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## Lease of Land by a Private Club from a Municipality Constitutes Sufficient State Action to Bring the Club's Discriminatory Conduct within the Fourteenth Amendment.

Steven D. Spiegel

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**TORTS—Products Liability—Strict Liability is Imposed on the  
Seller of a Defective Used Product**

*Hovenden v. Tenbush,*

529 S.W.2d 302 (Tex. Civ. App.—San Antonio 1975, no writ).

Plaintiff Richard Hovenden purchased used bricks from the defendant Wallace Tenbush, whose business was selling building materials including new and used bricks. After the walls of the plaintiff's commercial building deteriorated, suit was filed for damages resulting from the defective bricks. Hovenden sought recovery on various theories, including strict liability in tort, but the trial court granted defendant's motion for summary judgment. On appeal, the plaintiff insisted on the applicability of his theories of recovery. Held—*Reversed and Remanded*. The doctrine of strict liability imposes liability on the non-manufacturing seller of a defective used product.<sup>1</sup>

Strict liability in tort allows recovery to plaintiffs who plead and prove several elements,<sup>2</sup> and defendant may be liable even though he has exercised all possible care.<sup>3</sup> The law of torts progressed slowly from a recognition of fault as a basis for a wrongdoer's liability to the rapid and recent development of the doctrine of strict liability in tort as a method of recovery.<sup>4</sup> The doctrine was introduced early in a California Supreme Court case<sup>5</sup> and Mr. Prosser's persuasive article<sup>6</sup> convinced the courts to adopt such a doctrine.<sup>7</sup>

1. *Hovenden v. Tenbush*, 529 S.W.2d 302 (Tex. Civ. App.—San Antonio 1975, no writ).

2. See *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1272 (5th Cir.), cert. denied, 419 U.S. 1096 (1974). This case listed five elements needed for recovery: (a) defective product, (b) defect existed when it left defendant's hand, (c) product was unreasonably dangerous to plaintiff due to defect, (d) plaintiff suffered damage or injury, (e) defect was proximate cause of injury.

3. *Olsen v. Royal Metals Corp.*, 392 F.2d 116, 118 (5th Cir. 1968) (containing Texas authority in the opinion).

4. *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 789 n.2 (Tex. 1967) (contains elaborate citation of important and persuasive treatises and authorities in development of the doctrine). See generally 2 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 19A, at 5-222 (1975); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 75, at 492-94 (4th ed. 1971); Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855 (1963); Sales, *An Overview of Strict Tort Liability in Texas*, 11 HOUS. L. REV. 1043 (1974); 63 AM. JUR. 2d *Products Liability* § 123 (1972); Annot., 13 A.L.R. 3d 1057 (1967).

5. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (concurring opinion).

6. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

7. E.g., *Greenman v. Yuba Power Prods., Inc.*, 27 Cal. Rptr. 697, 700 (1963) (first court to apply the doctrine, holding a manufacturer of a defective combination power tool liable); accord, *Putman v. Erie City Mfg. Co.*, 338 F.2d 911, 912 (5th Cir. 1964); *Vandermark v. Ford Motor Co.*, 37 Cal. Rptr. 896 (1964); *Dealers Transp. Co. v. Battery Distrib. Co.*, 402 S.W.2d 441, 447 (Ky. Ct. App. 1965).

The nationwide trend toward adoption influenced the American Law Institute to incorporate the doctrine of strict liability into Section 402A of the *Restatement of Torts*, with accompanying comments.<sup>8</sup> Observing the nationwide trend, the Texas Supreme Court in *McKisson v. Sales Affiliates, Inc.*,<sup>9</sup> adopted the rule of strict liability as stated in section 402A and today, manufacturers, distributors, wholesalers, retailers, and sellers are clearly liable under this theory of recovery.<sup>10</sup> The *Restatement*, however, provides no suggestion as to whether the doctrine of strict liability may be expanded further to include manufacturers and sellers of used products.

Because there is no express direction from the *Restatement* or its comments, courts considering the question of liability for a defective used product have hesitated in expanding the language, apparently, at times, influenced because there was no precedent for such expansion.<sup>11</sup>

Courts faced with the issue have given this area of the law some direction with implied or express comments. For example, an Arizona appellate court, though it disallowed recovery because plaintiff failed to meet the burden of proving a defect in the product, made no mention of the used product's precluding recovery under strict liability in any manner.<sup>12</sup> The

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8. The RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides that the seller of any defective product that is unreasonably dangerous to the user or to his property may be liable for physical harm if he is in the business of selling such product and the user receives it "without substantial change in the condition in which it is sold." Comment (b) indicates that the institute was merely reiterating what courts were beginning to formulate as policy toward the seller of defective products that were unreasonably dangerous.

9. 416 S.W.2d 787 (Tex. 1967) (holding distributor strictly liable for plaintiff's loss of hair and burns resulting from defective wave lotion preparation).

10. *Putman v. Erie City Mfg. Co.*, 338 F.2d 911 (5th Cir. 1964) (manufacturers and sellers); *Vandermark v. Ford Motor Co.*, 37 Cal. Rptr. 896, 899-900 (1964) (retailers); *Darryl v. Ford Motor Co.*, 440 S.W.2d 630 (Tex. 1969) (manufacturers); *Franklin Serum Co. v. Hoover & Son*, 418 S.W.2d 482 (Tex. 1967) (extended seller's liability for damages to *property* of consumer); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967) (manufacturers and distributors); *Shoppers World v. Villareal*, 518 S.W.2d 913 (Tex. Civ. App.—Corpus Christi 1975, no writ) (sellers); *McLain v. Hodge*, 474 S.W.2d 772 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.) (retailers); *Monsanto Co. v. Thrasher*, 463 S.W.2d 25 (Tex. Civ. App.—Amarillo 1970 writ dism'd) (sellers); *Sharp v. Chrysler Corp.*, 432 S.W.2d 131, 136 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.) (cites several cases holding manufacturers liable); 2 F. HARPER & F. JAMES, *THE LAW OF TORTS*, § 28.31, at 1602 (1956) (wholesalers). See generally 72 C.J.S. *Products Liability* § 40 (Supp. 1975).

11. *Pridgett v. Jackson Iron & Metal Co.*, 253 So. 2d 837 (Miss. 1971). The court did not need to resolve the issue in this case because the plaintiff failed to prove that the used 55 gallon drum was "inherently dangerous for its intended use." *Id.* at 841.

12. See *Tucson Gen. Hosp. v. Russell*, 437 P.2d 677, 681 (Ariz. Ct. App. 1968) (plaintiff did not prove that used x-ray machine that fell on her while she was on hospital table was defective when it left manufacturer); *Siemen v. Alden*, 341 N.E.2d 713, 714-15 (Ill. Ct. App. 1976). The seller of defective used saw was not liable since it was isolated transaction. The fact that it was a used product did not influence the decision. See also *Sharp v. Chrysler Corp.*, 432 S.W.2d 131, 136 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.). Here the product was a defective used car; the court

Oregon Supreme Court in 1971 stated in dictum that the strict liability rule was not limited to new product sellers.<sup>13</sup> While these courts were struggling with the issue of liability for defective used products, several other courts expressly held manufacturers of defective used products liable.<sup>14</sup> In *Gibbs v. General Motors Corp.*,<sup>15</sup> the manufacturer of a used 1961 Chevrolet pickup was held liable when the ball-joint unit on the left front tire was defective, causing the wheel to collapse and the truck to swerve into another car. The importance of *Gibbs* is that strict liability was imposed on the manufacturer even though the product had gone through several transactions before reaching the Gibbs family.<sup>16</sup> The next year the Waco Court of Civil Appeals, in *McClain v. Hodge*,<sup>17</sup> was faced with a case in which the plaintiff lost the vision of his right eye when a defective used rifle misfired while the plaintiff was loading the gun. The court reversed the trial court and held that the defendant, a retailer of new and used guns, was strictly liable for the personal injury resulting from the used and defective rifle.<sup>18</sup> This decision becomes significant after a careful reading of the *Restatement* comment which indicates that "sellers" may include "retail dealers."<sup>19</sup> In *Markle v. Mulholland's Inc.*,<sup>20</sup> the Oregon Supreme Court found the recapper-manufacturer, the wholesaler, and the immediate seller liable under the strict liability theory.

With the nationwide trend indicating an expansion in the area of strict liability, it was logical for the courts to continue extending liability.<sup>21</sup>

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reversed and remanded for a determination of whether intervening causes destroyed the defendant's liability.

13. *Cornelius v. Bay Motors, Inc.*, 484 P.2d 299, 303 n.4 (Ore. 1971) (held the driver of a used 1961 Plymouth with defective brakes could not recover against dealer since there was no proof that used product was "unreasonably dangerous.").

14. See *Suvada v. White Motor Co.*, 210 N.E.2d 182 (Ill. 1965) (purchaser of reconditioned tractor whose brake system failed recovered against manufacturer of brakes); *Bombardi v. Pochel's Appliance & T.V. Co.*, 518 P.2d 202 (Wash. 1973) (plaintiff recovered against manufacturer for defective used television that caused fire).

15. 450 S.W.2d 827 (Tex. 1970).

16. The appellate court opinion stated that Revel bought the vehicle new from Beard's Chevrolet Co., who sold it or traded the truck to Libby's Coach Sales. Gibbs then purchased the truck as a used product from Libby's Coach Sales. See *Gibbs v. General Motors Corp.*, 445 S.W.2d 589, 591 (Tex. Civ. App.—Eastland), *rev'd*, 450 S.W.2d 827 (Tex. 1970).

17. 474 S.W.2d 772 (Tex. Civ. App.—Waco 1971, writ *ref'd n.r.e.*).

18. *Id.* at 775.

19. RESTATEMENT (SECOND) OF TORTS § 402A, comment (f) (1965). See also 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 19A, at 5-223 (1975).

20. 509 P.2d 529, 535 (Ore. 1973).

21. *Embs v. Pepsi-Cola Bottling Co.*, 528 S.W.2d 703, 705 (Ky. Ct. App. 1975) (held that the doctrine protects not only users and consumers, but also bystanders); *Rourke v. Garza*, 511 S.W.2d 331 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ) (lessor of defective product held strictly liable). See generally Note, 6 ST. MARY'S L.J. 751 (1974); Annot., 52 A.L.R.3d 121 (1973) (concerns applicability of doctrine to

*Hovenden v. Tenbush*<sup>22</sup> was a case of first impression in Texas, dealing with the issue of the liability of the seller of a defective used product. The court relied on *Markle* declaring that this imposition of liability on the immediate seller, wholesaler, and manufacturer "clearly supported" imposing liability on the seller of defective used bricks.<sup>23</sup> Furthermore, the court found that the *Gibbs* decision imposing liability on the manufacturer of a used truck and the *McLain* determination that a retailer of a used rifle was liable, was consistent with the decision to hold the seller of defective used bricks liable.<sup>24</sup> Finally, the court noted that the *Restatement* did not preclude imposing liability and that the facts in *Hovenden* would be compared to lease cases since the leased property is by necessity a used product.<sup>25</sup>

Although courts of civil appeals are frequently reluctant to extend doctrines, usually relying upon the supreme court for such action,<sup>26</sup> *Hovenden* clearly extended liability to a seller of a defective used product and diminished a seller's attempt to avoid the *McLain* holding because of the facts.<sup>27</sup> It is significant to note that the court did not emphasize reasons that other courts had given for the strict liability rule as a significant factor in the expansive decision. Prior decisions placed great emphasis on this factor in the determination of whether the court should extend the strict liability doctrine to manufacturers of used products.<sup>28</sup> *Hovenden* de-emphasized obtaining an inference from the basis of the strict liability doctrine that would aid in the determination of whether to extend the doctrine.

The frequent use, however, of the basis of strict liability as an important factor in determining whether the doctrine should be extended warrants a careful study and analysis of these concepts. A comment to the *Restatement* indicates that "public policy" burdens the seller with the cost of injuries sustained because of his ability to protect himself through liability insurance and because he may treat such expense as a production cost.<sup>29</sup> Still another

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lessors of personal property); Annot., 33 A.L.R.3d 415 (1970) (contains authority on recovery by non-purchasers and non-users).

22. 529 S.W.2d 302 (Tex. Civ. App.—San Antonio 1975, no writ). The *Hovenden* opinion clearly explained how the Texas cases may be distinguished on the facts involved.

23. *Markle v. Mulholland's, Inc.*, 509 P.2d 529, 535 (Ore. 1973).

24. *Hovenden v. Tenbush*, 529 S.W.2d 302, 310 (Tex. Civ. App.—San Antonio 1975, no writ).

25. The lessor of a defective leased chattel is now strictly liable in tort. See *Rourke v. Garza*, 511 S.W.2d 331 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

26. *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 791 (Tex. 1967).

27. There had been some doubt as to how strong *McLain v. Hodge* would be since the defendant in that case, although held liable, had sold the gun new, bought it from the original buyer, and then resold it to the plaintiff.

28. *E.g.*, *Suvada v. White Motor Co.*, 210 N.E.2d 182 (Ill. 1965); *Gibbs v. General Motors Corp.*, 450 S.W.2d 827 (Tex. 1970); *Bombardi v. Pochel's Appliance & T.V. Co.*, 518 P.2d 202 (Wash. Ct. App. 1973).

29. See RESTATEMENT (SECOND) OF TORTS § 402A, comment (c) (1965). Some

comment indicates that the doctrine applies to those who *sell* products for consumption and use.<sup>30</sup> This concept is known as the "enterprise liability rationale."<sup>31</sup> Some courts and legal scholars have rejected the theory of "enterprise liability" as the rationale for the adoption of section 402A.<sup>32</sup> Specifically, the *Hovenden* court discounted the theory that liability of the seller depends on whether he has *represented* that the product in question meets a particular standard.<sup>33</sup> This "representational conduct" theory is inconsistent with the "enterprise liability" theory, which the appellant relied on in *Hovenden*,<sup>34</sup> because it imposes liability only if the seller made a representation and the buyer relied upon it. More emphasis should be placed on these theories because some recent cases deciding the issue of whether a seller of a defective used product is strictly liable have based the holdings on these theories.

While some recent cases are in accord with *Hovenden*, others have held to the contrary, or may be distinguishable on their facts. In 1974, the New Jersey Supreme Court recognized that they were faced with "the novel question" of the strict liability of a retail seller of a used product, but refused to answer the "broad question" and laid down a narrow rule that a used car dealer who conducted repair work on the used car prior to a sale was strictly liable in tort.<sup>35</sup> Another recent opinion embraced the question of the

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courts would categorize this concept as risk-spreading instead of enterprise liability. See *Seely v. White Motor Co.*, 45 Cal. Rptr. 17, 23 (1965).

30. RESTATEMENT (SECOND) OF TORTS § 402A, comment (f) (1965).

31. *McDevitt v. Standard Oil Co.*, 391 F.2d 364, 370 (5th Cir. 1968) (states that doctrine provides "judicial protection" to the "defenseless consumer"); *Greenman v. Yuba Power Prods. Inc.*, 27 Cal. Rptr. 697, 701 (1963) (one of the early cases using the enterprise liability rationale); *Markle v. Mulholland's Inc.*, 509 P.2d 529, 532-34 (Ore. 1973) (discusses both the rationale of enterprise liability and that of representational tort); *Davis v. Gibson Prods. Co.*, 505 S.W.2d 682, 690 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.) (describes principal justification for strict liability as "loss spreading"). See generally Keeton, *Products Liability—Liability Without Fault and Requirement of a Defect*, 41 TEXAS L. REV. 855, 858-59 (1963).

32. E.g., *Helene Curtis Indus., Inc. v. Pruitt*, 385 F.2d 841, 863 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968) (expressly rejects the idea that liability should be imposed because sellers are best riskbearers); *Markle v. Mulholland's Inc.*, 509 P.2d 529, 539 (Ore. 1973) (specially concurring opinion) (section 402A liability may be based on various other theories); Freedman, *The Texas Politics of Today's Products Liability*, 5 ST. MARY'S L.J. 16 (1973) (calls enterprise liability an "un-principle" of products liability).

33. *Markle v. Mulholland's Inc.*, 509 P.2d 529, 539 (Ore. 1973) (concurring opinion); *Cornelius v. Bay Motors Inc.*, 484 P.2d 299, 308 (Ore. 1971) (concurring opinion); *Wights v. Staff Jennings, Inc.*, 405 P.2d 624, 628 (Ore. 1965) (if enterprise liability was adopted, liability would be extended any time a loss could be distributed).

34. Brief for Appellant, *Hovenden v. Tenbush*, 529 S.W.2d 302 (Tex. Civ. App.—San Antonio 1975, no writ). The appellant attempted to convince the court of the validity of the "enterprise liability" theory, so that it would expand that doctrine to encompass holding the seller liable on these "policy considerations." *Id.* at 8.

35. *Realmuto v. Straub Motors*, 322 A.2d 440, 444 (N.J. 1974) (plaintiff recovered for personal injuries due to accident caused by defective accelerator-carburetor in used car).

liability of sellers of defective used products.<sup>36</sup> The court held that they were not implying that there could *never* be liability when a used product was sold, but that it would refuse to hold the seller of used automotive parts strictly liable in tort. The court expressed the fear that to hold otherwise would induce Arizona courts to extend liability to all sellers of used products.<sup>37</sup> Moreover, in predicting the effect of holding the seller liable, the court stated that this would inflict a "severe economic blow" since dealers would have to follow a three-pronged requirement of repairing and inspecting parts before the sale, warning of the dangers in using secondhand parts, and insuring against the possible liability for personal injuries resulting from the use of the used product.<sup>38</sup>

In *Peterson v. Bachrodt Chevrolet Co.*,<sup>39</sup> the Illinois Supreme Court declared that a used car seller was *not* liable as a matter of law for damages resulting because of the used automobile's defective brakes. The persuasive opinion began by explaining the manufacturers were held to be strictly liable because of the enterprise liability rationale whereby they were burdened with payment because they created the risk and profited from it.<sup>40</sup> Secondly, the judge explained that liability had been extended to retailers and wholesalers because they occupy a position in the marketing process whereby they may "exert pressure on the manufacturer to enhance the safety of the product."<sup>41</sup> Finally, the court reasoned that the defendant was not liable because, being outside the original producing and marketing chain, such imposition of liability would make the used car dealer an insurer of defects resulting "after the chain of distribution was completed" and while consumers had control of the product.<sup>42</sup> The dissenting judge would agree with the *Hovenden* decision, but reasons that sellers of defective used products can be said to have created the risk and thereby profited by introducing the product into commerce like manufacturers, wholesalers, and retailers.<sup>43</sup>

Other authorities apparently would disagree with the *Peterson* decision denying recovery to the plaintiff because the transaction was outside the original producing and marketing chain. Explaining that the bailor of a defective used product is strictly liable, it has been stated that one should

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36. *Rix v. Reeves*, 532 P.2d 185 (Ariz. Ct. App. 1975). Plaintiff purchased a used wheel that supports the tire "with a lock ring or rim," which "exploded" from the wheel the next day, striking plaintiff in the mouth and causing personal injuries.

37. *Id.* at 187.

38. *Id.* at 187.

39. 329 N.E.2d 785 (Ill. 1975). See also Comment, *Strict Products Liability for Used Car Dealers*, 63 KY. L. REV. (1975) (article written before the *Peterson* reversal).

40. *Peterson v. Bachrodt Chevrolet Co.*, 329 N.E.2d 785, 786 (Ill. 1975).

41. *Id.* at 787.

42. *Id.* at 787.

43. *Id.* at 787 (dissenting opinion).

distinguish between new or used chattels, implying that the same rule should apply to a defective used product seller.<sup>44</sup>

At first glance, the cases enunciating either a narrow rule,<sup>45</sup> a reluctance to expand strict liability,<sup>46</sup> or an express denial of such expansion<sup>47</sup> appear to be very well reasoned opinions. But such arguments to limit strict liability were refuted by a New Jersey court<sup>48</sup> that economically analyzed the concept of enterprise liability and concluded that those who sell used products "may similarly distribute their costs of doing business which, in turn, will reflect what is considered by the public to be justifiable expectations regarding safety, quality and durability of used goods."<sup>49</sup>

There is no apparent trend in these recent decisions; however, what appears to be common to all is the use of the "enterprise rationale" in cases admitting that the rule applies and in those denying recovery against the seller of defective used products.<sup>50</sup> These recent decisions indicate that the courts are attempting to reach a fair solution to the question of who will be burdened with the expenses incurred when a defective used product causes an injury to a plaintiff. Courts must continue answering the question of whether to burden the seller because he may distribute the loss to buyers of other products or to neglect the plaintiff and declare that he has no remedy since such decision would be unfair to the seller of the used product. The recent cases indicate that injustices may result regardless of whom the court holds liable. The line of cases denying recovery to the injured plaintiff has added another factor limiting the defendant's liability by deciding that those who are classified as sellers of used products are not strictly liable in tort. On the other hand, those cases allowing recovery against a seller of a used product alleviate the plaintiff's burden by requiring proof of only the traditional elements for strict liability recovery.<sup>51</sup>

The *Hovenden* court based its reasoning more on logic than on public policy. In one of the major arguments the court stated that to hold otherwise it would have to change the *Restatement's* words from the

44. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A (4)(b)(iv), at 3-283 (1975).

45. *Realmuto v. Straub Motors*, 322 A.2d 440, 444 (N.J. 1974).

46. *Rix v. Reeves*, 532 P.2d 185 (Ariz. Ct. App. 1975).

47. *Peterson v. Bachrodt Chevrolet Co.*, 329 N.E.2d 785 (Ill. 1975).

48. *Turner v. International Harvester Co.*, 336 A.2d 62, 70 (N.J. App. Ct. 1975) (court determined that questions of fact as to strict liability should be decided at the trial).

49. *Id.* at 71. The court stated that the *Restatement* strict liability rule applies to the sale of a defective used product.

50. *Peterson v. Bachrodt Chev. Co.*, 329 N.E.2d 785 (Ill. 1975) (denied recovery); *Turner v. International Harvester Co.*, 336 A.2d 62, 71 (N.J. App. Ct. 1975) (stated that rule applied to used products).

51. *Reyes v. Wyeth Lab.*, 498 F.2d 1264, 1272 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974).

imposition of liability on a seller of "any product" to "any new product."<sup>52</sup> A recent article criticizing what appears to be the only previous Texas decision on the subject of the applicability of the implied warranty of merchantability to the sale of used goods, has advanced arguments that would extend the *Hovenden* logic.<sup>53</sup> The author argues that the mere mention of "goods" instead of "used goods" does not preclude the finding that a "used good was intended" since such conclusion would apparently exclude "new goods" because they are not expressly mentioned. Such argument seems to be useful in a *Hovenden* fact situation.

*Hovenden* clearly extended strict liability to include sellers of used defective products. The court's decision was a logical continuation and expansion of the change from a "sell and forget" philosophy to one requiring the acceptance of legal obligations and responsibilities.<sup>54</sup> This extension of liability may cause future sellers of defective used products to protect themselves by alternative defenses<sup>55</sup> rather than merely asking for summary judgment.<sup>56</sup> Moreover, if Texas should decide to become what appears to be the only minority rule state that denies recovery under implied warranty of merchantability in the sale of used goods, plaintiffs may prefer strict liability in tort as a better cause of action in light of the *Hovenden* decision.<sup>57</sup>

Notwithstanding the *Restatement's* inconclusiveness, the court has removed any doubt remaining from prior case law. When the Texas Supreme Court reviews the issue of liability of sellers of defective used products, an analysis of *Hovenden* and other out of state authorities will provide sufficient

52. *Hovenden v. Tenbush*, 529 S.W.2d 302, 306 (Tex. Civ. App.—San Antonio 1975, no writ).

53. *Chaq Oil Co. v. Gardner Mach. Corp.*, 500 S.W.2d 877 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ); Comment, *UCC Implied Warranty of Merchantability and Used Goods*, 26 BAYLOR L. REV. 630 (1974).

54. See G. PETERS, *PRODUCT LIABILITY AND SAFETY* 2 (1971).

55. See, e.g., *McDevitt v. Standard Oil Co.*, 391 F.2d 364, 367-68 (5th Cir. 1968); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 793 (Tex. 1967); *Shamrock Fuel & Oil Sales Co. v. Tunks*, 406 S.W.2d 483, 490 (Tex. Civ. App.—Houston 1966, no writ). See also Annot., 46 A.L.R.3d 240 (1972).

56. *Gibbs v. General Motors Corp.*, 450 S.W.2d 827 (Tex. 1970); *Hovenden v. Tenbush*, 529 S.W.2d 302 (Tex. Civ. App.—San Antonio 1975, no writ).

57. The law is not completely settled in this area. In *Chaq Oil Co. v. Gardner Mach. Corp.*, 500 S.W.2d 877, 878 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ), the court held that no implied warranty of merchantability existed where the buyer knew that the goods were used. But see *Larson, Commercial Transactions*, 29 Sw. L.J. 118, 131-32 (1975) (questions *Chaq* and says that official comment 3 of UCC 2-314 seems to allow plaintiff recovery for implied warranty of merchantability in used good sales); Comment, *UCC Implied Warranty of Merchantability and Used Goods*, 26 BAYLOR L. REV. 630 (1974) (refuses to accept *Chaq* reasoning and suggests a "better approach" that Texas follow majority view by applying warranty of merchantability to used goods). See also Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?*, 42 TENN. L. REV. 123 (1974) (answers "no" to his question and discusses differences between strict liability in tort and UCC implied warranty liability).