

# In Search of a Remedy: Do State Laws Exempting Sellers from Strict Product Liability Adequately Protect Consumers Harmed by Defective Chinese-Manufactured Products?

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## I. INTRODUCTION

A wave of defective Chinese-manufactured products hit U.S. shores in the past few years,<sup>1</sup> creating a firestorm of bad publicity for the Chinese manufacturers and the U.S. retailers of these products.<sup>2</sup> This on-going crisis coincides with a U.S. state-level trend of enacting laws limiting the liability of sellers of defective products and shifting liability to the manufacturer.<sup>3</sup> This Note examines the intersection of this crisis and this trend by analyzing whether state laws limiting the liability of sellers of defective products offer adequate protection to consumers injured by defective Chinese-manufactured products.

Part II of this Note examines the juridical rise of the doctrine of strict liability for all sellers of defective products and the resulting backlash, leading to state laws generally exempting nonmanufacturing sellers from strict liability. Part II categorizes these state laws based on the exceptions they provide that allow courts to hold the seller strictly liable. Part II also examines the barriers faced by U.S. consumers harmed by defective Chinese-manufactured products when attempting to sue the manufacturer in U.S. or Chinese courts.

Part III examines whether state laws exempting sellers of defective products from strict liability offer adequate protection to consumers harmed by Chinese-manufactured products. Part III analyzes these laws under the categories established in Part II. Part III also examines and discusses the limits of the protection that the Model Uniform Product Liability Act<sup>4</sup> affords consumers harmed by defective Chinese products. Part IV suggests measures that states can take when drafting laws limiting the product liability of sellers of defective products to provide adequate protection to consumers harmed by Chinese-manufactured defective products.

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1. Ting Ting Ng, *U.S. Recalls of China Goods Almost Triple Since June*, BLOOMBERG.COM, Sept. 11, 2007, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=amWxcXLhGsX4>. In the fall of 2008, a tainted Chinese milk scandal rocked the world. Chinese milk products tainted with the dangerous chemical melamine spread throughout China, killing four infants and sickening 54,000 people. Calum MacLeod, *Many Chinese Doubt Food Scandals Will End*, USA TODAY, Oct. 8, 2008, at 8A, available at [http://www.usatoday.com/money/industries/food/2008-10-07-chinamilk\\_N.htm](http://www.usatoday.com/money/industries/food/2008-10-07-chinamilk_N.htm). Exports of these tainted milk products spread as far as Australia and South America. *Id.* Melamine-tainted candies from China found their way onto U.S. store shelves. Elizabeth Weise, *Chinese Candy Sold in U.S. Has Harmful Chemical*, USA TODAY, Sept. 24, 2008, at 9A, available at [http://www.usatoday.com/money/industries/food/2008-09-24-tainted-milk\\_N.htm](http://www.usatoday.com/money/industries/food/2008-09-24-tainted-milk_N.htm).

2. See Ng, *supra* note 1 (noting that recall of Chinese goods by U.S. companies tripled in June, July, and August of 2008).

3. See *infra* Part II.D (discussing state limits on product liability for nonmanufacturers).

4. MODEL UNIF. PROD. LIAB. ACT, 44 Fed. Reg. 62,714 (Oct. 31, 1979).

## II. BACKGROUND

*A. The Birth of Strict Liability for Nonmanufacturers*

The doctrine of strict tort liability for products first appeared in *Escola v. Coca Cola Bottling Co.*,<sup>5</sup> a 1944 case in which Justice Traynor, in a concurring opinion, advocated going beyond the majority's *res ipsa loquitur*<sup>6</sup> approach to a strict liability standard for manufacturers.<sup>7</sup> Twenty years later, strict liability for manufacturers gained the support of a majority of the California Supreme Court in the landmark case *Greenman v. Yuba Power Products, Inc.*<sup>8</sup> The *Greenman* court stated that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."<sup>9</sup> The California Supreme Court extended strict liability to sellers of injury-causing defective products in *Vandermark v. Ford Motor Co.*<sup>10</sup> In *Vandermark*, the court held both the manufacturer and the retailer of a defective car strictly liable for injuries caused to its driver, despite the fact that the manufacturer had delegated the responsibility of the final safety inspection to the car dealership and the dealership had disclaimed liability for personal injuries in its sales contract with the injured driver.<sup>11</sup>

The American Law Institute's publication of the Restatement (Second) of Torts<sup>12</sup> in 1965 showed the legal community's widespread acceptance of the strict liability doctrine by applying strict liability to both manufacturers and sellers of defective goods.<sup>13</sup> The Restatement holds sellers strictly liable for the injury-causing, defective goods they sell, even if the seller "exercised all possible care in the preparation and sale of his product."<sup>14</sup>

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5. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944); see also Frank J. Cavico, Jr., *The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products*, 12 NOVA L. REV. 213, 216–18 (1987) (discussing the history of strict liability for nonmanufacturers).

6. This doctrine states that the mere fact that an accident occurred establishes an inference of negligence. *Escola*, 150 P.2d at 439–40.

7. *Id.* at 441 (Traynor, J., concurring).

8. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963) (holding a power tool manufacturer strictly liable for injury-causing product defects when the product was put to its intended use).

9. *Id.* at 900.

10. *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 172 (Cal. 1964) (stating that "as a retailer engaged in the business of distributing goods to the public, [defendant car dealer] is strictly liable in tort for personal injuries caused by defects in cars sold by it").

11. *Id.* at 170–72. The court held that "Ford, as the manufacturer of the completed product, cannot delegate its duty to have its cars delivered to the ultimate purchaser free from dangerous defects." *Id.* at 171. The court also stated that, since the dealership was strictly liable in tort for injuries caused by defective cars it sold, the fact that it limited its liability in its sales contract was "immaterial." *Id.* at 172.

12. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

13. Cavico, *supra* note 5, at 217–18.

14. 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.

The Restatement defines defective products as those “in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.”<sup>15</sup> The Restatement states that strict liability applies to all nonmanufacturers, i.e., “any wholesale or retail dealer[s] or distributor[s],” that sell defective products.<sup>16</sup>

The vast majority of states incorporated the strict liability principles of *Greenman*, *Vandermark*, and the Restatement into their state laws in the following years.<sup>17</sup> The Restatement (Third) of Torts: Products Liability reaffirmed the principle that courts should apply strict liability to nonmanufacturers.<sup>18</sup>

### *B. Rationales for Strict Liability for Nonmanufacturers*

Proponents of strict liability for nonmanufacturers advance several rationales in support of their position.<sup>19</sup> One is the “marketing enterprise” argument articulated in *Vandermark*, stating that “[r]etailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products.”<sup>20</sup> Justice Traynor, who is in many ways the father of strict liability,<sup>21</sup> articulated a second strict liability rationale in *Vandermark*: that strict liability for nonmanufacturers affords injured consumers maximum protection.<sup>22</sup> He pointed out that “[i]n some cases the retailer may be the only member of that enterprise reasonably

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(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.

15. *Id.* cmt. g; see also M. Stuart Madden, *Strict Products Liability Under Restatement (Second) of Torts § 402A: “Don’t Throw Out the Baby with the Bathwater,”* 10 *TOURO L. REV.* 123, 128 n.10 (1993).

16. RESTATEMENT (SECOND) OF TORTS § 402A cmt. f.

17. Cavico, *supra* note 5, at 217–18.

18. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998) (stating that “[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect”); see also Jason R. Burt, Note, *The Effects of Judicial Immunization of Passive Sellers in Sanns v. Butterfield Ford and a Proposal for the Shifting Nature of Fault*, 2005 *BYU L. REV.* 477, 487 n.59 (examining the evolution of strict liability exemptions for nonmanufacturers in Utah).

19. See generally *Vandermark v. Ford Motor Co.*, 391 P.2d 168 (Cal. 1964) (reasoning that strict liability for sellers affords injured consumers maximum protection); *Kasel v. Remington Arms Co.*, 101 Cal. Rptr. 314, 323 (Cal. Ct. App. 1972) (holding that the seller’s conduct in creating demand for the defective product justifies strict liability), cited in Cavico, *supra* note 5, at 221.

20. *Vandermark*, 391 P.2d at 171; see also *Kasel*, 101 Cal. Rptr. at 323 (“It is the defendant’s participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product . . . which calls for imposition of strict liability.”).

21. Justice Traynor was the first judge to apply the doctrine of strict liability, which eventually received widespread acceptance in California. Cavico, *supra* note 5, at 217.

22. *Vandermark*, 391 P.2d at 171 (stating that “[s]trict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship”).

available to the injured plaintiff.”<sup>23</sup> Justice Traynor also argued that nonmanufacturers are in a position to pressure manufacturers to produce safer products.<sup>24</sup> Proponents of strict liability further argue that nonmanufacturers will likely be able to seek indemnification from manufacturers and thus will suffer minimal harm if they are not at fault.<sup>25</sup>

### *C. Criticisms of Strict Liability for Nonmanufacturers*

Despite the widespread adoption of strict liability for nonmanufacturers, commentators have presented several arguments against this doctrine.<sup>26</sup> One major argument posed by commentators is that nonmanufacturers have little to no actual control over the goods they sell.<sup>27</sup> They simply receive the goods in sealed packages and sell them to consumers, without taking any action to contribute to the defective nature of the products.<sup>28</sup> Thus, critics of the *Vandermark* doctrine say the doctrine essentially makes nonmanufacturers insurers of the products they sell without having a means to prevent defects in the products.<sup>29</sup> Further, because the nonmanufacturers did not cause the defect, they are ill-equipped to defend against a lawsuit.<sup>30</sup>

Critics also attack the argument that nonmanufacturers have a unique ability to influence manufacturers to make products safer.<sup>31</sup> Critics say that, given the increased ability of courts to obtain personal jurisdiction over nonresident manufacturers since *Vandermark*, manufacturers now feel just as strongly threatened by a direct suit from consumers as they do from a nonmanufacturer’s indemnification suit.<sup>32</sup> Other factors, such as public relations, also motivate manufacturers to reduce the number of defective products they put on the market.<sup>33</sup>

Finally, critics argue that the indemnification system is wasteful and inefficient.<sup>34</sup> Critics contend that nonmanufacturers will incur significant legal costs to obtain indemnification, despite the fact that the nonmanufacturers realistically were in no position to prevent the defects.<sup>35</sup> Nonmanufacturers must participate in two lawsuits, one to defend the consumer product liability action, and a separate suit for indemnification against the manufacturer.<sup>36</sup> Further, since the nonmanufacturer has the burden of proving that the product was defective when it left the manufacturer’s hands, an indemnification

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23. *Id.* at 171.

24. *Id.* at 171–72 (stating that “[retailers] may be in a position to exert pressure on the manufacturer to that end; the retailer’s strict liability thus serves as an added incentive to safety”).

25. Cavico, *supra* note 5, at 222.

26. See generally Burt A. Leete, *Products Liability for Nonmanufacturer Product Sellers: Is It Time to Draw the Line?*, 17 FORUM 1250 (1982) (advocating legal reforms excluding nonmanufacturing sellers from strict liability in most circumstances), cited in Cavico, *supra* note 5, at 229.

27. Cavico, *supra* note 5, at 227.

28. *Id.*

29. *Id.* at 228.

30. *Id.*

31. *Id.*

32. Cavico, *supra* note 5, at 228.

33. *Id.* at 228–29.

34. *Id.* at 229.

35. *Id.* at 229–30.

36. *Id.* at 229.

attempt may fail.<sup>37</sup>

#### *D. Laws Limiting the Liability of Nonmanufacturers*

##### *1. The Model Uniform Product Liability Act*

Criticism of the *Vandermark* doctrine of strict liability for nonmanufacturers created a regulatory movement to limit the liability of nonmanufacturers in product liability actions. Established under the Ford Administration and continued under the Carter Administration, the Federal Interagency Task Force on Product Liability, chaired by the Department of Commerce and receiving input from ten federal agencies, researched product liability over a span of several years.<sup>38</sup> The Task Force found two major problems with U.S. product liability law: subjective insurance company ratemaking procedures and diverse product liability standards that lead to uncertainty.<sup>39</sup> As a result, the Task Force attempted to bring uniformity to U.S. product liability law by drafting the Model Uniform Product Liability Act (the Model Act), first published in 1979.<sup>40</sup>

While the Model Act is sweeping in scope,<sup>41</sup> this Note focuses specifically on the Model Act's limitations on nonmanufacturer liability. The Model Act repudiates the *Vandermark* doctrine of strict liability for nonmanufacturers, stating that "product sellers shall not be subject to liability in circumstances in which they did not have a reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, reveal the existence of the defective condition."<sup>42</sup> Thus, the Act essentially exempts nonmanufacturers from liability in circumstances where they receive sealed container goods and distribute them to consumers without inspection.<sup>43</sup>

However, the Model Act does make a concession to Justice Traynor's concern that an injured plaintiff could be left without a party against whom to seek redress. The Model Act includes exceptions for circumstances in which the manufacturer is not available for suit or the injured consumer otherwise cannot effectively sue the manufacturer.<sup>44</sup> Model Act section 105C states that courts will hold the nonmanufacturer, for the purposes of product liability, to the legal standard of a manufacturer if:

- (1) The manufacturer is not subject to service of process under the laws of the claimant's domicile; or

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37. Cavico, *supra* note 5, at 230. *Coca Cola Bottling Co. v. Hobart*, 423 S.W.2d 118 (Tex. Ct. App. 1967), cited in Cavico, *supra* note 5, at 230 n.89, illustrates the difficulty nonmanufacturers face in meeting this burden of proof. In this case, defendant grocery store's expert testified that the bottle would not have broken under such light impact were it not defective. *Hobart*, 423 S.W.2d at 125. However, the court held the expert's testimony was insufficient to prove that the bottle was defective when it left the bottler. *Id.* Thus, the court denied the nonmanufacturer indemnification. *Id.*

38. Victor E. Schwartz & Mark A. Behrens, *The Road to Federal Product Liability Reform*, 55 MD. L. REV. 1363, 1363-65 (1996).

39. Cavico, *supra* note 5, at 233.

40. MODEL UNIF. PROD. LIAB. ACT, 44 Fed. Reg. 62,714 (Oct. 31, 1979).

41. The Model Act covers a wide range of topics, from liability for product design defects and misuse of a product to standards for expert testimony in product liability trials. *Id.*

42. *Id.* at 62,726.

43. *See id.* (stating that sellers who do not have a reasonable opportunity to inspect sealed goods are not liable).

44. *Id.*

- (2) The manufacturer has been judicially declared insolvent in that the manufacturer is unable to pay its debts as they become due in the ordinary course of business; or
- (3) The court determines that it is highly probable that the claimant would be unable to enforce a judgment against the product manufacturer.<sup>45</sup>

## *2. State Limits on Nonmanufacturer Liability*

A majority of states have enacted product liability reform statutes, many of which limit the liability of nonmanufacturers.<sup>46</sup> While these laws have generally followed the Model Act,<sup>47</sup> they wildly diverge regarding under what circumstances, if any, a court can hold a nonmanufacturer strictly liable for the sale of defective goods.<sup>48</sup> For the purposes of this Note, these laws will be broken into categories based on the circumstances under which they allow courts to hold nonmanufacturers liable when an impediment prevents the injured consumer from bringing action against the manufacturer.

### *a. Laws That Absolutely Immunize Nonmanufacturing Sellers from Strict Liability*

Some states have passed laws that completely exempt nonmanufacturing sellers from liability.<sup>49</sup> These laws contain no exception for circumstances in which the injured consumer faces impediments to suing the manufacturer.<sup>50</sup> The goal of these laws appears to be to shift all liability onto the manufacturers, provided only that the nonmanufacturing seller was not negligent.<sup>51</sup>

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45. MODEL UNIF. PROD. LIAB. ACT, 44 Fed. Reg. at 62,726.

46. Cavico, *supra* note 5, at 237.

47. Several states have adopted aspects of the Model Act into their product liability statutes, but they have done so in a piecemeal fashion. Schwartz & Behrens, *supra* note 38, at 1366.

48. Cavico, *supra* note 5, at 241. Cavico divides the states' statutes into four different categories. *Id.* at 237–38. The first category is “indemnification statutes,” whereby the nonmanufacturer may seek indemnification from the manufacturer, and, if the indemnification action is successful, the plaintiff may seek recovery against the nonmanufacturer only if attempts to collect from the manufacturer were not successful. *Id.* at 237. The second category is “sealed container” statutes, whereby strict liability cannot be applied to nonmanufacturers for “sealed container goods” (goods that were received and distributed by the nonmanufacturer in sealed containers) or goods that the nonmanufacturer did not have a reasonable opportunity to inspect. *Id.* at 238. The third category is that of “absolute bars,” whereby a court may not under any circumstances hold a nonmanufacturer strictly liable. *Id.* at 238–39. The final category is that of “partial bars,” whereby the nonmanufacturer is only exempt from strict liability when the manufacturer is subject to the service of process, and is not insolvent or otherwise unavailable for judgment. Cavico, *supra* note 5, at 239–40. However, the scope of this Note is limited to potential lawsuits against nonmanufacturers that sell defective sealed container goods from China. Therefore, this Note will categorize state laws based on their provisions allowing courts to hold nonmanufacturers liable when impediments prevent suing the manufacturers.

49. *See, e.g.*, GA. CODE ANN. § 51-1-11.1 (2000) (limiting the doctrine of strict liability, without exception, to manufacturers); NEB. REV. STAT. ANN. § 25-21,181 (LexisNexis 2007) (stating that “no product liability action based on the doctrine of strict liability in tort shall be commenced or maintained against any seller or lessor of a product which is alleged to contain or possess a defective condition unreasonably dangerous”).

50. GA. CODE ANN. § 51-1-11.1; NEB. REV. STAT. ANN. § 25-21,181.

51. GA. CODE ANN. § 51-1-11.1; NEB. REV. STAT. ANN. § 25-21,181.

*b. Laws That Immunize Nonmanufacturing Sellers from Strict Liability with an Exception for Cases Where a Court Cannot Gain Jurisdiction over the Manufacturer*

Some state laws limit nonmanufacturing seller liability but provide an exception allowing strict liability against the nonmanufacturing seller for the sale of defective products when the court cannot obtain jurisdiction over the manufacturer.<sup>52</sup> When this exception applies, the statutes consider the seller to be the manufacturer, thus allowing a strict liability action against the seller.<sup>53</sup> Such statutes partially track the Model Act's "no jurisdiction" exception.<sup>54</sup> Since these statutes do not mention an alternative procedure,<sup>55</sup> presumably the injured party must first bring a suit against the manufacturer and obtain a judicial declaration that the court does not have jurisdiction over the manufacturer before bringing suit against the seller.

*c. Laws That Immunize Nonmanufacturing Sellers from Strict Liability with an Exception for Cases Where a Court Has Declared the Manufacturer Insolvent*

The next category of laws is those that immunize nonmanufacturing sellers from strict liability with an exception for cases where a court has declared the manufacturer insolvent.<sup>56</sup> These statutes do not specify which court must declare the manufacturer insolvent.<sup>57</sup> This category of statute tracks the Model Act's "judicially declared insolvent" exception.<sup>58</sup>

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52. *See, e.g.*, COLO. REV. STAT. § 13-21-402 (2005) (stating that no product liability action shall be brought against a nonmanufacturing seller, unless the court cannot obtain jurisdiction over the manufacturer, in which case the seller shall legally be considered the manufacturer); IND. CODE ANN. § 34-20-2-3 (LexisNexis 2007) (stating that a "product liability action based on the doctrine of strict liability in tort may not be commenced . . . against a seller of a [defective product] unless the seller is a manufacturer of the product"); *id.* § 34-20-2-4 (stating that "[i]f a court is unable to hold jurisdiction over a particular manufacturer of a product . . . that manufacturer's [seller] over whom a court may hold jurisdiction shall be considered . . . the manufacturer of the product"); N.C. GEN. STAT. § 99B-2 (2007) (barring any product liability action against sellers of sealed container goods or sellers who have no reasonable opportunity to inspect the product, except when the goods' manufacturer is beyond the jurisdiction of the state's courts or is insolvent); TEX. CIV. PRAC. & REM. CODE ANN. § 82.003 (Vernon 2005) (stating that "a seller that did not manufacture a product is not liable for harm caused . . . [unless] the manufacturer of the product is: (A) insolvent; or (B) not subject to the jurisdiction of the court").

53. *See* IND. CODE ANN. § 34-20-2-3; *id.* § 34-20-2-4; N.C. GEN. STAT. § 99B-2; TEX. CIV. PRAC. & REM. CODE ANN. § 82.003.

54. MODEL UNIF. PROD. LIAB. ACT § 105C, 44 Fed. Reg. 62,714, 62,726 (Oct. 31, 1979).

55. IND. CODE ANN. § 34-20-2-3; *id.* § 34-20-2-4; N.C. GEN. STAT. § 99B-22; TEX. CIV. PRAC. & REM. CODE ANN. § 82.003.

56. *See, e.g.*, DEL. CODE ANN. tit. 18, § 7001 (2007) (stating that a nonmanufacturing seller of sealed container products is immune from liability except for when "[t]he claimant is unable to identify the manufacturer through reasonable effort [or the] manufacturer is insolvent, immune from suit or not subject to suit in Delaware"); N.C. GEN. STAT., § 99B-2 (providing exemptions for lack of jurisdiction over the manufacturer and for manufacturer insolvency); TEX. CIV. PRAC. & REM. CODE ANN. § 82.003 (same).

57. COLO. REV. STAT. § 13-21-402; DEL. CODE ANN. tit. 18, § 7001; N.C. GEN. STAT., § 99B-2; TEX. CIV. PRAC. & REM. CODE ANN. § 82.003.

58. MODEL UNIF. PROD. LIAB. ACT § 105C, 44 Fed. Reg. at 62,726.

*d. New Jersey's Nonmanufacturing Seller Strict Liability Statute*

New Jersey has a unique nonmanufacturing seller strict liability immunity statute<sup>59</sup> in that the statute provides that a seller is not liable for strict liability claims if the seller files an affidavit identifying the correct manufacturer of the injury-causing product.<sup>60</sup> However, a court can hold the seller strictly liable if the seller incorrectly identifies the manufacturer, or if “[t]he manufacturer has no known agents, facility, or other presence within the United States; or [t]he manufacturer has no attachable assets or has been adjudicated bankrupt and a judgment is not otherwise recoverable from the assets of the bankruptcy estate.”<sup>61</sup>

*e. Sealed Container Defective Imports from China*

In recent years, the United States has imported from China numerous defective products.<sup>62</sup> The products ranged from pet food tainted with dangerous chemicals to toys coated with toxic lead paint to poisonous toothpaste.<sup>63</sup> Mistakes on the part of U.S. designers caused some of the defects.<sup>64</sup> In other cases, U.S. manufacturers imported defective Chinese-made materials and mixed them with other materials to make a final product.<sup>65</sup> Both of these circumstances are beyond the scope of this Note. Instead, this Note focuses on the case of sealed container products<sup>66</sup> imported from China and sold, without inspection, by sellers in the United States. An example of such a product is the toothpaste containing dangerously high levels of melamine that was imported from China and sold in the United States in the summer of 2007.<sup>67</sup>

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59. N.J. STAT. ANN. § 2A:58C-9 (West 2007).

60. *Id.*

61. *Id.*

62. Ng, *supra* note 1.

63. *Id.*

64. Jason Scott & John Liu, *Starbucks Won't Halt China-Made Products After Recall*, BLOOMBERG.COM, Oct. 10, 2007, [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a8K7d\\_zE\\_Y2M](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a8K7d_zE_Y2M).

65. David Barboza, *Exporter of Gluten is Detained by China*, INT'L HERALD TRIB., May 4, 2007, at 1.

66. Delaware's product liability statute offers a typical definition of the requirements for goods to be considered sealed container goods and the seller to be immune from liability:

- (1) The product was acquired and then sold or leased by the seller in a sealed container and in unaltered form;
- (2) The seller had no knowledge of the defect;
- (3) In the performance of the duties the seller performed or while the product was in the seller's possession could not have discovered the defect while exercising reasonable care;
- (4) The seller did not manufacture, produce, design or designate the specifications for the product, which conduct was the proximate and substantial cause of the claimant's injury;
- (5) The seller did not alter, modify, assemble or mishandle the product while in the seller's possession in a manner which was the proximate and substantial cause of the claimant's injury; and
- (6) The seller had not received notice of the defect from purchasers of similar products.

DEL. CODE ANN. tit. 18, § 7001 (2007).

67. *U.S. Seizes Tainted Toothpaste from China*, REUTERS.COM, June 1, 2007, <http://www.reuters.com/article/domesticNews/idUSWAT00764420070601>.

*f. Why Focus on China?*

Protecting consumers from defective Chinese products is important simply because of the sheer volume of goods the United States imports from China. China is the United States's second largest trading partner, after Canada,<sup>68</sup> delivering \$287.6 billion worth of goods to the United States.<sup>69</sup> The range of goods heavily imported from China, from apparel to office machinery,<sup>70</sup> virtually guarantees that Chinese-made products are part of nearly every U.S. resident's life.<sup>71</sup>

*g. The Difficulty for U.S. Citizens to Sue in Chinese Courts*

U.S. citizens bringing lawsuits in China appear to face formidable challenges. One challenge is discovering the company's location, as some Chinese manufacturers lack official addresses.<sup>72</sup> Upon finding the company, corporate records are frequently incomplete and the company's level of cooperation with the lawsuit is often low.<sup>73</sup> Chinese courts rarely grant large damage awards.<sup>74</sup> Additionally, many manufacturers in China are relatively small operations without sufficient assets to satisfy a large judgment.<sup>75</sup> One experienced U.S. attorney described suing Chinese companies in Chinese courts as "spitting in the wind."<sup>76</sup>

*h. The Ability of U.S. Courts to Gain Jurisdiction over Chinese Manufacturers*

A court's determination of whether it can assert personal jurisdiction over an out-of-state (including a non-U.S.) defendant is often a complicated analysis, depending heavily upon the specific circumstances of the case.<sup>77</sup> However, the courts consistently apply some general standards. The laws of the forum state and the Due Process Clause of the

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68. Mark Drajem, *Commerce Department Applies New Duties Against China*, BLOOMBERG.COM, Mar. 30, 2007, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=afwdlYwBdEWQ>.

69. The US-China Business Council, US-China Trade Statistics and China's World Trade Statistics, <http://www.uschina.org/statistics/tradetable.html> (last visited Oct. 21, 2008).

70. See THOMAS LUM & DICK K. NANTO, CRS REPORT FOR CONGRESS: CHINA'S TRADE WITH THE UNITED STATES AND THE WORLD 20 (2007), available at <http://www.fas.org/sgp/crs/row/RL31403.pdf> (explaining that the United States imported \$42 billion worth of office machines and data processing equipment and \$20 billion worth of apparel and accessories from China in 2005).

71. See, e.g., Jayne O'Donnell & Mindy Fetterman, *When it Comes to Toys, Buying American is Tough*, USA TODAY, Oct. 5, 2007, at 1B, available at [http://www.usatoday.com/money/industries/retail/2007-10-04-toy-fear\\_N.htm](http://www.usatoday.com/money/industries/retail/2007-10-04-toy-fear_N.htm) (stating that 80% of the toys sold in the United States are made in China); Jiang Jingjing, *Wal-Mart's China Inventory to Hit US\$18b This Year*, CHINA BUS. WKLY., Nov. 29, 2004, [http://www.chinadaily.com.cn/english/doc/2004-11/29/content\\_395728.htm](http://www.chinadaily.com.cn/english/doc/2004-11/29/content_395728.htm) (stating that 70% of the goods sold at Wal-Mart are manufactured in China).

72. Xiyun Yang, *Liability Lawyers Struggle to Pierce the Chinese Curtain*, WASH. POST, July 28, 2007, at D1.

73. *Id.*

74. Don Lee, *The People's Verdict: Going to Court in China Pays Off*, L.A. TIMES, Nov. 29, 2004, at A1.

75. Lorraine Woellert, *Made in China. Sued Here.*, BUS. WK., July 9, 2007, at 9, available at [http://www.businessweek.com/magazine/content/07\\_28/c4042003.htm](http://www.businessweek.com/magazine/content/07_28/c4042003.htm).

76. Yang, *supra* note 72, at D1.

77. See, e.g., Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619, 1620 (2001) (noting that personal jurisdiction is a case-by-case analysis turning on the details of the defendant's contacts with the forum state).

Fourteenth Amendment limit personal jurisdiction.<sup>78</sup> In the landmark case *World-Wide Volkswagen Corp. v. Woodson*,<sup>79</sup> the U.S. Supreme Court held that a court may, under the Fourteenth Amendment, exercise personal jurisdiction over a foreign (in this case, out-of-state) defendant only when the defendant's contacts with the forum state are sufficient for the defendant to reasonably predict that it would be subject to the forum state's jurisdiction.<sup>80</sup> In *Asahi Metal Industry Co. v. Superior Court*,<sup>81</sup> the Court could not agree on what circumstances should reasonably put a defendant corporation on notice that it would be subject to a forum state's jurisdiction.<sup>82</sup> Asahi, a valve manufacturer, sold valves to Cheng Shin Rubber Industrial Co. in Taiwan.<sup>83</sup> Cheng Shin then used the valves in tires that it exported to the United States.<sup>84</sup> The Court held that Asahi did not have sufficient contacts with California (where a defective tire caused injury) for the district court to assert personal jurisdiction over it.<sup>85</sup> The Asahi Court, however, did not garner a majority on the issue of whether a "stream-of-commerce theory" (the theory that a defendant should reasonably expect that placing a product into the stream of commerce could cause it to end up in the forum state) was, on its own, sufficient to support personal jurisdiction.<sup>86</sup> Justice O'Connor, announcing the opinion of the Court, stated that there needed to be some action purposefully directed towards the forum state to support personal jurisdiction, even if Asahi had reason to believe that its product would end up in California.<sup>87</sup> However, Justice Brennan, concurring in the judgment, believed that the fact that the injury-causing product had a normal and foreseeable path from the manufacturer to the retailer on its own was sufficient to support personal jurisdiction.<sup>88</sup> Thus, the stream-of-commerce debate remains unresolved and several circuits still allow district courts to assert jurisdiction based upon stream-of-commerce theories alone.<sup>89</sup>

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78. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 289–91 (1980) (holding that Oklahoma's assertion of personal jurisdiction over a New York car dealership under the state's "long-arm" statute was impermissible on due process grounds in this case). A "long-arm" statute is a state statute stating the circumstances under which a state court may assert personal jurisdiction over parties outside of the state's territorial bounds. PETER L. WINK, LATHAM & WATKINS LLP, JURISDICTION IN UNITED STATES COURTS OVER FOREIGN MANUFACTURERS AND SUPPLIERS I (2005) (on file with author). Generally, long-arm statutes permit the state to assert jurisdiction to the full extent permissible under the Fourteenth Amendment, thus the Due Process Clause is often the only limit on a court's ability to assert personal jurisdiction. *Id.* In *World-Wide Volkswagen*, the Court clarified its prior holding that due process requires that subjecting a defendant to personal jurisdiction in a particular forum state must conform to "traditional notions of fair play and substantial justice." *World-Wide Volkswagen*, 444 U.S. at 292 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

79. *World-Wide Volkswagen*, 444 U.S. at 286.

80. *Id.* at 297.

81. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), *cited in* WINK, *supra* note 78, at 3.

82. *Id.*

83. *Id.* at 106.

84. *Id.*

85. *Id.* at 108.

86. *Asahi*, 480 U.S. at 108–21.

87. *Id.* at 112.

88. *Id.* at 117 (Brennan, J., concurring).

89. *See, e.g., Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir. 1994) (finding personal jurisdiction over the defendant, a Japanese fireworks manufacturer, because the defendant targeted a certain regional area of the United States); *Ruston Gas Turbines, Inc. v. Donaldson Co., Inc.*, 9 F.3d 415, 420–21 (5th Cir. 1993) (holding that an out-of-state defendant's knowledge or awareness that a product

As a result of the U.S. Supreme Court's lack of clarity, the federal judicial circuits have applied varying standards when determining what level of contact between an out-of-state defendant and the forum state is sufficient to support personal jurisdiction.<sup>90</sup> The U.S. Supreme Court has not further clarified this issue, and thus courts of appeals apply varying standards in their determination of what contacts with the forum state are sufficient to support a state court's assertion of personal jurisdiction over an out-of-state defendant. Therefore, it is extremely difficult to accurately predict whether a court will assert personal jurisdiction over a defendant.<sup>91</sup>

*i. The Difficulty of Enforcing U.S. Court Judgments in China*

Chinese courts do not enforce the judgments of U.S. courts.<sup>92</sup> Researchers have not found any instance where a Chinese court has enforced a U.S. judgment without first relitigating the issues of the case.<sup>93</sup> In fact, in almost no modern cases have Chinese courts enforced the judgments of foreign courts without relitigating the case on the merits.<sup>94</sup> Chinese courts have, in several cases, refused to enforce the judgments of foreign courts.<sup>95</sup> According to Chinese law, Chinese courts will not enforce U.S. court judgments in the absence of a treaty between the United States and China for the recognition of each other's judgments.<sup>96</sup> No such treaty exists.<sup>97</sup> Because U.S. courts do not enforce Chinese court judgments, Chinese courts have no actual reciprocity to use as a basis to enforce U.S. court judgments.<sup>98</sup>

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will reach the forum state in a stream of commerce is alone enough to support personal jurisdiction).

90. Compare *Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 282 (3d Cir. 1994) (holding that a stream-of-commerce theory must be accompanied by some other act of "personal availment" on the part of the out-of-state defendant to support personal jurisdiction), and *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945-46 (4th Cir. 1994) (holding that a stream-of-commerce theory, unsupported by some "activity purposefully directed toward the forum state" by the out-of-state defendant, is insufficient to support personal jurisdiction), with *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943, 948 (8th Cir. 1998) (holding that "when a foreign manufacturer 'pour[s] its products' into a regional distributor with the expectation that the distributor will penetrate a discrete, multi-State trade area, the manufacturer has 'purposefully reaped the benefits' of the laws of each State in that trade area for due process purposes" even if the defendant "is a foreign corporation having no office, agents, employees, or property in the [forum state], and [the defendant] neither advertises nor directly solicits business in [the forum state]"), and *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992) (holding that a stream-of-commerce theory can support personal jurisdiction over an out-of-state defendant if the defendant was aware that the product would enter the forum state). See also WINK, *supra* note 78, at 3-5.

91. See the inconsistent treatment of the stream of commerce theory across judicial circuits, discussed *supra* note 90.

92. Donald C. Clarke, *The Enforcement of United States Court Judgments in China: A Research Note 1* (George Washington Univ. Law Sch. Pub. Law and Legal Theory Working Paper No. 236, 2004), available at <http://ssrn.com/abstract=943922>. However, Chinese courts routinely enforce the arbitration awards of Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention) contracting states, including the United States. *Id.* at 5. The New York Convention is codified in the United States at 9 U.S.C. § 201 (2006).

93. Clarke, *supra* note 92, at 5.

94. *Id.* at 3-4.

95. *Id.*

96. *Id.* at 2.

97. *Id.*

98. Clarke, *supra* note 92, at 2-3. While it would be possible to enforce a U.S. judgment against a Chinese

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*j. China's Bankruptcy Law*

Many of the statutes that this Note analyzes include provisions for when a court has declared the manufacturer insolvent.<sup>99</sup> However, China's bankruptcy law just took effect in June of 2007, and the courts will not enforce it until the central government issues a series of implementation orders on the appointment and training of judges.<sup>100</sup> Thus, it will likely take a significant amount of time for bankruptcy filings to become widespread in China.<sup>101</sup>

## III. ANALYSIS

This Part first considers how the different categories of state laws protecting sellers from strict liability claims<sup>102</sup> affect the remedies available to U.S. consumers harmed by defective sealed container goods imported from China. Second, this Part will analyze the remedies available to the same consumers under the Model Act. Finally, this Part will determine which category of law best protects injured consumers.

*A. This Note's Assumptions*

This Part focuses on defective sealed container goods imported from China and sold in the United States. Thus, this Note makes several assumptions to narrow its scope to circumstances in which a negligence theory<sup>103</sup> would not hold the seller liable and strict

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manufacturer who holds assets outside of China, such a scenario would be unlikely. *See generally* Peter Hessler, *China's Instant Cities*, NAT'L GEOGRAPHIC, June 2007, at 88 (describing the factories in Wenzhou, China, an export-oriented manufacturing center, as low capital, fly-by-night operations). Such operations are unlikely to have assets within the reach of a U.S. court. While China's outward direct investment (investment leaving mainland China) rose to \$16 billion in 2006, only 7% of this went to North America, with 60% remaining in Asia. Posting of Bill Powell to Time's China Blog, [http://time-blog.com/china\\_blog/2007/02/get\\_ready\\_for\\_chinese\\_fdi.html](http://time-blog.com/china_blog/2007/02/get_ready_for_chinese_fdi.html) (Feb. 20, 2007 7:44 EST). Further, investment by large state-owned enterprises in areas such as natural resources, or by major private players such as Lenovo, made up much of this figure. *Id.* State-owned enterprises could shield themselves with sovereign immunity in a product liability action. Hillel Parness & Derek Craig, *Chinese Takeaway*, LAWYER, Dec. 3, 2007, at 30. Most medium- and small-scale Chinese enterprises wishing to move assets out of the country do so clandestinely, funneling funds into shell companies in Hong Kong or tax havens such as the Virgin Islands and Mauritius. Dai Yan, *Investment Outflows to Tax Havens*, CHINA DAILY, June 22, 2004, available at [http://www.chinadaily.com.cn/english/doc/2004-06/22/content\\_341345.htm](http://www.chinadaily.com.cn/english/doc/2004-06/22/content_341345.htm).

99. *See, e.g.*, COLO. REV. STAT. ANN. § 13-21-402 (West 2007); DEL. CODE ANN. tit. 18, § 7001(c)(2) (2007); N.C. GEN. STAT. § 99B-2 (2007); N.J. STAT. ANN. § 2A:58C-9 (West 2008); TEX. CIV. PRAC. & REM. CODE ANN. § 82.003 (Vernon 2005).

100. Shu-Ching Jean Chen, *China's Bankruptcy Big Bang*, FORBES.COM, June 12, 2007, [http://www.forbes.com/facesinthenews/2007/06/12/china-bankruptcy-law-face-markets-cx\\_jc\\_0612auto\\_facescan01.html](http://www.forbes.com/facesinthenews/2007/06/12/china-bankruptcy-law-face-markets-cx_jc_0612auto_facescan01.html).

101. *Id.*

102. *See supra* Part II.D.2 (discussing state limits on nonmanufacturer liability).

103. Negligence generally requires the existence of a duty ("the existence and violation of a legal duty to use care"), breach ("the failure to exercise the degree of care demanded by the circumstances"), and harm ("the breach of a duty to another to protect him or her from the particular harm that ensued"). 57A AM. JUR. 2D Negligence § 5 (2004). A seller of goods is generally not liable in *negligence* (as opposed to strict liability) for failing to discover a defect in a product it sells when the product is manufactured by a third party. RESTATEMENT (SECOND) OF TORTS § 402 (1965).

liability would be the only cause of action available against the seller.<sup>104</sup> This Note assumes that the nonmanufacturing seller did not negligently handle or modify the imported goods, but simply resold them in the same condition in which they were imported. It further assumes the seller had no reason to suspect that the goods were defective and had no knowledge about the manufacturer that would reasonably lead the seller to suspect that the goods might be defective. This Note also assumes that the Chinese manufacturer does not have enough assets subject to attachment in the United States or other reachable jurisdictions for an injured consumer to enforce a judgment against the manufacturer. Thus, because Chinese courts do not enforce U.S. court judgments<sup>105</sup> and because suing Chinese companies in Chinese courts is an extremely difficult process with a low probability of success,<sup>106</sup> this Note assumes that suing the Chinese manufacturer is not a viable option.

*B. Current State Laws Limiting the Liability of Nonmanufacturers Fail to Protect Consumers Injured by Defective Chinese Products*

This Part analyzes how well various forms of existing state laws limiting seller liability protect consumers who were injured by defective Chinese products.<sup>107</sup> The first category of laws absolutely immunizes sellers against strict liability exposure.<sup>108</sup> These laws effectively leave consumers injured by defective Chinese products without remedy. Since the seller was not negligent, and strict liability is not an option, the injured consumer cannot sue the seller. At the same time, the consumer cannot seek a remedy against the Chinese manufacturer.<sup>109</sup>

The second category of laws immunizes nonmanufacturing sellers against strict liability exposure with an exception for cases in which the court cannot gain jurisdiction over the manufacturer.<sup>110</sup> These laws also risk leaving the injured consumer without an effective remedy. The circumstances under which a court can assert personal jurisdiction over a foreign defendant vary from court to court, and the U.S. Supreme Court has left the stream-of-commerce issue unresolved.<sup>111</sup> A court willing to assert personal jurisdiction on a stream-of-commerce theory alone would possibly assert jurisdiction over a Chinese manufacturer of defective products that harmed consumers in the forum

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104. This Note's assumptions track the actual way in which many major U.S. retailers get products from Chinese suppliers. While some goods are manufactured for U.S. brands (e.g., Nike) by Chinese manufacturers according to the U.S. brand's design specifications, major U.S. retailers, such as Wal-Mart, Target, J.C. Penney, Home Depot, and Sears, often buy products in bulk directly from Chinese suppliers, who manufacture the goods to their own specifications. Dexter Roberts et al., *Secrets, Lies, and Sweatshops*, BUS. WK., Nov. 27, 2006, at 50, available at [http://www.businessweek.com/magazine/content/06\\_48/b4011001.htm](http://www.businessweek.com/magazine/content/06_48/b4011001.htm); see also Parija B. Kavilanz, *China to Eliminate Lead Paint in Toy Exports*, CNNMONEY.COM, Sept. 11, 2007, [http://money.cnn.com/2007/09/11/news/economy/cpsc\\_chinasafety/index.htm](http://money.cnn.com/2007/09/11/news/economy/cpsc_chinasafety/index.htm) (stating that many major U.S. retailers buy a substantial amount of goods directly from Chinese suppliers); Hessler, *supra* note 98, at 88 (describing the independent factories in global manufacturing center Wenzhou).

105. See *supra* Part II.D.2.

106. See *supra* Part II.D.2.g.

107. See *supra* Part II.D.2.

108. See *supra* Part II.D.2.a.

109. See *supra* Parts II.D.2.g., II.D.2.

110. See *supra* Part II.D.2.b.

111. See *supra* Part II.D.2.h.

state.<sup>112</sup> If the court were to assert jurisdiction over the Chinese manufacturer, the consumer would lack an effective remedy. The law would protect the seller from suit in strict liability (the only means by which one could sue the seller since it was not negligent). At the same time, the injured consumer would have no effective remedy against the Chinese manufacturer because of the difficulty in suing in Chinese courts and enforcing U.S. judgments in China.<sup>113</sup>

The next category of laws immunizes nonmanufacturing sellers against strict liability exposure with an exception for cases in which a court has declared the manufacturer insolvent.<sup>114</sup> These laws could possibly afford the injured consumer an effective remedy; if a scandal broke out regarding a manufacturer's defective goods, the manufacturer could go bankrupt. However, this category of laws presents several disadvantages for injured consumers seeking remedies against Chinese manufacturers. Because China's bankruptcy law just came into effect and is not yet fully implemented, widespread use of bankruptcy is likely still years away.<sup>115</sup> Further, in many instances in which a Chinese company is responsible for manufacturing defective products, the Chinese government tends to simply revoke the company's license and shut it down rather than allow the company to fail and declare bankruptcy.<sup>116</sup> Thus, if the government simply shut down a company, the court would have difficulty determining whether the company is insolvent, and would therefore have difficulty determining whether the seller liability exception applied.

A final problem is the fact that whether the manufacturer went bankrupt in China might not have any relationship to the harms the defective product caused in the United States. Because Chinese courts' refusal to enforce foreign judgments shields the manufacturer from U.S. court judgments, the manufacturer would possibly not suffer any economic losses from exporting defective products. Further, even if the manufacturer was in financial dire straits, the court would need some impetus for a judicial declaration of insolvency. Absent the manufacturer or its creditors initiating such a proceeding, the injured party in the United States would have to persuade a Chinese court to make such a declaration. Again, however, it is difficult for foreigners to operate effectively in the Chinese legal system.<sup>117</sup> Thus, while this category of laws might offer the injured consumer a remedy against the seller in some circumstances, it hardly guarantees one.

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112. See, e.g., *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943 (8th Cir. 1998) (finding personal jurisdiction over the defendant, a British grain elevator manufacturer, when the defendant targeted a discrete multi-state area); *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610 (8th Cir. 1994) (finding personal jurisdiction over the defendant, a Japanese fireworks manufacturer, because the defendant targeted a certain regional area of the United States); *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 420 (5th Cir. 1993) (holding that an out-of-state defendant's knowledge or awareness that a product will reach the forum state in a stream of commerce is alone enough to support personal jurisdiction); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992) (holding that a stream-of-commerce theory can support personal jurisdiction over an out-of-state defendant if the defendant was aware that the product would enter the forum state), all cited in WINK, *supra* note 78, at 3–5.

113. See *supra* Parts II.D.2.g., II.D.2.i.

114. See *supra* Part II.D.2.c.

115. See *supra* Part II.D.2.j.

116. See David Barboza & Walt Bogdanich, *China Shuts 3 Companies Over Safety of Products*, N.Y. TIMES, July 21, 2007, at 1, available at <http://www.nytimes.com/2007/07/21/business/21food.html> (describing the circumstances under which China revoked three companies' operating licenses).

117. See *supra* Part II.D.2.g.

The fourth example of state law limiting nonmanufacturing seller liability is the New Jersey statute.<sup>118</sup> Of the existing state statutes limiting seller liability, this statute offers consumers injured by defective Chinese products the best protection. The statute discharges a seller sued for selling defective products from strict liability claims if the seller files an affidavit identifying the correct manufacturer of the injury-causing product.<sup>119</sup> This protects the consumer in situations in which the seller is not aware of the manufacturer's identity. A court can also hold a seller strictly liable if the seller incorrectly identifies the manufacturer,<sup>120</sup> or if "[t]he manufacturer has no known agents, facility, or other presence within the United States; or . . . [t]he manufacturer has no attachable assets or has been adjudicated bankrupt."<sup>121</sup> The bankruptcy provision of this statute is not particularly helpful to the injured consumer.<sup>122</sup> However, the "no attachable assets" provision could possibly provide the consumer with a remedy against the seller. If the manufacturer has no assets that are attachable by a U.S. court, the seller would lose its immunity.<sup>123</sup>

However, because the New Jersey statute focuses on whether a U.S. court could attach *some* assets,<sup>124</sup> and not whether a court could attach *enough* assets to satisfy a judgment,<sup>125</sup> this provision does not guarantee injured consumers a remedy. In a scenario in which a Chinese manufacturer of defective products has a few sales agents in the United States and some minimal amount of assets outside of China to which U.S. courts could attach, the seller would be exempt from liability if it correctly identified the manufacturer. However, a judgment against the manufacturer would only be enforceable to the extent of the manufacturer's attachable assets. Thus, while this statute could possibly provide protection to a consumer injured by defective Chinese products, it also presents circumstances under which the injured consumer would be unable to sue the seller, and would also be unable to enforce a judgment against the manufacturer. Thus, all four existing categories of state seller strict liability exemption laws run the risk of leaving the injured consumer without an effective remedy.

### *C. The Model Act Protects Consumers Injured by Defective Chinese Products*

The Model Act generally exempts nonnegligent sellers from strict liability.<sup>126</sup> However, the Model Act does not exempt the seller in circumstances in which (1) the manufacturer is not subject to service of process in the court's jurisdiction, (2) a court has declared the manufacturer insolvent, or (3) a judgment is unlikely to be enforceable against the manufacturer.<sup>127</sup> The "judgment is unlikely to be enforceable" provision

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118. *See supra* Part II.D.2.d.

119. N.J. STAT. ANN. § 2A:58C-9(a)-(b) (West 2007).

120. *Id.* § 2A:58C-9(c)(1).

121. *Id.* § 2A:58C-9(c)(2)-(3).

122. *See supra* Part III.B.

123. N.J. STAT. ANN. § 2A:58C-9(c)(2)-(3).

124. Because Chinese courts do not enforce U.S. court judgments, it is unlikely that U.S. courts would consider assets in China to be "attachable." *See supra* Part II.D.i.

125. N.J. STAT. ANN. § 2A:58C-9.

126. MODEL UNIF. PROD. LIAB. ACT, 44 Fed. Reg. 62,714, 62,726 (Oct. 31, 1979).

127. *Id.* The "not subject to service of process" and bankruptcy exceptions are not particularly helpful to a consumer injured by defective Chinese products. *See supra* Part III.B.

guarantees the injured consumer a remedy when the Chinese manufacturer has insufficient attachable assets to satisfy a U.S. court judgment because Chinese courts do not enforce U.S. court judgments.

The Model Act focuses on the consumer's ability to enforce a judgment rather than the attachability of *some* assets. Thus, the Model Act, unlike the New Jersey statute, gives consumers a remedy against the seller in situations where a U.S. court can attach some amount of the manufacturer's assets, but the amount is insufficient to satisfy a judgment. By giving the injured consumer a remedy against the seller up until the point at which a court can effectively enforce a judgment against the manufacturer, the Model Act guarantees the injured consumer a remedy in all circumstances.

#### IV. RECOMMENDATION

States should follow the Model Act when drafting their seller strict liability limitation statutes because the Model Act guarantees injured consumers an effective remedy. Existing state laws limiting the liability of sellers of defective products do not provide adequate protection to consumers injured by Chinese-manufactured defective products.<sup>128</sup> These existing state laws all focus on circumstances other than the enforceability of a judgment against the manufacturer in determining when a court can hold the seller liable. Thus, they all potentially create situations where the injured consumer may not have an effective remedy against the seller or the manufacturer. However, because the Model Act focuses on whether a judgment is enforceable against the manufacturer, it guarantees consumers injured by defective Chinese products a remedy.

It is important for legislators to give consumers injured by defective Chinese products a remedy against the seller of the products for several reasons. First, when consumers suffer serious injury<sup>129</sup> they are entitled to be made whole. The injuries resulting from defective Chinese products in the past few years, including lead poisoning and dead pets,<sup>130</sup> show that defective Chinese products can inflict serious harms that warrant substantial compensation.

Second, sellers can influence manufacturers to increase product safety. As Justice Traynor pointed out in *Vandermark*, sellers are in a unique position to influence manufacturers to produce safer products.<sup>131</sup> Strict liability for sellers gives them an

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128. *See supra* Part III.B.

129. In February of 2006, a four-year-old boy in Minnesota died of lead poisoning after swallowing part of a bracelet made by "a third-party, independent vendor in China" that was 99% lead. Chris Reidy, *Reebok Recalls Bracelets After Boy Dies*, BOSTON GLOBE, Mar. 24, 2006, at C1. In 2007, pet food with contaminated ingredients from China killed several pet dogs and cats. Barboza, *supra* note 65, at 1. Chinese-made tires that lacked a key safety component caused several accidents and one death in 2007. David Welch, Lorraine Woeller & John Carey, *An Importer's Worst Nightmare; A Chinese Supplier, Safety Shortcuts, and an American Middleman Under Siege*, BUS. WK., July 23, 2007, at 46. According to the U.S. Consumer Product Safety Commission, deaths, injuries, and property damage from consumer product incidents cost the United States more than \$700 billion annually. Hal Stratton, Chairman, U.S. Consumer Prod. Safety Comm., Testimony Submitted to the House Appropriations Subcommittee on Transportation, Treasury, and HUD, the Judiciary, DC 1 (Apr. 14, 2005), available at <http://www.cpsc.gov/pr/trans.pdf>.

130. Ng, *supra* note 1.

131. *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 171-72 (Cal. 1964) (stating that "[sellers] may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added

incentive to apply this pressure.<sup>132</sup> In the case of defective Chinese products, this incentive would likely come in the form of indemnification clauses in the contract between the Chinese manufacturer and the U.S. seller. Because Chinese courts recognize U.S. arbitral awards,<sup>133</sup> if the contract specified arbitration as the remedy if a court held the U.S. seller liable for selling the defective product, this indemnification clause would be enforceable even if the manufacturer resisted. Thus, sellers are in a better position to protect themselves from the damage of defective Chinese goods than consumers. If sellers had a greater incentive to include and enforce such clauses, Chinese manufacturers would feel more pressure to avoid product defects.<sup>134</sup>

Additionally, if courts can hold sellers strictly liable for the sale of defective Chinese goods, sellers will have an incentive to be more discriminating and exercise more diligence when choosing their supplier.<sup>135</sup> Indeed, after the wave of defective products in the past few years, sellers of Chinese goods in the United States should be aware of the possibility that they are selling defective products. Thus, it is only fair that the burden be on the sellers to take action to ensure the safety of the goods that they sell.

Further, the Model Act shares the same goal of state laws limiting seller liability because it shields nonmanufacturing sellers from strict liability in most cases.<sup>136</sup> Thus, if these states adopted the Model Act formulation, the general rule that courts should not hold nonmanufacturing sellers of sealed container goods strictly liable would remain intact. The only time a court can hold a nonmanufacturing seller strictly liable under the Model Act is when the seller is the only party that the injured consumer can effectively sue.<sup>137</sup>

Finally, trade in defective goods is a global problem. Defective Chinese goods have caused injury worldwide, not just in the United States.<sup>138</sup> Given their economic influence, U.S. retailers are in a powerful position to keep defective Chinese products from reaching consumers worldwide.<sup>139</sup> Defective products are also rampant within

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incentive to safety”).

132. *Id.*

133. Clarke, *supra* note 92, at 5.

134. U.S. companies with Chinese suppliers already put pressure on Chinese manufacturers to follow labor standards. *See* Roberts et al., *supra* note 104 (chronicling major U.S. retailers’ efforts to enforce labor standards at the factories of their suppliers through inspections). U.S. retailers could impose similar pressure to increase quality control.

135. Having a trusted local team of due diligence experts investigate a supplier is the best way for a seller to avoid the loss of reputation and financial liability that potentially accompanies selling defective products. *See* Jeff Buckstein, *Navigating the Outsourcing Minefield*, GLOBE & MAIL (Canada), Nov. 7, 2007, at B10 (listing, in addition to due diligence, measures that importers of Chinese products can take to ensure that the products are of a high quality, including: inserting into the contract a provision that the manufacturer cannot subcontract production to unapproved third parties, providing for factory inspections, and hiring an outside consultant to inspect the importer’s risk management procedures).

136. *See supra* Part II.D.1 (discussing the Model Uniform Product Liability Act).

137. *See supra* Part II.D.1 (discussing the Model Uniform Product Liability Act).

138. *See, e.g.*, Walt Bogdanich & Jake Hooker, *From China to Panama, a Trail of Poisoned Medicine*, N.Y. TIMES, May 6, 2007, at 1, available at <http://www.nytimes.com/2007/05/06/world/06poison.html?ei=5124&en=de306836ac6ea5> (tracing the trail of deadly contaminated cough syrup from China to Panama, Haiti, Bangladesh, Argentina, Nigeria, and India).

139. The potential economic influence of the United States to encourage Chinese manufacturers to ensure that their products are not defective is striking in comparison with some of the significantly less developed defective product-affected nations named above. In 2007, the United States imported nearly \$316 billion worth

China itself, with one investigation finding that 20% of products on Chinese shelves were defective.<sup>140</sup> Presumably, if the quality of exports increased, Chinese manufacturers would apply the same quality controls to products for the domestic market. Thus, U.S. retailers are in a position to protect consumers worldwide.

Overall, the value of ensuring consumers a remedy when defective products harm them outweighs any of the potential deficits. While a cost increase might follow a move to ensure consumers a remedy against U.S. sellers of defective Chinese products, consumers appear to be willing to pay this price.<sup>141</sup> Thus, states that currently have laws limiting seller liability should amend these laws to include the Model Act's exception allowing a court to hold the seller liable if a judgment would not be enforceable against the manufacturer. States considering laws limiting seller liability should also follow the Model Act on this point. Only in this way can states guarantee consumers a remedy when defective Chinese-manufactured products harm their citizens.

#### V. CONCLUSION

The wave of defective Chinese-manufactured products that hit the United States in recent years has proved that the United States needs to take action to protect U.S. consumers. Guaranteeing consumers injured by defective Chinese-manufactured products a remedy is both a means to ensure justice in the case at hand and a means to prevent future injuries. However, in most circumstances, consumers do not have a remedy against the Chinese manufacturer because of the difficulty of suing in China and the unwillingness of Chinese courts to enforce U.S. court judgments. Also, in many cases, state laws exempting sellers from strict liability block the injured consumer's remedy against the seller, leaving the consumer without a remedy. The Model Uniform Product Liability Act's provision permitting courts to hold a seller strictly liable if a court cannot enforce a judgment against the manufacturer is the best way to guarantee the injured consumer a remedy. Thus, states that wish to limit seller liability need to include the Model Uniform Product Liability Act's exception that a court can only hold the seller strictly liable if a court cannot enforce a judgment against the manufacturer. In this way, states can ensure that their consumers, as well as consumers around the world, are safe from defective products.

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of goods from China. CIA, *The World Factbook: United States*, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Oct. 21, 2008). In the same year, India led the countries listed in note 138 in Chinese imports with only \$20 billion. CIA, *The World Factbook: India*, <https://www.cia.gov/library/publications/the-world-factbook/geos/in.html> (last visited Oct. 21, 2008).

140. David Barboza, *China Finds Poor Quality on Its Store Shelves*, N.Y. TIMES, July 5, 2007, at C1, available at <http://www.nytimes.com/2007/07/05/business/worldbusiness/05safety.html>.

141. See Buckstein, *supra* note 135 (stating that consumers are willing to pay a premium to ensure that their goods are safe).