purports to stand as a watch-dog to ensure that product design decisions made by manufacturers do not expose product users to unreasonable risks of injury. Thus, in a design defect case, the issue is whether the manufacturer properly weighed the alternatives and evaluated the trade-offs and thereby developed a reasonably safe product; the focus is unmistakably on the *quality* of the decision and whether the decision conforms to socially acceptable standards.

Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives in Products Liability: From Quality to Process Standards*, 55 N.Y.U. L. Rev. 347, 357 (1980) (emphasis in original). Thus, to say in a defective design case (under the LPLA, at least) that "the product is on trial, not the knowledge or conduct of the manufacturer," *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 113 (La. 1984); *Hunt v. City Stores, Inc.*, 387 So. 2d 585, 589 (La. 1980), may be "nothing more than semantic artifice" because competing factors to be weighed under a risk-utility balancing test invite the

The other and final matter worth considering is the extent to which sections 2800.56 and 2800.59(A) change pre-LPLA law and, if they do, whether the sections are an improvement. The most recent and authoritative statement on Louisiana products liability law is the Louisiana Supreme Court's opinion in *Halphen v. Johns-Manville Sales Corp.*¹⁶⁹ The Court in *Halphen* said that a product may be defective in design in one of two ways. The first is unreasonably dangerous per se. A product is unreasonably dangerous per se because of its design if the design's danger is greater than its utility. Both danger and utility are to be determined at the time of trial, which means that the inability of the manufacturer to know of or prevent the danger at the time of initial sale is irrelevant.¹⁷⁰ The second way is the alternative design or product approach, under which liability exists if "there was a feasible way to design the product with less harmful circumstances" or if "alternative products were available to serve the same needs or desires [as the suspect product] with less risk of harm."¹⁷¹ With respect to this definition of defective design,

[t]he standard of knowledge, skill and care is that of an expert, including the duty to test, inspect, research and experiment commensurate with the danger. . . . Accordingly, evidence as to whether the manufacturer, held to the standard and skill of an expert, could know of and feasibly avoid the danger is admissible under a theory of recovery based on alleged alternative designs or alternative products. Such evidence is not admissible, however, in a suit based on the first design defect theory, which is governed by the same criteria as proof that a product is unreasonably dangerous per se.¹⁷²

There are obvious similarities between the LPLA approach to defective design, which is embodied in sections 2800.56 and 2800.59(A) of the statute, and *Halphen's* alternative design or product approach. Both require proof of scienter in that a manufacturer is not liable under either theory unless he knew or should have known of the product's danger, and both allow the manufacturer to defend against liability by showing that the danger could not feasibly have been prevented. Both

trier of fact to consider the alternatives and risks faced by the manufacturer and to determine whether in light of these he exercised reasonable care in making the design choices he did. Instructing a jury that weighing factors concerning conduct and judgment must yield a conclusion that does not describe conduct is confusing at best.

Birnbaum, *supra* note 7, at 648.

169. 484 So. 2d 110 (La. 1986).

170. *Id.* at 114. See *supra* notes 113-18 and accompanying text.

171. *Halphen*, 484 So. 2d at 115.

172. *Id.* See *supra* note 164 and accompanying text.

also use basically the same yardstick for measuring feasibility and what the manufacturer should have known, which is the scientific and technological knowledge and skill of an expert at the time the product was made and sold. Both as a result judge the manufacturer's conduct by focusing on the quality of the manufacturer's design choice at the time of distribution (even if *Halphen* does not admit as much¹⁷³).

Nevertheless, the LPLA rules for defective design and *Halphen's* alternative design or product theory differ dramatically in at least one very important respect. The *Halphen* alternative design or product approach omits the widely accepted risk-utility balancing test. The absence of the risk-utility test means that a manufacturer is liable under *Halphen* if his product's design does not incorporate every available safety feature and device, as explained above, and this is so even if the utility of the chosen design is greater than its risk.¹⁷⁴

The balancing test is present in *Halphen's* unreasonably dangerous per se theory of liability but the differences between per se liability and the LPLA definition of defective design are also striking and fundamental. Unlike the LPLA, per se liability imputes time-of-trial knowledge of the design danger to the manufacturer whether he had such knowledge or not at the time of distribution. Thus, the manufacturer is liable even if the risk was scientifically and technologically unknowable when the product left his control.

Portions of the *Halphen* decision also indicate that per se liability may even impute to the manufacturer knowledge of scientific and technological advances occurring after distribution that would have made the product safer had they been known about and adopted when the product was made.¹⁷⁵ If that is so, evidence that a safer, alternative design was not feasible in terms of science, technology or economic practicality at the time the product left its manufacturer's control (because the safer design was then unknowable) would not be admis-

173. See supra note 168.

174. See *Toups v. Sears Roebuck and Co.*, 507 So. 2d 809, 815-16 (La. 1987) (citing *Halphen*, 484 So. 2d 110); Crawford, supra note 7, at 486-87, 489. See also *Thompson v. Tuggle*, 486 So. 2d 144, 150 (La. App. 3d Cir. 1986) (safety feature or device must have been incorporated; availability as an option to the consumer not sufficient); *Lanclos v. Rockwell Int'l Corp.*, 470 So. 2d 924, 930-31 (La. App. 3d Cir. 1985) (manufacturer has continuing duty to incorporate safety features or devices as they become available). The cited portions of *Halphen*, *Toups*, *Thompson* and *Lanclos* are not the law under the LPLA. See supra notes 155 and 156 and accompanying text.

The LPLA defective design provisions and *Halphen's* alternative design or product theory may also differ in that *Halphen* is unclear whether the scientific and technological knowledge for which a manufacturer is held accountable under the decision must be reasonably available to the manufacturer, as it must be under the LPLA.

175. See supra note 172 and accompanying text.

sible.¹⁷⁶ Other parts of *Halphen* indicate, however, that such evidence may be admissible¹⁷⁷ and at least one commentator suggests that the only time-of-trial knowledge imputed to the manufacturer under the per se rule is knowledge of the danger.¹⁷⁸ Assuming that view is correct, per se liability is still strict liability because imputation of knowledge of the danger is sufficient alone to make it so.¹⁷⁹

Halphen's brand of strict liability for defective design was once in vogue.¹⁸⁰ Today, however, only a single state embraces it (for asbestos only)¹⁸¹ and virtually every leading products liability scholar has rejected it,¹⁸² including Dean Wade, one of its initial

176. For a discussion of the different types of knowledge at issue in a products liability case, see, e.g., J. Henderson & A. Twerski, *supra* note 7, at 607-37; Henderson, *supra* note 142; Wade, *supra* note 142, at 751-53.

177. The court in *Halphen* cited several of Dean Keeton's scholarly works in support of per se liability. See *Halphen*, 484 So. 2d at 114 (citing W. Prosser and P. Keeton, *Torts* 699 (5th ed. 1984); Keeton, *Torts*, Annual Survey of Texas Law, 1981, Sw. L.J. 1, 9 (1981); Keeton, The Meaning of Defective in Products Liability Law—A Review of Basic Principles, 45 Mo. L. Rev. 579, 592, 595 (1980) [hereinafter Keeton, The Meaning of Defective]; Keeton, Products Liability—Inadequacy of Information, 48 Tex. L. Rev. 398, 407-08 (1970)). Dean Keeton recommends imputing time-of-trial knowledge of danger to a manufacturer but not time-of-trial knowledge of a risk reduction measure. See, e.g., Henderson, *supra* note 142, at 929; Keeton, The Meaning of Defective, *supra*, at 595; Wade, *supra* note 142, at 763-64; *infra* note 180.

178. See J. Henderson & A. Twerski, *supra* note 7, at 609-18.

179. See, e.g., Henderson, *supra* note 142, at 924-31; *supra* note 125 and accompanying text.

180. Imputing time-of-trial knowledge of risk to manufacturers under the risk-utility test has been credited to Deans Keeton and Wade, see J. Henderson & A. Twerski, *supra* note 7, at 614-15; Birnbaum, *supra* note 3, at 618-31; Henderson, *supra* note 142, at 928-29; Keeton, Products Liability and the Meaning of Defect, 5 St. Mary's L.J. 30 (1973); Keeton, Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products, 20 Syracuse L. Rev. 559 (1969); Keeton, Products Liability—Current Developments, 40 Tex. L. Rev. 193 (1961); Wade, *supra* note 3; Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. 5 (1965), but others followed their lead. See *Dougherty v. Hooker Chem. Corp.*, 540 F.2d 174 (3d Cir. 1976); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A.2d 140 (1979); *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033 (Ore. 1974); Birnbaum, *supra* note 3, at 618-31; Dickerson, Products Liability: How Good Does a Product Have to Be?, 42 Ind. L.J. 301, 331 (1967); Henderson, *supra* note 142, at 928; Montgomery & Owen, Reflections on the Theory and Administration of Strict Tort Liability for Defective Products, 27 S.C.L. Rev. 803, 843-44 (1976); Page, Generic Product Risks: The Case Against Comment K and for Strict Tort Liability, 58 N.Y.U. L. Rev. 853 (1983); Schwartz, *supra* note 144, at 488; Vetri, Products Liability: The Developing Framework for Analysis, 54 Or. L. Rev. 293 (1975). The Wade-Keeton test is whether a reasonable manufacturer would have designed the product the same way had he known at the time of manufacture of the risks known at the time of trial. Liability is strict, as noted above in the text. See *supra* note 179 and accompanying text.

181. See *supra* note 116 and accompanying text.

182. See, e.g., J. Henderson & A. Twerski, *supra* note 7, at 607-37; Birnbaum, *supra* note 3, at 618-31, 643-49; Danson, Tort Reform and the Role of Government in Private

champions.¹⁸³ The reasons for this disapproval relate to the purposes of strict liability for products.

Strict products liability was originally fashioned to achieve four objectives, all of which have moral, social and economic worth. First, those who crafted strict liability for products thought it would operate as an incentive to manufacturers to make safer products. The theory was that manufacturers, being unable to escape liability as frequently under strict liability, would seek to avoid the courthouse by exercising greater care in the manufacturing process. Second, strict liability was developed because its creators believed manufacturers were in a superior position to spread the losses occasioned by product-related accidents. This purportedly was so because manufacturers could insure against civil judgments in products cases and pass on the cost of the insurance through increased prices. Even without insurance the manufacturer allegedly could pass on the costs of such judgments through price adjustments. The loss would be spread among large numbers of persons in either case. Third, it was felt that strict liability would reduce the costs of administering the tort system by eliminating the expensive and time-consuming proof of scienter, which supposedly would make products liability disputes less expensive. Finally, to its advocates strict liability seemed fair. Experience had shown that requiring a plaintiff to prove some act of negligence by a manufacturer in the production process was a formidable, often impossible task. And besides, why should an innocent plaintiff bear the loss caused by a product that the manufacturer made for his own benefit, enjoyment and profit?¹⁸⁴

Insurance Markets, 13 J. Legal Stud. 3 (1984); Henderson, *supra* note 142; Schwartz, Products Liability, Corporate Structure and Bankruptcy: Toxic Substances and the Remote Risk Relationship, 14 J. Legal Stud. 689 (1985); Wheeler & Kress, A Comment on Recent Developments in Judicial Imputation of Post-Manufacture Knowledge in Strict Liability Cases, 6 J. Prod. Liab. 127 (1983). See generally Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521 (1987). Section 402A of the Restatement also opts for a time-of-distribution perspective. See Restatement (Second) of Torts § 402A, comments g, j, k (1965); Henderson, *supra* note 142, at 925 & n.20; Klein, *supra* note 137, at 236-37.

183. See Wade, *supra* note 142. That time-of-trial knowledge of a safer alternative design is not to be imputed to the manufacturer at the time of distribution, which is another way of saying that state of the art evidence is admissible, see *supra* notes 160, 175 and 176 and accompanying text, is also the majority position by far. See J. Henderson & A. Twerski, *supra* note 7, at 626-27 and authorities cited therein; Klein, *supra* note 137, at 237-39, 242-74.

184. See, e.g., Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 116-19 (La. 1986); Bell v. Jet Wheel Blast, 462 So. 2d 166, 171 (La. 1985); Suvada v. White Motor Co., 32 Ill. 2d 612, 619 (1965); G. Calabresi, The Costs of Accidents: A Legal and Economic Analysis 1078-84 (1970); Birnbaum, *supra* note 3, at 596 n.18 and authorities cited therein; Calabresi & Hirschhoff, Toward a Test for Strict Liability in Torts, 81 Yale L.J. 1055, 1078-84 (1972); Henderson, *supra* note 142, at 931-39 and authorities cited

These are not the only rationales for strict products liability but they are its primary ones.¹⁸⁵ They also are the purposes endorsed by the Louisiana Supreme Court in *Halphen*, which found that they justified strict liability for products unreasonably dangerous in design.¹⁸⁶

Nevertheless, persuasive arguments can be and have been made that strict design liability and the goals of strict products liability are incompatible. Consider the incentive for safety argument. The threat of strict liability may indeed spur manufacturers to exercise greater care in the manufacturing process, which perhaps does result in a reduction in the number of defects in construction or composition and maybe the number of deficient designs as well. The incentive for safety rationale becomes less compelling, however, insofar as design is concerned when one considers that strict liability also creates a disincentive to safety. Under a negligence standard, the conscientious manufacturer who over time continues to test his product and its design after marketing it is not punished when he discovers previously unknown and unknowable dangers. Under strict liability he is. In fact, the manufacturer's own best efforts and good works help establish his culpability because in strict liability that the danger was unknowable at the time of distribution is not a defense. In this way strict liability may actually discourage safety by discouraging testing and, even if the new dangers are discovered, by encouraging their concealment in order to avoid liability.¹⁸⁷ Some scholars have suggested, therefore, that the real result of strict liability for defective design is not safety but the tendency to cause manufacturers to behave too cautiously, leading to a waste of scarce resources and needless delay in bringing new and urgently needed products to the consumer.¹⁸⁸

The loss-spreading rationale for strict design liability also bears a closer look. Perhaps loss-spreading does work for mismanufacturing

therein; James, Optimal Deterrence and Accidents, 84 Yale L.J. 656, 670-71 (1975); Kennedy, *supra* note 7, at 20-21, 24-25; Owen, Rethinking the Policies of Strict Products Liability, 33 Vand. L. Rev. 681, 684-715 & 683 n.12 and authorities cited therein; Posner, Utilitarianism, Economics, and Legal Theory, 8 J. Legal Stud. 103, 120-21 (1979); Prosser, The Assault on the Citadel, 69 Yale L.J. 1099, 1119-22 (1960); Schwartz, *supra* note 182, *passim*; Schwartz, Old Products, New Products, Evolving Law, Retroactive Law, 58 N.Y.U. L. Rev. 796, 825 n.180 (1983); Wade, *supra* note 142, at 754-56; Wade, *supra* note 3, at 826; authorities cited in *supra* notes 180 & 182.

185. See authorities cited in *supra* note 184.

186. See *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 116-19 (La. 1986).

187. See, e.g., Henderson, *supra* note 142, at 940-41; Wade, *supra* note 142, at 754-55. See also UPLA § 104 comment.

188. See, e.g., J. Henderson & A. Twerski, *supra* note 7, at 633; Henderson, Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality, 58 N.Y.U. L. Rev. 765, 780-83 (1983); Henderson, *supra* note 142, at 941-42; Wade, *supra* note 142, at 755; see also Schwartz, *supra* note 144, at 444.

defects. Though some commentators vociferously disagree,¹⁸⁹ it seems plausible at least in theory that these sorts of product flaws can be insured against, because they are relatively few in number and statistically predictable. It seems equally plausible that the costs of the insurance or, if insurance is not available, the costs of civil judgments can be passed along through price increases for well-made products in the same product line.¹⁹⁰ But how does a manufacturer spread the loss resulting from an unknown design danger? More than one critic has suggested that unknown design hazards cannot be adequately insured against.¹⁹¹ Absent insurance the costs of civil judgments must be passed along through adjustments in the product's price, but this cannot be accomplished that easily. For one thing, a determination that a design is defective impugns an entire product line, not merely a single substandard product as is the case with mismanufacturing liability. The civil damages can be staggering. In a price sensitive market (as most are today) such huge losses cannot automatically be spread through higher prices.¹⁹² Moreover, even when they can, a large portion of the losses must be spread through price increases for products other than those defectively designed, for the defectively designed product line will be withdrawn from the market or at the very least marketed much more restrictively. Some have argued this is neither fair nor efficient.¹⁹³

Insofar as the rationale that strict liability makes products liability lawsuits less expensive is concerned, this justification may be correct for mismanufacturing cases. Once scienter is irrebuttably presumed, all that remains to be proven in those disputes is deviation from the norm, proximate cause and damages. In design cases, however, scienter is only a threshold issue. The trier of fact still must grapple with the fundamental and imperspicuous question of risk and utility, as well as the issues of proximate cause and damages. Though one commentator claims that the transaction costs of strict liability and negligence products cases are the

189. See, e.g., Owen, *supra* note 184, at 691-92, 703-07, 715. See also Birnbaum, *supra* note 3, at 643-45.

190. See, e.g., Henderson, *supra* note 142, at 949; Wade, *supra* note 142, at 755; UPLA § 104 comment.

191. See, e.g., Birnbaum, *supra* note 3, at 644-45; Henderson, *supra* note 142, at 948-49; Wade, *supra* note 142, at 755.

192. See, e.g., Henderson, *supra* note 142, at 949; Schwartz, *supra* note 182, at 729-30; Schwartz, *supra* note 184, at 825 n.180; UPLA § 104 comment. The manufacturer must absorb the losses if they cannot be distributed through insurance or price increases and many manufacturers will not be strong enough financially to survive these losses. See, e.g., Henderson, *supra* note 142, at 949; Pratt & Parnon, *Diagnosis of a Legal Headache: Liability for Unforeseeable Defects in Drugs*, 53 *St. John's L. Rev.* 517, 537 n.85 (1979). See generally Schwartz, *supra* note 184, at 825 n.180.

193. See, e.g., Henderson, *supra* note 142, at 942-44.

same,¹⁹⁴ the better view would seem to be that strict liability makes for a much cheaper controversy as a percentage of total costs in cases of manufacturing defects than it does in cases of purportedly defective design.¹⁹⁵

Finally, consider the fairness rationale. Requiring plaintiffs in mis-manufacturing cases to demonstrate some act of manufacturer negligence would surely disadvantage them unfairly. But an argument can be marshalled that design cases are different:

A design defect is neither random, nor unpredictable, nor inevitable. It is the result of deliberate and documentable decisions on the part of the manufacturer. Here the plaintiff does not struggle to find some fleeting indicia of negligent conduct; instead, he seeks to impugn an entire product line by condemning a manufacturer's judgment, as manifested by his conscious choice of available options. Vastly expanded and liberalized discovery rules enable the plaintiff to prove that the manufacturer's deliberate design decision was an ill-considered one. Plaintiffs have ready access to technical data and expert witnesses, making the assumption that it is unduly or impossible to prove the manufacturer's negligence in design cases fallacious. Furthermore, as almost every vigorously litigated design defect case shows, plaintiffs do in fact come forward with detailed technical evidence tending to prove that the manufacturer was either aware of the nature and gravity of the risk posed by the challenged product or that he could have designed the product more safely. Imputed scienter is thus essentially an unnecessary fiction that does not theoretically or even pragmatically serve the questionable foundation upon which it is based.¹⁹⁶

As for the manufacturer-benefits-manufacturer-pays rationale, its acceptance turns inevitably on how one views the character of manufacturers and consumers:

If one views product manufacturers as dominant, powerful actors who impose value choices on passive, unconsenting users, consumers, and bystanders, then . . . strict liability [is] likely to be attractive on fairness grounds. If one views manufacturers as conduits through which the value choices of users and consumers find expression, and if one feels that product-related costs and benefits are fairly evenly distributed throughout our interdependent society, then principles of fairness will seem less im-

194. *Id.* at 948.

195. See *id.* See also Wade, *supra* note 142, at 754.

196. Birnbaum, *supra* note 3, at 648. See *supra* note 3.

portant in deciding whether or not to impose strict liability. Because this writer tends to agree with the latter view, he finds it difficult to support, on fairness grounds, those forms of strict liability that seem likely to result in the waste of scarce resources.¹⁹⁷

The above discussion is meant to be illustrative and not exhaustive in its treatment of the complex moral and socio-economic issues attendant to the justifications for strict liability in products cases. Scores of articles more scholarly and insightful than this one have been written on the subject.¹⁹⁸ The only conclusions that may permissibly be drawn from the previous discussion are that reasonable people may disagree over these important matters of policy and there was at least a rational basis for the Louisiana Legislature's choice of negligence over strict liability as the LPLA standard of culpability in design cases.¹⁹⁹

197. Henderson, *supra* note 142, at 965. See, e.g., Birnbaum, *supra* note 3, at 643-49; Owen, *supra* note 184, at 715; UPLA § 104 comment.

198. See authorities cited in *supra* note 184.

199. The LPLA also may have changed Louisiana products liability law in another significant respect. In 1981 in *DeBattista v. Argonaut-Southwest Ins. Co.*, 403 So. 2d 26 (La. 1981), the Louisiana Supreme Court appeared to adopt the definition of "unreasonably dangerous" set forth in comment i to section 402A of the Restatement (Second) of Torts. See *DeBattista*, 403 So. 2d at 30-31. Known as the consumer expectation test, this definition provides that a product is unreasonably dangerous if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Restatement (Second) of Torts § 402A comment i (1965). The Court in *DeBattista* apparently embraced the consumer expectation test for all types of product flaws, including mismanufacturing, design and warning defects. See Note, *supra* note 3, at 1460-67. However, in 1986 in *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986), the Louisiana Supreme Court did not mention the consumer expectation test in its discourse on *per se* liability or the other three traditional ways that a product may be unreasonably dangerous except to say, in a footnote, that "other tests may have their own merits in different contexts. . . ." *Id.* at 114 n.2 (citing, e.g., *DeBattista*, *supra*).

Whether the consumer expectation test survived *Halphen* makes for provocative academic debate but is of little practical consequence, because the LPLA decidedly rejects the consumer expectation test as a means of determining design defects. (Nor does the act use the test in its mismanufacture or breach of express warranty sections, though the test is in the act's warning section to make the point that a manufacturer is not required to warn of obvious dangers. See *infra* notes 210-12 and accompanying text.) The consumer expectation test should play no role in shaping design defect liability for two reasons. First, as Dean Wade has explained, "[i]n many situations, particularly involving design matters, the consumer would not know what to expect because he would have no idea how safe the product could be made." Wade, *supra* note 3, at 829. This means that most jurors charged with judging a design defect (or any other type of defect, for that matter) on the basis of the ordinary consumer's expectations simply guess about those expectations, which creates "haphazard subjectivity" in the application of the consumer expectation test. Birnbaum, *supra* note 3, at 614. See, e.g., *id.* at 604, 646; Wade, *supra* note 3, at

D. *Unreasonably Dangerous Because of an Inadequate Warning*

Sections 2800.53(9), 2800.57 and 2800.59(B) of the LPLA explain how a product may be unreasonably dangerous because of an inadequate warning. These sections address the two issues that arise in most products liability warning cases: whether the manufacturer had a duty to warn of a dangerous characteristic of his product, which is addressed in sections 2800.57 and 2800.59(B), and whether a warning actually given and required to be given was adequate, which is addressed in section 2800.53(9).²⁰⁰

Considering the second issue first, section 2800.53(9) defines "adequate warning" as

a warning or instruction that would lead an ordinary reasonable user or handler of a product to contemplate the danger in using or handling the product and either to decline to use or handle the product or, if possible, to use or handle the product in such a manner as to avoid the damage for which the claim is made.²⁰¹

The quality of a warning, therefore, is to be judged by whether it apprises the "ordinary reasonable user" of the product's danger. This is an objective standard that should be distinguished from its subjective counterpart, which would be to require that the warning, to be adequate, must apprise the particular claimant of the danger.

Additionally, section 2800.53(9) provides that an adequate warning must be such that it would cause an ordinary reasonable user to contemplate the danger and then *either* to decline to use the product *or* to use it safely if that is possible. The second option reflects the recognition that many products cannot be used without some risk and that an ordinary reasonable user may wish to use a product even though he is aware of the danger.

Finally, note that an adequate warning under the LPLA may be provided through a warning itself or in instructions for the product's use and, further, that the parties to which the adequate warning must be directed are both the ordinary reasonable user *and* the ordinary

829; UPLA § 104 comment (B). Second, the consumer expectation test unfairly disadvantages plaintiffs when a manufacturer could have easily and inexpensively eliminated a design defect but the manufacturer is found not liable because the defect would be apparent to the ordinary consumer. See, e.g., Birnbaum, *supra* note 3, at 613-14.

200. See, e.g., *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 114-15 (La. 1986); UPLA § 104 comment (C).

201. La. R.S. 9:2800.53(9), as enacted by 1988 La. Acts No. 64. Compare *id.* with UPLA § 104(C)(3) and comment (C), and LLIB § 2800.2(G).

reasonable handler of the product.²⁰² Section 2800.53(9)'s definition of "adequate warning" was not intended to and does not change prior Louisiana law.²⁰³

202. See UPLA § 104 comment (C); LLIB § 2800.2 comment (j). Whether a warning is adequate under the LPLA will depend not only on the language used in the warning but also on the conspicuousness of the warning. See UPLA § 104(C) and comment (C); LLIB § 2800.6 comment (c). This was also the pre-LPLA rule. See, e.g., *Dalton v. Tulane Toyota, Inc.*, 526 F. Supp. 575, 578-79 (E.D. La. 1981); *Andries v. General Motors Corp.*, 444 So. 2d 1180, 1183 (La. 1983); *Quattlebaum v. Hy-Reach Equip. Inc.*, 453 So. 2d 578, 586 (La. App. 1st Cir.), writs denied, 458 So. 2d 474, 458 So. 2d 483 (1984); *Broussard v. Continental Oil Co.*, 433 So. 2d 354, 358 (La. App. 3d Cir.), writ denied, 440 So. 2d 726 (1983); *Cobb v. Insured Lloyds*, 387 So. 2d 13, 19 (La. App. 3d Cir.), writ denied, 394 So. 2d 615 (1980).

203. See, e.g., *Bridges v. Chemrex Specialty Coatings, Inc.*, 704 F.2d 175, 178-79 (5th Cir. 1983); *Scott v. White Trucks, Inc.*, 699 F.2d 714, 724-25 (5th Cir. 1983); *Byrd v. Hunt Tool Shipyards, Inc.*, 650 F.2d 44, 47 & n.1 (5th Cir. 1981); *LeBouef v. Goodyear Tire & Rubber Co.*, 623 F.2d 985, 988-89 (5th Cir. 1980); *Reed v. John Deere*, 569 F. Supp. 371, 376 (M.D. La. 1983); *Schneider v. Eli Lilly & Co.*, 556 F. Supp. 809, 810-12 (E.D. La. 1983); *Bakunas v. Life Pack, Inc.*, 531 F. Supp. 89, 92 (E.D. La. 1982), aff'd, 701 F.2d 946 (5th Cir. 1983); *Dalton v. Tulane Toyota, Inc.*, 526 F. Supp. 575, 578-80 (E.D. La. 1981); *Poland v. Beaird-Poulan*, 483 F. Supp. 1256, 1263-65 (W.D. La. 1980); *Brown v. Sears Roebuck and Co.*, 516 So. 2d 1154, 1155 (La. 1988) (on application for rehearing) (Cole, J., concurring in denial of rehearing); *id.*, 514 So. 2d 439, 444-45 (La. 1987) (original opinion); *id.* at 445 (Calogero, J., concurring); *Bloxom v. Bloxom*, 512 So. 2d 839, 844 (La. 1987) ("The determination of whether a warning is adequate depends upon a balancing of considerations including, among other factors, the severity of the danger, . . . the likelihood that the warning will catch the attention of those who will foreseeably use the product and convey the nature of the danger to them; . . . the intensity and form of the warning, . . . and the cost of improving the strength or mode of the warning."); *Toups v. Sears Roebuck and Co.*, 507 So. 2d 809, 815 (La. 1987); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 114-15 (La. 1986); *Winterrowd v. Travelers Indem. Co.*, 462 So. 2d 639, 640-43 (La. 1985); *Andries v. General Motors Corp.*, 444 So. 2d 1180, 1183 (La. 1983); *Hunt v. City Stores, Inc.*, 387 So. 2d 585, 588-90 (La. 1980); *Chappuis v. Sears Roebuck and Co.*, 358 So. 2d 926, 929-30 (La. 1978); *Lanclos v. Rockwell Int'l Corp.*, 470 So. 2d 924, 928 (La. App. 3d Cir. 1985); *Miller v. Upjohn Co.*, 465 So. 2d 42, 45 (La. App. 1st Cir. 1985); *Brumley v. Firestone Tire & Rubber Co.*, 459 So. 2d 572, 574-76 (La. App. 3d Cir. 1984); *Quattlebaum v. Hy-Reach Equip., Inc.*, 453 So. 2d 578, 585-86 (La. App. 1st Cir.), writs denied, 458 So. 2d 474, 483 (1984); *Broussard v. Continental Oil Co.*, 433 So. 2d 354, 356-68 (La. App. 3d Cir. 1983); *Lovell v. Earl Grissmer Co.*, 422 So. 1344, 1350-51 (La. App. 1st Cir. 1982), writ denied, 427 So. 2d 871 (La. 1983); *Cobb v. Insured Lloyds*, 387 So. 2d 13, 19 (La. App. 3d Cir. 1980); *Fincher v. Surrette*, 365 So. 2d 850, 862-63 (La. App. 4th Cir. 1978); *Walter v. Valley*, 363 So. 2d 1266 (La. App. 4th Cir. 1978); *Foster v. Marshall*, 341 So. 2d 1354, 1361-62 (La. App. 2d Cir.), writ denied, 343 So. 2d 1067 (1977); *Leonard v. Albany Mach. & Supply Co.*, 339 So. 2d 458, 463 (La. App. 1st Cir. 1976), writ denied, 341 So. 2d 419 (1977); *Amco Underwriters of Audubon Ins. Co. v. American Radiator and Standard Corp.*, 329 So. 2d 501, 503-05 (La. App. 1st Cir. 1976); *American Guar. & Liab. Ins. Co. v. Little*, 328 So. 2d 706, 711 (La. App. 3d Cir. 1976); *Bowen v. Western Auto Supply Co.*, 273 So. 2d 546, 548 (La. App. 1st Cir. 1973); *Frey v. Travelers Ins. Co.*, 271 So. 2d 56, 59 (La. App. 4th Cir.), writ denied, 273 So. 2d 840

Whether a warning is adequate is, of course, immaterial unless the manufacturer had a duty to warn in the first place. Section 2800.57 establishes the elements that a claimant must prove in order to show that an adequate warning should have been given. These elements are in addition to those contained in section 2800.54 that pertain generally to all types of defects. Section 2800.57(A) provides:

A product is unreasonably dangerous because an adequate warning about the product has not been provided if, at the time the product left its manufacturer's control, the product possessed a characteristic that may cause damage and the manufacturer failed to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.²⁰⁴

Section 2800.57(A) also does not change Louisiana law.²⁰⁵ As under prior law, section 2800.57(A) directs a manufacturer to use "reasonable care" in warning about his product's danger and in deciding whether or not to warn. Among the factors that should be considered in ascertaining whether a manufacturer has exercised such reasonable care are:

1. The likelihood and gravity of the danger.
2. The feasibility of providing an adequate warning in light of the reasonably available scientific and technological knowledge existing at the time the product left its manufacturer's control and then-existing economic practicality.
3. The manufacturer's ability at the time the product left his control to anticipate that the likely product user or handler would be aware of both the danger and the nature of the potential damage.²⁰⁶

(1973); *Williams v. Allied Chem. Corp.*, 270 So. 2d 157, 160-61 (La. App. 1st Cir. 1972), writ denied, 271 So. 2d 875 (1973); *Gauthier v. Sperry Rand, Inc.*, 252 So. 2d 129, 133 (La. App. 3d Cir.), writ denied, 253 So. 2d 382 (1971); *Ducote v. Chevron Chem. Co.*, 227 So. 2d 601, 604-05 (La. App. 3d Cir. 1969); *Richardson v. DeLuca*, 53 So. 2d 199, 202 (La. App. Or. 1951); Crawford, *supra* note 7, at 487-91; Grimsley, *supra* note 7, at 199-200; Phillips, *A Synopsis of the Developing Law of Products Liability*, 28 Drake L. Rev. 317, 351-52 (1979); Robertson, *supra* note 1, at 92-94; Wade, *supra* note 3, at 842. A comment to the LLIB indicates that the issue of whether the standard is objective (ordinary reasonable user) or subjective (the individual claimant) in determining whether a warning is adequate is *res nova* in Louisiana. See LLIB § 2800.2 comment (j).

204. La. R.S. 9:2800.57(A), as enacted by 1988 La. Acts No. 64. See UPLA § 104(C)(1)-(3); LLIB § 2800.6(A).

205. See authorities cited in *supra* note 203.

206. See *supra* note 203; UPLA § 104(C) and comment (C); LLIB § 2800.6(A)(2) and comment (c).

Whether the manufacturer knew or could have known of the danger at the time of distribution is also relevant to the issue of whether reasonable care was exercised²⁰⁷ but section 2800.57(A) does not require the claimant to show that the danger was known or knowable to the manufacturer. Instead, as will be seen below, the manufacturer can defeat the claimant's warning action if the manufacturer proves he did not know and could not have known of the existence or danger of the damage-causing product characteristic that was not warned about.²⁰⁸

There are two circumstances under the LPLA when a manufacturer has no duty to warn. Both exceptions are found in section 2800.57(B). Neither changes Louisiana law.²⁰⁹ The first exception applies when "[t]he

207. See authorities cited in *supra* note 203; UPLA § 104(C) and comment (C); LLIB § 2800.6(A)(2) and comment (c).

208. A comment to the UPLA section on duty to warn is instructive:

Even where the lack of scientific knowledge or cost factors preclude the use of an alternative design, the manufacturer may still be required to provide a warning about the product's hazard or to provide adequate instructions about the product's use. . . .

[T]he trier of fact is to place itself in the manufacturer's position at the time the product was manufactured. In order to impose liability on the manufacturer, the claimant must prove that the probability that the product would cause the claimant's harm and similar harms and the seriousness of those harms rendered the manufacturer's instructions inadequate, and that the manufacturer should and could have provided the warnings or instructions which claimant alleges would have been adequate. Obviously, where harms were likely to occur and unlikely to be recognized by the product user, the necessity of adequate warnings and instructions is correspondingly acute. On the other hand, the duty to provide adequate warnings and instructions cannot go beyond the technological and other information that was reasonably available at the time of manufacture. The concept is in accord with the overwhelming majority of court decisions.

UPLA § 104 comment (C).

By not providing specific examples of what constitutes reasonable care, section 2800.57(A) is intended to preserve prior case law on that issue. For example, the LPLA does not affect the continued existence of the so-called "learned intermediary" defense under prior law (which actually is not a defense at all) providing that a drug manufacturer may satisfy his duty to warn of product risks by informing the prescribing or treating physician of those risks and need not warn the consumer directly. See, e.g., *Rhoto v. Ribando*, 504 So. 2d 1119, 1123 (La. App. 5th Cir.), writ denied, 506 So. 2d 1225 (1987) and cases cited therein; UPLA § 104(C)(5) and comment (C); LLIB § 2800.6(D)(2) and comment (D). See also La. R.S. 9:2800.53(8)(b), as enacted by 1988 La. Acts No. 64. Nor does the LPLA overrule prior case law holding, in certain other circumstances, that a manufacturer has exercised reasonable care by providing the warning to a third person who reasonably may be expected to inform the ultimate user or to take appropriate precautions so as to avoid the risk. See, e.g., *Gordon v. Niagara Mach. & Tool Works*, 574 F.2d 1182, 1188-89 (5th Cir. 1978); *West v. Hydro-Test, Inc.*, 196 So. 2d 598, 606 (La. App. 1st Cir. 1967). See also La. R.S. 9:2800.53(8)(b), as enacted by 1988 La. Acts No. 64.

209. See authorities cited at *supra* note 203.

product is not dangerous to an extent beyond that which would be contemplated by the ordinary user or handler of the product, with the ordinary knowledge common to the community as to the product's characteristics."²¹⁰ This is the familiar consumer expectation test of comment i to the Restatement (Second) of Torts²¹¹ and, as used in the LPLA, is meant to indicate that a warning is not required when the danger would be obvious to an ordinary reasonable user of the product. Knives cut, gasoline is flammable and it is dangerous to drive automobiles at high speeds. These obvious dangers need not be warned about under the LPLA.²¹²

The second duty-to-warn exception comes into play when "[t]he user or handler of the product already knows or reasonably should be expected to know of the characteristic of the product that may cause damage and the danger of such characteristic."²¹³ This exception addresses the situation where a claimant already knew of the danger even though the manufacturer did not though should have warned adequately about it. If that is the case, the manufacturer is not liable. The exception also contemplates that some consumers are "sophisticated users." They fall into a class of persons who ordinarily possess special knowledge about a particular product, its use and its dangers. The manufacturer is not required to warn such sophisticated users, who reasonably should be expected to know about the product's risks.²¹⁴

Section 2800.57(C) of the LPLA establishes the parameters of the manufacturer's post-manufacture duty to warn. It provides:

A manufacturer of a product who, after the product has left his control, acquires knowledge of a characteristic of the product that may cause damage and the danger of such char-

210. La. R.S. 9:2800.57(B)(1), as enacted by 1988 La. Acts No. 64. See UPLA § 104(C)(4); LLIB § 2800.6(A)(1).

211. Restatement (Second) of Torts § 402A comment i (1965).

212. See UPLA § 104 comment (C); LLIB § 2800.6 comment (e).

213. La. R.S. 9:2800.57(B)(2), as enacted by 1988 La. Acts No. 64. See LLIB § 2800.6(C)(2).

214. See, e.g., *Byrd v. Hunt Tool Shipyards, Inc.*, 650 F.2d 44, 46-48 & 47 n.1 (5th Cir. 1981) (on rehearing); *Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co.*, 532 F.2d 501, 504 (5th Cir. 1976); *Thibodeaux v. McWane Cast Iron Pipe Co.*, 381 F.2d 491, 495-96 (5th Cir. 1967); *Fannin v. Louisiana Power & Light Co.*, 532 So. 2d 968, 971-72 (La. App. 5th Cir. 1988); *Gary v. Dyson Lumber & Supply Co.*, 465 So. 2d 172, 175 (La. App. 3d Cir. 1985); *Ducote v. Liberty Mut. Ins. Co.*, 451 So. 2d 1211, 1213 (La. App. 4th Cir. 1984); *American Ins. Co. v. Duo Fast Dixie, Inc.* 367 So. 2d 415, 417 (La. App. 4th Cir. 1979); *Falcon v. Bigelow-Liptak Corp.*, 356 So. 2d 507, 511 (La. App. 1st Cir. 1977); *Foster v. Marshall*, 341 So. 2d 1354, 1362 (La. App. 2d Cir. 1977); *Dixon v. Gutnecht*, 339 So. 2d 1285, 1291 (La. App. 1st Cir. 1976), writ denied, 342 So. 2d 673 (1977); *West v. Hydro-Test, Inc.*, 196 So. 2d 598, 606 (La. App. 1st Cir. 1967).

acteristic, or who would have acquired such knowledge had he acted as a reasonably prudent manufacturer, is liable for damage caused by his subsequent failure to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.²¹⁵

Consequently, the manufacturer who learns about a dangerous characteristic of his product after he has placed the product on the market, or who would have learned about it had he acted as a reasonably prudent manufacturer, has a post-manufacture duty to warn about both the characteristic and its danger. This duty is satisfied by the exercise of reasonable care in providing the later warning and the factors discussed above for determining reasonable care in providing a warning at the time of distribution will also be relevant to the post-manufacture determination of reasonable care.²¹⁶ Section 2800.58(C) codifies pre-LPLA Louisiana law.²¹⁷

The final LPLA duty-to-warn section is section 2800.59(B), which enunciates what a manufacturer must prove in an LPLA warning case. Section 2800.59(B) provides:

Notwithstanding R.S. 9:2800.57(A) or (B), a manufacturer of a product shall not be liable for damage proximately caused by a characteristic of the product if the manufacturer proves that, at the time the product left his control, he did not know and, in light of then-existing reasonably available scientific and technological knowledge, could not have known of the characteristic that caused the damage or the danger of such characteristic.²¹⁸

This section establishes the requirement of scienter by providing that a manufacturer is only responsible for warning about known or knowable product characteristics and dangers. If the manufacturer proves he did not warn about a damage-causing characteristic or its danger because they were unknowable at the time the product left the manufacturer's control in light of then-existing reasonably available scientific and tech-

215. La. R.S. 9:2800.57(C), as enacted by 1988 La. Acts No. 64. See UPLA § 104(C)(6); LLIB § 2800.6(E).

216. See UPLA § 104 comment (C); LLIB § 2800.6 comment (f).

217. See, e.g., *Toups v. Sears Roebuck & Co.*, 507 So. 2d 809, 816 (La. 1987); *Burk v. Illinois Cent. Gulf R.R. Co.*, 529 So. 2d 515, 522 (La. App. 1st Cir. 1988); *Beauhall v. Sears Roebuck & Co.*, 526 So. 2d 479, 482-83 (La. App. 1st Cir. 1988); *Gines v. State Farm Fire & Cas. Co.*, 516 So. 2d 1231, 1235 (La. App. 2d Cir. 1988); *Greer v. General Motors Corp.*, 293 So. 2d 228, 232-33 (La. App. 3d Cir. 1974). See also *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 114-15 (La. 1986); *Winterrowd v. Traveler's Indem. Co.*, 462 So. 2d 639, 642-43 (La. 1985).

218. La. R.S. 9:2800.59(B), as enacted by 1988 La. Acts No. 64. Compare *id.* with UPLA § 104(C)(1), (2)(a), and LLIB § 2800.6(B).

nological knowledge, i.e., the knowledge that a skilled expert reasonably should be expected to have, the manufacturer cannot be held liable for the claimant's damage.²¹⁹ Section 2800.59(B) thus establishes two affirmative defenses to warning liability under sections 2800.57(A) and (B).²²⁰ The manufacturer carries the burden of proof as to the knowledge issues in both for the same reasons of policy set forth above in the discussion of the manufacturer's burden of proof in design cases.²²¹

The requirement of scienter means that the standard of liability in an LPLA warning case is negligence,²²² just as it was under pre-LPLA law.²²³ Negligence is also, at least arguably, the appropriate standard because to hold a manufacturer responsible for risks he did not and could not have known about at the time of distribution is as defensible morally, socially and economically in a warning case as it is in a case where a product's design is challenged.²²⁴

219. See UPLA § 104 comment (C); LLIB § 2800.6 comments (c), (e); supra note 164 and accompanying text.

220. See supra notes 158-60 and accompanying text. One affirmative defense is for unknowability of the damage-causing product characteristic and the other is for unknowability of the danger.

221. See supra notes 161-63 and accompanying text. Pre-LPLA case law is not entirely clear on who had the burden of proving scienter in a warning case. See authorities cited in supra note 203.

222. See UPLA § 104 comment (C); LLIB § 2800.6 comment (c); supra notes 125, 138 and 166-68 and accompanying text.

223. See authorities in supra note 203; LLIB § 2800.6 comment (c). That negligence was the standard in warning cases under prior law is evidenced by the following statement of Louisiana law in *Halphen*:

A manufacturer is required to provide an adequate warning of any danger inherent in the normal use of its product which is not within the knowledge of or obvious to the ordinary user. . . . In performing this duty a manufacturer is held to the knowledge and skill of an expert. It must keep abreast of scientific knowledge, discoveries and advances and is presumed to know what is imparted thereby. . . . A manufacturer also has a duty to test and inspect its product, and the extent of research and experiment must be commensurate with the dangers involved. . . . Under the failure to warn theory evidence as to the knowledge and skill of an expert may be admissible in determining whether the manufacturer breached its duty.

Halphen v. Johns-Manville Sales Corp., 484 So. 2d 114, 115 (La. 1986). The LPLA warning provisions will, in any event, supplant and supercede those in *Halphen*.

224. See, e.g., J. Henderson & A. Twerski, supra note 7, at 618 ("One is tempted to conclude that strict liability language adds little but confusion to the proper decision in a design defect or failure-to-warn case, and represents the straw man of modern products liability law."); supra notes 180-99 and accompanying text. The imposition of strict liability in warning cases by refusing to admit evidence bearing on the manufacturer's knowledge of the danger at the time of distribution is virtually unheard of throughout the United States. See, e.g., J. Henderson & A. Twerski, supra note 7, at 366; Klein, supra note 137, at 243-74 (only Massachusetts and North Dakota as of 1986).

E. *Unreasonably Dangerous Because of Nonconformity to an Express Warranty*

The fourth and final way a product may be unreasonably dangerous under the LPLA is when the product fails to conform to an express warranty made at any time by its manufacturer about the product. Section 2800.58 explains this method of recovery:

A product is unreasonably dangerous when it does not conform to an express warranty made at any time by the manufacturer about the product if the express warranty has induced the claimant or another person or entity to use the product and the claimant's damage was proximately caused because the express warranty was untrue.²²⁵

Obviously, the meaning of "express warranty" is critical to this theory of recovery. The term is defined in LPLA section 2800.53(6):

"Express warranty" means a representation, statement of alleged fact or promise about a product or its nature, material or workmanship that represents, affirms or promises that the product or its nature, material or workmanship possesses specified characteristics or qualities or will meet a specified level of performance. "Express warranty" does not mean a general opinion about or general praise of a product. A sample or model of a product is an express warranty.²²⁶

A cause of action based on breach of express warranty is not new to Louisiana law. The traditional basis for such liability in our state, however, has been the Civil Code articles on redhibition.²²⁷ Sections

225. La. R.S. 9:2800.58, as enacted by 1988 La. Acts No. 64. See UPLA § 104(D); LLIB § 2800.7.

226. La. R.S. 9:2800.53(6), as enacted by 1988 La. Acts No. 64. See UPLA § 102(K); LLIB § 2800.2(E).

227. See, e.g., La. Civ. Code arts. 2520-48; *Alexander v. Burroughs Corp.*, 359 So. 2d 607, 609 (La. 1978); *Moreno's, Inc. v. Lake Charles Catholic High School, Inc.*, 315 So. 2d 660, 662 (La. 1975); *Rey v. Cuccia*, 298 So. 2d 840, 842-45 (La. 1974); *Prince v. Paretto Pontiac Co.*, 281 So. 2d 112, 115-16 (La. 1973); *Fraser v. Ameling*, 277 So. 2d 633, 638 (La. 1973); *Borneman v. Richards*, 245 La. 851, 862, 161 So. 2d 741, 745 (La. 1964); *Kennedy v. Jacobson-Young, Inc.*, 244 La. 191, 194, 151 So. 2d 368, 369 (La. 1963); *Danilson v. Crown Brick, Inc.*, 480 So. 2d 503, 504-06 (La. App. 5th Cir. 1985); *Couch v. Frichter's Sportsmen's Haven, Inc.*, 365 So. 2d 901, 902-03 (La. App. 4th Cir. 1978), writ denied, 367 So. 2d 1185 (1979); *Robertson v. Coffee*, 50 So. 2d 659, 662 (La. App. 2d Cir. 1951); *Crawford, Products Liability—Cause of Action*, 22 La. B.J. 239, 239-53 (1975); *Hersbergen, Developments in the Law, 1979-1980—Consumer Protection*, 41 La. L. Rev. 443, 470 (1981); *Palmer, In Quest of a Strict Liability Standard Under the Code*, 56 Tul. L. Rev. 1317, 1327 (1982); *Robertson, Manufacturers' Liability for Defective Products in Louisiana Law*, 50 Tul. L. Rev. 50, 79-113 (1975); Note,

2800.53(6) and 2800.58 of the LPLA now provide a basis in tort for the recovery of personal injury and appropriate property damage when a manufacturer's express warranty is breached, much like section 402B of the Restatement (Second) of Torts.²²⁸ The Model Uniform Product Liability Act also has a breach of express warranty provision.²²⁹

Sections 2800.53(6) and 2800.58 are reasonably straightforward, but a few observations may help in understanding them. Section 2800.58 establishes the four elements the claimant must prove in a breach of express warranty case in addition to those contained in section 2800.54. These section 2800.58 elements are:

1. The defendant manufacturer made an express warranty.
2. The express warranty induced the claimant or someone else to use the product.
3. The express warranty was untrue.
4. The claimant sustained damage because the express warranty was untrue.

Regarding the first element, either the manufacturer or his agent, i.e., one for whom the manufacturer is legally responsible, must make the express warranty. Barring unusual circumstances, a retailer of the product will not be the manufacturer's agent. A salesman who works directly for the manufacturer probably will be in most instances.²³⁰ Additionally, the express warranty need not have been made at the time the product left its manufacturer's control. Section 2800.58 applies to an express warranty made by the manufacturer at any time—before, during or after initial sale.²³¹

The second element of section 2800.58, consistent with the LPLA's definition of "claimant," provides that the claimant himself need not

"Manufacturer" Warranty in Louisiana, 33 La. L. Rev. 724, 724-31 (1973); Comment, A Comparison of Redhibition in Louisiana and the Uniform Commercial Code, 19 La. L. Rev. 165, 166-72 (1958); Note, Sales—Implied Warranty—Liability of Producer, 13 La. L. Rev. 624, 625 (1953).

228. Restatement (Second) of Torts § 402B (1965). Section 402B, entitled "Misrepresentation by Seller of Chattels to Consumer," provides:

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

- (a) it is not made fraudulently or negligently, and
- (b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

229. UPLA §§ 102(K), 104(D).

230. See UPLA § 104 comment (D); LLIB § 2800.2 comment (h).

231. See id; supra note 127 and accompanying text.

be the product user (or the product's purchaser),²³² but whoever was using the product at the time the claimant sustained damage must have been induced to do so by the express warranty. "Inducement" means "reliance." The product user must be using the product because he relied on the express warranty.²³³

Elements three and four of section 2800.58 require little explanation. To be actionable the express warranty must be untrue and the claimant's damage must have been caused by the material fact that the manufacturer misrepresented.²³⁴

The definition of "express warranty" in section 2800.53(6) also should not prove troublesome. An express warranty means a positive, fact-specific assertion or claim that a product possesses certain characteristics or qualities or will perform in a certain way. For example, "this medication will not cause drowsiness" and "this knife never needs sharpening" are express warranties. An express warranty does not, however, mean "puffing" or a general opinion about or praise of a product. "This medication beats all the rest" and "this knife is one of the world's sharpest" are not express warranties for this reason. An express warranty may be made orally or in writing and may even be communicated through a sample or model of the product.²³⁵

Liability for breach of express warranty under the LPLA is strict liability. Whether the manufacturer knew or should have known that the express warranty was untrue and whether the manufacturer could have prevented the claimant's damage are irrelevant.²³⁶ The LPLA imposes strict liability for breach of express warranty because pre-LPLA law did²³⁷ and because imposition of strict liability in this instance has been the majority position throughout the country for many years.²³⁸ Beyond that, and more important, strict liability is justified. A higher

232. See *supra* notes 51-54 and accompanying text.

233. See Restatement (Second) of Torts § 402B (1965) (requiring "justifiable reliance" on the misrepresentation) (set forth in full in *supra* note 228); *id.* comment (j); UPLA § 102 comment (K) ("It should be noted that an action based on a violation of an express warranty must include the element of reliance, and the breach must relate to a misrepresentation of material facts."); *id.* § 104 comment (D); LLIB § 2800.7 comment.

234. See UPLA § 102 comment (K); *id.* § 104 comment (D); LLIB § 2800.7 comment.

235. See UPLA § 102 comment (K); *id.* § 104 comment (D); LLIB § 2800.2 comment (h); *id.* § 2800.7 comment. The meaning of "express warranty" should be guided by and is intended to incorporate the principles on that subject contained in pre-LPLA Louisiana law and jurisprudence. See authorities cited in *supra* note 227. See also LLIB § 2800.2 comment (h) ("The definition [of express warranty] incorporates the principles regarding declarations of quality found in Civil Code Articles 2529 and 2547 (1870). It is not synonymous with the common law concept of express warranty.").

236. See *supra* notes 125, 138, 166-68 and 222-24 and accompanying text.

237. See authorities cited in *supra* note 227.

238. See UPLA § 104 comment (D) (citing W. Prosser, *Torts* 652 (4th ed. 1971)); W. Prosser & P. Keeton, *supra* note 177, at 679-81; Klein, *supra* note 137, at 240.

standard than negligence is appropriate when the manufacturer's own specific representation caused either the claimant or someone else to use the product and the claimant suffered damage because the representation was not true.²³⁹

IV. THE EFFECTIVE DATE OF THE LPLA

The final provision of the LPLA that should be considered is its effective date. Section 2 of Act 64, which creates the LPLA, provides simply that "[t]his Act shall become effective September 1, 1988."²⁴⁰ There can be no doubt, therefore, that the LPLA will apply in those cases where the claimant's cause of action has accrued (because all of the elements of his cause of action, including the sustaining of damage, have occurred) on or after September 1, 1988.²⁴¹ But what about the claimant who sustained damage before September 1, 1988 but who files suit on or after that date or whose suit is pending on that date? Does the act apply in these cases?

The answer depends on whether the LPLA applies retroactively to causes of action that rest in whole or in part on facts that occurred prior to September 1, 1988. Article 6 of the Civil Code provides in this respect:

In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary.²⁴²

Thus, resolution of the retroactivity issue will turn on whether there is an expression of legislative will on the subject and, if not, on whether

239. See UPLA § 104 comment (D); W. Prosser & P. Keeton, *supra* note 177, at 679-81; authorities cited in *supra* note 227. In this sense breach of express warranty under the LPLA is akin to breach of implied warranty as to the fitness of the product, which is also strict liability. See Birnbaum, *supra* note 3, at 594 n.8; Henderson, *supra* note 142, at 926; Klein, *supra* note 137, at 240; Wade, *supra* note 142, at 742; Wade, *On Product "Design Defects" and Their Actionability*, 33 *Vand. L. Rev.* 551, 553 (1980).

240. 1988 La. Acts No. 64, § 2.

241. See, e.g., *Lott v. Haley*, 370 So. 2d 521, 523-24 (La. 1979); *Coates v. Owens-Corning Fiberglass Corp.*, 444 So. 2d 788, 790 (La. App. 4th Cir. 1984); Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 *Yale L.J.* 1191 (1987); Johnson, *Developments in the Law, 1983-84—Legislation—Procedure and Interpretation*, 45 *La. L. Rev.* 341, 343-44 (1984); Samuel, *The Retroactivity Provisions of Louisiana's Equal Management Law: Interpretation and Constitutionality*, 39 *La. L. Rev.* 347, 352-60 (1979); Shawson, *Constitutional and Legislative Considerations in Retroactivity Lawmaking*, 48 *Cal. L. Rev.* 216, 216-51 (1960).

242. La. Civ. Code art. 6. But cf. La. R.S. 1:2 (1987) ("No Section of the Revised Statutes is retroactive unless it is expressly so stated.").

the LPLA is a substantive law or a procedural or interpretative law.²⁴³

The plain meaning of Act 64's effective date provision indicates that the legislature has not spoken one way or the other on whether the LPLA should be given retroactive effect.²⁴⁴ Act 64's legislative history confirms that fact. Before the act was amended in the Senate as a result of the compromise reached during Senate debate,²⁴⁵ section 2 of then Senate Bill 684 stated that the LPLA would apply "to causes of action for damage sustained on or after" September 1, 1988.²⁴⁶ Part of the legislative compromise, however, was an agreement to remove this provision, substitute the current language and allow the issue of retroactivity to be determined by whether the LPLA is deemed to be a substantive or procedural law.²⁴⁷

Our courts, of course, will make this determination. Whether the LPLA is substantive or procedural is probably not beyond the scope of this article but, inasmuch as the author participated in the negotiation of the legislative compromise, a discussion of that question would be inappropriate here.²⁴⁸

243. See, e.g., *Lott v. Haley*, 370 So. 2d 521, 523-24 (La. 1979); *Ardoin v. Hartford Accident and Indem. Co.*, 360 So. 2d 1331, 1338-39 (La. 1978); *Sunlake Apartment Residents v. Tonti Dev. Corp.*, 522 So. 2d 1298, 1303 (La. App. 5th Cir. 1988); *Producers Oil & Gas Co. v. Nix*, 488 So. 2d 1099, 1102 (La. App. 2d Cir. 1986); *Barron v. State Dept. of Pub. Safety*, 397 So. 2d 29, 32 (La. App. 2d Cir. 1981); *Orleans Parish School Bd. v. Pittman Constr. Corp.*, 372 So. 2d 717, 720 (La. App. 4th Cir. 1979); A. Yiannopoulos, *Civil Law Systems* 68 (1977).

244. See La. Civ. Code art. 9 ("When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature."). However, such legislative silence may mean that the LPLA should not be given retroactive effect in light of the provisions of Louisiana Revised Statutes 1:2. See *supra* note 242.

245. See *supra* note 17 and accompanying text.

246. See La. S. 684, § 2, 1988 Reg. Sess., *supra* note 17 (engrossed bill) ("This Act shall become effective September 1, 1988 and shall apply to causes of action for damage sustained on or after that date.").

247. See *supra* note 17 and accompanying text.

248. For case law and commentary that addresses the issue of whether a statute is substantive or procedural, see the authorities cited in *supra* notes 241 and 243.

In the 1988 Second Extraordinary Session of the Louisiana Legislature an amendment regarding the effective date of the LPLA was added to Senate Bill 16 of that session by the Committee on Civil Law and Procedure of the House of Representatives. Senate Bill 16 pertained to the effective date of Act 515 of the 1988 Regular Session, which created the new Louisiana Code of Evidence. See La. S. 16, 2d Extra. Sess. (1988) (enrolled bill) (copy on file with the Louisiana Senate Administrative Services, Post Office Box 94183, Baton Rouge, Louisiana 70804). The LPLA amendment provided:

The provisions of Act No. 64 of the 1988 Regular Session are hereby deemed to establish the limitations of liability of manufacturers for damage caused by their products and the right of a claimant to recover from the manufacturer for damage caused by the product, and all of the provisions are deemed to be

V. THE PURPOSE OF THE LPLA

Any purported explanation of why the Louisiana Legislature passed the LPLA should be viewed with skepticism. The statute contains no stated purpose and those familiar with the legislative process know that legislators have a multitude of reasons for voting as they do. The LPLA was drafted, however, with two objectives in mind. First, it was intended to strike an equitable balance between the right of a claimant who is injured in a product-related accident to just compensation and the right of the product's manufacturer to be judged fairly. At the same time, the statute was meant to bring added clarity, precision and certainty to Louisiana's products liability doctrine.

Achievement of these goals would not only benefit the individual claimant and manufacturer in a particular case but would also profit society as a whole. A civilized culture has a compelling interest in proper reparation, moral treatment and laws that make good sense analytically as ends in themselves. We also have a practical interest because these objectives, if attained, will reduce the cost of administering our legal system and result in safer and cheaper products. This is accomplished when consumers and manufacturers better understand their respective responsibilities (and, one must hope, act accordingly) and, further, when accident losses are placed on the party or parties who can most effectively and least expensively prevent them.²⁴⁹

No reasonable person can quarrel with the worth of these ideals. Yet several reasonable people have suggested, during the legislative process and now after, that the LPLA accomplishes neither of its purposes or at least could achieve one or the other better if the statute's provisions were different. They may be right. Time will tell. There are good arguments the other way, too, some of which have been presented here.

substantive in nature and shall have prospective application only and shall apply to all claims brought on or after September 1, 1988.

Id. § 2. Senate Bill 16 passed the legislature but Governor Roemer vetoed it, in part because the LPLA amendment went beyond the Governor's call for the special session in violation of Article III, Section 2(B) of the Louisiana Constitution of 1974 and because the amendment caused Senate Bill 16 to have a dual object in violation of Article III, Section 15(A) and (C) of the Louisiana Constitution of 1974. See Veto Message of Governor Buddy Roemer, Senate Bill 16, 1988 Second Extraordinary Session of the Louisiana Legislature (copy on file with the Office of the Governor, State of Louisiana, Post Office Box 94004, Baton Rouge, Louisiana 70804).

249. See, e.g., UPLA, Criteria for the Act; LLIB § 2800 comment (c); J. Henderson & A. Twerski; supra note 7, at 607-37; Birnbaum, supra note 3, at 596 & n.18, 600-01; Henderson, supra note 142, at 931-39; Kennedy, Assumption of the Risk, Comparative Fault and Strict Liability After Rozell, 47 La. L. Rev. 791, 819 n.123 and authorities cited therein; Kennedy, supra note 7, at 20-21, 24-25; Wade, supra note 142, at 754-56; supra note 182.

But for now, the Louisiana Products Liability Act is the law of products liability in Louisiana. The author hopes this article will help in understanding it.

