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Recommended Citation

Charles E. Cantú, *The Recycling, Dismantling, and Destruction of Goods as a Foreseeable Use Under Section 402A of the Restatement (Second) of Torts*, 46 *Ala. L. Rev.* 81 (1994).

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THE RECYCLING, DISMANTLING, AND DESTRUCTION
OF GOODS AS A FORESEEABLE USE UNDER
SECTION 402A OF THE RESTATEMENT
(SECOND) OF TORTS

*Charles E. Cantu**

I. INTRODUCTION

The past thirty years have witnessed the significant expansion¹ and transformation² of products liability law. Despite

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The author would like to express his appreciation to his three research assistants: D. Todd Smith for his excellent assistance in editing; Scott Allen Carlson and Rob G. Dickinson for their extensive help in writing the footnotes; and to all three for the ideas that they gave me during the writing of this Article.

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1. The origin of strict products liability can be traced to the 1963 California Supreme Court decision in *Greenman v. Yuba Power Products*, 377 P.2d 897, 901 (Cal. 1963). In 1965, the American Law Institute adopted § 402A of the Restatement (Second) of Torts, which embraced the holding in *Greenman* that a strict liability cause of action is available in litigation involving injuries caused by defective products. See RESTATEMENT (SECOND) OF TORTS § 402A (1965). The consequences of this innovative theory were explosive. See William P. Bivins, Jr., *The Products Liability Crisis: Modest Proposals for Legislative Reform*, 11 AKRON L. REV. 595, 598 (1978) (describing products liability reform as a "volatile" area of law); see also John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 825 (1973) (recognizing that strict liability for injury has "swept" the area of products liability). See generally W. Kip Viscusi, *The Determinants of the Disposition of Product Liability Claims and Compensation for Bodily Injury*, 15 J. LEGAL STUD. 321, 326-27 (1986) (finding statistical support for the proposition that products liability suits outnumber other types of tort actions); Michael Hoenig, *Products Liability Problems and Proposed Reforms*, 1977 INS. L.J. 213, 220 (noting that "the modern era of products liability has witnessed a tremendous growth of claims involving a wide diversity of products and factual circumstances").

2. See William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 802-05 (1966) (detailing explosion in field of products liability law and noting that strict liability is historically linked to law of animals, abnormally dangerous activities, nuisance, worker's compensation, libel, misrepresentation, and respondeat superior); see also Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About*

some initial confusion as to the proper interpretation and application of Section 402A of the Restatement (Second) of Torts,³ the combined efforts of various jurists and legal commentators have settled a considerable number of these issues.⁴ Some problems remain, however, that require further investigation.⁵ Many

Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4, 69 (1983) (finding contemporary increase in litigation to be caused by changing social conditions such as greater knowledge of injury causation and better dissemination of such knowledge to consuming public).

3. Section 402A 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 relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965). The innovative theory advanced by the *Greenman* court and adopted by the Restatement led to some initial confusion as the courts were not sure how to apply some of the novel provisions of § 402A. See U.S. DEPT OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REP., VOL. I, at 3-6 (1978) (noting wide disparity in courts' interpretation of the legal theories of recovery available in § 402A). Much of the indecision that initially plagued the application of § 402A has now been settled, and the section continues to be a means of compensation for injured plaintiffs. See, e.g., *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113, 118 (Miss. 1966) (concluding that § 402A states appropriate standards of responsibility for manufacturer), *cert. denied*, 386 U.S. 912 (1967).

4. See *Turner v. General Motors Corp.*, 584 S.W.2d 844, 849-51 (Tex. 1979) (defining "defect" and "unreasonably dangerous" in design defect cases); *Gonzales v. Caterpillar Tractor Co.*, 571 S.W.2d 867, 870 (Tex. 1978) (recognizing that strict liability involves determination of whether a product is defective). Now that almost three decades have passed since the adoption of § 402A, the concept and a majority of its elements have been clearly established and universally accepted. See, e.g., *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865-66 (1986) (recognizing strict products liability as part of general maritime law); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 789-90 (Tex. 1967) (adopting § 402A strict liability); *Morris v. Adolph Coors Co.*, 735 S.W.2d 578, 582 (Tex. Ct. App. 1987) (noting that strict products liability was adopted in Texas in 1967 and has been applied since that date).

5. See generally Charles E. Cantu, *A New Look at an Old Conundrum: The Determinative Test for the Hybrid Sales/Service Transaction Under Section 402A of the Restatement (Second) of Torts*, 45 ARK. L. REV. 913, 914-18 (1993) (noting that § 402A does not apply to service transactions, but expressing special concern for sales/service transactions and determinative test used to ascertain whether § 402A

of these problems were not contemplated at the time of the Section's adoption. One of these problem areas involves the allocation of liability for injuries resulting from the destruction, dismantling, and recycling of products whose useful lives have come to an end.

This Article considers the current state of the law in this area and, by necessity, presents an alternative to both the reasoning and outcome of cases that affect this area of the law. As we prepare to enter the twenty-first century, America and the world face the end of an era in which we could be described as a "disposable society."⁶ Because we can no longer afford the luxury of burgeoning landfills, we must learn to reclaim and extend the use of our natural resources.⁷ Current conditions necessarily require the recycling of goods which cease to be useful in their originally manufactured form.⁸ Should the recycling process result in injury to the earth, the environment,⁹ or to individuals

should be applied to particular transaction); Charles E. Cantu, *The Illusive Meaning of the Term "Product" Under Section 402A of the Restatement (Second) of Torts*, 44 OKLA. L. REV. 635, 638 (1991) (finding that in interpreting word "product," courts have consistently rejected dictionary definitions and instead used policy reasons underlying strict liability as a method of definition). The use of the underlying policy reasons has led to unusual results. For example, services, real estate, blood, electricity, component parts, water, computer software, and ideas have been labeled as products in one form or another. *Id.* at 638-59. In some cases, § 402A has been interpreted in a manner inconsistent with the American Law Institute's original intent. Charles E. Cantu, *Reflections on Section 402A of the Restatement (Second) of Torts: A Mirror Crack'd*, 25 GONZ. L. REV. 205, 211 (1989-90) (noting that § 402A has not always been interpreted as originally intended).

6. See Roger D. Wynne, Note, *Defining "Green": Toward Regulation of Environmental Marketing Claims*, 24 U. MICH. J.L. REF. 785, 785-86 (1991) (reporting that consumers are becoming environmentally conscious shoppers who seek to purchase products whose disposal will not contaminate environment). The awareness of the impact on the environment from disposable goods has fostered a phenomenon known as "green consumerism." *Id.*

7. Lack of landfill space is now considered to be a crisis situation in the United States. See OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, *FACING AMERICA'S TRASH: WHAT NEXT FOR MUNICIPAL SOLID WASTE?* 271-75 (1989) (reporting EPA's estimate that in 20 years 80% of all American landfills will be closed).

8. See Wynne, *supra* note 6, at 786 (noting that manufacturers are converting many products and their packaging, including recyclable products, to forms considered to be "environmentally friendly"); Denis Hayes, *Feeling Green About "Green,"* ADVERTISING AGE, Jan. 29, 1991, at 46 (finding trend by manufacturers to minimize environmental impact by making products that are durable, reusable, repairable, and recyclable).

9. See *Kalik v. Allis-Chalmers Corp.*, 658 F. Supp. 631, 634 (W.D. Pa. 1987)

engaged in the recycling procedure itself,¹⁰ then the law must hold someone accountable. Liability is most logically and appropriately placed on the original product manufacturer, especially in instances where the damaging event is a foreseeable one.¹¹

(discussing environmental damage by PCB-contaminated oil that leaked or spilled during course of storage, handling, and dismantling of defendant's electrical components); *High v. Westinghouse Elec. Corp.*, 559 So. 2d 227, 227-28 (Fla. Dist. Ct. App. 1989) (indicating plaintiff's dismantling procedure included dumping onto ground dielectric fluid contained in defendant's transformers), *approved in part and quashed in part*, 610 So. 2d 1259 (Fla. 1992); *cf.* 42 U.S.C.A. § 9659 (West Supp. 1994) (impliedly granting a private cause of action for cost of cleaning up toxic waste); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982) (noting Congressional intent to hasten cleanup of hazardous waste disposal sites).

10. *See Boscarino v. Convenience Marine Products, Inc.*, 817 F. Supp. 116, 117-18 (S.D. Fla. 1993) (holding injury to plaintiff obtained during process of dismantling product intended for disposal was not a reasonably foreseeable use of the defendant's product and, therefore, summary judgment ruling was appropriate); *Wingett v. Teledyne Indus.*, 479 N.E.2d 51, 56 (Ind. 1985) (finding injury to plaintiff during demolition of a product not covered under § 402A because activity was not a reasonably foreseeable use of product); *Johnson v. Murph Metals, Inc.*, 562 F. Supp. 246, 249-50 (N.D. Tex. 1983) (recognizing that injury to plaintiff was due to recycling of defendant's product, but that plaintiffs were neither "users" of defendant's products under § 402A nor persons for whose use the products were supplied under § 388).

11. *See White v. Amoco Oil Co.*, 835 F.2d 1113, 1118 (5th Cir. 1988) (extending strict liability and negligence to foreseeable product uses and even to foreseeable misuses); *Merriweather v. E.W. Bliss Co.*, 636 F.2d 42, 45 (3d Cir. 1980) (allowing foreseeability question to proceed to jury since manufacturer should be liable for subsequent alterations found to be reasonably foreseeable); *Scott v. Allen Bradley Co.*, 362 N.W.2d 734, 738 (Mich. 1984) (holding that an intervening act will not relieve a manufacturer's liability if act was reasonably foreseeable); Michael B. Gallub, *Limiting the Manufacturer's Duty for Subsequent Product Alteration: Three Steps to a Rational Approach*, 16 HOFSTRA L. REV. 361, 404 n.242 (1988) (noting that commentators have stated that "the foreseeability approach to substantial change is vital in the determination of design defects that render a product unsafe in normal use" and that "foreseeability of product's uses establishes the parameters of its manufacturer's responsibility").

II. CURRENT STATE OF THE LAW

At present, there are five cases which address this particular issue.¹² The rule derived from each is that a manufacturer's liability does not extend to injuries resulting from the destruction, dismantling, or recycling of products.¹³ The rationale behind this rule is twofold: First, individuals engaged in these types of procedures are not "users" for purposes of the Restatement.¹⁴ Second, these processes do not constitute foreseeable

12. See *Boscarino*, 817 F. Supp. at 117 (considering plaintiffs' claims that "intended use" of product under § 402A includes any use reasonably foreseeable to manufacturer and that dismantling and disposal of product was reasonably foreseeable); *High*, 559 So. 2d at 227 (noting that plaintiff sought recovery under strict products liability for injuries resulting from exposure to hazardous material contained in junk transformers), *modified*, 610 So. 2d 1259 (Fla. 1992); *Kalik*, 658 F. Supp. at 634 (identifying plaintiffs' claim that manufacturers of electrical components containing hazardous substance are liable under § 402A for damages resulting from scrap recovery process); *Wingett*, 479 N.E.2d at 55-56 (recognizing appellant's assertion that dismantling or demolition of product should fall within meaning of "use" under strict products liability doctrine); *Johnson*, 562 F. Supp. at 248 (addressing plaintiffs' contention that defendant battery manufacturers are responsible under strict products liability for injuries resulting from process of smelting lead obtained from dismantled automotive batteries).

13. See *Boscarino*, 817 F. Supp. at 117 (agreeing that dismantling a product is not an intended use which gives rise to a strict liability claim); *High*, 559 So. 2d at 229 (affirming trial court's grant of summary judgment for defendant upon holding as matter of law that salvaging junk components of manufacturer's product was not foreseeable product use, nor was plaintiff intended user); *Kalik*, 658 F. Supp. at 635-36 (dismissing claim for damages on basis that dismantling and processing of junk electrical components did not comprise reasonably foreseeable use of product); *Wingett*, 479 N.E.2d at 56 (holding that manufacturer's liability for product placed in stream of commerce does not extend to injuries resulting from demolition of that product); *Johnson*, 562 F. Supp. at 249-50 (granting defendants' motion for summary judgment on ground that smelting of lead previously contained in automotive batteries manufactured by defendant did not constitute "use" of product under Restatement).

14. See *High*, 559 So. 2d at 229 (declining to classify plaintiff as "user" under meaning of Restatement § 402A); *Johnson*, 562 F. Supp. at 249-50 (refusing to define plaintiffs involved in smelting process as "users" of defendants' automotive batteries). Although the *High* and *Johnson* courts narrowly defined "user" as a person who has contact with the actual product rather than its toxic byproducts, historically "user" has been broadly construed. See *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973) (finding that workers who made goods out of asbestos were "users" of asbestos and therefore fell under § 402A), *cert. denied*, 419 U.S. 869 (1974); *Otis Elevator Co. v. Wood*, 436 S.W.2d 324 (Tex. 1968) (holding that individual leaning across escalator to render aid to fallen child was "user" of product). See generally Nicolas P. Terry, *Stricter Products Liability*, 52 MO. L. REV.

product uses.¹⁵ Consequently, the few courts which have considered this issue have held that the provisions of Section 402A do not apply.¹⁶ As a result of this reasoning, manufacturers escape responsibility for products which either contaminate the earth¹⁷ or cause individual injury¹⁸ at the reclamation stage of their existence. In many instances, these harms are inflicted, not because the product is an inherently dangerous one, but instead because the manufacturer has failed to issue a simple warning to the user of the product.¹⁹

1, 40-45 (1987) (discussing essential decisional criteria of foreseeable use, product misuse, and foreseeable user when assessing whether product is unreasonably dangerous and manufacturer is subject to liability).

15. See *High*, 559 So. 2d at 229 (holding that dismantling of electrical transformer to salvage contents did not comprise reasonably foreseeable use of product as matter of law); *Kalik*, 658 F. Supp. at 635 (concluding as matter of law that "the dismantling and processing of junk electrical components was not a reasonably foreseeable use of [defendant's] product"); *Wingett*, 479 N.E.2d at 56 (finding that removal of ductwork did not constitute foreseeable use). A product's legal defectiveness is "judged within the context of its utilization" or through "its reasonably anticipated (or foreseeable) use." Terry, *supra* note 14, at 41. See also *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1036-37 (Or. 1974); *Nesselrode v. Executive Beechcraft*, 707 S.W.2d 371, 375 n.4 (Mo. 1986) (en banc). The inquiry into whether liability exists turns on the meaning of "foreseeable," which has been broadly as well as narrowly defined. Terry, *supra* note 14, at 42. "At the very least, something is foreseeable if it has occurred before or if someone of relevance predicted that it would occur" during the manufacturer's intended use. *Id.* See *Jackson v. Ray Kruse Constr. Co.*, 708 S.W.2d 664, 670 (Mo. 1986) (Higgins, C.J., concurring). When foreseeability is broadly defined, it "does not require that prior identical or even similar events must have occurred." *Becker v. IRM Corp.*, 698 P.2d 116, 129 (Cal. 1985) (en banc) (Bird, C.J., concurring).

16. See *High*, 559 So. 2d at 229 (holding § 402A to be inapplicable to plaintiff's claim); *Kalik*, 658 F. Supp. at 634-36 (dismissing plaintiff's attempt to recover damages under § 402A for injuries resulting from dismantling of junk electrical components); *Wingett*, 479 N.E.2d at 55-56 (affirming trial court's grant of summary judgment to defendants on partial basis that they owed no duty to injured party under strict products liability law); *Johnson*, 562 F. Supp. at 249-50 (refusing to apply § 402A to plaintiffs' claims).

17. See *High*, 559 So. 2d at 229 (exonerating manufacturer from liability when its product's useful life had ceased); *Kalik*, 658 F. Supp. at 635-36 (holding that dismantling junk electrical components was not "reasonably foreseeable" and that defendant was not liable for damages caused by PCB-contaminated oil that spilled onto plaintiff's land).

18. See *Wingett*, 479 N.E.2d at 55-56 (refusing to compensate plaintiffs for injuries which resulted from the demolition of manufacturer's product); *Johnson*, 562 F. Supp. at 249-50 (holding that employees contaminated by lead during recycling process were not "users" of products under the Restatement).

19. See *Wingett*, 479 N.E.2d at 55-56 (holding that dismantling of product was

In the first case, *Johnson v. Murph Metals, Inc.*,²⁰ which was decided over a decade ago, employees of various lead smelting companies brought suit in an attempt to recover damages for injuries which resulted from their exposure to toxic fumes and particulants.²¹ These materials were emitted during the process of smelting lead from dismantled automotive batteries which were originally manufactured by the defendants.²² The plaintiffs stipulated that the batteries did not injure them while the batteries were intact or while the batteries were being destroyed.²³ Instead, the alleged injuries were sustained while the lead portion of the previously dismantled batteries was being transformed into an injurious substance.²⁴ Under these circumstances, the court found that the plaintiffs had not come in contact with the defendants' product, which was the intact automotive battery; rather, it was apparent that by the time the harm occurred, the defendants' product had ceased to exist.²⁵ Al-

not foreseeable use and, therefore, manufacturer did not have duty to warn); *Johnson*, 562 F. Supp. at 249-50 (stating that manufacturer had no duty to warn of potential danger of lead contamination involved in recycling automobile batteries because recycling was not foreseeable use of product). The Restatement does not mention warnings or directions for use; the language of comment j is pertinent to the issue of when the duty to warn arises. RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965). Comment j states that "[i]n order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use." *Id.*; cf. *Boyl v. California Chem. Co.*, 221 F. Supp. 669 (D. Or. 1963) (distinguishing between instructions which are provided to assure effective use and warnings which are provided to assure safe use). *But see Mason v. Ashland Exploration, Inc.*, 965 F.2d 1421 (7th Cir. 1992) (refusing to extend liability for failure to warn when danger was obvious).

20. 562 F. Supp. 246 (N.D. Tex. 1983).

21. *Johnson*, 562 F. Supp. at 248.

22. *Id.* The court cited several stipulations from the record concerning the recycling of automotive batteries. *Id.* The court noted that batteries contain lead which is normally an inert material that does not result in injuries in an intact form. *Id.* Because lead is a fairly rare metal, the batteries are resold for recycling after their useful life has ended. *Id.* The initial step in the recycling process is to destroy the battery; however, the destruction of the battery does not generate any significant level of lead fumes or dust. *Johnson*, 562 F. Supp. at 249. The types of fumes and dust that are damaging to humans, and those alleged by the plaintiffs to have caused their injuries, occur only after the extraction of the lead from the destroyed battery and the subsequent introduction of that lead into the smelting process. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* The court stated that "[p]laintiffs did not even come in contact with

though the court conceded that the term "user" had been broadly construed in the past,²⁶ the court reasoned that some limits must be imposed²⁷ and consequently held as a matter of law that the plaintiffs were neither users "nor persons for whose use the products are supplied."²⁸ Because it refused to classify the plaintiffs as users in this case, the court concluded that liability under Section 402A did not apply.²⁹

From the peculiar circumstances of this case, the court's conclusion was correct that when the plaintiffs sustained their alleged injuries, the product was no longer in existence, nor was it in the process of being recycled.³⁰ Instead, after the commodity had been totally dismantled, a part thereof had been removed and was in the process of being transformed.³¹ The lead, which was a part of the original battery, was being salvaged.³² It would be untenable to hold that the plaintiffs were users in this scenario. The cases that followed *Johnson*, however, are not so logical. Their error resulted from the misapplication of the rule of this case.

The second case, *Wingett v. Teledyne Industries*,³³ was decided two years after *Johnson*.³⁴ The plaintiff in *Wingett*, an

[d]efendants' product; [d]efendants' product had ceased to exist" at time of plaintiffs' injuries. *Johnson*, 562 F. Supp. at 249.

26. *Johnson*, 562 F. Supp. at 249 (conceding existence of prior broad construction of "user" as contained in § 402A). In support of this observation, the court cited *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973) (finding that workers producing goods from asbestos are "users" of asbestos), *cert. denied*, 419 U.S. 869 (1974), and *Otis Elevator Co. v. Wood*, 436 S.W.2d 324 (Tex. 1968) (holding that person leaning across moving escalator to save fallen child is a "user" of escalator). *Johnson*, 562 F. Supp. at 249. The court noted that "even an accidental contact with the product, after it has passed through many hands, can constitute 'use' of the product." *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 402A cmt. 1 (1965) (providing that protection extends to all parties who will be affected by product's ultimate use). *But see Oman v. Johns-Manville Corp.*, 764 F.2d 224, 233 (4th Cir. 1985) (stating that manufacturer's duty to warn ultimate user is satisfied if sophisticated employer is aware of dangers involved in use of product).

27. *Johnson*, 562 F. Supp. at 249.

28. *Id.* at 250 (refusing to apply products liability concept of "user" in case at bar).

29. *Id.*

30. *Id.* at 249.

31. *Id.*

32. *Johnson*, 562 F. Supp. at 248.

33. 479 N.E.2d 51 (Ind. 1985).

34. *Johnson* was decided on April 8, 1983. *Johnson*, 562 F. Supp. at 246.

employee of an independent contractor, was injured while removing ductwork which had been manufactured and sold by the defendant.³⁵ The ductwork, which was to be replaced by a new reclamation system, was approximately thirty inches in diameter, made of half-inch gauge steel, and connected at the end of each segment by an iron collar.³⁶ It was located "twenty-five to thirty feet above the [ground] floor, was supported by aluminum hangers attached to the . . . ceiling . . . at six to eight-foot intervals."³⁷ The removal procedure utilized, which the plaintiff alleged was the standard procedure in the trade, required the plaintiff to crawl onto a section of the ductwork, wrap a cable around it, and attach the cable to a crane, which would then support the ductwork as well as the plaintiff while he cut the hangers with a torch.³⁸ The injury took place when the section of ductwork upon which the plaintiff was working fell to the floor after the plaintiff cut the second of two hangers supporting that segment.³⁹ The collapse allegedly occurred because that particular segment was supported by an eighth-inch sheet metal band, screws, and two clamps instead of the standard iron collar.⁴⁰ The plaintiff subsequently filed suit, alleging that in addition to defendant's negligence, this condition rendered the product defective under strict products liability law.⁴¹

The court found for the defendants, reasoning that since the plaintiff was engaged in the process of dismantling the product at the time of his injury, he was engaged in an unforeseeable

Wingett was decided on June 19, 1985. *Wingett*, 479 N.E.2d at 51.

35. *Wingett*, 479 N.E.2d at 53.

36. *Id.*

37. *Id.*

38. *Id.* at 53-54, 56 (describing removal method used by plaintiff and recognizing plaintiff's argument, which was accepted by court of appeals as sufficient to raise fact issue that procedure was trade standard).

39. *Id.* at 53.

40. *Wingett*, 479 N.E.2d at 53.

41. *Id.* at 53-55 (describing nature of plaintiff's allegations and his claim that because pipe was supported by one-eighth inch sheet metal band, screws, and two clamps instead of the standard iron collar, the product was defective). See generally *McJunkin v. Kaufman & Broad Home Sys.*, 748 P.2d 910 (Mont. 1987) (determining defectiveness by demonstrating that the product is unsuitable for its intended foreseeable purpose); cf. *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204, 207 (N.Y. 1983) (noting that the standard for defectiveness is whether a product is not reasonably safe as designed).

use of the product.⁴² Although the court recognized that the issue of foreseeability of use is generally a question of fact for the jury, it held as a matter of law that the dismantling and/or demolition of the ductwork was not foreseeable notwithstanding the plaintiff's allegation that he had employed the existing standard trade procedure for ductwork removal.⁴³ The court concluded that because the activity was unforeseeable, the defendants owed no duty to warn the plaintiff of any risks related to the removal process.⁴⁴ In so finding, the court issued the following blanket statement: "We hold that a manufacturer's potential liability for products placed in the stream of commerce does not extend to the demolition of the product."⁴⁵

The dissent, in contrast, took note of the plaintiff's allegation that "[t]here is a standard method in the trade for removing ductwork of this type."⁴⁶ "If this is so," the dissent stated, "then

42. See *Wingett*, 479 N.E.2d at 56 (vacating court of appeals' ruling and affirming trial court's grant of summary judgment on grounds that defendants had no duty to warn plaintiff because risk was not reasonably foreseeable). *But see* *Hale Farms, Inc. v. American Cyanamid Co.*, 580 So. 2d 684, 688 (La. Ct. App. 1991) (holding that simply because product is being used in a manner that is not specified on product label or in instructions does not mean that use is unforeseeable or constitutes misuse); *Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145, 1156-57 (Ind. Ct. App. 1990) (holding that product misuse will not relieve a manufacturer of liability unless the intervening acts could not have been reasonably foreseen by the defendant).

43. *Wingett*, 479 N.E.2d at 56.

44. *Id.* In the useful expression of one court, the requirement that the possibility of injury be reasonably foreseeable impels the examination of "whether it was reasonably foreseeable to the manufacturer that the product would be unreasonably dangerous if distributed without a warning on the label and, if so, whether the manufacturer supplied the warning that a reasonably prudent manufacturer would have supplied." *Anderson v. Klix Chem. Co.*, 472 P.2d 806, 808 (Or. 1970); *see, e.g.*, *Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, 496 N.W.2d 247, 252 (Iowa 1993) (acknowledging that reasonable foreseeability triggers obligation to warn of product danger); *Sperry v. Bauermeister, Inc.*, 4 F.3d 596, 597-98 (8th Cir. 1993) (indicating that recovery in Missouri is dependent upon plaintiff proving product was used in reasonably anticipated manner); *Featherall v. Firestone Tire & Rubber Co.*, 252 S.E.2d 358, 367 (Va. 1979) (finding that manufacturer has no duty to warn when product is used in unlikely, unexpected, or unforeseeable manner); *see also* M. Stuart Madden, *The Duty to Warn in Products Liability: Contours and Criticism*, 89 W. VA. L. REV. 221, 244 & n.81 (1987) (stating that majority of jurisdictions hold that in strict liability a seller is under a duty to warn of only those dangers that are reasonably foreseeable).

45. *Wingett*, 479 N.E.2d at 56.

46. *Id.* (DeBruler, J., dissenting).

the designer and constructor of [the ductwork] have a legal duty to factor the employment of that method of removal into its design and construction."⁴⁷ By force, the foreseeability of this type of use would require the manufacturer to issue a warning, which in turn would prevent injury to anyone engaged in the dismantling of the product.

Every first-year law student knows that problems wherein reasonable minds would differ are defined as questions of fact for the jury.⁴⁸ If the injured employee in *Wingett* was in fact following the generally accepted trade practice for ductwork removal, it would appear that the manufacturer knew, or at least should have known, that this involvement with the product would eventually take place. Such knowledge on the manufacturer's part would necessarily present a foreseeable use issue appropriate for jury consideration. In this case, however, the court elected to rule as a matter of law that the event was not foreseeable, and as a result the defendants were not held liable for their failure to warn of the danger.⁴⁹ As we shall see, the illogical reasoning of this decision, along with the rule stated in *Johnson*,⁵⁰ is responsible for the current state of the law.

The third case, *Kalik v. Allis-Chalmers Corp.*,⁵¹ makes this fact clear. In that case, the plaintiffs operated a scrap metal establishment.⁵² During the normal course of business, various junk electrical components containing polychlorinated biphenyls (PCBs) were purchased, stored, dismantled, and subsequently

47. *Id.* (noting that allegation of trade standard was supported by plaintiff's evidence).

48. See, e.g., *Wingett*, 479 N.E.2d at 56 (stating that foreseeability is generally question of fact for jury); *Sheldon v. West Bend Equip. Corp.*, 718 F.2d 603, 608 (3d Cir. 1983) (holding that whether plaintiffs' use of product is foreseeable is a question of fact for jury); *Kalik v. Allis-Chalmers Corp.*, 658 F. Supp. 631, 635 (W.D. Pa. 1987) (asserting that whether particular use of product is foreseeable by manufacturer is generally a question of fact for jury); *Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928) (indicating that it is question of fact for jury when reasonable minds could disagree).

49. *Wingett*, 479 N.E.2d at 56.

50. *Johnson v. Murph Metals, Inc.*, 562 F. Supp. 246, 249-50 (N.D. Tex. 1983) (stating that even accidental contact with a product can constitute "use" of the product).

51. 658 F. Supp. 631 (W.D. Pa. 1987).

52. *Kalik*, 658 F. Supp. at 633.

processed for scrap.⁵³ The alleged injury occurred when PCB-contaminated oil spilled or leaked onto the site and dioxins, produced by the burning of contaminated materials in a furnace, polluted the surrounding area.⁵⁴ The plaintiffs brought suit to recover damages related to the costs of cleaning up the site, for injuries to the site, and for injuries to the business.⁵⁵ The complaint identified General Electric as one of the defendants on the basis that it had manufactured some of the electrical components that contained PCBs.⁵⁶

In its defense, General Electric specifically alleged that "it manufactured *new* electrical components, but that [plaintiff] dealt in *junk*."⁵⁷ General Electric contended that since its product⁵⁸ had been substantially altered,⁵⁹ the plaintiff was not a user⁶⁰ of that product and therefore was not afforded protection

53. *Id.* at 634.

54. *Id.*

55. *Id.* (The United States Environmental Protection Agency (EPA) spent \$1.9 million and the plaintiffs spent \$22,000 to remove the contaminated oil during clean-up of the site.).

56. *Kalik*, 658 F. Supp. at 634.

57. *Id.*

58. See Charles E. Cantu, *Twenty-Five Years of Strict Product Liability Law: The Transformation and Present Meaning of Section 402A*, 25 ST. MARY'S L.J. 327, 331-33 (1993) (discussing evolution of term "product"). See generally Scott G. Night, *Products Liability: Component Part Manufacturer's Liability For Design and Warning Defects*, 54 J. AIR L. & COM. 215, 219 n.13 (1988) (noting that original concept of strict liability was applied to situations involving sale of food, but courts have since extended doctrine to all "products").

59. See *Soler v. Castmaster, Div. of H.P.M. Corp.*, 484 A.2d 1225, 1230 (N.J. 1984) (stating that a change is not "substantial" unless it relates to the safety of the product); *Hiller v. Kawasaki Motors Corp.*, 671 P.2d 369, 372-73 (Alaska 1983) (holding that the alteration of the product after it leaves the manufacturer removes manufacturer's liability because no "defect" existed at the time of manufacture); *Kuisis v. Baldwin-Lima-Hamilton Corp.*, 319 A.2d 914, 922 n.15 (Pa. 1974) (noting that some courts have held that alterations made after the product has left the control of the manufacturer are beyond the "substantial change" language of the Restatement).

60. See *Aller v. Rodgers Mach. Mfg. Co.*, 268 N.W.2d 830 (Iowa 1978); see generally RESTATEMENT (SECOND) OF TORTS § 402A, cmt. 1 (1965) (stating that "users" include those passively enjoying benefit of product, as well as those performing work on product); *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 512 (5th Cir. 1984) (explaining that "users" include those who perform work on product); *Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519, 529 (Tex. Civ. App. 1979) (determining whether plaintiff is "user" of product requires court to first define product at issue); Cantu, *supra* note 58, at 341-42 (discussing expansion of concept of "user" to include third parties).

under Section 402A of the Restatement (Second) of Torts.⁶¹ As the court explained, the essence of this defense was that the plaintiff's use of the product was not reasonably foreseeable by the defendant.⁶² The court concluded that it was not foreseeable, reasoning that in order to be held liable under strict products liability law, a manufacturer must fail to ensure that its product is safe for both its intended use and for any foreseeable uses.⁶³ As previously mentioned, this issue generally poses a question of fact for the jury.⁶⁴ In this case, however, the court relied upon the established precedent, citing both *Johnson*⁶⁵ and *Wingett*⁶⁶ for the proposition that neither recycling of a product after it has been dismantled, nor its destruction in a recycling process, is reasonably foreseeable to the manufacturer.⁶⁷ Since the plaintiff had alleged that the injuries occurred during the course of storing, handling, dismantling, and pro-

61. *Kalik v. Allis-Chalmers Corp.*, 658 F. Supp. 631, 634 (W.D. Pa. 1987).

62. *Id.*

63. *Id.* at 634-35. The court noted that under § 402A a product is defective if it contains a condition or lacks an element which makes it unsafe for its intended use. *Id.* at 634. The court also noted that "intended use" is defined as any use of the product which is reasonably foreseeable to the manufacturer. *Id.* at 635; see *White v. Amoco Oil Co.*, 835 F.2d 1113, 1118 (5th Cir. 1988) (extending strict liability and negligence to foreseeable product uses and even to misuse); *Scott v. Allen Bradley Co.*, 362 N.W.2d 734, 738 (Mich. Ct. App. 1984) (holding that intervening act will not relieve a manufacturer's liability if the act was reasonably foreseeable); *Gallub, supra* note 11, at 404 n.242 (noting that commentators have stated that foreseeability approach to substantial change is vital to determination of design defects that render product unsafe in normal use, and that foreseeability of product's uses establishes the parameters of manufacturer's responsibility).

64. *Kalik*, 658 F. Supp. at 635 (stating that whether plaintiff's use of product was reasonably foreseeable to manufacturer generally raises question of fact for jury deliberation); see also *Sheldon v. West Bend Equip. Corp.*, 718 F.2d 603, 608 (3d Cir. 1983) (asserting that foreseeability of use to manufacturer raises question of fact); *Fane v. Zimmer Inc.*, 927 F.2d 124, 128-29 (2d Cir. 1991) (determining that adequacy of or need for warning is question of fact for the jury); *Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928) (indicating that it is question of fact for jury when reasonable minds could disagree).

65. *Johnson v. Murph Metals, Inc.*, 562 F. Supp. 246 (N.D. Tex. 1983).

66. *Wingett v. Teledyne Indus., Inc.*, 479 N.E.2d 51 (Ind. 1985).

67. *Kalik*, 658 F. Supp. at 635. The court, following *Johnson*, held "as a matter of law, that the recycling of a product, after it has been destroyed, is not a use of the product reasonably foreseeable to the manufacturer." *Id.* (citing *Johnson*). Additionally, the court emulated the holding in *Wingett* by declaring that "as a matter of law . . . the destruction of a product is not a use of the product reasonably foreseeable to the manufacturer." *Id.* (citing *Wingett*).

cessing the junk electrical components, the court concluded, as a matter of law, that the procedure did not constitute a foreseeable or intended use as far as General Electric was concerned.⁶⁸ Consequently, the court held that General Electric owed no duty to warn and could not be held liable for its failure to do so.⁶⁹

Applying the same reasoning to similar facts, the court in *High v. Westinghouse Electric Corp.*⁷⁰ reached an identical conclusion.⁷¹ The plaintiff in *High*, the employee of a scrap metal salvage business, was injured by exposure to PCBs while involved in the handling, dismantling, and processing of junked electrical transformers.⁷² Although defendant Westinghouse notified plaintiff's employer that some transformers might contain PCBs,⁷³ that a number of states had enacted legislation providing for special reporting and labeling of PCBs,⁷⁴ and that the transformers should be checked for the presence of PCBs during repair, maintenance, or disposal,⁷⁵ the court still held

68. *Id.* at 635. The court found persuasive the *Johnson* and *Wingett* holdings and cited them as authority for dismissing the claim against defendant for injury resulting from the dismantling and processing of the electrical components. *Id.* at 635-36.

69. *Kalik*, 658 F. Supp. at 635. The duty to warn is tied to users and their reasonably foreseeable uses of the manufactured product. *Hopkins v. Chip-In-Saw, Inc.*, 630 F.2d 616, 619 (8th Cir. 1980). The *Hopkins* court stated:

When a manufacturer can reasonably foresee that the warning it gives to a purchaser of its product will not be adequately conveyed to probable users of the product, then its duty to warn may extend beyond the purchaser to those persons foreseeably endangered by the product's use.

Id. See generally *Madden*, *supra* note 44, at 285 (discussing duty to warn tied to reasonably foreseeable use and user). Under the Restatement, a negligent failure to warn imposes liability upon the manufacturer of a product when injury results from the product's intended use. RESTATEMENT (SECOND) OF TORTS § 388 (1965).

70. 559 So. 2d 227 (Fla. Dist. Ct. App. 1989), *approved in part and quashed in part*, 610 So. 2d 1259 (Fla. 1992).

71. *High*, 559 So. 2d at 227-28 (citing *Johnson*, *Kalik*, and *Wingett* and holding that (1) dismantling and destroying defendant's product in order to salvage junk components were not reasonably foreseeable uses of product and (2) plaintiff was not an intended user within meaning of § 402A).

72. *Id.* at 227. The Florida Supreme Court, on rehearing, noted the adverse effects of human contact with PCBs, including but not limited to digestive disorders, chloracne and other epidermal disorders, jaundice, impotence, throat and respiratory irritations, and severe headaches. *High v. Westinghouse Elec. Corp.*, 610 So. 2d 1259, 1260 (Fla. 1992).

73. *High*, 559 So. 2d at 229.

74. *Id.*

75. *Id.*

that "Westinghouse did not assume liability for a transformer once its useful life was over and it had become a scrap item. Rather Westinghouse was acting in a responsible corporate fashion to inform its ultimate consumer⁷⁶ . . . of potentially important product information."⁷⁷ The court employed this line of reasoning to follow the precedent of the three previously discussed cases,⁷⁸ concluding as a matter of law that salvaging junk transformers was not a reasonably foreseeable use of the product, and as such the injured plaintiff was not an intended user within the meaning of Section 402A.⁷⁹

In *High*, as in *Johnson*,⁸⁰ there was a logical and well-stated dissent. The dissent began by acknowledging that the issue before the court was a narrow one: Whether a manufacturer's responsibility for injuries terminates as a matter of law when the product's useful life comes to an end.⁸¹ The dissent continued by noting that the *Wingett*⁸² holding went beyond the issues presented by its facts in that the *Wingett* plaintiff's unforeseeable use caused the accident.⁸³ Judge Ferguson argued that the issue of foreseeable use is generally a question of fact for the jury,⁸⁴ and that from the evidence presented, a jury could have concluded that the salvaging activities involving the transformers were foreseeable by the defendant manufacturer.⁸⁵ The dissent concluded that when an individual, without knowledge of any danger, sustains an injury while engaged in a foreseeable use (like the recycling or dismantling of a product) there is no need for a rule which insulates a manufacturer from liability

76. *Id.* (emphasis added) (indicating that ultimate consumer who received notification was Florida Power & Light and not plaintiff because plaintiff was not an intended user).

77. *Id.*

78. *High*, 539 So. 2d at 228 (citing *Kalik*, *Wingett*, and *Johnson* as authority for holding that *High* was not an intended user and activities of dismantling and salvaging were not intended uses).

79. *Id.* at 228-29. *But see* *Weir v. Federal Ins. Co.*, 811 F.2d 1387, 1391-92 (10th Cir. 1987) (stating that whether plaintiff's use of the product is foreseeable or unforeseeable is question of fact for jury).

80. *Johnson v. Murph Metals, Inc.*, 562 F. Supp. 246 (N.D. Tex. 1983).

81. *High*, 539 So. 2d at 229 (Ferguson, J., dissenting).

82. *Wingett v. Teledyne Indus.*, 479 N.E.2d 51 (Ind. 1985).

83. *High*, 539 So. 2d at 230 n.6 (Ferguson, J., dissenting).

84. *Id.* at 231.

85. *Id.*

merely because the product's useful life has come to an end.⁸⁶

Despite the rationale of the *High* dissent, courts continue to apply the current rule.⁸⁷ In *Boscarino v. Convenience Marine Products*,⁸⁸ the plaintiff was injured while attempting to dismantle and dispose of a charged fire extinguisher.⁸⁹ Believing that the product might be hazardous in its existing condition, the plaintiff and a co-worker elected to manually disarm the extinguisher before throwing it away.⁹⁰ After mounting it to a wall, they removed two springs from the sprinkler head with a pair of needle-nosed pliers and a few minutes later placed the apparatus in a trash container.⁹¹ Almost immediately thereafter, the extinguisher flew out of the container, striking the plaintiff on the head.⁹² The extinguisher then bounced off two walls, flew out a doorway, and landed underneath a truck.⁹³

In the subsequent lawsuit, the plaintiffs attempted to distinguish their cause of action on the basis that, unlike the earlier cases, their injuries did not result from the reprocessing of the product for financial gain, but rather from an attempt to dispose of the product in a safe manner.⁹⁴ The plaintiffs contended that this distinguishable purpose was, or at least should have been, foreseeable to the manufacturer.⁹⁵ The court, however, was not convinced by plaintiffs' argument.⁹⁶ Citing all four cases discussed above,⁹⁷ the court concluded that "the opinions themselves do not suggest that these decisions would be affected by a lack of prospective commercial gain. They clearly find that the dismantling of a product is not an intended use which gives rise to a strict liability claim."⁹⁸ Thus, relying on the established precedent, the court granted the defendant's motion for summa-

86. *Id.*

87. *See Boscarino v. Convenience Marine Products*, 817 F. Supp. 116 (S.D. Fla. 1993).

88. 817 F. Supp. 116 (S.D. Fla. 1993).

89. *Boscarino*, 817 F. Supp. at 117.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Boscarino*, 817 F. Supp. at 117-18.

95. *Id.* at 118.

96. *Id.*

97. *Id.* (referring to *Kalik*, *Johnson*, *Wingett*, and *High*).

98. *Id.* at 118.

ry judgment regarding the plaintiffs' strict liability claim.⁹⁹

III. NECESSITY FOR A CHANGE

As the previous discussion illustrates, the current rule emerged from three erroneous lines of reasoning: (1) the continued misapplication of the decision reached in *Johnson v. Murph Metals, Inc.*;¹⁰⁰ (2) the illogical conclusion that individuals engaged in recycling, dismantling, or demolition procedures are not product users under section 402A;¹⁰¹ and (3) the deduction that these processes do not constitute uses which are uses foreseeable by the original product manufacturer.¹⁰²

The *Johnson* court was correct in its conclusion. In that case, the product had been dismantled, and a portion of the original commodity was in the process of being salvaged when the damaging event took place.¹⁰³ Thus, because the product had been inexorably altered, it had ceased to exist at the time of the injury.¹⁰⁴ In the cases that followed *Johnson*, however, the sequence of events was different. Each of these cases involved a product that caused injury while the product was in the process of being dismantled or demolished. In all of these decisions, the courts overlooked or simply refused to recognize this crucial

99. *Boscarino*, 817 F. Supp. at 118.

100. 562 F. Supp. 246, 249-50 (N.D. Tex. 1983) (recognizing that injuries to plaintiffs were due to recycling of defendant's product, but that plaintiffs were neither "users" of defendant's product nor persons for whose use the product was supplied). See also *Boscarino*, 817 F. Supp. at 118.

101. See *Boscarino*, 817 F. Supp. at 117-18.

102. *High v. Westinghouse Elec. Corp.*, 559 So. 2d 227, 230 n.6 (Fla. Dist. Ct. App. 1990) (Ferguson, J., dissenting) (concluding that reasonable jury could have found that salvaging activities were foreseeable by defendant manufacturer); *Wingett v. Teledyne Indus.*, 479 N.E.2d 51, 56 (Ind. 1985) (DeBruler, J., dissenting) (asserting that foreseeability should be question of fact for jury). See generally *Cantu*, *supra* note 58, at 351-52 (predicting that dismantling, disposal, and reuse will eventually be deemed foreseeable use under § 402A).

103. *Johnson*, 562 F. Supp. at 248.

104. *Id.* at 249 (recognizing that plaintiffs were in process of recycling defendant's lead batteries which required destruction of batteries). Some courts have held that where it is undisputed that a product defect has been created by subsequent alteration, and not by the actions of the manufacturer, the manufacturer is properly exonerated of liability as a matter of law. *E.g.*, *Foecker v. Allis-Chalmers*, 366 F. Supp. 1352, 1355 (E.D. Pa. 1973); *Dutsch v. Sea Ray Boats, Inc.*, 845 P.2d 187, 191 (Okla. 1992); *Glassey v. Continental Ins. Co.*, 500 N.W.2d 295, 301 (Wis. 1993).

distinction.

In addition, each court incorrectly held, as a matter of law, that because the dismantling and/or demolition of products is not foreseeable, all individuals engaged in such processes are not "users" under the Restatement.¹⁰⁵ This reasoning is erroneous because every product, regardless of the technology involved, has a useful life span.¹⁰⁶ After a certain period of time, every product eventually grows old and dies. A manufacturer has never had a duty "to furnish . . . [goods] that will not wear out."¹⁰⁷ This fact is well-recognized by courts, and as a result, some jurisdictions have adopted the so-called "useful life defense."¹⁰⁸ This defense recognizes that a manufacturer will not

105. See *Boscarino*, 817 F. Supp. at 117-18 (upholding ruling of lower court as a matter of law); *High*, 559 So. 2d at 229 (ruling as a matter of law that plaintiff's process of recycling did not fall within reasonably foreseeable use definition nor did plaintiff fall within definition of intended user); *Kalik v. Allis-Chambers Corp.*, 658 F. Supp. 631, 635 (W.D. Pa. 1987) (finding as a matter of law that the dismantling of a product is not a reasonably foreseeable use); *Wingett*, 479 N.E.2d at 56 (holding as a matter of law that plaintiff's use of ductwork was not reasonably foreseeable).

106. See *High*, 559 So. 2d at 228 (acknowledging that when transformers become too old to be of further use, defendant sells them to scrap businesses for recycling); *Johnson*, 562 F. Supp. at 248 (recognizing that because they have limited life span, batteries are often resold for recycling purposes). Many companies are incorporating innovative ways to facilitate the recyclability of their products into the manufacturing process. OFFICE OF POLICY, PLANNING AND EVALUATION, U.S. ENVTL. PROTECTION AGENCY, PUB. NO. EPA 530-SW-89-066, PROMOTING SOURCE REDUCTION AND RECYCLABILITY IN THE MARKETPLACE: A STUDY OF CONSUMER AND INDUSTRY RESPONSE TO PROMOTION OF SOURCE REDUCED, RECYCLED, AND RECYCLABLE PRODUCTS AND PACKAGING 32 (1989).

107. *Mitchell v. Ford Motor Co.*, 533 F.2d 19, 20 (1st Cir. 1976) (citing *McLaughlin v. Sears, Roebuck & Co.*, 281 A.2d 587, 589 (N.H. 1971)), *cert. denied*, 429 U.S. 871 (1976) (noting that duty of manufacturer is limited to foreseeing results of normal use); *Barich v. Ottenstror*, 550 P.2d 395, 398 (Mont. 1976) (stating that neither manufacturer nor seller is required "to produce or sell a product that will never wear out"); *Savage v. Jacobsen Mfg. Co.*, 396 So. 2d 731, 733 (Fla. Dist. Ct. App. 1981) (quoting *Foster v. Marshall*, 341 So. 2d 1354, 1361 (La. Ct. App. 1977), for the proposition that manufacturers are not expected to produce parts that never wear out). See generally Peter V. Letsou, *A Time Dependent Model of Products Liability*, 53 U. CHI. L. REV. 209, 213 n.14 (1986) (citing cases which recognize the absence of a duty to create goods that will not wear out); Robert A. Van Kirk, *The Evolution of Useful Life Statutes in the Products Liability Reform Effort*, 1989 DUKE L.J. 1689 (1989) (relating absence of duty to produce goods that will not wear out to history of "useful life" defense).

108. See *Miller v. G & W Elec. Co.*, 734 F. Supp. 450, 452 (Kan. 1990) (defining "useful safe life" defense and exceptions to the defense); *Hendricks v. Comerio Ercole*, 763 F. Supp. 505, 507-09 (Kan. 1991) (discussing evidence sufficient to rebut useful life presumption); see, e.g., *Kozlowski v. John E. Smith's Sons Co.*, 275

be held liable for injuries caused by a product which should no longer be in use and in fact should have been discarded.¹⁰⁹ In addition, various state legislatures have confronted the issue by enacting statutes of repose.¹¹⁰ Unlike statutes of limitation, statutes of repose bar any products liability cause of action beyond a set number of years after the product has been introduced into the marketplace.¹¹¹ In some cases, these statutes

N.W.2d 915, 924 (Wis. 1979) (recommending, after allowing for recovery, that legislature adopt statute of repose to address burgeoning problem of open-ended liability); Terry M. Dworkin, *Federal Reform of Product Liability Law*, 57 TUL. L. REV. 602, 604 nn.10 & 12 (1983) (stating that two-thirds of states have adopted some measure of products liability reform and listing 21 states adopting statutes of repose).

109. See *Miller*, 734 F. Supp. at 452.

110. *E.g.*, KAN. STAT. ANN. § 60-3303 (1983). The Kansas "Useful Safe Life" statute states in part:

Useful safe life ten-year period of repose, evidence. (a) (1) Except as provided in paragraph (2) of subsection (a) of this section, a product seller shall not be subject to liability in a product liability claim if the product seller proves by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired. "Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner.

Id.; see ALA. CODE § 6-2-30 (1993) (recognizing prohibition of products liability suit for injury when cause of action is brought after certain period of time). Since the date of injury is controlling under a statute of repose, several jurisdictions legislatively established the date of accrual for asbestos-related injuries in their statutes of repose. *E.g.*, ALA. CODE § 6-2-30 (1993); CAL. CIV. PROC. CODE § 340.2 (West 1982); CONN. GEN. STAT. ANN. § 52-577a(e) (West Supp. 1994); D.C. CODE ANN. § 12-311 (1989); IND. CODE ANN. § 33-1-1.5-5.5 (West Supp. 1994); MISS. CODE ANN. § 15-1-49(2) (Supp. 1994); NEB. REV. STAT. § 25-224(5) (1989); N.D. CENT. CODE § 28-01.1-02(4) (1991); OHIO REV. CODE ANN. § 2305.10 (Baldwin 1990); OR. REV. STAT. § 30.907 (1988); TENN. CODE ANN. § 29-28-103(b) (Supp. 1993); VA. CODE ANN. § 8.01-249(4) (1992). The date of accrual under statutes of repose is when the injured person discovered, or should have discovered, the injury in the exercise of reasonable diligence. *E.g.*, COL. REV. STAT. § 13-80-108(8) (West 1989); N.H. REV. STAT. ANN. § 507-D:2 (1983); N.C. GEN. STAT. § 1-52(16) (Supp. 1993); S.D. CODIFIED LAWS ANN. § 15-2-12.2 (Supp. 1994); UTAH CODE ANN. § 78-15-3 (1992); VT. STAT. ANN. tit. 12, § 512(4) (Supp. 1994); WASH. REV. CODE ANN. § 7.72.060(3) (West 1992). The date of accrual in most states is not legislatively defined and must be determined by the courts. See, *e.g.*, *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 31 (Ariz. 1989) (applying "discovery rule" approach in determining accrual date for asbestos-related injuries); *Chase v. Cassiar Mining Corp.*, 622 F. Supp. 1027, 1028 (N.D.N.Y. 1985) (implementing "last breath rule" in determining accrual date for asbestos-related injuries).

111. *School Bd. v. United States Gypsum Co.*, 360 S.E.2d 325, 327-28 (Va. 1987) (explaining that "statutes of repose" and "statutes of limitations" are two distinct types of statutes which conflict in concept, definition, and function). Statutes of repose are distinguishable from statutes of limitations in that the latter merely cuts

may bar a cause of action even before an injury is sustained. Both the "useful life" and repose doctrines are unquestionably defensive in nature.

As a matter of logic, however, courts must recognize the converse of these doctrines. If every product has a finite useful life and eventually reaches a point when it should no longer be used, then at the end of that period of time the commodity must necessarily be recycled, dismantled, or demolished. In other words, these processes are clearly foreseeable. Although products are not introduced into the marketplace for this purpose, and it may therefore be argued that such procedures do not constitute intended product uses, it is nonetheless foreseeable that all goods placed into the stream of commerce will eventually be recycled, dismantled, or demolished when their useful lives have ended.

An analogy on this point may be made to one of the major debates in products liability law that occurred in the late 1960s and early 1970s. During this time period, there was growing concern as to whether an automotive manufacturer had any responsibility to protect the occupants of a vehicle from the so-called "second collision."¹¹² The decision in *Evans v. General*

off the right to maintain a cause of action after accrual of the action. *Id.* Products liability statutes of repose generally limit the liability of manufacturers by circumscribing the time in which a cause of action may be sustained. See Mark W. Peacock, *An Equitable Approach to Products Liability Statutes of Repose*, 14 N. ILL. U. L. REV. 223, 225 (1993). The statute of repose extinguishes a cause of action after a certain time period which is measured from the delivery of the product. *Id.* The statute operates regardless of when the cause of action accrues. A cause of action "accrues" when all the elements of the cause of action are in place so that the injured party can maintain a suit thereon. *Id.* Conceptually, statutes of repose reflect the legislative decision that "as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability. Thus a 'statute of repose' is intended as a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights." Robert I. Stevenson, *Products Liability and the Virginia Statute of Limitations—A Call for the Legislative Rescue Squad*, 16 U. RICH. L. REV. 323, 334 n.38 (1982).

112. The first impact occurs when the vehicle comes into contact with an object; the second occurs when the driver and any passengers collide with the interior of the vehicle. *Larsen v. General Motors Corp.*, 391 F.2d 495, 502 (8th Cir. 1968); see, e.g., *Ford Motor Co. v. Zahn*, 265 F.2d 729 (8th Cir. 1959) (holding automobile manufacturer liable for injuries sustained by plaintiff when driver rapidly applied brakes causing plaintiff's head to hit dashboard and come in contact with jagged edge of ashtray); see also, e.g., *Seese v. Volkswagenwerk A.G.*, 648 F.2d 833, 838 n.7 (3d Cir.) (defining "crashworthiness" theory), *cert. denied*, 454 U.S. 867 (1981);

*Motors Corp.*¹¹³ originated the controversy. In *Evans*, the court held that the defendant manufacturer had breached no duty in failing to design a safer vehicle, reasoning that automobiles are not designed, manufactured, and placed into the stream of commerce for the intended use of participating in collisions.¹¹⁴ As a result of this case, automobile manufacturers had no duty to protect the occupants of a vehicle from such an event.¹¹⁵

A contrary position emerged a short time later in *Larsen v. General Motors Corp.*,¹¹⁶ in which the United States Court of Appeals for the Eighth Circuit held that automotive manufacturers have a duty to provide users with a reasonably safe means of transportation.¹¹⁷ In *Larsen*, the plaintiff was severely injured

Huddell v. Levin, 537 F.2d 726, 737-38 (3d Cir. 1976) (acknowledging "second collision" theory of liability); Olsen v. United States, 521 F. Supp. 59, 63 (E.D. Pa. 1981) (discussing "second collision" doctrine), *aff'd*, Ford Motor Co. v. Cooper, 688 F.2d 820 (3d Cir. 1982), *cert. denied*, 459 U.S. 1107 (1983). See generally W. James Foland, *Enhanced Injury: Problems of Proof in "Second Collision" and "Crashworthy" Cases*, 16 WASHBURN L.J. 600 (1977); Paul A. Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 HOFSTRA L. REV. 521, 542-43 (1974) (discussing crashworthiness and second collisions).

113. 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966), *rev'd*, Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977).

114. *Evans*, 359 F.2d at 824. See Martin v. Volkswagen of America, 707 F.2d 823, 824 (4th Cir. 1983); Wilson v. Ford Motor Co., 656 F.2d 960, 960 (4th Cir. 1981); McClung v. Ford Motor Co., 333 F. Supp. 17, 20 (S.D. W. Va. 1971), *aff'd*, 472 F.2d 240 (4th Cir.), *cert. denied*, 412 U.S. 940 (1973). See generally J.M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197, 259 (1990) (citing *Evans* as example for argument that defendant is not liable for plaintiff's injuries even if it is foreseeable that some automobile collisions will occur); Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427, 429-30 (1989) (acknowledging common law view that automobile manufacturers were not required to predict that their products would be involved in accidents).

115. See *Evans*, 359 F.2d at 825 (asserting that "the intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur"). The court added that "the defendant also knows that its automobiles may be driven into bodies of water, but it is not suggested that defendant has a duty to equip them with pontoons." *Id.* See also Robert F. Cochran, Jr., *New Seat Belt Defense Issues: The Impact of Air Bags and Mandatory Seat Belt Use Statutes on the Seat Belt Defense, and the Basis of Damage Reduction Under the Seat Belt Defense*, 73 MINN. L. REV. 1369, 1397 (1989) (acknowledging that some courts have refused to attach liability in crashworthiness cases on the basis that accidents are not within purpose of vehicle).

116. 391 F.2d 495 (8th Cir. 1968).

117. *Larsen*, 391 F.2d at 503. Cf. Richardson v. Volkswagenwerk, A.G., 552 F. Supp. 73, 80 (W.D. Mo. 1982) (reflecting courts' uniform recognition of potential liability for enhanced injury caused by the "second collision"); Caiazzo v.

following a head-on collision.¹¹⁸ At trial, the plaintiff introduced evidence tending to prove that most vehicles are involved in at least one damaging event during their useful lives and that these events sometimes cause the deaths of drivers or passengers.¹¹⁹ The court accepted the plaintiff's argument, relying extensively on statistical data to reach its conclusion that automobile accidents are clearly foreseeable.¹²⁰ Based upon this reasoning, the court imposed a definite duty upon automobile manufacturers to produce crashworthy products.¹²¹

Evans was followed for a time, but shortly thereafter *Larsen* became the majority rule in the country. Today, there is no question concerning the duty of automobile manufacturers to design, build, and market crashworthy vehicles.¹²² This same reasoning could be employed concerning the recycling and dismantling of goods. If all products have a useful life span, it is likely that some sort of salvaging process will take place. As a result, it is foreseeable that individuals will engage in such procedures. Courts should identify salvaging processes as eventual "uses" of products, and manufacturers could be liable for any injuries resulting from these methods.

Furthermore, manufacturer liability in this context may be justified under the very rationale originally advanced in favor of

Volkswagenwerk, A.G., 647 F.2d 241, 250 (2d Cir. 1981) (holding that upon plaintiff's proof of enhanced injury attributed to a defective design, manufacturer is liable for second collision injuries).

118. *Larsen*, 391 F.2d at 496-97.

119. *Id.* at 504-05.

120. *Id.* at 504-05 & n.8. The court notes that "[b]etween one-fourth and two-thirds of all vehicles manufactured are at sometime during their subsequent use involved in the tragedy of human injury and death." *Id.* at 505 n.8. In 1965, 49,000 deaths and almost two million disabling injuries were attributed to motor vehicle accidents. *Id.* at 502 n.4 (citing NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 40 (1966)).

121. *Larsen*, 391 F.2d at 504. Liability for foreseeable misuse is now widely accepted. *E.g.*, Findlay v. Copeland Lumber Co., 509 P.2d 28 (Or. 1973) (accepting liability for foreseeable misuse); General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977), *overruled on other grounds by* Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979). See generally Aaron D. Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521, 523-24 (1982) (noting that former concept of intended purpose doctrine, used to immunize defendants from liability because defendant lacked duty to plaintiff, has vanished).

122. See James D. Pearson, Jr., Annotation, *Products Liability: Sufficiency of Proof of Injuries Resulting From "Second Collision,"* 9 A.L.R. 4th 494, 497 (1981).

the adoption of strict products liability law. First, manufacturers are in the best position to select and utilize the safest materials in the design, manufacture, and marketing of goods.¹²³ This reasoning may be extended to include dismantling and demolition among the factors that manufacturers must consider when introducing a product into the stream of commerce. Second, manufacturers are well-positioned to absorb the cost of liability for injuries sustained during the "use" of their products.¹²⁴ This argument may be expanded to include salvaging procedures. Third, manufacturers may protect themselves from costly liability through the procurement of insurance. Again, this principle may be applied to encompass reclamation processes. Fourth, if the damaging event may be prevented by the issuance of a warning, the manufacturer of the injury-causing product is the logical entity in the chain of distribution upon whom this burden should be placed.¹²⁵

123. *E.g.*, *Lartigue v. R.J. Reynolds Tobacco Co.* 317 F.2d 19, 36 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring); *Jacob E. Decker & Sons v. Capps*, 164 S.W.2d 828, 829 (Tex. 1942). *See generally* Keith O'Connell, *Products Liability: Manufacturer's Liability for Products Not Unreasonably Dangerous When Originally Marketed—A Commentary on Bell Helicopter v. Bradshaw*, 12 ST. MARY'S L.J. 494, 500-01 (1980) (stating that imposition of strict products liability is justified because manufacturers occupy the best position to discover and correct unreasonably dangerous defects in products and because manufacturers' incentive to produce safe products is increased).

124. The dominant precept underlying the law of strict liability is that enterprises engaging in commercial activity are in a superior position to shoulder the costs of, and therefore must assume strict liability for, the dangerous products they create:

The courts [in strict liability cases] have tended to lay stress upon the fact that the defendant is acting for his own purposes, and is seeking a benefit or a profit from such activities, and that he is in a better position to administer the unusual risk by passing it on to the public than is the innocent victim.

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 75, at 537 (5th ed. 1984).

125. *See Dougherty v. Hooker Chem. Corp.*, 540 F.2d 174, 179 (3d Cir. 1976) (stating that the following considerations must be balanced: the dangerous nature of the product, the form in which it is to be used, the intensity and form of the warnings given, the burden of requiring additional warnings, and the likelihood that the additional warnings will be adequately communicated to those who will foreseeably use the product); *Hopkins v. Chip-In-Saw, Inc.*, 630 F.2d 616, 619 (8th Cir. 1980) (holding that manufacturer's duty to warn extends to all persons who are foreseeably endangered by the product); *Madden, supra* note 44, at 285 (discussing duty to warn tied to reasonably foreseeable use and user); RESTATEMENT (SECOND)

Finally, the argument can be made that America is awakening environmentally.¹²⁶ We now seek ways not only to improve our surroundings, but to minimize our impact on "Mother Earth" and to make amends for our past sins.¹²⁷ Terms such as "environmentally friendly," "recyclable," and "biodegradable" are currently household words as shoppers and buyers consciously attempt to protect the air and soil.¹²⁸ Consumers want the production of both goods and packaging to expend fewer natural resources and to use less energy. In addition, burgeoning landfills have forced us to become more and more adept at the art of recycling our goods once they fulfill their intended uses.¹²⁹ These developments have given rise to the phenomenon of "green consumerism," which has virtually replaced our "disposable society."¹³⁰ Many manufacturers have taken note of this trend and have employed the strategy of "green marketing" of their products.¹³¹ This process promotes the idea of recycling

OF TORTS § 388 (1965) (stating that failure to warn imposes liability upon the manufacturer of a product when injury results from the product's intended use).

126. See *DemoMemo*, AM. DEMOGRAPHICS, May 1988, at 58 (finding 39% of those surveyed in 1988 to be self-proclaimed environmentalists); Schwartz, *Earth Day Today*, AM. DEMOGRAPHICS, Apr. 1990, at 40-41 (citing 1989 Gallup report that found 79% of those aged 30-49 surveyed described themselves as environmentalists).

127. E.g., U.S. ENVTL. PROTECTION AGENCY, EPA CONTRACT NO. 68-D9-0169, ASSESSING THE ENVIRONMENTAL CONSUMER MARKET 1-4 (1991); U.S. ENVTL. PROTECTION AGENCY, *supra* note 106, at 39-40; Wynne, *supra* note 6, at 785-86.

128. According to some marketing experts, "green marketing" has attained the status of a revolution. Wynne, *supra* note 6, at 786-87 (citing *Special Issue: The Green Marketing Revolution*, ADVERTISING AGE, Jan. 29, 1991).

129. Lack of landfill space is considered to be a crisis situation in the United States. See OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 7, at 271 (reporting EPA estimates that in 20 years 80% of all landfills will be full). Many corporations are now attempting to lessen their effect on the landfill problem. See Zach Schiller, *P&G Tries Hauling Itself out of America's Trash Heap*, BUS. WEEK., Apr. 23, 1990, at 101 (describing efforts of Proctor and Gamble to minimize excess packaging by redesigning containers and concentrating their products).

130. See Wynne, *supra* note 6, at 785-86 (reporting that consumers are becoming environmentally conscious shoppers who seek to purchase products whose disposal will not contaminate environment). The awareness of the impact on the environment from disposable goods has fostered this phenomenon known as "green consumerism." *Id.*

131. Many companies have made considerable attempts to minimize their products' environmental impact. See P. CARSON & J. MOULDEN, GREEN IS GOLD: BUSINESS TALKING TO BUSINESS ABOUT THE ENVIRONMENTAL REVOLUTION (1991) (planning business strategies around increasing "green" products and images); see also Christy Fisher, *Tending Wal-Mart's Green Policy*, ADVERTISING AGE, Jan. 29,

goods, while at the same time asserting or implying that any reclamation procedures involving the manufacturer's goods will inflict no harm upon the environment.¹³² As a result, consumers of "green" products may continue their previous rate of consumption while maintaining their environmental peace of mind.

This scenario expressly qualifies the recycling, dismantling, and destruction of goods as a foreseeable use. Once we have accepted this fact, manufacturers *must* be required to act accordingly by providing proper and adequate instructions pertaining to the reclamation process and by accepting responsibility for the choice of materials that go into the design, manufacturing, and marketing of their goods. As the above discussion illustrates, recycling is logically included among the uses that manufacturers and courts should recognize as foreseeable.

IV. CONCLUSION

One of the remaining problem areas in strict products liability law concerns the allocation of liability for injuries that occur during the destruction, dismantling, and recycling of goods once a product's useful life has come to an end. In this situation, the law has evolved to provide a rule that imposes no liability upon the manufacturer. The courts have reasoned that individuals engaged in reclamation procedures are not users as required by the Restatement and additionally that such processes are not foreseeable product uses.

This Article has attempted to justify an alternate position to that of the existing law by explaining the court's misapplication

1991, at 20 (illustrating trend of retailers to provide products to environmentally conscious consumers).

132. See Wynne, *supra* note 6, at 785-86 (noting purchasing trend of consumers who make decisions based upon product's ability to be recycled, its biodegradability, or its environmental friendliness); cf. Bob Garfield, *Beware: Green Overkill*, ADVERTISING AGE, Jan. 29, 1991, at 26 (stressing that many assertions of environmental friendly practices and products are merely gimmicks to exploit consumer's desire to lessen harm to environment); John Holusha, *Coming Clean on Goods: Ecology Claims Faulted*, N.Y. TIMES, Mar. 12, 1991, at D1 (asserting that most companies are changing their packaging practices not because of environmental findings, but because of marketing studies showing consumer demand for goods less harmful to environment).

of the rule in *Johnson v. Murph Metals, Inc.*,¹³³ by pointing out the illogical reasoning of later cases, and by setting forth other policy considerations. The underlying rationale of this position is based upon a recognition of the fact that all products have a useful life and eventually reach a point where they should no longer be used, an analogy to the great debate of the 1960s and 1970s involving the crashworthiness of automobiles, the policy behind the original adoption of strict products liability law, and finally the fact that America is becoming more environmentally aware. The only logical conclusions are that reclamation procedures are foreseeable and that manufacturers are in the best position to assume liability for injuries caused by these procedures. Manufacturers are best equipped to provide adequate warnings relating to potential risks in the reclamation process or to make safer choices as to the materials that go into the design, manufacture, and marketing of goods placed into the stream of commerce.

133. 562 F. Supp. 246 (N.D. Tex. 1983).