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**THE FRANCHISOR AS “SELLER”
UNDER STRICT LIABILITY IN TORT—
KOSTERS V. SEVEN-UP CO.**

Since the initial carving out of the nonfault doctrine of strict liability in tort in products liability actions,¹ the majority of jurisdictions in the United States have declared the marketing of harmful products to be contrary to public policy.² Motivated by predominantly social reasons, those courts

1. The doctrine of strict tort liability for injuries caused by defective products as an alternative to negligence principles based on fault was first expounded as early as 1944 by Justice Traynor in the concurring opinion in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944). Justice Traynor stated:

I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. . . . Even if there is no negligence, however, public policy demands that responsibility be fixed where it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.

Id. at 461-62, 150 P.2d at 440.

In 1962, again through Justice Traynor, the California Supreme Court became the first to apply the doctrine of strict liability in the landmark case of *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). For a discussion of the history of the development of strict liability, see Prosser, *The Fall of the Citadel: Strict Liability to the Consumer*, 50 MINN. L. REV. 791 (1966); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L. J. 825 (1973) [hereinafter cited as Wade].

2. Thirty-one jurisdictions have expressly accepted strict liability principles—some adopting the strict liability terminology set forth in *Greenman* and others retaining the warranty terminology. State courts' decisions which have adopted strict liability principles are the following: *Clory v. Fifth Ave. Chrysler Center, Inc.*, 454 P.2d 244 (Alaska 1969); *O.S. Stapely Co. v. Miller*, 103 Ariz. 556, 447 P.2d 248 (1968); *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); *Yarthwait v. Burgio*, 153 Conn. 284, 216 A.2d 189 (1965); *Stewart v. Budget Rent-A-Car Corp.*, 52 Hawaii 71, 470 P.2d 240 (1971); *Shields v. Morton Chem. Co.*, 95 Idaho 674, 518 P.2d 857 (1974); *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965); *Cornette v. Serjeant Metals Prods., Inc.*, 147 Ind. App. 46, 258 N.E.2d 652 (1970); *Hawkeye Security Ins. Co. v. Ford Motor Co.*, 174 N.W.2d 672 (Iowa 1970); *Dealers Transp. Co. v. Battery Distrib. Co.*, 402 S.W.2d 441 (Ky. 1966); *McCormack v. Hanksraft Co.*, 278 Minn. 322, 154 N.W.2d 488 (1967); *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966); *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969); *Brandenburger v. Toyota Motor Sales, U.S.A., Inc.*, 162 Mont. 506, 513 P.2d 268 (1973); *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971); *Shoshone Coca Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 420 P.2d 855 (1966); *Buttrick v. Arthur Lessard & Sons, Inc.*, 110 N.H. 36, 260 A.2d 111 (1969); *Santor v. A & M Karagheusian Inc.*, 44 N.J. 52, 207 A.2d 305 (1965); *Stang v. Hertz Corp.*, 83 N.M. 730, 497 P.2d 732 (1972); *Lonzrick v. Republic Steel Corp.*, 1 Ohio App. 2d 374, 205 N.E.2d 92 (1965), *aff'd*, 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966); *Marathon Battery Co. v. Kilpatrick*, 418 P.2d 900 (Okla. 1965); *Wights v. Staff Jennings, Inc.*, 241 Ore. 301, 405 P.2d 624 (1965); *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966); *Ritter v. Narragansett Elec. Co.*, 109 R.I. 176, 283 A.2d 255 (1971); *Engberg v. Ford Motor Co.*, 87 S.D. 196, 205 N.W.2d 104 (1973); *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 398 S.W.2d 240 (1966); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967); *Ulmer v. Ford Motor*

have joined the movement to adopt the strict tort liability principles set forth in the Restatement (Second) of Torts, Section 402A.³ In so doing, they have undertaken to hold those engaged in the business of selling products strictly liable to the consuming public for physical harm caused by defective products.⁴

Co., 75 Wash. 2d 522, 452 P.2d 729 (1969); *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). States adopting strict liability by statute are Maine, ME. REV. STAT. ANN. tit. 14, § 221 (West Cum. Supp. 1978); and South Carolina, S.C. CODE § 15-73-10 (1976).

Some states have inferentially adopted strict liability. See *Cosrell v. Altec Indus. Inc.*, 335 So. 2d 128 (Ala. 1976); *Schenfeld v. Norton Co.*, (Colo.), 391 F.2d 420 (10th Cir. 1968); *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965); *Goldberg v. Kollsman Instrument Co.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963); *Wasik v. Borg*, (Vt.), 423 F.2d 44 (2d Cir. 1970).

3. RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter cited as RESTATEMENT] states:

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

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

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

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

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

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

4. The public policy considerations underlying the adoption of strict liability principles for defective products are enumerated in *Brandenburger v. Toyota Motor Sales, U.S.A., Inc.*, 162 Mont. 506, 514-15, 513 P.2d 268, 273 (1973), citing *Lechuga, Inc. v. Montgomery*, 12 Ariz. App. 32, 37-38, 467 P.2d 256, 261-62 (1970) (Jacobsen, J., concurring) as follows:

(1) The manufacturer can anticipate some hazards and guard against their recurrence, which the consumer cannot do. Restatement, supra, comment c.

(2) The cost of injury may be overwhelming to the person injured while the risk of injury can be insured by the manufacturer and be distributed among the public as a cost of doing business. *Greenman v. Yuba Power Products, Inc.*, [59 Cal. 2d 57], 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

(3) It is in the public interest to discourage the marketing of defective products. *Escola v. Coca Cola Bottling Co. of Fresno*, supra.

(4) It is in the public interest to place responsibility for injury upon the manufacturer who was responsible for its reaching the market. *Greenman v. Yuba Power Products, Inc.*, supra.

(5) That this responsibility should also be placed upon the retailer and wholesaler of the defective product in order that they may act as the conduit through which liability may flow to reach the manufacturer, where ultimate responsibility lies. *Vandermark v. Ford Motor Co.*, [61 Cal. 2d 256], 37 Cal. Rptr. 896, 391 P.2d 163 (1964).

(6) That because of the complexity of present day marketing processes and their secretiveness, the ability to prove negligent conduct by the injured plaintiff is almost impossible. *Escola v. Coca Cola Bottling Co. of Fresno*, supra.

(7) That the consumer does not have the ability to investigate for himself the soundness of the product. *Santor v. A and M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965).

The initial theories upon which strict liability was implemented were limited in their reach, however, to defendants who were in the "business of selling products."⁵ As a result, a vital part of the development of strict liability law has centered on the questions of which defendants fit within the definition of one who "sells" products,⁶ and whether other defendants should also be included.⁷ Despite the increased willingness of courts to expand the concept of *seller* to extend laterally across the chain of distribution, encompassing the many parts of the marketing enterprise, the principles of strict liability rarely have been applied in the context of the franchise system of marketing practice.⁸ Even though the franchise licensor generally may be the cornerstone of a significant consumer enterprise, directing the

(8) That this consumer's vigilance has been lulled by advertising, marketing devices and trademarks. Concurring opinion, Lockwood, J., Nalbandian v. Byron Jackson Pumps, Inc., 97 Ariz. 280, 399 P.2d 681 (1965).

5. RESTATEMENT, *supra* note 3, at § 402A(1)(a).

6. Early attempts by courts define the "seller" generally limited liability to those business entities more traditionally associated with the sale and manufacture of consumer products. *See, e.g.,* Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965) (manufacturers); Canifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965); Dunham v. Vaughn & Bushnell Mfg. Co., 86 Ill. App. 2d 315, 229 N.E.2d 684 (1967), *aff'd*, 42 Ill. 2d 339, 247 N.E.2d 401 (1969); Santor v. A & M Karagheusian Inc., 44 N.J. 52, 207 A.2d 305 (1965); Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966) (wholesalers); Vandermark v. Ford Motor Co., 61 Cal. 2d 356, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Dunham v. Vaughan & Bushnell Mfg. Co., 86 Ill. App. 2d 315, 229 N.E.2d 684 (1967), *aff'd*, 42 Ill. 2d 339, 247 N.E.2d 401 (1969); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967) (retailers); *but cf.* Ellis v. Rich's Inc., 233 Ga. 573, 212 S.E.2d 373 (1975) (Georgia remains the only jurisdiction which shields the retailer from strict liability); Clark v. Bendix Corp., 42 App. Div. 2d 727, 345 N.Y.S.2d 66 (1973); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965) (manufacturers of component parts).

7. A wealth of case law has addressed the extension of the concept of "seller" to reach additional defendants who are neither *manufacturers* nor *sellers* in a technical sense but who are unique members of the American business scene. *See, e.g.,* Stewart v. Budget Rent-A-Car Corp., 52 Hawaii 71, 470 P.2d 240 (1971); Crowe v. Public Bldg. Comm'n, 74 Ill. 2d 10, 383 N.E.2d 951 (1978); Cintrone v. Hertz Leasing & Rental Serv. Co., 45 N.J. 434, 212 A.2d 769 (1965) (lessors); Garcia v. Halsett, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970); Thompson v. Reilly, 211 So. 2d 537 (Miss. 1968) (commercial licensor of coin operated laundry machines); Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) (builders engaged in the mass production of homes); Newmark v. Gimbel's Inc., 54 N.J. 585, 258 A.2d 697 (1969); Carpenter v. Best's Apparel, Inc., 4 Wash. App. 439, 481 P.2d 924 (1971) (hybrid partaking of incidents of sale and service for hair products). *But cf.* Nickel v. Hyster Co., 412 N.Y.S.2d 273 (1978) (doctrine of strict liability does not encompass providers of services including repairers of products). *See also* note 37 *infra* and related text for discussion of extension of strict liability to trademark licensors.

8. The U.S. Dept. of Commerce defines franchising as

a form of marketing or distribution in which a parent company customarily grants an individual or a company the right, or privilege, to do business in a prescribed manner over a certain period of time in a specified place. The parent company is termed the franchisor; the receiver of the privilege, the franchisee; and the right, or privilege, the franchise.

flow of consumer goods into the stream of commerce for profit,⁹ its licensing arrangements¹⁰ have effectively insulated the franchisor from strict liability for injuries sustained by customers of the franchisee.¹¹

In *Kosters v. Seven-Up Co.*,¹² the United States Court of Appeals for the Sixth Circuit, in a case of first impression, examined the unsettled area of franchisor liability and determined that a franchisor could be held liable for injuries to one of its franchisee's customers even though the franchisor did not design, manufacture, or sell the product that caused the injury.¹³ The court held that a franchisor's sponsorship, management, and control of the

U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. 847 (1978). See generally Brown, *Franchising—A Fiduciary Relationship*, 49 TEX. L. REV. 650 (1971) [hereinafter cited as Brown]. See also *Kosters v. Seven-Up Co.*, 595 F.2d 347, 352 (6th Cir. 1979).

9. By 1983, total franchise sales are projected to reach \$437 billion, reflecting an annual compound growth rate of about 10 percent [from 1973]. The following table illustrates the significant growth of sales from franchisees:

Franchising: Trends and Projections 1973-79
(in billions of current dollars)

	1973	1974	1975	1976	1977 ¹	1978 ¹	Percent change 1977-78	1979 ²	Percent change 1978-79
Sales									
Total	168.8	173.4	189.8	221.6	253.4	274.4	8	298.6	9
Company-owned	24.1	26.2	28.8	32.8	38.1	41.5	9	44.5	7
Franchisee-owned	144.7	147.1	161.0	188.8	215.2	232.9	8	254.1	9

¹ Estimated.

² Forecast.

U.S. DEP'T OF COMMERCE, INDUSTRY AND TRADE ADMINISTRATION, U.S. INDUSTRIAL OUTLOOK 1979 500 (1979).

The profits reaped by the franchisor often reflect a two-fold financial benefit with income accruing in the form of royalty payments under the licensing agreements and from the sale of necessary ingredients to its franchisee. See *City of Hartford v. Associated Constr. Co.*, 34 Conn. Supp. 204, 384 A.2d 390 (1978); note 52 and accompanying text *infra*.

10. The franchise licensing agreement closely regulates the relationship between the franchisor and franchisee. It may specify, for example, standards of quality, fixed prices, and franchisee training. It may also guarantee exclusive sales territory, require that certain supplies and services be purchased from the franchisor, and provide for uniform advertising. Its purpose is to protect the trademark or trade name through standardized operations and appearance, and establish control over the franchisee. Note, *Liability of a Franchisor for Acts of the Franchisee*, 41 S. CAL. L. REV. 143, 144-46 (1967) [hereinafter cited as *Liability of a Franchisor*].

11. In addition, the absence of case law assessing these principles in context of franchising has generally reinforced this insulation. It would seem that the recent rapid growth of the franchise system of marketing in place of the direct marketing of goods by the trademark owners has resulted in a lagging case law relating to franchisors' liabilities. See generally Brown, *supra* note 8. The absence of judicial precedent became conspicuous in the recent opinion of the Connecticut Superior Court in *City of Hartford v. Associated Constr. Co.*, 34 Conn. Supp. 204, 384 A.2d 390 (1978). The court, in acknowledging the emerging realities of the commercial marketplace, stated: "The marketplace is the common denominator of franchising as a fact and strict tort liability as a law, and two were bound to join in issue for resolution by the court." *Id.* at , 384 A.2d at 393.

12. 595 F.2d 347 (6th Cir. 1979) [hereinafter cited as *Seven-Up*].

13. *Id.* at 353.

system for distributing products places the franchisor in the position of a supplier of the product for purposes of tort liability.¹⁴ The *Seven-Up* holding, extending the concept of *seller* to include franchisors, was not based upon the underlying policy considerations of strict liability,¹⁵ but upon the franchisor's control over the operation of the marketing system that produced the injury causing product.¹⁶ The result is a cautious extension of strict liability principles to reach the franchisor where it has retained some undetermined amount of control.¹⁷

The purpose of this Note is to examine the *Seven-Up* decision in light of the policy based reasoning which preceded it in other jurisdictions. Also, the extension of the concept of seller to include franchisors will be compared to the law extending strict liability to trademark licensors and to the definition of a seller in the Illinois Products Liability Act. Finally, the impact of the decision will be discussed.

SEVEN-UP'S FACTS AND REASONING

In *Kosters v. Seven-Up*, the plaintiff, a young woman, was injured when a bottle of 7-Up slipped from the end of a sixpack carton of 7-Up beverage and shattered, and a piece of glass struck her in the eye.¹⁸ After settling her claim against the bottler, the carton manufacturer, and the grocer for \$30,000,¹⁹ plaintiff brought an action²⁰ against the franchisor, the Seven-Up Company, alleging that it should be held strictly liable in tort for injuries caused by the defectively designed carton.²¹ The trial court charged the

14. *Id.*

15. See generally note 2 *supra*.

16. 595 F.2d at 353.

17. *Id.* at 353, n.22.

18. Plaintiff was carrying the carton under her arm while approaching the checkout counter of a grocery store when the accident occurred. *Id.* at 350.

19. The grocer was the seller of the bottles which were packaged in an over-the-crown cardboard wrap. The wrap [carton] was manufactured by Olinkraft, Inc., on an automatic machine leased by the bottler, Brooks Bottling Company [hereinafter Brooks], a franchisee of the Seven-Up Company [hereinafter Seven-Up]. *Id.*

Brooks is a franchise of Seven-Up under an agreement whereby it is the exclusive bottler of 7-Up products distributed in 52 counties of Michigan. Brooks bought an extract from Seven-Up, to which it added sugar, water, and other ingredients to produce the finished beverage. This beverage was then placed in bottles purchased by Brooks from the bottle producers and packaged in cartons selected and purchased by Brooks, after receiving Seven-Up's approval, from carton manufacturers among whom was Olinkraft, Inc. Brief for Plaintiff-Appellee at 1, *Kosters v. Seven-Up Co.*, 595 F.2d 347 (6th Cir. 1979).

20. The case was first tried, on diversity grounds, before a jury in the United States District Court for the Western District of Michigan. 595 F.2d at 348.

21. The plaintiff's case was premised on five related theories of liability. These included one negligence theory, one contract theory, and three strict liability theories. This Note will focus on the plaintiff's theory that she may recover from a franchisor for "breach of implied warranty of fitness" if the product, the 7-Up carton, was defective. See 595 F.2d at 350. Michigan has inferentially adopted the Restatement (Second) of Torts' doctrine of strict liability for defective products "under the guise" of the implied warranty theory. *Id.* at 351 n.6. See *Continental Cas.*

jury that it could find that Seven-Up was a "manufacturer" or "seller" for purposes of imposing strict liability if it could find that Seven-Up controlled the "approval or disapproval of the entry in the Channels of Commerce" of the beverage, 7-Up, "including the totality of the advertising on the carrier" (carton).²²

On appeal, Seven-Up argued that the trial court erred in extending the theories of strict liability to a franchisor, when it seemed clear that the franchisor had neither designed, manufactured, nor sold the product in question.²³ Seven-Up also objected to its characterization as a seller or manufacturer simply because of its approval of the defective carton design.²⁴

The court of appeals²⁵ held that the franchisor could be liable to an injured consumer for breach of implied warranty of fitness if it consented to the distribution of a defective product bearing its name.²⁶ Liability, the court reasoned, would arise from a combination of four factors: the risk created by the franchisor's approval for distribution of unsafe products, the franchisor's ability to prevent the loss, the consumer's lack of awareness of the danger, and the consumer's reliance on the trade name.²⁷ The *Seven-*

Co. v. Westinghouse Elec. Corp., 327 F. Supp. 720, 723 (E.D. Mich. 1970), *See also* Piercefield v. Remington Arms Co., 375 Mich. 85, 89-99, 133 N.W.2d 129, 135 (1965); Comment, *Products Liability in Michigan: Implied Warranty, Strict Tort or Both?*, 15 WAYNE L. REV. 1558, 1564, 1573-74 n.108, 1580 (1969).

The question of whether the product, 7-Up, included the defective carton in which it was carried was not an issue in the case. It is, however, generally held that the product includes the packaging or container. *See* cases cited in Wade, *supra* note 1, at 849.

22. 595 F.2d at 350 n.1. Regarding the issue of the franchisor's liability as a seller or manufacturer of products, the trial court instructed the jury, in part, as follows:

If you find that Seven-Up controls the approval or disapproval of the entry into the channels of commerce of the product Seven-Up, the bottles—the bottle carriers, including the totality of advertising on the carriers, then you may find that Seven-Up is a manufacturer and seller, such that it is liable for an implied warranty of fitness for its product.

Brief for Defendant and Third Party Plaintiff-Appellant at 10, *Kosters v. Seven-Up Co.*, 595 F.2d 347 (6th Cir. 1979).

23. *See* note 19 *supra*.

24. There was evidence that the carton design in question was approved by the Seven-Up Company pursuant to its franchise agreement with the bottler. *See* 595 F.2d at 355 n.27 for relevant sections of the franchise agreement. Seven-Up, however, contended that its approval of the cartons was only of the "graphics" and to ensure that its trademark was properly displayed. *Id.* at 350.

25. The U.S. Court of Appeals for the Sixth Circuit interpreted the theories of tort liability under Michigan law in deciding whether an injured purchaser is entitled to recover against the franchisor of a product. *Id.* at 349. *See* note 21 *supra*.

26. Despite the court's ruling that Seven-Up could be held liable as a supplier or seller of the defective product, the case was reversed and remanded for a new trial based on other liability issues successfully argued by defendant Seven-Up Co. These issues centered on erroneous jury instructions regarding inherently dangerous activity, opportunity to change design, and third-party beneficiary claims, which taken together constituted reversible error at the trial court level. 595 F.2d at 353-56.

27. 595 F.2d at 353. The court found that these factors have been relied on in previous Michigan decisions in determining who may be held liable for breach of implied warranty in

Up court, however, relied primarily on the franchisor's "control" over the system for distributing its products, and the public's assumption that it does in fact "control and vouch for"²⁸ the products as the basis for extending liability to the franchisor for injuries to a customer of its franchisee.²⁹

AN ANALYSIS OF SEVEN-UP IN LIGHT OF PRIOR CASE LAW

The *Seven-Up* decision is best understood when viewed against the backdrop of prior case law extending strict liability principles to trademark licensors. In these cases, the trademark licensor can be said to hold an analogous, if not identical, position in the marketing enterprise to the franchise licensor.³⁰

A line of decisions that were not decided upon strict liability principles, nor related solely to the sale of products, emerged over the past decade and focused upon the franchisor as owner of a popular trade name. In these cases the combination of the popular trademark and central advertising were held to give the consumer the impression that he or she was dealing with a centrally managed organization when in fact the injury was caused by dealings with the franchisee, or trademark licensee.³¹ The liability of the franchisor

other products liability situations. Note, however, that the cases cited do not necessarily lend support to the extension of the concept of "seller" to include the franchisor under strict liability doctrine or policy. *See id.* at 353 n.21. In fact, a close analysis of the Michigan decisions from which the court drew the four central factors reveals that some of these cases are grounded on theories at variance with strict liability doctrine. *See, e.g.,* *Livesley v. Continental Motors Corp.*, 331 Mich. 434, 49 N.W.2d 365 (1951) (a case based on negligence theory); *Serijanjan v. Associated Material & Supply Co.*, 7 Mich. App. 725, 151 N.W.2d 345 (1967) (a case decided on sales theories of implied warranty of fitness and merchantability under the Uniform Sales Act). *See also* *Cova v. Harley Davidson Motor Co.*, 26 Mich. App. 602, 182 N.W.2d 800 (1970) (the court approved of strict liability concepts but rejected the "jargon" of strict liability).

28. 595 F.2d at 353.

29. *See* note 60 and accompanying text *infra*. The court declines to address the question of whether the judge or jury should decide the sufficiency of control to justify the liabilities based on implied warranty, although the trial court submitted the question to the jury in this case. *See* 595 F.2d at 353 n.22.

30. *See generally* *Brown*, *supra* note 8, at 659. The sale by the franchisor to the franchisee of a license to use the trademark is an essential ingredient in the franchise relationship. *Liability of Franchisor*, *supra* note 10, at 147.

31. *See, e.g.,* *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781 (3d Cir. 1978) (franchisor of drug store held liable under doctrine of respondeat superior for death caused by druggist's faulty prescription); *Gizzi v. Texaco, Inc.*, 437 F.2d 308 (3d Cir. 1971) (Texaco held liable under apparent authority or agency by estoppel for a defective used car sold and serviced by an attendant at its franchised dealership displaying "the Texaco star"); *Clark v. Texaco, Inc.*, 55 Mich. App. 100, 222 N.W.2d 52 (1974) (involvement of "the man who wears the star" was substantial enough to justify application of agency by estoppel); *Johnson v. American Oil Co.*, 51 Mich. App. 646, 215 N.W.2d 719 (1974) (Standard Oil's national ad campaign promoting its products included slogan "you expect more from Standard and you get it" could make it liable for acts of franchisee under agency or estoppel by apparent authority). *See generally* *Liability of a Franchisor*, *supra* note 10.

was based on the doctrines of respondeat superior, apparent authority, and agency by estoppel.³² In *Seven-Up* the court distinguished these agency decisions, correctly recognizing that they are not applicable in the context of products liability doctrine.³³ Ironically, prominent among the factors considered by the *Seven-Up* court were the consumer's *reliance* on the trade name, giving the *impression* of the franchisor's responsibility for the product, and the franchisor's *control* of the marketing. These factors are closely aligned to the issues considered central to the cases decided upon agency doctrine.³⁴

Although agency principles have permitted courts to extend vicarious liability to trademark licensors for tortious acts of their licensees, these principles have been formally abandoned in the general context of strict liability for defective products.³⁵ Judicial efforts to place strict tort liability for defective products upon the production and marketing enterprises responsible for placing such goods in the stream of commerce have dictated this departure from agency considerations.³⁶ The result has been a policy based extension of the concept of the *seller* to include the trademark licensor as a proper party defendant in strict liability actions.

32. Under the doctrines of respondeat superior, apparent authority, and agency by estoppel, a principal is subject to liability for tortious conduct of a servant or agent. The Restatement (Second) of Agency observes that the liability under respondeat superior is normally based on the fact that the tort is brought about in the course of an undertaking for the benefit, and subject to the right, of the principal to *control* his servant or agent. RESTATEMENT (SECOND) OF AGENCY § 216, Comment a (1957). Likewise, a principal is subject to liability for torts resulting from a third party's reliance upon, or belief in, statements or conduct within an agent's apparent authority. *See id.* §§ 8, 219(2)(d), 265. Similarly, the doctrine of agency by estoppel holds the principal liable for transactions entered into by third parties in belief that the principal authorized them where the principal has intentionally or carelessly caused the belief, or knowing the belief he does not take reasonable care to give notice of the lack of authority. *Id.* § 141, Comment b. For apparent authority distinguished from estoppel, *see id.* § 8, Comment d.

33. 595 F.2d at 352. In *Seven-Up*, the court points out that the franchisor's liability under the agency doctrines is a "different question" which may arise in other franchising contexts. *Id.*

34. Reliance on the trade name as the indicia of authority is a central issue in cases decided upon agency principles. *See* cases cited in note 31 *supra*. *See also* Sanders v. Clark Oil Refining Co., 57 Mich. App. 687, 226 N.W.2d 695 (1975). The amount of control retained by the franchisor over the franchise operations is also the focal point of vicarious liability discussion. *See* Drexel v. Union Prescription Centers, Inc., 582 F.2d 781 (3d Cir. 1978). *See generally Liability of a Franchisor, supra* note 10.

35. The common law theories of negligence and agency, of course, have been *formally* abandoned by the adoption of the principles and language of section 402A. Nonetheless, these common law principles have not been altogether excised from court reasoning extending strict liability theory. *See* note 81 and accompanying text *supra*.

36. *See* notes 31 & 34 *supra*. Certainly an agency requirement that plaintiff must show a reasonable reliance on the indicia of authority or upon the trade name as the sine qua non of the trademark licensor's liability would work hardship upon the injured consumers in a products liability setting. The very underlying social policies giving rise to strict liability are a response to this type of consumer disadvantage. *See* note 4 *supra*. *See also* note 54 *infra*.

Four cases aptly illustrate this development. At the forefront, the California Court of Appeals, in *Kasel v. Remington Arms Co.*,³⁷ found a trademark licensor strictly liable for injuries caused by a defective shell bearing its trade name. *Kasel* rejected the requirement of finding a precise legal relationship as had been advocated by the proponents of agency liability. Instead the court emphasized the enterprise-stream of commerce approach to strict liability.³⁸ Under this theory, the trademark licensor was held liable for its "participatory connection"³⁹ for personal profit with the injury producing product, and with the enterprise that created the consumer demand for and reliance upon the product.⁴⁰ Significantly, the California court resisted the argument that the defendant's control was to be the paramount focal point for extending strict liability.⁴¹ Also, unlike the *Seven-Up* ruling,⁴² the *Kasel* court found that the trial court should have imposed strict liability upon the defendant as a "matter of law" for its integral connection with the "composite business enterprise" that placed the defective product into the stream of commerce.⁴³

Reaching a result similar to *Kasel*, a federal district court, in *Carter v. Bancroft & Sons, Co.*,⁴⁴ found its justification for extending strict liability to a trademark licensor in the language of Section 400 of the Restatement (Second) of Torts.⁴⁵ In *Carter*, a trademark licensor of a clothing manufacturing process was deemed to be a seller for purposes of imposing strict liability when the injury producing product carried the defendant's "Ban-Lon" trademark.⁴⁶ The court reasoned that under section 400, there was no difference between the trademark licensor and a seller for purposes of strict

37. 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972).

38. *Id.* at 725, 101 Cal. Rptr. at 323.

39. *Id.*

40. *Id.*

41. In *Kasel*, defendant held a 40% stock ownership in the Mexican corporation which manufactured the product. Defendant was also closely involved in its operations, financing, and advertising. Yet, the court could impose strict liability without regard to the individual defendant's control, though such control, if it existed, could remain a significant factor. *Id.* at 725, 101 Cal. Rptr. at 323-24. The court thereby followed previous California decisions utilizing the enterprise-stream of commerce concept without regard for the amount of an individual defendant's control over the defect in the product. *Id.*

42. See note 11 *supra*.

43. 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972).

44. 360 F. Supp. 1103 (E.D. Pa. 1973).

45. *Id.* at 1106-07. See RESTATEMENT, *supra* note 3, at § 400. This section reads in pertinent part: "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though *he were its manufacturer*" (emphasis added). The Restatement further defines the meaning of "one who puts out his own product," stating: "Thus, one puts out a chattel as his own product when he puts it out under his name or affixes to it his trade name or trademark." *Id.* at Comment d.

46. Ban-Lon is a trademark identifying garments and fabrics made according to specification and quality standards prescribed by the defendant trademark licensor. *Carter v. Bancroft & Sons Co.*, 360 F. Supp. 1103, 1106 (E.D. Pa. 1973).

liability under section 402A.⁴⁷ Although the trademark licensor claimed it was not involved in the manufacture or sale of the defective product, the act of licensing the use of the trademark "Ban-Lon" alone was sufficient to raise the liabilities of section 402A.⁴⁸

Further, the Illinois Supreme Court in the recent case of *Connelly v. Uniroyal, Inc.*,⁴⁹ approved the *Carter* reasoning⁵⁰ and applied strict liability to defendant Uniroyal on the basis that an allegedly defective tire bore its trademark.⁵¹ The *Connelly* decision relied on the theory of strict liability to counter the defendant's argument that absent some participation in the distribution chain, it could not be assessed with the liabilities of one who "puts out" products under section 400 of the restatement (second).⁵² The court found this argument "wholly irrelevant"⁵³ to the issues of strict liability which are based on public policy grounds.⁵⁴

In *City of Hartford v. Associated Construction Co.*,⁵⁵ the doctrine of enterprise liability, expounded by *Kasel* and later advanced in *Connelly*, was applied to a franchisor for injury sustained by the ultimate consumer of its trademark product.⁵⁶ Thus, the *City of Hartford* decision became the first case to deal squarely with the status of the franchisor, per se, in the strict liability context.⁵⁷ In that decision, the court drew heavily from *Kasel's* emphasis on policy considerations and recognized the realities of the franchise method of marketing that has profited from the sale of the injury producing goods.⁵⁸ The result is yet another logical extension of strict products

47. RESTATEMENT, *supra* note 3. See 360 F. Supp. 1103, 1107 (E.D. Pa. 1973). Other cases have found legal support for the proposition that § 400 incorporates trademark licensors into the reach of § 402A. See, e.g., *Lovelace v. Astra Trading Corp.*, 439 F. Supp. 753 (S.D. Miss. 1977); *Wojciuk v. United States Rubber Co.*, 13 Wis. 2d 173, 108 N.W.2d 149 (1961).

48. See 360 F. Supp. 1103, 1107 (E.D. Pa. 1973).

49. 75 Ill. 2d 393, 389 N.E.2d 155 (1979).

50. *Id.* at 411, 389 N.E.2d at 163.

51. *Id.*

52. *Id.* at 410-11, 389 N.E.2d at 162-63.

53. *Id.*

54. *Id.* In *Connelly*, the court reviews the societal purposes underlying the extension of strict liability in Illinois. The court concludes that:

A licensor is an integral part of the marketing enterprise, and its participation in the profits reaped by placing a defective product in the stream of commerce (citations omitted) presents the same public policy reasons for the application of strict liability which supported the imposition of such liability on wholesalers, retailers, and lessors.

Id. at 411, 389 N.E.2d at 163.

55. 34 Conn. Supp. 204, 384 A.2d 390 (1978).

56. *Id.* at , 384 A.2d at 397.

57. In addressing the question of franchisor liability the court noted that the claim was "unique," "without precedent or parallel." *Id.* at , 384 A.2d at 393. The *Seven-Up* court concedes that it is "a new question not generally considered in other jurisdictions." 595 F.2d at 352-53.

58. See note 9 *supra*.

liability law to an enterprise within the entity of marketing goods—the franchisor.⁵⁹

Curiously, the *Seven-Up* court footnotes this precedent as a case relating to trademark licensors.⁶⁰ The court also disregarded the decisions from *Kasel* to *City of Hartford* while it interpreted the products liability law of Michigan in the context of franchising. Instead, the court drew from the traditional concepts used by early Michigan courts to analyze whether or not a particular defendant should be held liable for defective products.⁶¹ In so doing, the court *in fact* relied upon theories traditionally associated with agency principles while it extended the law of strict liability to reach a new defendant—the franchisor.⁶² The problems arising from such reliance in fact upon traditional concepts are discussed below.

CRITICISM OF SEVEN-UP'S CONTROL BASED ANALYSIS

Products liability law is a fast developing area. All the rules have not yet been formulated and products liability as it matures, has to shake off various impediments associated with traditional concepts, which while relevant to other problems, are inappropriate for this new area.⁶³

The use of the franchisor's control as a focal point of liability injects vestiges of the agency principles⁶⁴ which may impede the underlying policy reasons for implementing and expanding strict liability doctrine.⁶⁵ Of the factors considered central to the issue of liability, the court inappropriately condenses the issues to two.⁶⁶ The first is the franchisor's control as evidenced by rights contained in the franchise agreement⁶⁷ and its actual *control* to the distribution of the carton. The second issue considers the consumer's expectation, induced by the *franchisor's conduct*, that the franchisor did in fact control the product.⁶⁸ It is submitted that these factors echo the reasoning of the cases founded on traditional theories of agency and negligence and therefore are an awkward medium for analysis of strict liability concepts.⁶⁹

59. See generally Note, *Tort Liability of Trademark Licensors*, 55 IOWA L. REV. 693, 706 (1970) [hereinafter cited as *Tort Liability*].

60. 595 F.2d at 352 n.11.

61. See note 27 *supra*.

62. See note 35 *supra*.

63. *Turner v. Bituminous Cas. Co.*, 397 Mich. 406, 416, 244 N.W.2d 873, 877 (1976).

64. See note 34 and accompanying text *supra*.

65. See notes 1, 2, & 54. But see note 41 (discussion of control) *supra*.

66. The *Seven-Up* decision is allegedly premised on the combination of four factors, yet the court appears to have relied primarily on these two. 595 F.2d at 353; note 27 and accompanying text *supra*.

67. 595 F.2d at 355 n.27.

68. *Id.* at 353.

69. The reasonableness of a defendant's conduct should not be an issue in a strict liability action. See RESTATEMENT, *supra* note 3, at § 402A(2). In *Liberty Mut. Ins. Co. v. Williams*

The major defect of this control centered analysis is that it results in an extension of strict liability concepts, incorporating a new defendant into its doctrinal reach, without first acknowledging the underlying social reasons for imposing strict liability in the first place.⁷⁰ The result may be a logical extension of liability to the franchisor⁷¹ premised on the wrong reasons.

Practical difficulties also arise because attorneys are not instructed as to the amount of control needed to fix liability of a franchisor in products liability actions.⁷² That confusion is compounded by the fact that *some* control over the quality of products sold by the franchisee may be inherent in the very nature of a franchise.⁷³ The Lanham Trade-Mark Act⁷⁴ mandates that a trademark licensor must exercise active control to make certain that the licensee's goods conform to set standards in order to retain the use of the trademark.⁷⁵ Although the court observes that franchises are identified by a trade name and may be associated with a trademark,⁷⁶ it fails to recognize the legal requirements on Lanham Act franchisors—that they control their products or risk abandonment of one of their most important assets, the trademark.⁷⁷

Another problem with control of the product as the basis for attaching liability is that it may tend to obfuscate the true focal point in a design

Machine & Tool Co., 62 Ill. 2d 77, 338 N.E.2d 857 (1975), the Illinois Supreme Court emphasized that the major purpose of strict liability is to place the loss on those who create the risk and reap the profits by placing defective products into the stream of commerce, "regardless of whether the defect resulted from the 'negligence' of the manufacturer." *Id.* at 82, 338 N.E.2d at 860 (emphasis added). See note 1 *supra*.

70. See note 4 *supra*.

71. See *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972) ("as long as the franchisor . . . can be said to be a link in the marketing enterprise which placed a defective product within the stream of commerce, there is no reason in logic for refusing to apply strict liability in tort to such an entity." *Id.* at 725, 101 Cal. Rptr. at 323, quoting *Tort Liability*, *supra* note 59, at 706). *Accord*, *City of Hartford v. Associated Constr. Co.*, 34 Conn. Supp. 204, 384 A.2d 390 (1978).

72. 595 F.2d at 353 n.22.

73. See *Liability of a Franchisor*, *supra* note 10.

74. Lanham Trade-Mark Act, 15 U.S.C. §§ 1051-1127 (1946). The Act provides that the trademark owner may license its use to another related company as long as the mark is not used to deceive the public and provided the licensor adequately controls the licensee. Failure to exercise the necessary control may result in abandonment and loss of the trademark. *Liability of a Franchisor*, *supra* note 10.

75. See *Lahart, Control—The Sine Qua Non of a Valid Trademark*, 50 TRADE-MARK REP. 103 (1960). The amount of control necessary to prevent abandonment is not specified in the Lanham Trade-Mark Act. See note 30 *supra*.

76. 595 F.2d at 352.

77. The result of this failure is more than an analytical problem. If the Lanham Act requires control for a valid trademark and control is used as the basis for applying strict liability, then effectively all franchisors who identify their products by trademarks would be held to strict liability standards. Since most franchisors are associated with a trademark, the court's control based reasoning could arguably extend strict liability in the majority of cases.

defect case: the condition of the product itself.⁷⁸ The jury should be concerned with the dangerousness of the product designed in a particular way and not with the reasonableness of the franchisor's actions in consenting to the distribution of a defective product bearing its name.⁷⁹ The *Seven-Up* decision, however, declined to remove the issue of control from the province of the jury⁸⁰ and left the question for further judicial resolution.⁸¹ The result is that the jury's proper focus upon the condition of the product is unnecessarily displaced by considerations relating to defendant's control of the distribution of the product, that are, at least, confusing issues in the strict liability context.⁸²

IMPACT OF THE *SEVEN-UP* DECISION

The *Seven-Up* decision, if it falls short on doctrinal grounds by premising the liability of a business entity on its control of the distribution of products,⁸³ has nonetheless drawn important attention to unsettled liability questions in context of franchising which pervade the law in most jurisdictions.⁸⁴ Whether the conceptual hurdle of control will stifle its application as important precedent in these jurisdictions remains to be seen. The ruling at least wrestles with the new question of franchisor liability and, in this regard, effectively extends the concept of seller in context of a strict liability case to include the franchisor where it has retained *some* control.

The case illustrates the frustration inherent in the verbalization and utilization of strict liability principles when courts attempt to operate within the framework of implied warranty doctrine and language structure.⁸⁵ Nonetheless, the judicial evolution of strict liability doctrine, even in jurisdictions operating within the language of section 402A, has generally failed to effectively incorporate the franchisor within its reach. This may be a result of the difficulty arising from the use of section 402A as a functional means of ex-

78. See, e.g., *Barker v. Lull Eng'r Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). Accord, *Ruckner v. Norfolk & Western Ry.*, 64 Ill. App. 3d 770, 798, 381 N.E.2d 715, 735-36 (1978) (Jones, J., dissenting); *Everett v. Bucky Warren, Inc.*, 78 Mass. Adv. Sh. 2424, 380 N.E.2d 653, 660 (1978).

79. See *Roach v. Kononen*, 269 Or. 457, 525 P.2d 125 (1974). In *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972), the court, regarding the issue of defendant's conduct, held that "strict liability in tort is not concerned with . . . conduct. It is actually an expression of policy that once an entity is instrumental in placing a defective product . . . into the stream of commerce, then *liability attaches without regard to conduct (fault)*." *Id.* at 733, 101 Cal. Rptr. at 329 (emphasis added).

80. 595 F.2d at 353 n.22.

81. *Id.*

82. See, e.g., note 77 and accompanying text *supra*.

83. 595 F.2d at 355 n.27.

84. See *Brown*, *supra* note 8.

85. See note 21 *supra*.

pression of the doctrine of strict liability,⁸⁶ combined with continuing judicial reluctance to abandon familiar and *broadly* applicable common law theory in the analysis of strict liability.⁸⁷ The *Seven-Up* decision illustrates this tendency to fall back, not formally but generally, on some common law principle, such as control, in order to explain an extension of strict liability law.⁸⁸ As a result, *Seven-Up's* reliance *in fact* on traditional concepts may impede its use in other jurisdictions as precedent for extending the concept of seller to include the franchisor. In this regard it may be incumbent upon the state legislatures to transcend the constraints of judicial definitions of the concept of "seller" in order to fully implement the social policies underlying the strict liability doctrine.

An example of such a statutory redefinition of strict liability concepts is found in the recently enacted Illinois Products Liability Act.⁸⁹ This act offers a comprehensive definition of the "seller" which would appear to incorporate the composite marketing enterprise.⁹⁰ Though the franchisor is not specifically named, it arguably would be included as one who "labels," "markets," or is otherwise involved in placing a product in the stream of commerce.⁹¹ The *Connelly*⁹² ruling, decided since the statutory definition went into effect,⁹³ had no difficulty finding a trademark licensor strictly liable as a "seller" simply by its status as such.⁹⁴ Yet even absent the legislative redefinition of seller in most jurisdictions to incorporate the franchisor, the *Seven-Up* decision along with *City of Hartford*⁹⁵ and the preceding trademark rulings will stand to put the franchisor on notice that it will be expected to share the loss suffered by consumers of defective products produced by the marketing enterprise under its aegis.

CONCLUSION

The growing importance of franchising as a method of marketing consumer goods has mandated judicial attention to the reach of the strict liability doc-

86. See generally Kiely, *The Art of the Neglected Obvious in Products Liability Cases: Some Thoughts on Llewellyn's The Common Law Tradition*, 24 DEPAUL L. REV. 914 (1975).

87. *Id.*

88. For criticism of control as the basis for extending strict liability to the franchisor, see note 64 and accompanying text *supra*.

89. ILL. REV. STAT. ch. 83, § 22.2 (West Supp. 1979) states in pertinent part: "[S]eller" means one who, in the course of a business conducted for the purpose, sells, distributes, leases, assembles, installs, produces, manufactures, fabricates, prepares, constructs, packages, labels, markets, repairs, maintains, or otherwise is involved in placing a product in the stream of commerce" (emphasis added).

90. *Id.*

91. *Id.*

92. 75 Ill. 2d 393, 389 N.E.2d 155 (1979).

93. The Illinois Products Liability Act became effective on January 1, 1979; ILL. REV. STAT. ch. 83, § 22.2 (West Supp. 1979).

94. *Connelly* did not, however, scrutinize the new statutory definition and it remains untested in the Illinois courts. 75 Ill. 2d 393, 389 N.E.2d 155 (1979).

95. 34 Conn. Supp. 204, 384 A.2d 390 (1978).

trine. Before that doctrine is expanded to include a new defendant, however, the underlying social policy reasons for implementing strict liability must be understood. If the franchisor fits within the conceptual framework of strict liability policy by profiting from the sale of consumer products, there is no logical reason why he or she should not carry the liabilities of a "seller." The *Seven-Up* rule is neither premised upon this policy foundation nor within the doctrinal framework of strict liability in its extension of products liability law. Nonetheless, the result is encouraging, if doctrinally unsound, in that it does bring the franchisor within the ambit of those potentially liable for products that have caused injury to an unwitting consumer.

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