Don’t Worry, Be Happy: Why Patent Holders Need Not Concern Themselves With the Products Liability Implications of Licensing Their Patents to Others

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INTRODUCTION

Increased public and governmental concern over product safety during the Twentieth Century has led to an unprecedented expansion to the area of products liability.[1] Because trademark licensors are now commonly held liable for injuries caused by goods associated with their marks, some academics have suggested that patent holders are certain to be the next class of defendants found liable under the various theories of products liability.[2] To date, however, no plaintiff has been able to successfully assert a products liability cause of action against a patent licensor.[3] What is more, only a few courts have even addressed the subject; most discussing the potential applicability of products liability to patent licensors only cursorily.[4] This lack of judicial precedent, then, begs the question: do patent licensors really need concern themselves with the products liability implications of licensing their patents to others?

The following pages seek to address this question. To this end, Part II begins with an overview of the various theories of products liability: strict liability, negligence, breach of warranty, and misrepresentation. Part III continues by summarizing the arguments made by scholars in support of extending products liability to patent licensors. Part IV then provides a discussion of the judicial precedent which has addressed the issue. Because only a few courts have even indirectly addressed the extension of products liability to patent licensors, particular attention is paid in this section to the case of Firestone Steel Products Co. v. Barajas.[5] Finally, Part V concludes by arguing that patent licensors need not be wary of the products liability implications of licensing their patents to others and offers support for this conclusion.

II.

THEORIES OF RECOVERY UNDER PRODUCTS LIABILITY

In its broadest sense, "[p]roducts liability is the name currently given to the area of law involving the liability of those who supply goods or products for the use of others to purchasers, users, and bystanders for losses of various kinds resulting from so-called defects in those products."[6] Within the larger framework of products liability, however, there are four specific theories of recovery: (1) negligence; (2) strict liability; (3) breach of warranty; and (4) misrepresentation.[7]

A. Negligence

Recovery under a negligence theory of products liability generally requires a showing that the defendant acted in a way "which falls below the standard established by law for the protection of others against unreasonable risk of harm."[8] The "traditional formula"[9] of negligence, however, is a bit more precise; requiring a plaintiff to evidence the following four elements: (1) " [a] duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks"[10]; (2) "[a] failure on his part to conform to the standard required"[11]; (3) "[a] reasonable close causal connection between the conduct and the resulting injury"[12]; (4)and "[a]ctual loss or damage resulting to the interests of another."[13] Although liability for negligence may be imposed for a wide variety of acts and omissions, in regards to products liability it is most often applied to "conscious design choices, inadvertent mistakes on the assembly line, or failures to warn of the dangerous aspects of products."[14]

B. Strict Liability

As the term "strict liability" implies, recovery under strict products liability is based solely upon the

"dangerousness of conduct"[15] without regard to fault.[16] That is, "[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."[17] Ultimately, then, recovery for strict products liability is dependent upon the defectiveness of the product causing the injury rather than the conduct of the person or business offering the product for sale.[18] While several justifications have been articulated in support of this theory of products liability[19], the basic policy rationale underlying the doctrine "is to ensure that the costs of injuries resulting from defective products are borne by the manufacturer that put such products on the market rather than by the injured persons who are powerless to protect themselves."[20]

C. Breach of Warranty

Subsumed within the breach of warranty theory of products liability are three separate sub-theories of liability recognized by Article 2 of the Uniform Commercial Code: breach of an express warranty, breach of an implied warranty of merchantability, and/or breach of an implied warranty of fitness for a particular purpose.[21] Regardless of the type of warranty alleged to have been breached, however, the elements necessary for recovery under a breach of warranty theory of products liability are similar; requiring generally that a plaintiff show: (1) existence of a warranty, either through the defendant's own conduct or at law; (2) a breach of the warranty at the time the product was sold; (3) harm resulting from the breach of the warranty; and (4) proof that the breach was both the legal and proximate cause of the harm.[22]

D. Misrepresentation

A products liability claim based upon a misrepresentation theory is generally "grounded in the manufacturer's or other

defendant's communication of false and material words about a product to a plaintiff who is harmed by relying on the truth of the communication."[23] Unlike the other theories of products liability, the success of a products liability claim based upon the theory of misrepresentation is not dependent upon the plaintiff's ability to evidence a defect in the defendant's product.[24] All that is required to succeed on the merits of this type of products liability claim is a showing of "communication of words that are false."[25] What is more, a defendant need not intentionally make a false statement regarding his product in order for his words to be actionable under the misrepresentation theory of products liability.[26] Comments made by a defendant either negligently without regard to their potential falsity or in other limited circumstances may also give rise a products liability claim based upon the theory of misrepresentation.[27]

III.

ARGUMENTS IN SUPPORT OF EXTENDING PRODUCTS LIABILITY TO PATENT LICENSORS

Scholars have articulated several arguments in support of extending products liability to patent licensors. These arguments include: (1) that case law holding trademark licensors liable for the tortious acts of their licensees and the doctrine of apparent authority might create a basis for extending products liability to patent licensors;[28] (2) that a patent license is equivalent to the sale of property and thus patent licensors might be liable for products liability under Section 402A of the Restatement (Second) of Torts;[29] (3) that an equitable basis exists for holding patent licensors liable for products liability under the implied warranties of merchantability and fitness for a particular purpose;[30] and (4) that patent licensors might be liable for products liability

because tort authorities Prosser and Keeton themselves have suggested this possibility.[31]

A. Trademark Licensors Are Commonly Found Liable for Products Liability and Thus Patent Licensors Are Liable Too

Some scholars have suggested that products liability might be extended to patent licensors where a licensor has exercised some degree of control over the licensee of his patent.[32] Recognizing that "[a] licensor may be found to control a licensee where a relevant statute exists that invests the licensing relationship with such control,"[33] this theory is based in part on the large amount of case law finding trademark licensors tortiously liable for injuries to third parties under Sections 5 and 45 of the Lanham Act.[34] Noting that the Patent Act does not require a licensor to retain control over a licensed patent, however, it has also been suggested that products liability might be extend to patent licensors "where the licensee can be viewed as an agent of the licensor."[35] Arguing that the doctrine of apparent authority might provide a sufficient legal basis for making such a finding, it has been further suggested that "it would at least be a question of fact for a jury to decide whether, in specific circumstances, apparent authority existed so that a patentee licensor could be held accountable for the actions of the licensee."[36]

B. Patent Licensors Are Liable for Products Liability Because They Fall Within the Scope of Section 402A of the Restatement (Second) of Torts

Other scholars have suggested that patent licensors fall within the scope of strict liability articulated by Section 402A of the Restatement (Second) of Torts.[37] Because "the federal patent statutes command that patents be treated as possessing the 'attributes of personal property'"[38], academics subscribing to this theory do so on the assumption that a court would be willing to treat a patent as the "product" of an inventor and

the licensing of the invention as a "sale."[39] Also underlying this premise is the assumption that a court would be willing to characterize the licensing of a patent as part of an "on-going business" because "inventors usually take on a significant financial and time commitment over a span of years in acquiring, exploiting and enforcing the patent."[40] Under this theory, the remaining elements of Section 402A are met because "the federal patent statutes require the patent specifications to be detailed enough so as to serve as a design plan from which the final physical product is fashioned."[41] If these specifications ultimately prove to be "unreasonably dangerous," argue some academics, "the conduct of subsequent parties in failing to prevent the ultimate harm caused by the defect is immaterial."[42]

C. Patent Licensors Are Liable for Products Liability Because They Fall Within the Scope of Persons Able to Be Sued for Breach of Warranty

In support of the extension of products liability to patent licensors, some scholars have argued that the implied warranties of merchantability and fitness for a particular purpose should be applied equally to contract and licenses alike.[43] Despite acknowledging that the application of these implied warranties to patent licenses might be "tantamount to the licensor's assuming the undesirable role of an insurer of the licensee's business success,"[44] academics willing to extend products liability to patent licensors under an implied warranty theory do so because "the very fact that licenses have so much commercial importance is a good reason to insist upon integrity, high standards of quality and reasonable assurances that the parties' expectations will be fulfilled."[45] This premise is further supported by the policy justification that "the experienced licensor should be held to warrant liability when his materials prove to be worthless"[46] and "if the materials are

unsuited to the licensee's purpose when the latter has justifiably relied on the licensor to supply plans, an invention, technical assistance or information suited to that purpose."[47]

D. Patent Licensors Are Liable for Products Liability Because Prosser and Keeton Say So

Scholars also argue that products liability might be extended to patent licensors because tort-authorities Prosser and Keeton themselves suggest this possibility.[48] In the 5th edition of their seminal treaty "Prosser and Keeton on the Law of Torts," Prosser and Keeton offer the following observation:

> It can be said that all those who participate in the process of making products available to users for profit or financial gain are subject to liability on a negligence theory. This would include endorsers, licensors of trademarks and franchisers, and perhaps also those who license another to manufacture and sell a patented invention.[49]

Because of the influence that these two authorities have had on the development of tort law during the past several decades, some academics theorize that this statement alone might be sufficient enough authority for a court to hold patent licensors liable for products liability in the absence of other more primary authorities.[50]

IV.

PATENT LICENSORS AND PRODUCTS LIABLITY CASE LAW

Only a few cases considering the application of the various theories of products liability to patent licensors exist. Moreover, only one of these cases, Firestone Steel Products Company v. Barajas[51], actually addresses the issue directly. Other cases such as Mechanical Rubber and Supply Company v. Caterpillar Tractor Company[52], Turlington v. Phillips Petroleum Company[53], and Torres v. Goodyear Tire & Rubber Company[54] only address the issue in passing. Regardless of the extent to

which the issue is dealt with, however, each of these cases is important in understanding whether a court might be willing to extend a products liability theory to a patent licensor.

A. The Seminal Case: Firestone Steel Products Company v. Barajas

During the 1960s, the Firestone Steel Products Company (Firestone) patented the design for an automobile wheel which allowed for the installation of a tubeless tire.[55] Seeking to profit "from industry use of products that would help build customer demand for [its] own products"[56], Firestone granted a royalty-free license in the patent to a number of domestic companies in the automobile tire and wheel manufacturing industries.[57] One of these companies, Kelsey-Hayes, significantly modified Firestone's wheel design "by making it 16.5-inches in diameter, by making it narrower to fit only 6 or 6.75-inch tires, and by making it with a 'hump bead.'"[58] Without any participation from Firestone, Kelsey-Hayes then manufactured and marketed the modified automobile wheel to the public.[59] When Jimmy Barajas was fatally injured trying to put a 16-inch tire manufactured by General Tire Company on a 16.5-inch Kelsey-Hayes wheel, his parents brought a negligence and strict products liability action against both Firestone and Kelsey-Hayes.[60]

Firestone quickly moved for summary judgment based upon the fact that "its summary judgment evidence showed, as a matter of law, that is did not design, manufacture or sell the wheel in question."[61] Firestone also supported its motion by claiming "that it could not be liable based upon its original patent."[62] The trial court agreed, granting Firestone's motion for summary judgment "on all the Barajases' claims and rendered a take nothing judgment for Firestone against the Barajases."[63] This judgment was subsequently appealed by the Barajases to the Texas Court of Appeals.[64] Finding that "Firestone's summary judgment

proof did not negate all of the Barajases' allegations,"[65] the Court of Appeals reversed the take nothing judgment entered by the trial court.[66] Firestone then appealed to the Texas Supreme Court which granted the company's application for writ of error.[67]

Recognizing that the sole issue in the case was "whether Firestone designed all or a component part of the wheel that caused Jimmy Barajas' death,"[68] the court began its analysis by considering the Barajases' negligence claim.[69] After explaining that "[a]t common law, a negligence cause of action consists of: (1) a legal duty owned by one person to another; (2) a breach of that duty; and (3) damages proximately resulting from the breach"[70], the court found that the court of appeals erred in concluding that "Firestone's summary judgment proof did not negate all of the Barajases' allegations."[71] Finding that "Firestone conclusively showed it did not design, manufacture or sell the wheel in question,"[72] the court held that "Firestone owed no duty to the Barajases"[73] and as such "Firestone negated an essential element of the Barajases' negligence cause of action."[74] Thus, the court held that the court of appeals erred in reversing the take nothing judgment entered by the district court.

Not every member of the court, however, was so quick to dismiss the Barajases' negligence claim. Noting that "[u]nlike strict products liability, liability in negligence is not premised on placing a defective products into the stream of commerce"[75], Justice Enoch authored a dissenting opinion in which he argued that the decision of the court of appeals should be affirmed and the Barajases' negligence claim remanded back to the district court for trial.[76] In particular, Justice Enoch reasoned that:

> The fact that Firestone's design has become an industry standard does not militate against a duty. Liability should not be more limited the more widely adopted a design is by an industry. To the contrary, a designer who offers up its design for a product through a royalty-free license in the hopes of gaining widespread adoption of the design in the industry militates in favor of a duty.[77]

Accordingly, Justice Enoch found that "[a] designer's duty of ordinary care and duty to warn derive from the conduct in designing the product; that duty should not vanish simply because the design is developed from someone other than the manufacturer."[78]

Justice Enoch's dissenting opinion aside, the court then turned to consider whether Firestone might be liable to the Barajases under a theory of strict products liability.[79] The court began its analysis of this issue by noting that "[i]n Texas, section 402A of the Restatement (Second) of Torts governs claims for strict liability in tort."[80] Under that section:

> (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 customer without substantial change in the condition in which it is sold.[81]

Recognizing that Section 402A clearly "applies to any person engaged in the business of selling products for use or consumption"[82], the Court further explained that "a defendant does not have to actually sell the product; introducing the product into the channels of commerce is enough"[83] in order for liability to be imposed under that section.[84] What is a necessary requirement, found the court, is that "the product must reach the user or consumer without substantial change in

the condition it left the manufacturer's or seller's possession."[85]

After articulating the general requirements of Section 402A, the court continued its strict products liability analysis by recognizing three related principles of law.[86] First, the court explained that "[i]f the original designer of a system of prototype gives the design to another party, this action alone is not enough to impose liability under a strict products liability theory."[87] The court then recognized the principle that "[m]ere preparation of drawings or a prototype, does not constitute designing the eventual product from which liability does lie."[88] Finally, the court acknowledged that "[m]ost jurisdictions require more than the mere act of licensing a design to impose strict products liability, and require some purposeful activity with respect to the design by the licensor as well"[89] and as such "[a] mere licensor is not subject to strict products liability."[90]

With the applicable law clearly stated, the court turned to consider the Barajases' claim that "Firestone should be liable in strict liability because it developed a design idea that another manufacturer – Kelsey-Hayes – copied, modified, and used."[91] This contention, however, was quickly dismissed by the court which noted that "[t]his is not the law."[92] If it were, reasoned the court,:

> the automobile manufacturer who first developed air bags could be held liable because other manufacturers used the idea, modified the design, and incorporated air bags into their own cars. If there were a successor company of the Wright Brothers, this company could be held liable because other airplane manufacturers borrowed the idea of aerodynamic wings.[93]

Reiterating that "[t]he imposition of strict liability demands more than an incidental role in the overall marketing program of the product,"[94] the court held that the court of appeals erred in

reversing the take nothing judgment issued by the trial court on these grounds.[95]

In reaching this conclusion, the court also considered the legal validity of the "Barajases' assertion that because Firestone was the original designer of the bead-taper, low-flange wheel that it had a duty to warn their son about the alleged defective nature of the Kelsey-Hayes product."[96] Again, however, the court found that this argument was unsupported by law; noting in particular that "[a] manufacturer does not have a duty to warn or instruct about another manufacturer's products, though those products might be used in connection with the manufacturer's own products."[97] Accordingly, the court held that the court of appeals erred in reversing the take nothing judgment on these grounds as well.[98]

B. Relevant Dicta: Mechanical Rubber and Supply Co, Turlington, and Torres

Although Firestone Steel is the only published opinion directly addressing the potential liability of patent licensors for products liability, there are three other cases which have indirectly considered the issue.[99] In Mechanical Rubber and Supply Company v. Caterpillar Tractor Company[100], the Illinois Appellate Court considered "whether a designer of a product may be obligated under the theory of strict liability in tort to indemnify the supplier and manufacturer of the product designed."[101] In holding that the law imposed no such duty, the court found that:

> There are many parties who conceivably have some relation with the manufacture and sale of the product, but their relationship is peripheral and not directly related to the distributive process. For example, a patent licensor, a consultant, and independent engineering firm, and independent testing laboratory, a law firm, or, for that matter, a transportation company or an independent warehouse, might have some relation to a product and, although perhaps related to

> the general economic system, they are outside the manufacturing distributing system contemplated by the products liability theories.[102]

In Turlington v. Phillips Petroleum Company[103], the Fifth Circuit Court of Appeals was asked to consider whether the licensor-licensee relationship between Phillips Petroleum (Phillips) and Crown Central Petroleum (Crown Central) was also that of employer-independent contractor.[104] In concluding that Crown Central was not an independent contractor, the court expressly found that "[t]he contract between Phillips and Crown Central was for the sale and lease of certain knowledge and technology, including patents. This agreement did not make Phillips the employer of Crown Central, nor did it make Crown Central an independent contractor."[105] Thus, the court held that the district court did not err in refusing to instruct the jury "on Phillips' strict liability for 'inherently dangerous activities,' a theory of recovery under Texas law."[106]

In Torres v. Goodyear Tire & Rubber Company[107], the Ninth Circuit Court of Appeals addressed the issue of whether strict products liability could be properly asserted against a trademark licensor.[108] Holding that strict products liability may be applied to a trademark licensor in certain circumstance, at least one member of the Ninth Circuit found that patent licensors are distinguishable from trademark licensors for purposes of strict liability.[109] Recognizing that "[t]he application of strict liability to trademark licensors such as Goodyear has been endorsed by various commentators,"[110] Judge Noonan explained that:

> The licensor of a patent is often in a somewhat different position. The licensor's contract is generally nothing more than a contract authorizing the use of an alleged patent, i.e., an invention. The product sold by the licensee is generally not sold under the trade name of the licensor of the patent.

> The general public is not in most instances relying on the licensor. *This is not to say the licensor may not participate to such an extent in the construction and sale of products made pursuant to a patent to justify the imposition of strict liability*.[111]

Because "the comment quoted from Prosser accurately describes the proper common law rule,"[112] Judge Noonan found that "there exists no justification based in theory or precedent for failing to apply [strict liability] to such a licensor."[113]

V.

ANALYSIS

Despite scholarly arguments in support of extending products liability to patent licensors, no court has ever been willing to adopt this theory and only a few have even considered the issue. Two conclusions can be drawn from the lack of judicial precedent on this issue: (1) plaintiffs seeking to recover under a products liability theory are generally uninterested in holding a patent licensor responsible for their injuries; and/or (2) patent licensors generally do not fall within the scope of persons able to be sued for negligence, strict liability, breach of warranty, and misrepresentation and thus are not often sued for products liability. Regardless of the reason for the dearth of case law on the issue, both conclusions support the same proposition: patent holders need not be concerned with the products liability implications of licensing their patent to others.

A. Plaintiffs Are Generally Uninterested in Pursuing Products Liability Claims Against Patent Licensors

Twenty years after it was first suggested by scholars that a patent licensor might be liable for products liability, only a few courts have even cursorily considered the issue.[114] If the patent licensor-patent licensee relationship truly were such a fertile ground for liability, surely more than a handful of

cases discussing the application of the various theories of products liability to patent licensors would exists. That only a small amount of judicial precedent on this issue exists speaks volumes as to the potential viability of a products liability action brought against a patent licensor. Could it be, however, that plaintiffs are simply uninterested in pursuing a products liability action against patent licensors? After all, patent licensors are not always the traditional "deep pocket" usually sought after in such cases. Sovereign immunity, for example, often insulates many patent licensors from tort liability almost entirely.[115] One possible explanation for the lack of case law on this issue, then, is that plaintiffs are generally uninterested in pursuing products liability claims against patent licensors.

B. Patent Licensors Do Not Fall Within the Scope of Persons Liable for Products Liability

A better explanation for the lack of judicial precedent in this area, however, is the fact that patent licensors generally do not fall within the scope of persons able to be sued under the various theories of products liability. Strict products liability, for example, is applicable only to those who are "in the business of selling products for use or consumption."[116] A patent, though, is not a product; it is a "new and useful process, machine, manufacture, of composition of matter, of any new and useful improvement thereof."[117] Moreover, a patent license is nothing more than "a promise not to sue the licensee if he should practice the invention."[118] The argument that patent licensors might be liable for strict products liability because U.S. law requires that patents be treated "as hav[ing] the attributes of personal property"[119], then, is ultimately unconvincing. As such, patent licensors have not often been sued for strict products liability because they fall outside the

scope of those persons able to be sued under that particular theory of products liability.

Despite the fact that Prosser and Keeton have suggested otherwise[120], patent licensors are equally as unlikely to be found liable under a negligence based theory of products liability. The ability to successfully evidence "[a] duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks"[121] is a fundamental requirement in any negligence action.[122] As they generally act "outside [of] the manufacturing distributing system contemplated by the products liability theories"[123], though, patent licensors would rarely owe any such duty to users of a product based upon their licensed patent.[124] It is true, as Justice Enoch suggested in Firestone, that some courts might be willing to find that "[a] designer's duty of ordinary and care and duty to warn derive from the conduct in designing the product."[125] No court to date, however, has been willing to accept this premise. Because of the difficulty a plaintiff faces in successfully evidencing the existence of a duty, patent licensors have not often been sued under a negligence theory of products liability.

For similar reasons, patent licensors are also unlikely to be found liable for products liability based upon either a breach of warranty or misrepresentation theory. Before a plaintiff can recover for breach of warranty, he must first show that a communication was made either through the defendant's own conduct or at law.[126] A plaintiff seeking to recover under the theory of misrepresentation must likewise evidence a "communication of false and material words about a product ...."[127] Patent licensors, though, rarely meet with consumers who purchase the licensee's product. In the absence of such contact, it would be nearly impossible for a patent licensor to

warrant or otherwise make an affirmation about the quality of the product which a consumer is purchasing. What is more, patent licensors are not in a position to make a statement regarding the quality of the licensee's product because they typically are not privy to the process used to manufacture the product. For these reasons, patent licensors have not often been sued for breach of warranty or misrepresentation because they fall outside the scope of those persons able to be sued under these particular theories of products liability.

VI.

CONCLUSION

Despite scholarly arguments to the contrary, patent licensors have little reason to be concerned about products liability. No plaintiff has ever been able to successfully assert a products liability cause of action against a patent licensor. What is more, only a few have even tried. It might be that plaintiffs are generally uninterested in pursuing liability against patent licensors. A better explanation for the dearth of case law on this issue, however, is that patent licensors do not fit within the scope of persons able to be sued for products liability. Regardless of the exact reason why patent licensors have yet to become the next class of defendants in the ever-expanding area of products liability, one thing is certain: patent holders need not be concerned with the products liability implications of licensing their patents to others.

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[1] *See* Cowan, Tort Liability of Patentee Licensors, 64 J. Pat. Off. Soc'y 87, 87 (1982).

[2] *See* Melissa Evans Buss, Products Liability and Intellectual Property Licensors, 27 Wm. Mitchell L. Rev. 299, 316 (2000) (citing Arthur Schwartz, Patents Contingency Fees and United States Products Liability Law, Pat. World, March 1988, 26, 29). Ms. Buss notes that "many commentators have predicted that products liability will eventually extend to patent licensors" because "patent licensors are in positions analogous to trademark licensors."

[3] *See* Firestone Steel Products Co. v. Barajas, 927 S.W.2d 608 (Tex. 1996). Firestone Steel is the only published opinion directly addressing the liability of a patent licensor for products liability.

[4] *See* Mechanical Rubber and Supply Co. v. Caterpillar Tractor Co., 399 N.E.2d 722 (Ill. App. Ct. 1980); Turlington v. Phillips-Petroleum Co., 795 F.2d 434 (5th Cir. 1986); Torres v. Goodyear Tire & Rubber Co., Inc., 786 P.2d 939 (Ariz. 1990).

[5] *See* Firestone Steel, 927 S.W.2d 608 (Tex. 1996).

[6] W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 95, at 677 (5th ed. 1984).

[7] *See* DAVID G. OWEN ET AL., 1 MADDEN AND OWEN ON PRODUCTS LIABILITY § 1.5, at 14-15 (3rd ed. 2000).

[8] RESTATEMENT (SECOND) OF TORTS § 282 (1965).

[9] WILLIAM L. PROSSER, LAW OF TORTS § 30, at 143 (4th ed. 1971).

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] MARSHALL S. SHAPO, THE LAW OF PRODUCTS LIABILITY, ¶ 5.01 at 5-2 (1987).

[15] Keeton, *supra* note 6, § 98 at 693.

[16] *See id.* (explaining that "[a] tort theory based on the dangerousness of conduct is more adaptable to dealing with physical harm to persons and things than that of a contract theory based on the breach of an implied promise and can be applied without so many of the nuances and complexities related to obvious defects and contractual disclaimers that are applicable to claims for damages based on commercial losses and other types of intangible economic loss").

[17] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (1998). Note, however, that many states base strict liability upon the definition articulated by the

Restatement (Second) of Torts. *See* Firestone Steel, *infra* note 76, 927 S.W.2d at 613.

[18] *See* Buss, *supra* note 2, at 304 (citing JAMES A. HENDERSON, JR. & AARON D. TWERSKI, PRODUCTS LIABILITY PROBLEMS AND PROCESSES 73 (3rd. ed. 1997)).

[19] *See*, e.g. William Powers, Jr., A Modest Proposal to Abandon Strict Products Liability, 1991 U. Ill. L. Rev. 639, 642-651 (1991) (recognizing that the strict liability theory of products liability is generally justified for the following reasons: 1) compensation; 2) cost internalization; 3) deterrence; 4) proof problems; and 5) protection of consumer expectations).

[20] Greenman v. Yuba Power Prod., Inc, 377 P.2d 897, 900 (Cal. 1962).

[21] *See* DAVID W. ROBERTSON, ET. AL., CASES AND MATERIALS ON TORTS 539 (3rd ed. 2004); *see also* U.C.C. § 2-313 (2001) (governing express warranties), U.C.C. § 2-314 (2001) (governing implied warranties of merchantability), and U.C.C. § 2-315 (2001) (governing implied warranties of fitness for a particular purpose).

[22] *See* Buss, *supra* note 2, at 305 (citing Louis R. Frumer & Melvin I. FRIEDMAN, PRODUCTS LIABILITY § 2.03 (Nov. 1998)).

[23] *See* OWEN, *supra* note 7, § 3:2 at 79.

[24] *See id.* § 3:1 at 79.

[25] *Id.*

[26] *See id.*; *see also id.* § 3:2, at 79-92 (discussing fraud).

[27] *See id.*; *see also id.* § 3:3, at 92-98 (discussing negligent misrepresentation), § 3:4, at 98-100 (discussing misrepresentation as a violation of statute), and § 3:5, at 100-109 (discussing strict liability for misrepresentation).

[28] *See* Cowan, *supra* note 1, at 91; *see also* Buss, *supra* note 2, at 316.

[29] *See* Dennis R. Kimball, Strict Tort Liability of Inventors for Defective and Dangerous Inventions: The Issue May Be "On the Horizon", 10 Cap. U. L. Rev. 803, 815-17 (1981); *see also* Buss, *supra* note 2, at 316-17.

[30] *See* William T. Vukowich, Implied Warranties In Patent, Know-How and Technical Assistance Licensing Agreements, 64 J. Pat. Off. Soc'y 87, 330-33 (1989); *see also* Buss, *supra* note 2, at 93.

[31] *See* Buss, *supra* note 2, at 317 (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS, § 101 at (5th ed. 1984)).

[32] *See* Cowan, *supra* note 1, at 91; *see also* Buss, *supra* note 2, at 316.

[33] *See id.* at 92.

[34] *See id*; *see also* Buss, *supra* note 2, at 316 As Cowan explains, "Sections 5 and 45 of the Lanham Act require a trademark owner to retain actual control over the nature and quality of the product on which the trademark is used."

[35] *Id.*

[36] *Id.* at 93; *see* Buss, *supra* note 2, at 316 (recognizing Cowan's argument that a jury might reasonably conclude that a licensee is acting on the behalf of a licensor).

[37] *See* Kimball, *supra* note 29; *see also* Buss, *supra* note 2, at 316-17.

[38] *Id.* at 821.

[39] *See Id.* (Noting that in order for a defendant to be found liable under Section 402A, a plaintiff must show, among other things, that the defendant is a in the "business of selling" a "product.")

[40] *Id.*

[41] *Id.*

[42] *Id.* at 821-22 (citing William Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 826-27 (1966)).

[43] *See* Vukowich, *supra* note 30; *see also* Buss, *supra* note 2, at 93.

[44] *Id.* at 343.

[45] *Id.*

[46] *Id.* at 344.

[47] *Id.*

[48] *See* Buss, *supra* note 2, at 317 (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS, § 101 at (5th ed. 1984)).

[49] *See id.* (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS, § 101 at (5th ed. 1984)).

[50] *See id.*

[51] *See* 927 S.W.2d 608 (Tex. 1996).

[52] *See* 399 N.E.2d 722 (Ill. App. Ct. 1980)

[53] *See* 795 F.2d 434 (5th Cir. 1986).

[54] *See* 786 P.2d 939 (Ariz. 1990).

[55] *See* Firestone Steel at 611.

[56] *Id.*

[57] *Id.*

[58] *See id.*

[59] *Id.*

[60] *See id.* 611-12.

[61] *Id.* at 612.

[62] *Id.*

[63] *Id.*

[64] *See id.*

[65] *Id.*

[66] *See id.*

[67] *See id.* at 613.

[68] *Id.* at 615.

[69] *See id.* at 613

[70] *Id.*

[71] *Id.* at 612.

[72] *Id.* at 615.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 618 (Enoch, J. dissenting) (citing Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 591 (Tex. 1986).

[76] *See id.* at 619-20 (Enoch, J. dissenting).

[77] *Id.* at 619 (Enoch, J. dissenting).

[78] *Id.* (Enoch, J. dissenting).

[79] *See* Firestone Steel, 927 S.W.2d at 613-16.

[80] *Id.* at 613 (citing Restatement (Second) of Torts § 402A (1965); Lubbock Mfg. Co. v. Sames, 598 S.W.2d 2d 234, 236 (Tex. 1980); Armstrong Rubber Co. v. Urquidez, 570 S.W.2d 374, 375-76 (Tex. 1978)).

[81] *Id.* (citing Restatement (Second) of Torts § 402A (1965); Lubbock Mfg. Co. v. Sames, 598 S.W.2d 234, 236 (Tex. 1980)).

[82] *Id.*

[83] *Id.*

[84] *See id.*

[85] *Id.*

[86] *See id.* at 613-14.

[87] *Id.* at 613 (citing Piscitello v. Hobart Corp., 799 F.Supp. 224, 225-26 (D. Mass. 1992); Snyder v. ISC Aloys, Ltd., 772 F.Supp. 244, 250 n. 4 (W.D. Pa. 1991)).

[88] *Id.* (citing Zanzig v. H.P.M. Corp., 480 N.E.2d 1204, 1208 (1985); Talley v. City Tank Corp., 279 S.E.2d 264, 269 (1981); Chemical Design v. American Standard, 847 S.W.2d 488, 490-91 (Mo. Ct. App. 1993)).

[89] *Id.* at 614 (citing 1A LOUIS R. FRUMER AND MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 5.15 (1995); 1M M. STUART MADDEN, PRODUCTS LIABILITY § 6.17 (1998)).

[90] *Id.* (citing Mechanical Rubber and Supply Co. v. Caterpillar Tractor Co., 399 N.E.2d 722, 723-24 (1980); Harmon v. National Auto. Parts Ass'n, 720 F.Supp. 79, 81 (N.D. Miss. 1989); Ogg v. City of Springfield, 458 N.E.2d 1331, 1336 (1984); Harrison v. ITT Corp., 198 A.D.2d 50 (1993)).

[91] *Id.* at 616.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *See id.*

[96] *Id.*

[97] *Id.* (citing Walton v. Harnischfeger, 796 S.W.2d 225, 226 (Tex. App. 1990); Baughman v. General Motors Corp., 780 F.2d 1131, 1133 (4th Cir. 1986)).

[98] *See id.*

[99] *See* Mechanical Rubber and Supply Co. v. Caterpillar Tractor Co., 399 N.E.2d 722 (Ill. App. Ct. 1980); Turlington v. Phillips-Petroleum Co., 795 F.2d 434 (5th Cir. 1986); Torres v. Goodyear Tire & Rubber Co., Inc., 786 P.2d 939 (Ariz. 1990).

[100] *See* 399 N.E.2d 722 (Ill. App. Ct. 1980).

[101] *Id.* at 723.

[102] *Id.* at 723-24.

[103] *See* 795 F.2d 434 (5th Cir. 1986).

[104] *See id.* 444-45.

[105] *Id.* at 445.

[106] *Id.* at 444.

[107] *See* 786 P.2d 939 (Ariz. 1990).

[108] *See id.* at 752.

[109] *See id.* at 755-56 (Noonan, J. concurring).

[110] *See id.* at 755 (Noonan, J. concurring).

[111] *Id.* at 756 (citing PROSSER AND KEETON ON THE LAW OF TORTS § 100 (5th ed. 1984) ; 2 L. FRUMER AND M. FREEDMAN, PRODUCTS LIABILITY § 3.03[4] (1988)).

[112] *Id.*

[113] *Id.*

[114] *See*, e.g., Firestone Steel Products Co. v. Barajas, 927 S.W.2d 608 (Tex. 1996); Mechanical Rubber and Supply Co. v. Caterpillar Tractor Co., 399 N.E.2d 722 (Ill. App. Ct. 1980); Turlington v. Phillips-Petroleum Co., 795 F.2d 434 (5th Cir. 1986); Torres v. Goodyear Tire & Rubber Co., Inc., 786 P.2d 939 (Ariz. 1990).

[115] Take, for example, the case of a state university patent licensor. Although sovereign immunity may not eliminate any recover against the university, it would significantly reduce the amount of damages able to be recovered considerably because of state statutes in nearly every state capping the amount of damages able to be recovered against the state.

[116] Firestone Steel, 927 S.W.2d at 613.

[117] 35 U.S.C. § 101 (1999).

[118] Buss, *supra* note 2, at 323. (citing 35 U.S.C. § 154(a)(1) (1999) for the proposition that "a U.S. patent does not carry with it the right to use, but rather to exclude others from making, using, offering for sale, and selling the invention throughout the United States").

[119] 35 U.S.C. § 261 (1999).

[120] *See* Buss, *supra* note 44.

[121] PROSSER, *supra* note 10.

[122] *See id.*

[123] Mechanical Rubber, 399 N.E.2d at 724.

[124] *See id.*

[125] Firestone Steel, 927 S.W.2d at 618 (Enoch, J. dissenting).

[126] *See* Buss, *supra* note 22.

[127] Owen, *supra* note 23.