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Case Comments

Contracts: Reasonable Duration Inference in Exclusive Franchise Agreements

Plaintiff, a wholesale beer distributor, sued defendant brewery for breach of an oral contract made in 1950 which allegedly provided that the former was to be the latter's exclusive distributor in south Minneapolis and neighboring suburbs for as long as plaintiff performed its undertaking. Plaintiff alleged that defendant had terminated the agreement without cause in 1963 after the plaintiff had made substantial investments in distribution facilities. The district court sustained defendant's motion for summary judgment on the ground that the contract, as pleaded, was terminable at will since it lacked mutuality of obligation. On appeal the Eighth Circuit reversed, *holding* that an exclusive franchise dealer may claim breach of contract where the dealer, at the supplier's instance, has invested in costly distribution facilities and the agreement has been terminated without affording the dealer an opportunity to recoup this investment. *Clausen & Sons, Incorporated v. Theo. Hamm Brewing Company*, 395 F.2d 388 (8th Cir. 1968).

Exclusive franchise agreements,¹ which have recently become common devices used by manufacturers in marketing their products,² generally give to the dealer the exclusive right of distribution in a given geographical area and the right to purchase, on agreed terms, the quantity of product needed. The dealer, in turn, agrees to buy the product from the supplier and to promote and sell it in his territory. Frequently the dealer must invest in warehouse facilities, extensive inventory, delivery vehicles, advertising and other items necessary to facilitate the product's distribution.³ Either through design or oversight, some terms are often not expressed in the franchise agreement. Duration and rights of termination are frequently left indefi-

1. This kind of contract has also been referred to by various courts and commentators as an exclusive "sales-agency" contract or an exclusive "distributorship" contract. As used in this Comment the terms are meant to be synonymous with "exclusive franchise contract." See 2 A. CORBIN, *CONTRACTS* § 155 (1963).

2. *Superior Concrete Accessories v. Kemper*, 284 S.W.2d 482, 489 (Mo. 1955). See generally Gellhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465.

3. E.g., *E.I. Du Pont de Nemours & Co. v. Claiborne-Reno Co.*, 64 F.2d 224 (8th Cir. 1933); *J.C. Millett Co. v. Park & Tilford Distillers Corp.*, 123 F. Supp. 484 (N.D. Cal. 1954).

nite.⁴ Where the dealer has made substantial investments in reliance on the franchise agreement, arbitrary termination with little or no notice can be disastrous. Until recently, however, courts have disallowed dealers' breach of contract actions, holding that exclusive franchise agreements which fail to contain provisions for duration or termination are terminable at the will of either party.⁵ Historically, two arguments have been utilized to support this approach. First, it is thought that contracts that are indefinite or uncertain as to material terms are void, at least insofar as they are executory,⁶ as this uncertainty or indefiniteness renders the contract incapable of enforcement.⁷ Further, it is often said that it is without the court's province to remake the contract for the parties.⁸ Secondly, and closely related, is the contention that these agreements lack mutuality of obligation and are therefore not binding contracts.⁹ The precise concept that courts wish to convey by use of the term, "mutuality of obligation" is seldom made clear. However, the courts which have held that its absence makes the contract terminable at will have said essentially that neither party is bound unless both parties are.¹⁰

Recently, several courts have rejected both of the above positions and have held that the supplier cannot necessarily terminate at will in cases where the dealer has made heavy investments in reliance on the franchise agreement.¹¹ In response to

4. See Gellhorn, *supra* note 3. It is easy to understand the omission of these terms. The parties do not contemplate termination and both are reluctant to bind themselves to an unproven arrangement for a long period of time.

5. The Minnesota Supreme Court has not been directly presented with the questions of duration and termination rights in an exclusive franchise contract of indefinite duration for many years. In *Victor Talking Machine Co. v. Lucker*, 128 Minn. 171, 150 N.W. 790 (1915), and *Hoover v. Perkins Windmill & Axe Co.*, 41 Minn. 143, 42 N.W. 866 (1889), the Minnesota court held that the contracts were terminable at will. However, as the court in *Clausen* points out, in neither of those cases was detrimental reliance shown. 395 F.2d at 390.

6. *Jacob Schmidt Brewing Co. v. Minot Beverage Co.*, 93 F. Supp. 994 (D.N.D. 1950); *Joliet Bottling Co. v. Joliet Citizens' Brewing Co.*, 254 Ill. 215, 98 N.E. 263 (1912).

7. See, e.g., *Jordan v. Buick Motor Co.*, 75 F.2d 447 (7th Cir. 1935); *Ford Motor Co. v. Kirkmyer Motor Co.*, 65 F.2d 1001 (4th Cir. 1933).

8. *Thomson v. Gortner*, 73 Md. 474, 21 A. 371 (1891).

9. See, e.g., *E.I. Du Pont de Nemours & Co. v. Claiborne-Reno Co.*, 64 F.2d 224 (8th Cir. 1933); *Goodman v. Motor Prods. Corp.*, 9 Ill. App. 2d 57, 132 N.E.2d 356 (1956).

10. *Terre Haute Brewing Co. v. Dugan*, 102 F.2d 425 (8th Cir. 1939); *A. Santaella & Co. v. Otto F. Lange Co.*, 155 F. 719 (8th Cir. 1907).

11. In the situations in which the dealer has not yet detrimentally

the uncertainty objection, recent decisions argue that a reasonable *duration* and a reasonable *notice period* prior to termination may be implied.¹² When a distributor has invested heavily in reliance on the agreement, "justice" requires that a *reasonable duration* be implied in law.¹³ Additionally, such a period is implied in fact because businessmen certainly must intend that these agreements are to continue for a reasonable time.¹⁴ Similarly, a reasonable *notice period* can be implied both in law and in fact on the same grounds.

With respect to the mutuality objection, courts have recently taken the position that mutuality is merely another word for consideration and with the existence of valid consideration running from both parties there is a binding contract.¹⁵ In the context of the exclusive franchise agreement, the dealer's investment in a distribution facility can constitute the wanted consideration to support the supplier's implied promise to continue the agreement for a reasonable time.¹⁶

In the instant case the Eighth Circuit, interpreting Minnesota law, rejected the lower court's conclusion that the contract pleaded was terminable at will in that it lacked mutuality of obligation.¹⁷ The circuit court said that mutuality of obligation in this context is synonymous to consideration,¹⁸ and since detrimental reliance has long been regarded as valid consideration in Minnesota it was error for the lower court to dismiss without hearing evidence on plaintiff's investments in a distribution facility.¹⁹ Further, the court indicated that where such consideration exists, the dealer must be given an opportunity to recoup his investment.²⁰

relied on the exclusive franchise contract, or in which it can not be said that any substantial investment was made in reliance on the agreement, there is no compelling reason not to allow termination at will.

12. See, e.g., *San Francisco Brewing Corp. v. Bowman*, 52 Cal. 2d 607, 613-14, 343 P.2d 1, 4 (1959).

13. *Id.* at 614, 343 P.2d at 5.

14. See, e.g., *J.C. Millett Co. v. Park & Tilford Distillers Corp.*, 123 F. Supp. 484 (N.D. Cal. 1954).

15. *Hunt Foods, Inc. v. Phillips*, 248 F.2d 23 (9th Cir. 1957); *J.C. Millett Co. v. Park & Tilford Distillers Corp.*, 123 F. Supp. 484 (N.D. Cal. 1954).

16. *J.C. Millett Co. v. Park & Tilford Distillers Corp.*, 123 F. Supp. 484 (N.D. Cal. 1954); *Des Moines Blue Ribbon Distribs., Inc. v. Drewrys Ltd.*, U.S.A., 256 Iowa 899, 906, 129 N.W.2d 731, 736 (1964).

17. *Clausen & Sons, Inc. v. Theo. Hamm Brewing Co.*, 395 F.2d 388, 391 (8th Cir. 1968).

18. *Id.* at 389.

19. *Id.* at 390.

20. *Id.* at 391.

The recent trend in general and the *Clausen* decision in particular represent a desirable departure from earlier decisions for several reasons. First, the exclusive franchise agreement can be viewed most realistically as an agreement of more than a single nature.²¹ It cannot be described as a mere agency contract; rather, it has additional characteristics.²² The earlier decisions which held these agreements terminable at will either failed to recognize this complex nature²³ or failed to regard it as relevant to the questions of duration and terminability.²⁴ A reasonable duration has long been implied in agency contracts if the agent has given the principal some consideration in addition to his agency services.²⁵ Similarly, employment contracts have been declared not terminable at will where the employee has furnished additional consideration.²⁶ Thus, where the dealer has made substantial investments to further the distribution of the supplier's product—in addition to distributing the product—it can be argued that this additional consideration should render the agreement enforceable for a reasonable duration.²⁷

Earlier decisions which held such agreements terminable at will often seemed to equate mutuality of obligation with mutual rights of termination.²⁸ These decisions implied that there was something essentially unfair about holding a supplier to a reasonable duration when the distributor could terminate at will.²⁹

21. For a description of the characteristics of the type of exclusive franchise contract with which this Comment deals see text accompanying notes 2-4 *supra*.

22. In a sales contract, typically, one party to the agreement, the buyer, purchases goods from the seller and then must assume the risk of their loss or damage. In an agency contract, one party, the agent, often promises to provide personal services or otherwise promote the interests of the other, the principal. See *J.C. Millett Co. v. Park & Tilford Distillers Corp.*, 123 F. Supp. 484 (N.D. Cal. 1954); *Des Moines Blue Ribbon Distribs., Inc. v. Drewrys Ltd., U.S.A.*, 256 Iowa 899, 906-07, 129 N.W.2d 731, 736 (1964).

23. See, e.g., *Terre Haute Brewing Co. v. Dugan*, 102 F.2d 425, 426-27 (8th Cir. 1939).

24. *E.I. Du Pont de Nemours & Co. v. Claiborne-Reno Co.*, 64 F.2d 224, 228 (8th Cir. 1933); *Jacob Schmidt Brewing Co. v. Minot Beverage Co.*, 93 F. Supp. 994 (D.N.D. 1950).

25. See 4 S. WILLISTON, *CONTRACTS* § 1027A, at 2852 (rev. ed. 1936).

26. See, e.g., *Newhall v. Journal Printing Co.*, 105 Minn. 44, 117 N.W. 228 (1908). See also 20 L.R.A. (n.s.) 899 (1909) (comments to *Newhall*).

27. See cases cited note 22 *supra*.

28. See, e.g., *Meredith v. John Deere Plow Co.*, 185 F.2d 481 (8th Cir. 1950); *Jacob Schmidt Brewing Co. v. Minot Beverage Co.*, 93 F. Supp. 994 (D.N.D. 1950); *Joliet Bottling Co. v. Joliet Citizens' Brewing Co.*, 254 Ill. 215, 98 N.E. 263 (1912).

29. See cases cited note 28 *supra*.

These courts failed to take into account several significant factors. First, in industries where manufacturer or supplier franchises are scarce, a distributor often becomes economically "locked-in" to continue the contract. Because of the substantial investment in distribution facilities it is not feasible for a distributor to terminate the agreement before the relationship has continued for a reasonable time.³⁰ Thus, in such cases the fear that a supplier is at the mercy of a distributor who may arbitrarily terminate the agreement at any time is mitigated by the distributor's own self-interest.

Second, even if a distributor were to terminate before the agreement had run a reasonable time, it is unlikely that the supplier would sustain damages beyond his loss of bargain.³¹ Although there are exceptions, it is usually the distributor who makes large investments in reliance on the contract while typically the supplier makes no such expenditures.

Third, there is no valid reason to assume as a premise that the distributor necessarily has a right to terminate at will.³² In situations where the *supplier* has detrimentally relied on the agreement at the instance of the distributor it arguably could be found that the *distributor* had impliedly promised to continue for a reasonable time also.

The *Clausen* decision is particularly desirable in that it lends some substance to the term "reasonable duration."³³ The court implies that the formula should be that length of time which would afford a party an opportunity to recoup his investment.³⁴

30. Cf. *Jacob Schmidt Brewing Co. v. Minot Beverage Co.*, 93 F. Supp. 994, 996 (D.N.D. 1950). The cases concerned with exclusive franchise contracts evidence the general proposition that it is the supplier who more often arbitrarily terminates the contract of indefinite duration and the distributor who brings the breach of contract action.

31. The court in the instant case limits recovery to reliance damages. *But see San Francisco Brewing Corp. v. Bowman*, 52 Cal. 2d 607, 615, 343 P.2d 1, 5 (1959) (court implies that expectancy damages might be awarded).

32. *Clausen & Sons, Inc. v. Theo. Hamm Brewing Co.*, 395 F.2d 388, 391 (8th Cir. 1968). In *Clausen*, the Eighth Circuit notes that Minnesota courts are prone to construe any contract as *not* being terminable at will and that provisions which would limit termination rights of parties can be implied from the agreement. *Id.* at 391 nn.3 & 4. It is very doubtful then (at least insofar as the federal courts are concerned) that even the distributor whose obligation is indefinite can terminate the agreement prior to giving reasonable notice.

33. Other courts holding similar contracts not terminable at will often determine "reasonable duration" simply on a case-by-case basis. *See, e.g., General Tire & Rubber Co. v. Distributors, Inc.*, 253 N.C. 459, 117 S.E.2d 479 (1960).

34. 395 F.2d 388, 391 (8th Cir. 1968).

While the formula is definite enough to provide a rational basis for enforcement it is flexible enough to provide an equitable measure of damages. For example, if a distributor were not economically "locked-in" to continuing performance either because his investment was nominal or similar franchises were easily obtainable, the time required to give him an opportunity to recoup his investment would be shorter and his damages therefore smaller. On the other hand, if he had made a large investment in reliance on the agreement and similar franchises were not easily attainable, it would take a longer period to recover his investment and his damages would consequently be larger.

The *Clausen* decision is, therefore, a welcome change from earlier decisions and, at least insofar as the federal courts are concerned, brings Minnesota law into accord with recent decisions of other jurisdictions.³⁵ The result is desirable because it recognizes certain exclusive franchise contracts as being something more than a mere agency contract; it is also supported by stronger policy justifications than earlier decisions.

Torts: Manufacturer's Duty to Design Automobile Reasonably Safe to Occupy in Collision

Plaintiff, the driver of an automobile, received severe bodily injuries allegedly caused in part by the rearward displacement of the steering column when the vehicle he was driving was involved in a head-on collision. In a suit against the manufacturer of the automobile, the plaintiff alleged that the manufacturer's design of the steering mechanism was defective because it increased the chance of severe injuries whenever the vehicle was involved in a head-on collision.¹ The trial court rendered summary judgment in favor of the manufacturer, finding no duty to construct an automobile that is safe to occupy in a collision.²

35. See, e.g., *C.C. Hauff Hardware, Inc. v. Long Mfg. Co.*, 257 Iowa 1127, 136 N.W.2d 276 (1965); *Colony Liquor Distribs., Inc. v. Jack Daniel Distillery—Lem Motlow Prop., Inc.*, 22 App. Div. 2d 247, 254 N.Y.S.2d 547 (1964).

1. Specifically, the plaintiff alleged (1) negligent design of the steering assembly; (2) negligent failure to warn of the alleged latent danger to anyone occupying the driver's seat; and (3) breach of express and implied warranties of merchantability for the vehicle's intended use. At the trial on the merits the jury found for defendant General Motors by a general verdict.

2. *Larsen v. General Motors Corp.*, 274 F. Supp. 461 (D. Minn. 1967). The case was tried according to Michigan law by stipulation of the parties.

The Eighth Circuit Court of Appeals reversed, *holding* that a manufacturer of an automobile is under a duty to design vehicles so as to avoid subjecting the occupants to an unreasonable risk of harm in the event of an automobile accident which is, or should be, foreseeable by the manufacturer. *Larsen v. General Motors Corporation*, 391 F.2d 495 (8th Cir. 1968).

After the landmark *MacPherson v. Buick Motor Company*³ decision in 1916, the trend in products liability law has been to increase the scope of a manufacturer's liability for marketing unsafe products.⁴ Initially, negligence was the sole basis of manufacturer liability to the consumer. More recently there has developed from the law of sales a doctrine of strict liability whereby the manufacturer, regardless of his negligence, is liable to the consumer for injuries arising out of the use of his product.⁵ While strict liability was originally limited to certain products,⁶ today its application in many jurisdictions extends to nearly all products capable of injuring the consumer.⁷

In assessing liability, courts have distinguished between defects caused by the design of the product and those arising out of the construction of the product. Design defects involve an error in the plans and specifications that are adopted by the manufacturer in his manufacturing process, while construction defects are a departure from the plans and specifications employed. Although both design and construction negligence have been recognized in most jurisdictions, courts have seemed reluctant to impose liability in cases involving design defects,⁸ partially out of fear that judges and juries are not qualified to pass upon the manufacturer's design.⁹ In addition is the fre-

3. 217 N.Y. 382, 111 N.E. 1050 (1916).

4. See Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). For a review of those jurisdictions in which strict liability has been accepted, see *id.* at 794-99 and CCH PROD. LIAB. REP. ¶ 4050. For a review of the almost universal acceptance of a manufacturer's liability based upon negligence see 1 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 5.03(1); W. PROSSER, *LAW OF TORTS*, ch. 19 (3d ed. 1964) [hereinafter cited as PROSSER].

5. See PROSSER, *supra* note 4.

6. *Id.*

7. *Id.* at 805.

8. Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962). See also *Dillingham v. Chevrolet Motor Co.*, 17 F. Supp. 615 (D. Okla. 1936).

9. Manufacturers are generally held "... to an expert's knowledge of the arts, materials and processes relating to his product." *Pipe Welding Supply Co. v. Gas Atmospheres, Inc.*, 201 F. Supp. 191, 200 (N.D. Ohio 1961). See also *Wright v. Carter Prods.*, 244 F.2d 53, 59 (2d Cir. 1957); *Martin v. Bengue, Inc.*, 25 N.J. 359, 372, 136 A.2d 626, 632 (1957).

quently advanced argument that a "judgment for a particular plaintiff may open the door to many additional claims and suits."¹⁰ In contrast to a construction defect, a design defect supposedly infects *all* units produced by the manufacturer and thus liability resulting from the latter could be the basis for litigation by all injured persons possessing the product. Contributing to this hesitance is the contention that adverse judgments may cause many widely used products to be removed from the market, resulting in economic dislocations for both the consumers and employees of the manufacturer.¹¹

In defining the standard of care required of the manufacturer in designing a safe product, the courts have relied on the character of the product's use. The rule is stated:

A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.¹²

Thus, a manufacturer's liability extends only to injuries arising out of the use for which the product was manufactured. "Intended use" has become the focal point of much case analysis involving design negligence,¹³ and is particularly relevant to automobile safety factors.

While little disagreement exists as to the relevance of intended use, there has been considerable confusion in defining the doctrine. In the past, and in some jurisdictions today, intended use is narrowly construed so that a manufacturer is liable only when his product is unfit for the particular purpose for which it was made.¹⁴ Now, however, intended use is generally

10. Noel, *supra* note 8, at 816.

11. *Id.*

12. RESTATEMENT (SECOND) OF TORTS § 398 (1965) (emphasis added). See also PROSSER at 665-70.

13. *E.g.*, Evans v. General Motors Corp., 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966).

14. Rosin v. International Harvester Co., 262 Minn. 445, 115 N.W.2d 50 (1962). In Hentschel v. Baby Bathinette Corp., 215 F.2d 102 (2d Cir. 1954), *cert. denied*, 349 U.S. 923 (1955), a baby bathinette, while perfectly satisfactory for the particular purpose of attending to infants, constituted a fire hazard because it was partially constructed of very inflammable magnesium. During a bathroom fire in the home of the plaintiff, the magnesium became ignited and in the ensuing conflagration the plaintiff was severely burned, partly by the magnesium. The jury was instructed to find for the defendant manufacturer if they found that the bathinette itself was not the cause of the original fire. On appeal, the instruction and the verdict were upheld for the defendant.

In Poore v. Edgar Bros. Co., 33 Cal. App. 2d 6, 90 P.2d 808 (1939),

given a much broader construction in keeping with the general expansion of the scope of a manufacturer's liability. One such construction is that a manufacturer must design his product so that it will be safe for all foreseeable uses that could be classified as "normal."¹⁵ A corollary of this principle is that the product must "... fairly meet any emergency of use which could reasonably be anticipated."¹⁶ Therefore, the manufacturer must not only insure a safe product for any anticipated "normal" use, but must also insure such safety under slight abuse¹⁷ or exposure to some foreseeable emergency condition.¹⁸

the plaintiff was cut by broken window glass that had been used to replace the regular safety glass, when his car became involved in an automobile accident. Although safety glass was available at the time, the court held that the glass was not intended to receive such a blow when the car was being operated in a normal manner, and affirmed a verdict for the defendant, a dealer in used cars.

15. *Philips v. Ogle Aluminum Furniture*, 106 Cal. App. 2d 650, 235 P.2d 857 (1951). The defendant constructed his chairs with a plywood back which was attached to an aluminum tubing frame. While the back was secure enough to permit one to sit in the chair, it was not safe enough to permit one to place weight on the back when dismounting from the chair after standing on it. The court held that the manufacturer was required to anticipate this use of its chair and protect against the hazards connected with it. See also PROSSER at 668, and cases cited therein. Here it is difficult to say precisely how far the manufacturer's duty extends to guard against possible uses of his product. Prosser suggests, when speaking of the requirement of a warning in cases of allergic reactions to food and drugs, that factors such as "the seriousness of the harm to be expected to the allergic user and the expert knowledge of the defendant should be taken into consideration when fixing the limits on a manufacturer's duty to warn. PROSSER at 669. Perhaps these factors could be employed in defining the extent of "normal" use.

16. *Davlin v. Henry Ford & Son*, 20 F.2d 317, 319 (6th Cir. 1927).

17. *Carpini v. Pittsburgh & Weirton Bus Co.*, 216 F.2d 404 (3d Cir. 1954) (petcock used to drain airbrake system on bus broken off because of the combined negligence of the manufacturer in placing it too close to the ground and the bus driver's excessive speed over a debris-strewn road); *Lovejoy v. Minneapolis-Moline Power Implement Co.*, 248 Minn. 319, 79 N.W.2d 688 (1956) (pulley shattered when tractor driven too fast in low gear).

18. *Noel v. United Aircraft Corp.*, 219 F. Supp. 556 (D. Del. 1963) (failure to design system that would arrest the rotation of an airplane propeller if the engine were to fail while the plane was in flight). The "intended use" terminology employed obviously leads to considerable confusion and in some instances "unintended use" would be equally appropriate. In *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79 (4th Cir. 1962), an infant swallowed some poisonous furniture polish and died. Obviously, no one intends that a child ingest these substances. The *Spruill* court apparently recognized this semantic difficulty when it said, "intended use" is merely a convenient measure of "reasonable foreseeability of harm," and affirmed a verdict for the plaintiff. The *Spruill* case is typical of those cases dealing with an unavoidably

Since it is simply uneconomic in many cases and impossible in others to guard against all potential liability, a manufacturer is permitted to avoid liability if the consumer is given adequate warning of the product's dangers. In cases where the nature of the product reveals its obvious dangers, no warning is required.¹⁹ If the dangers inherent in the product are not readily apparent, however, the manufacturer is required to give a full and adequate warning.²⁰

With respect to a vehicle manufacturer's duty to design, there has been a reluctance to extend liability to injuries which arise from the absence of safety factors in the product. While case authority exists supporting a broader liability,²¹ the courts have generally applied a narrow and literal definition of intended use to immunize automobile manufacturers from liability for failure to design safety devices into their products.²² Illustrative of such an approach is *Evans v. General Motors Corporation*.²³ The plaintiff there alleged that injury resulted from the

dangerous product in that they dispense with the "intended use" terminology in favor of a "foreseeability of harm" test. *Steele v. Rapp*, 183 Kan. 371, 327 P.2d 1053 (1958); *Haberly v. Reardon*, 319 S.W.2d 859 (Mo. 1958); *Martin v. Bengue, Inc.*, 25 N.J. 359, 136 A.2d 626 (1957).

19. *Campo v. Scofield*, 301 N.Y. 468, 472, 95 N.E.2d 802, 804 (1950).

20. *Tomao v. A.P. De Sanno & Son*, 209 F.2d 544 (3d Cir. 1954); *Rice v. Gulf States Paint Co.*, 406 S.W.2d 273 (Tex. Civ. App. 1966); *Foster v. Ford Motor Co.*, 139 Wash. 341, 246 P. 945 (1926). Recently, however, it has been suggested that a manufacturer might be held liable even when a warning is given, if the product creates grave dangers. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS*, §§ 28.3-28.8 (1956); Noel, *supra* note 8, at 845, 862. In *Dickerson, Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301, 307 n.21 (1967), the author suggests that two cases have followed this view: *Iacurci v. Lummus Co.*, 340 F.2d 868, 872 (2d Cir. 1965); *Wright v. Massey-Harris, Inc.*, 68 Ill. App. 2d 70, 73-75, 215 N.E.2d 465, 467 (1966).

21. *E.g.*, *Phillips v. Ogle Aluminum Furniture*, 106 Cal. App. 2d 650, 235 P.2d 857 (1951); *Ringstad v. I. Magnin & Co.*, 39 Wash. 2d 923, 239 P.2d 848 (1952).

22. *General Motors Corp. v. Muncy*, 367 F.2d 493, 497 (5th Cir. 1966), *cert. denied*, 386 U.S. 1037 (1967); *Shumard v. General Motors Corp.*, 270 F. Supp. 311, 313-14 (S.D. Ohio 1967); *Willis v. Chrysler Corp.*, 264 F. Supp. 1010, 1011 (S.D. Tex. 1967); *Schemel v. General Motors Corp.*, 261 F. Supp. 134, 135 (S.D. Ind. 1966); *Kahn v. Chrysler Corp.*, 221 F. Supp. 677, 679 (S.D. Tex. 1963); *Hatch v. Ford Motor Co.*, 163 Cal. App. 2d 393, 395, 329 P.2d 605, 607 (1958). There has, as cited by the *Larsen* opinion, been a case imposing liability upon an employer for designing a truck which, due to its unusual design, required the driver to keep the door open when giving a hand signal. When the truck was struck by a car, the driver, an employee, fell through the open door and was crushed when the truck fell upon him. *Railway Express Agency v. Spain*, 249 S.W.2d 644 (Tex. Ct. App. 1952).

23. 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966). This case has received extensive and generally unfavorable treatment

manufacturer's production of a vehicle with an X-type frame instead of a box-type perimeter frame, which provided more protection in a side-on collision. The court, however, affirmed the manufacturer's summary judgment and stated that, "[t]he intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur."²⁴

In *Larsen* itself, the court cited a number of authorities for the proposition that a "manufacturer's duty of design and construction extends to producing a product that is reasonably fit for its intended use and free of hidden defects that could render it unsafe for such use," indicating that "the issue narrows on the proper interpretation of 'intended use.'"²⁵ However, general negligence principles seem to have been pursued, as the court concluded that the likelihood of harm was great,²⁶ that the gravity of the harm was serious (by implication), and that the burden imposed upon the manufacturer was sufficiently small so that a duty could be created.²⁷ In examining the burden of providing safety devices, the court held that a manufacturer is not obligated to construct an accident-proof vehicle but one which would ". . . avoid subjecting the user to an unreasonable risk of injury in the event of a collision."²⁸ The technology employed in this design should be ". . . consonant with the state of the art to minimize the effect of accidents"²⁹ and employ ". . . many common-sense factors in design, which are or should be well known to the manufacturer. . . ."³⁰

To meet the argument that the driver of the automobile was aware of the risk involved in any automobile accident and therefore the manufacturer had no duty to warn of any poten-

in Note, *Manufacturer's Liability for an "Uncrashworthy" Automobile*, 52 CORNELL L.Q. 444 (1967); Note, *Liability For Negligent Automobile Design*, 52 IOWA L. REV. 953 (1967); Comment, 80 HARV. L. REV. 688 (1967).

24. 359 F.2d at 825.

25. 391 F.2d at 501.

26. ". . . a frequent and inevitable contingency of normal automobile use will result in collisions and injury-producing impacts." *Id.* at 502.

27. When *Larsen* was retried according to the Eighth Circuit opinion, the trial court judge must have interpreted the decision as an extension of the intended use approach. At the conclusion of the case he charged the jury, "The normal and intended use of an automobile includes collisions and injury-producing impacts." Record at 2088.

28. 391 F.2d at 502.

29. *Id.* at 503.

30. *Id.* See also note 9 *supra*.

tial dangers,³¹ the court simply replied that the danger was latent and demanded a warning.³² Damages are to be fixed so that ". . . the manufacturer should be liable for that portion of the damage or injury . . . over and above the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design."³³

To the extent that the court disposed of the narrow and literal analysis of intended use that had characterized previous decisions concerning the manufacturer's duty to design, the *Larsen* decision represents an advance in product liability law. The term "intended use" has never been an adequate means of defining the manufacturer's duty.³⁴ The scope of negligence liability should depend on the exigencies of all the parties involved. When faced with the problem of defining the scope of design liability for other products, the courts have recognized the inadequacy of such a literal interpretation of intended use.³⁵ It is not entirely clear whether the *Larsen* court defined intended use in terms of reasonable foreseeability, or discarded the concept entirely in favor of traditional negligence principles. However, regardless of the theory, the court has recognized that the law of products liability should provide the consumer with optimum protection consonant with the realities of automobile transportation in the mid-twentieth century.

As the *Larsen* court recognized, tort law questions of duty are decided by weighing the probability and gravity of any possible harm arising from the defendant's conduct, against the burden imposed upon him in taking precautions to avoid that harm.³⁶ From a reading of *Larsen*, it appears that the court does not possess a basic understanding of some of the problems

31. See note 19 *supra*.

32. 391 F.2d at 505. Here the court seems to be creating a new function for a warning in the products liability area. Since every automobile driver knows that it is dangerous to participate in collisions, the reasonable driver would conduct himself so as to avoid just that. Thus, the manufacturer must warn the purchaser of the increment of danger inherent in the manufacturer's vehicle over and above the normal risk that would be associated with a safe car. It may be that the court is attempting to achieve "vigorous competition in the development and marketing of safety improvements," one of the goals of the National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. 89-563, 30 Stat. 718, quoted in 86 CCH PROD. LIAB. REP. ¶ 9 (1966). This was hinted at in the opinion. 391 F.2d at 506.

33. 391 F.2d at 503.

34. See note 18 *supra*.

35. *Id.*

36. *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

inherent in applying this concept to automobile design cases.³⁷ Seat belts, for example, have been regarded as a safety device; however, recent studies have indicated that seat belts may constitute a considerable danger to the wearer in some crash situations.³⁸ This uncertainty serves to illustrate a fundamental difficulty in imposing duties regarding automobile safety design: many safety devices which attempt to minimize particular dangers in some types of collisions often increase the dangers associated with other crash situations. This being the case, it is questionable whether a jury can adequately decide whether, on the whole, a particular safety device is in reality a safety aid or a safety hazard. Arguably, nonjudicial proceedings, perhaps administrative, are more capable of dealing with such a question.³⁹ Furthermore, if juries are the bodies that ultimately determine the reasonableness of a particular design, two conclusions appear inevitable. First, a manufacturer will not know in advance exactly what is required of him.⁴⁰ Second, the decision of juries may vary from case to case as to the safety value of a particular design, possibly resulting in conflicting rules⁴¹ to which a manufacturer cannot possibly conform.

It should be noted that in all of the foregoing cases, and for that matter all appellate court cases prior to *Larsen*, liability has only been imposed when the purported design defect caused the accident and the injury.⁴² While the matter of causation has not been discussed in the opinions, it may be that judges and

37. The court referred to the "many common sense factors in design." 391 F.2d at 503.

38. 52 MINN. L. REV. 918, 921 (1968).

39. This problem has been recognized by Congress and is one of the purposes for the enactment of the Motor Vehicle Safety Act. See 86 CCH PROD. LIAB. REP. ¶ 9 (1966). For other related reasons why an administrative approach is preferable, see Comment, 80 HARV. L. REV. 688, 692-93 (1967). In order to understand the complexity of the problem, it is interesting to observe the difficulty the federal government has had with exactly the alleged defect in *Larsen*. The original federal standard applicable to the rear-ward displacement of the steering column was promulgated in June, 1965 (although it was only applicable to vehicles purchased by federal agencies). At that time the maximum displacement was five inches at 20 miles per hour; now it is five inches at 30 miles per hour. See Motor Vehicle Safety Regulations, 23 C.F.R. § 255.21.

40. While this may not be a relevant question with respect to a simple product, for the more complicated ones (automobiles) the cost of retooling for a change may be quite burdensome in many automobile design cases.

41. See Comment, 80 HARV. L. REV. 688, 692-93 (1967).

42. But cf. *Ford Motor Co. v. Zahn*, 265 F.2d 729 (8th Cir. 1959) (construction defect caused only injury).

juries give considerable unconscious weight to it. Certainly there would be a moral reluctance in making a remote manufacturer bear full or partial responsibility for an automobile injury that resulted from the direct negligence of another driver.⁴³ The instant case, however, leaves open the question of dividing the damages among the manufacturer and other negligent parties. Many jurisdictions accept the rule that where two or more tortfeasors are responsible for a single injury incapable of any logical division, they are each liable for the whole injury unless they can establish that the other tortfeasor caused a greater portion of it.⁴⁴ In regard to the *Larsen* decision this means that the automobile manufacturer may always have to assume total liability in light of the difficulty of establishing whose negligence caused which part of the injury.⁴⁵ Furthermore, a negligent driver previously would not have been in any

43. At this point it may be asserted that the fact that a manufacturer has never been held liable for his failure to minimize injuries is really irrelevant. It can be argued that since one of the objects of tort law is to deter injury-producing conduct and the manufacturer is the only party who can reduce traffic injuries through the introduction of safer cars, then we should focus our attention upon his failure to do so, rather than the precipitating cause of the accident. However, as Prosser suggests, prevention of injury is not the only factor to be considered in determining tort liability. Others, he suggests, are the "Moral Aspect of the Defendant's Conduct" and the "Convenience of Administration." PROSSER at 16-23.

44. PROSSER at 250. See also *Maddux v. Donaldson*, 362 Mich. 425, 108 N.W.2d 33 (1961).

45. There may, however, be other factors involved in a design negligence claim tending to work against the plaintiff and in favor of the manufacturer. Because the plaintiff will have the burden of proving negligence in design, which entails considerable expense and preparation, plaintiffs may be reluctant to join the manufacturer. This seems especially likely in view of the past successes of the auto industry in defending these suits. In *Larsen* the jury returned a general verdict for the defendant General Motors after it was retried according to the Eighth Circuit decision. While the many issues submitted to the jury prevent one from determining exactly why the plaintiff failed to sustain his claim, it was apparent that the plaintiff incurred considerable expense in his efforts. Considering the resources available to a large automobile manufacturer and the rather limited funds available to individual plaintiffs, it may be that the plaintiff's only effective method of pursuing these claims will be through some sort of cooperative effort among the individual plaintiffs. This would be extremely helpful for a number of plaintiffs alleging identical design defects.

However, even if the plaintiffs manage to overcome the technical and financial obstacles in a design negligence suit, there still remains the formidable barrier of convincing the jury that a defect existed. This will undoubtedly be the most difficult part of any suit alleging negligent design. In fact, in *Larsen* the defendant introduced extensive evidence to show that there would be no rearward displacement of a steering column in relation to the ground in a front-end collision.

position to recover damages sustained in an accident resulting from his own negligence. Now it appears that a negligent plaintiff may be able to recover from the manufacturer for those injuries caused by the manufacturer's failure to incorporate adequate safety devices in his automobiles.⁴⁶

The administrative implications of the *Larsen* decision are very serious.⁴⁷ Certainly the amount of litigation stemming from automobiles is staggering. If the *Larsen* decision were accepted in all jurisdictions, it stands to reason that the amount of litigation would increase immeasurably as plaintiffs seek to recover under claims newly created. This consideration seems particularly acute in light of the apparent retroactive effect of the decision in applying to all cars presently in use. Furthermore, the decision will undoubtedly result in the joinder of many automobile manufacturers in the typical personal injury case resulting from collisions, a likely consequence of which is the reduced prospect of settlements.⁴⁸

In the absence of authority requiring that an automobile manufacturer be liable for *negligence* under the circumstances, it is understandable that the court is reluctant to impose the more onerous burden of strict liability. However, there is authority in Michigan which suggests that strict liability applies to all products.⁴⁹ Other states have applied the doctrine to automobile manufacturers under slightly different circumstances.⁵⁰ Furthermore, the court's reliance on a recent Michigan decision for the proposition that strict liability applies only to inherently dangerous objects seems misplaced.⁵¹ Even as-

46. A plaintiff may argue that he was only contributorily negligent with respect to those injuries which he would have suffered in a properly designed vehicle. This argument would be based upon the principle of contributory negligence which says that a plaintiff is not barred from recovering for injuries sustained from a risk which he could not foresee. See PROSSER at 431-32.

47. PROSSER at 334, recognizes that one of the factors to be considered by a court before imposing a duty is the convenience of administration. See also note 43 *supra*.

48. It would seem that some form of compulsory arbitration would be a much more efficient method of handling these multi-party cases. This approach would have the virtues of avoiding a complicated trial by taking many of these cases out of the courts and avoiding the possibility that a jury might be influenced by the solvency of an automobile manufacturer when deciding upon the merits of a safety design.

49. *Spence v. Three Rivers Builders & Masonry Supply*, 353 Mich. 120, 90 N.W.2d 873 (1958).

50. *E.g.*, *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

51. *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965). Nowhere in *Piercefield* does the Michigan court refer to an

suming there is no requirement that the product be inherently dangerous, it is not clear that strict liability should be imposed under the facts of the instant case. It is necessary to find that the injury arose out of the intended use of the product.⁵² Because of the greater burden imposed on the manufacturer through strict liability, it is not unreasonable nor surprising that the court was reluctant to define intended use as broadly for strict liability purposes as it did for purposes of negligent design.⁵³

No one would deny that improvements in the safety aspect of automobile design are needed. However, it is questionable whether traditional negligence law is the most appropriate means of solving the problem. It would appear that a federal administrative agency might be much more effective in processing design negligence claims than a common-law court. If such a step is too drastic, courts could perhaps rely exclusively on standards promulgated under the National Traffic and Motor Vehicle Safety Act. In the absence of such standards and in light of the need for both national uniformity and expertise in determining safety standards, courts should proceed with caution.⁵⁴

inherently dangerous product. See also RESTATEMENT (SECOND) OF TORTS § 402A, comment i at 362.

52. Prosser, *supra* note 4, at 824.

53. But see *Phillips v. Ogle Aluminum Furniture*, 106 Cal. App. 2d 650, 235 P.2d 857 (Dist. Ct. App. 1951).

54. But see *Nader & Page, Automobile Design and the Judicial Process*, 55 CALIF. L. REV. 645, 673-77 (1967).

