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# Proposed Legislation: A (Second) Modest Proposal to Protect Virginia Consumers Against Defective Products

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# PROPOSED LEGISLATION: A (SECOND) MODEST PROPOSAL TO PROTECT VIRGINIA CONSUMERS AGAINST DEFECTIVE PRODUCTS

*Peter Nash Swisher \**

## I. INTRODUCTION

Within the past year, there have been an enormous number of recalls of defective and unreasonably dangerous toys manufactured in China and sold by various American retailers.<sup>1</sup> Such recalls include lead paint found in Barbie Dolls, Big Bird, Elmo, Ernie, other Sesame Street toys, and Thomas and Friends wooden railroad toys, as well as toxic beads found in Aqua Dot play sets.<sup>2</sup> To date, more than twenty-one million toys made in China have been recalled because they contained lead paint, tiny magnets that could be swallowed, toxic glue, and other potentially dangerous contents.<sup>3</sup>

Children or their parents who are injured by these unreasonably dangerous consumer products, or any other defective products, currently have a strict liability remedy against the manufacturers and retailers of such defective consumer products in forty-eight states.<sup>4</sup> However, Virginia consumers currently do *not*

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1. See Howard Pankratz, *No Joy in Toys: Recalls Have Parents Worried, Kids Confused, Officials Critical*, DENVER POST, Nov. 9, 2007, at A1.

2. *Id.*

3. *Our Gift: A Guide to Finding Safe Toys*, RICH. TIMES-DISPATCH, Nov. 13, 2007, at A4.

4. At least forty-five states have adopted a strict liability in tort action in American products liability law, thirty-nine of which follow all or part of the section 402A of the Restatement (Second) of Torts. See Richard W. Bieman, *Strict Products Liability: An Overview of State Law*, 10 J. PROD. LIAB. 111, 111 & nn.1-2 (1987). Massachusetts and Maine have rejected a strict liability in tort remedy but, in the alternative, these states recognize a breach of implied remedy that cannot be disclaimed by the seller. See, e.g., ME. REV. STAT.

have this almost universally recognized legal protection against defective or unreasonably dangerous consumer products.<sup>5</sup>

The purpose of this article is to suggest a viable, necessary, and eminently reasonable legislative alternative that the Virginia General Assembly should enact for legitimate and pressing public policy reasons in order to properly protect Virginia consumers from defective and unreasonably dangerous consumer products. Adopting this alternative would bring the Commonwealth of Virginia into the mainstream of twenty-first century American, and transnational,<sup>6</sup> products liability law.

## II. PROTECTING VIRGINIA CONSUMERS VERSUS THE CURRENT “TORT REFORM” MOVEMENT

Fifteen years ago, this author wrote an article arguing that Virginia should adopt a strict liability in tort remedy for products liability actions,<sup>7</sup> as the overwhelming majority of other American states had done.<sup>8</sup>

### A. *Public Policy Arguments Supporting Strict Products Liability Remedies*

There are seven compelling public policy reasons for adopting a strict liability remedy in Virginia products liability actions.

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ANN. tit. 11, § 2-316(5) (Cum. Supp. 2007) (forbidding personal injury warranty disclaimers in consumer transactions); MASS. ANN. LAWS ch. 106, § 2-316A(2) (LexisNexis 1998 & Cum. Supp. 2008) (same).

5. See, e.g., *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 424 n.4, 374 S.E.2d 55, 57 n.4 (1988) (“Virginia law has not adopted § 402A of the Restatement (Second) of Torts and does not permit tort recovery on a strict-liability theory in products-liability cases.”); see also *Harris v. T.I., Inc.*, 243 Va. 63, 71, 413 S.E.2d 605, 609–10 (1992). The only other state besides Virginia that does not currently recognize a strict liability remedy in products liability actions is North Carolina. See *Smith v. Fiber Controls Corp.*, 268 S.E.2d 504, 509–10 (N.C. 1980).

6. The European Economic Community has adopted similar strict liability products liability laws, largely based upon American strict liability principles enunciated in Restatement (Second) of Torts § 402A and Restatement (Third) of Torts: Products Liability §§ 1–21.

7. Peter Nash Swisher, *Products Liability Tort Reform: Why Virginia Should Adopt the Henderson-Twerski Proposed Revision of Section 402A, Restatement (Second) of Torts*, 27 U. RICH. L. REV. 857 (1993). Professors Henderson and Twerski subsequently served as reporters for the Restatement (Third) of Torts: Products Liability, and their proposed revision of section 402A ultimately resulted in Restatement (Third) of Torts: Products Liability §§ 1-21.

Compensation and loss spreading is the first public policy justification. The use of complex modern products inevitably results in losses, and because these losses can have a devastating effect on the individual consumer, it is humane and fair to shift these losses to all consumers of the product. This shifting can be accomplished by imposing strict liability on manufacturers and other product sellers that are statistically associated with the enterprise, forcing them to raise prices enough to pay for the losses or insure against them.<sup>9</sup>

Deterrence is a second public policy justification for a strict liability remedy in products liability actions. This justification holds that manufacturers will make products safer if strict liability is imposed, and this rationale typically is grounded in economic analysis.<sup>10</sup> Strict liability “increases product costs, but business competition induces manufacturers to minimize costs.”<sup>11</sup> Imposing strict liability, therefore, provides manufacturers with an incentive to market safer products.<sup>12</sup>

It also has been argued that strict liability will require manufacturers of products either to make them safer or to raise prices, and that either action would promote safety and safer products.<sup>13</sup> Raising prices would promote safety because higher prices would include losses resulting from product injuries (therefore reflecting true costs) and buyers, to save money, may seek substitute products, which would generally be safer.<sup>14</sup> Moreover, the manufacturer often is in the best position to weigh a product’s risks and utilities, and is therefore the “cheapest cost avoider.”<sup>15</sup> Contrary to the initial fears of some critics of strict liability remedies for American products, to date American businesses have suffered no

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8. See *supra* note 4 and accompanying text.

9. See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* 975 (2000); Virginia E. Nolan & Edmund Ursin, *Enterprise Liability and the Economic Analysis of Tort Law*, 57 *OHIO ST. L.J.* 835, 844–45 (1996); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 *MISS. L.J.* 825, 826 (1973).

10. DOBBS, *supra* note 9, at 975.

11. Swisher, *supra* note 7, at 861.

12. See, e.g., Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 *YALE L.J.* 1055, 1071 (1972); DOBBS, *supra* note 9, at 975–76; Wade, *supra* note 9, at 826.

13. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

14. DOBBS, *supra* note 9, at 975.

15. *Id.* (citing Calabresi & Hirschoff, *supra* note 12).

negative competitive disadvantage in the world market and the world economy.<sup>16</sup>

Balancing the needs of consumers and manufacturers also justifies a strict liability remedy in Virginia products liability actions. Although compensation and deterrence are the most commonly cited bases for strict liability, no American court has ever required manufacturers to pay for all harm caused by their products or to be an “insurer” of their product’s safety.<sup>17</sup> To do so would place an unreasonable burden on manufacturers and other product sellers and discourage them from producing useful products. Therefore, balancing the needs of the product manufacturer against the needs of the consumer avoids over-deterrence.<sup>18</sup>

A fifth public policy justification for strict liability in Virginia products liability actions is that manufacturers implicitly represent that their products are healthy, safe, and fit for their ordinary purpose, and consumers are entitled to rely on this implied representation.<sup>19</sup>

The sixth public policy justification for a strict products liability law in Virginia concerns problems of proof. Quite often, a manufacturer of a defective product is negligent. However, complexities of modern products technology often make it extremely difficult for the consumer to establish negligence. The consumer is at a disadvantage because the product manufacturer has greater access to expertise, information, and economic resources.<sup>20</sup> Imposing strict liability remedies based on the defective *condition* of the product, rather than trying to ascertain the

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16. For example, the World Economic Forum currently ranks the United States as first in competitive ranking out of 131 countries, including forty-eight other developed countries. World Economic Forum, *The Global Competitiveness Report 2007–2008* (2008), <http://gcr.weforum.org> (follow “Rankings” hyperlink). See also Barbara Kiviat, *The Best Countries for Business*, TIME, Nov. 26, 2007, at 59–60.

17. See Calabresi & Hirschhoff, *supra* note 12, at 1056.

18. See Richard A. Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C. L. REV. 643, 658–59 (1978); David A. Fischer, *Products Liability—An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623, 1629 (1981).

19. See, e.g., MARSHALL S. SHAPO, *THE LAW OF PRODUCTS LIABILITY* ¶ 7.05 (3d ed. 1994); William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1123 (1960). This justification would apply equally to breach of warranty, tortious misrepresentation, and strict liability in tort actions.

20. See Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435, 465 (1979).

negligent *conduct* of the defendant, relieves the consumer of this very difficult burden of proving the manufacturer's fault.<sup>21</sup>

Protection of consumer expectations is the final public policy justification for adopting a strict liability remedy in Virginia products liability law. Consumers should be protected from unknown, hidden, or latent product dangers. This is particularly true because modern advertising and marketing techniques induce American and Virginian consumers to rely on product manufacturers to provide them with safe, high-quality products.<sup>22</sup>

These underlying public policy rationales for a strict liability remedy in American—and European—products liability law have been persuasive and compelling to the vast majority of American state legislators and jurists. It is surprising to this author that the Virginia General Assembly has not yet been persuaded by any or all of these seven compelling public policy reasons to adopt a strict liability remedy in Virginia products liability law.

### B. *The Defense-Oriented "Tort Reform" Movement*

The movement to expand consumer rights in American products liability law over the past thirty years has not been embraced by all parties. Indeed, there has been strong and consistent opposition by various business and insurance entities, resulting in a growing number of state and federal lobbyists and special interest groups on the defense side of tort litigation to "reform" American tort law in their favor.<sup>23</sup>

Initially, these "tort reform" efforts consisted of ad hoc attempts to address a series of perceived "crises," primarily in terms of the cost and availability of liability insurance.<sup>24</sup> Howev-

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21. See Page Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 34 (1973); Schwartz, *supra* note 20, at 458–60. Of course, the consumer must still prove that the product was in fact defective, that it was the actual and proximate cause of the injury, and that there was no comparative fault, assumption of risk, or unforeseeable product misuse on the part of the consumer. Likewise, problems of proof with warranty disclaimers or limitations are avoided with a strict liability remedy. Swisher, *supra* note 7, at 861–62.

22. See, e.g., Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1130–31 (1974).

23. See JAY M. FEINMAN, *UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW* 5 (2004).

24. However, placing a cap on medical malpractice tort claims in Virginia under Vir-

er, in the 1980s, the movement began to develop a more permanent and institutionalized approach to push for greater defense-oriented “tort reform.”<sup>25</sup> Unsurprisingly, there has been considerable, and heated, debate about the goals of this so-called “tort reform” movement, the fairness of the specific “reforms” it seeks to implement, and the methods it utilizes.<sup>26</sup> Indeed, one commentator has viewed this “tort reform” debate in the products liability context as a conflict between two cultural views over the proper allocation of risk.<sup>27</sup>

It is undoubtedly true that attempts by special interest groups to affect state and federal legislation will always be with us. As James Madison observed in *Federalist* Number 10, probably the most influential of all the *Federalist Papers*, special interest groups can counterbalance one another, and thereby avert tyrannical control.<sup>28</sup> However, the current defense-oriented “tort reform” movement enjoys a substantial economic and political advantage over American consumers and their supporters:

In the broader public debate . . . tort reform critics are outfinanced and often outgunned. Their research typically appears in specialized academic publications and is only occasionally discussed in the popular media. Moreover, there is no pro-litigation think tank to rival the

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ginia Code section 8.01-581.15 has *not* kept medical malpractice insurance premiums down, which was the intent of various “tort reform” proponents. *See, e.g.*, AMERICANS FOR INSURANCE REFORM, MEDICAL MALPRACTICE INSURANCE: STABLE LOSSES/UNSTABLE RATES IN VIRGINIA (2003) 2–4, 6, *available at* <http://www.insurance-reform.org/issues/StableLosses03VA.pdf> (stating that medical malpractice insurance premium rates in Virginia—as well as in Texas, Florida, Oklahoma, Ohio, and Mississippi—have not declined, but instead have continued to climb in spite of statutory medical malpractice damage caps).

25. *See generally* F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437 (2006) (discussing the organization of the “tort reform” movement).

26. *Id.* at 438. For support of this defense-oriented “tort reform” movement, *see, e.g.*, PHILIP K. HOWARD, *THE LOST ART OF DRAWING THE LINE: HOW FAIRNESS WENT TOO FAR* (2001); PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991).

For opposition to this defense-oriented “tort reform” movement, *see, e.g.*, CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW* (2001); FEINMAN, *supra* note 23; THOMAS H. KOENIG & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* (2001).

27. *See* MARSHALL S. SHAPO, *TORT LAW AND CULTURE* 158–62 (2003).

28. *See* THE FEDERALIST NO. 10, at 64–65 (James Madison) (Jacob E. Cooke ed., 1961).

likes of the Manhattan Institute's Center for Legal Policy, which supports the research of ["tort reform" proponents]. . . .<sup>29</sup>

The impact of these superior economic and political resources and the "tort reform" movement's massive marketing campaigns have strengthened public misperceptions of tort law in ways that favor the defense, with a current widespread—but unsupported—cultural belief of "too much litigation" involving "frivolous lawsuits."<sup>30</sup> Indeed, much of the alleged "evidence" of a so-called tort-related "lawsuit crisis" is based upon anecdotal evidence supplied by defense attorneys and others, rather than solid empirical evidence.<sup>31</sup>

Accordingly, American—and Virginian—tort law in general, and products liability law in particular, may be justified under a social justice public policy rationale.<sup>32</sup> Under this rationale, "tort law arguably rectifies imbalances in political power, specifically with regard to special interest groups that may block or distort legislation, or capture regulatory agencies that originally were designed to protect the public good," and protects the citizens of the commonwealth.<sup>33</sup>

It is clear, however, that the defense-oriented American "tort reform" movement will be with us for many years to come. As one commentator concludes:

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29. THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 45 (2002); *see also* BENJAMIN GINSBERG, *THE CAPTIVE PUBLIC: HOW MASS OPINION PROMOTES STATE POWER* 174–80 (1986) (discussing the political right's superior economic and political advantage in influencing public and legislative opinion).

30. *See* Stephen Daniels & Joanne Martin, "The Impact that It Has Had Is Between People's Ears": *Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 *DEPAUL L. REV.* 453, 462–63, 476–93 (2000) (discussing the impact of the "tort reform" movements on plaintiffs' lawyers).

31. *See* KOENIG & RUSTAD, *supra* note 26, at 6–8; Donald R. Songer, *Tort Reform in South Carolina: The Effect of Empirical Research on Elite Perceptions Concerning Jury Verdicts*, 39 *S.C. L. REV.* 585, 591–92 (1988) (casting doubt on the assertion that there is a crisis in the tort system because empirical studies revealed no significant increase in the number of lawsuits filed or the size of verdicts).

32. *See* PETER N. SWISHER ET AL., *VIRGINIA PRACTICE SERIES: TORT AND PERSONAL INJURY LAW* 6 (2007).

33. *Id.*; *see also* John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 *GEO. L.J.* 513, 560 (2003) ("By arming citizens with the power to sue corporations [and other defendants] for misconduct outside of the legislative and regulatory process, tort [law] corrects for this imbalance of power. In particular, it permits independent judges and especially juries to hold corporate America and other powerful actors accountable.").

In all likelihood, the movement's push for tort reform not only will continue but also will evolve to include more ways to achieve change favoring defendants. More specifically, the following are likely: (1) pushing for new doctrinal changes in favor of the defense side; (2) asserting new reasons why tort reform is needed; and (3) finding new forums to push for reform. Opposition to reform will also continue. This recurring theme of disagreement is not new; defining legal standards of wrongful conduct and liability always involves dispute. However, the nature of this struggle over tort law has shifted, and is likely to continue to shift, to a more politicized context where money and rhetoric tend to supplant traditional rational analysis.<sup>34</sup>

### C. *Virginia Products Liability Law and a "Tort Reform" Response*

In 1997, a Joint Subcommittee of the Virginia General Assembly (the "Joint Subcommittee") was organized pursuant to House Joint Resolution 523, sponsored by then-Delegate John Watkins (R-Chesterfield), to examine the "strengths and weaknesses" of Virginia products liability law, "and to compare Virginia's system with that of other states."<sup>35</sup> This author spoke before the Joint Subcommittee on September 3, 1997, arguing that Virginia products liability law should be legislatively modified in favor of the consumer to bring it more in line with the vast majority of other states.<sup>36</sup> This author believed that the subcommittee's initial charge to examine the strengths and weaknesses of Virginia products liability law, and compare Virginia's system with that of other states, was a positive first step in analyzing any proposed products liability tort reform recommendations, *pro or con*.

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34. Hubbard, *supra* note 25, at 538 (citation omitted).

[This] push is likely to continue for three reasons. First, the ideology of the movement provides a sense of intense moral commitment to get the United States on the right track and keep it there. Second, changing the tort system in favor of the defense side is in the self-interest of the movement's members because reducing payouts to claimants reduces their costs. Third, the professionals seeking these 'reforms' have a personal stake in continuing their employment.

*Id.*

35. Deborah Elkins, *Adopt New Rules on Products Law, Prof Says*, VA. LAW. WKLY., Sept. 8, 1997, at A3.

36. *Id.* ("The Virginia consumer presently does not have the same legal rights that consumers in other states have,' Professor Peter N. Swisher told the subcommittee. Swisher, a law professor at the University of Richmond Law School, reviewed the current state of products liability law at the subcommittee's opening meeting in Richmond Sept[ember] 3[, 1997]. Adopting portions of the Restatement (3rd) of Torts [Section 2], approved in May by the American Law Institute, would allow the Commonwealth to 'recognize and equalize' the rights of products manufacturers and consumers, Swisher said.")

The Joint Subcommittee study was opposed by various defense-oriented Virginia “tort reform” proponents seeking to quash the Joint Subcommittee’s initial inquiry into the “strengths and weaknesses” of current Virginia products liability law, including any in-depth analysis of proposed legislative tort reform.<sup>37</sup> Initially, a representative of the Virginia Manufacturers Association (“VMA”) tried to dissuade me from speaking before the Joint Subcommittee and suggested that future political and economic sanctions might be brought against anyone supporting this Joint Resolution. At the subcommittee hearing, Richmond defense lawyer Gary J. Spahn, who has been defending products liability cases for more than twenty years, stated that existing Virginia products liability law “works reasonably well and is reasonably fair to manufacturers and consumers.”<sup>38</sup> Spahn, who spoke on behalf of the VMA, said that he was unaware of “any studies showing that Virginia settlements or judgments [were] inadequate in products cases.”<sup>39</sup> “Existing Virginia products liability law is perceived by manufacturers as being fair, and is a selling point not only for maintaining business, but also for attracting business [to Virginia],” Spahn said.<sup>40</sup> General counsel for the VMA, Carol Wampler, echoed Spahn’s argument, saying that VMA members “cited the adage, ‘if it ain’t broke, don’t fix it,’ as their position on the reform of [Virginia] products liability law.”<sup>41</sup> Finally, “John B. Donohue, Jr., chief litigation [defense] counsel for Richmond-based Reynolds Metals, also warned the subcommittee that ‘the Virginia legal system does not afford [defendants] the typical protection

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37. *See id.*

38. *Id.*

39. *Id.*

40. *Id.* With all due respect to Mr. Spahn, this argument ignores the basic fact that most products bought and used by Virginia consumers are manufactured by *out-of-state* (and, increasingly, *out-of-country*) manufacturers, rather than Virginia manufacturers, and the legal rights of Virginia consumers *should* be protected against defective products manufactured by out-of-state defendants. Moreover, if Virginia manufacturers wish to sell their products outside the state, they must also comply with sister-state strict liability products liability laws. Does this mean that Virginia consumers should *not* have an adequate remedy at law against Virginia manufacturers who manufacture, design, or market defective and unreasonably dangerous products? Why should Virginia consumers bear this unnecessary burden not shared by consumers in other states?

41. *Id.* However, it can persuasively be argued that traditional American products liability law based on negligence principles *is* “broke” and *does* need “fixing.” *See supra* Part II.A.

against frivolous legal claims” that the federal court system does.<sup>42</sup>

Significantly, however, none of these speakers addressed, nor attempted to rebut, *any* of the underlying public policy arguments supporting strict liability remedies in American products liability law,<sup>43</sup> nor the fact that these strict liability remedies have been adopted in the overwhelming majority of other American states.<sup>44</sup>

Moreover, Virginia’s ranking as one of the best states in which to do business arguably is based on a number of quality of life and other interrelated business factors,<sup>45</sup> rather than based on Virginia’s relatively weak and inadequate consumer protection laws. However, ten days later the Joint Subcommittee voted to disband itself.

Although this author understands that this is all part of the give-and-take, rough-and-tumble legislative process that is an important part of the American and Virginian political process, the rights of Virginia consumers in a products liability context *do* need a more careful, in-depth legislative analysis—pro *and* con—regarding Virginia products liability “tort reform.” The decision should not be based on anecdotal evidence of various defense-oriented “tort reform” proponents or, for that matter, on the testimony of a Virginia law professor.

If the Virginia General Assembly does not adequately address the legal rights of Virginia consumers and protect them from defective and unreasonably dangerous consumer products in today’s marketplace, who will?

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42. Elkins, *supra* note 35. But again, where is the empirical evidence of such “frivolous legal claims?” See *supra* notes 29–30 and accompanying text.

43. See *supra* Part II.A.

44. See *supra* notes 4–5 and accompanying text.

45. Gregory J. Gilligan, *State Wins High Business Ranking*, RICH. TIMES-DISPATCH, Jan. 23, 2008, at B9 (“Virginia stood out in this year’s rankings [listed No. 4 among the best states to do business] because the state has maintained low jobless levels and has had a good pace of growth,” said Mike Kopko, the CEO index specialist for Chief Executive magazine. “CEOs consider [Virginia] to be a nice place to live and hire people, evidenced by their A-rating for work-force quality and living environment,” Kopko said.”). The top two ranked states for business, Texas and Nevada, have no state income tax. *Id.* Both Texas and Nevada, like the vast majority of American states, also have enacted strict liability remedies for defective consumer products. See *supra* note 4.

### III. PROPOSED LEGISLATION TO PROTECT VIRGINIA CONSUMERS AGAINST DEFECTIVE OR UNREASONABLY DANGEROUS PRODUCTS

#### A. *A Strict Liability in Tort Legislative Proposal*

In a prior law review article, this author argued that Virginia should legislatively adopt a “modified” strict liability in tort remedy, as proposed by Professor James Henderson of Cornell University Law School and Professor Aaron Twerski of Brooklyn Law School.<sup>46</sup> Professors Henderson and Twerski subsequently served as reporters for the *Restatement (Third) of Torts: Products Liability* and their “modified” strict liability in tort remedy was incorporated into sections one and two of the *Restatement (Third) of Torts: Products Liability*.<sup>47</sup>

##### § 1. Liability of Commercial Seller or Distributor for Harm Caused by Defective Products

*One 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.*

. . . .

##### § 2. Categories of Product Defect

*A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:*

*(a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;*

*(b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;*

*(c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.<sup>48</sup>*

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46. Swisher, *supra* note 7, at 865–66.

47. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998).

48. *Id.*

A more complete discussion and analysis of the underlying public policy justification and application of this proposed strict liability in tort remedy in Virginia products liability law is discussed in my earlier article,<sup>49</sup> and will not be revisited at length here.

The fact that a strict liability in tort analysis in Virginia products liability law did not receive favorable action by the Virginia General Assembly's Joint Subcommittee in 1997<sup>50</sup> suggests that a strict liability in tort legislative proposal today may share a similar fate, unless pro-consumer "tort reform" advocates and their supporters are able to resurrect another legislative proposal to study Virginia products liability "tort reform" in-depth.

### B. *A Breach of Warranty Strict Liability in Contract Legislative Proposal*

A second modest proposal to protect Virginia consumers against defective products involves breach of warranty actions under the Uniform Commercial Code ("UCC"). Some states that have not recognized a strict liability in *tort* remedy within their particular state products liability law have instead adopted various strict liability in *contract* remedies based upon breach of warranty actions under the UCC—as enacted, for example, in states such as Massachusetts<sup>51</sup> and Maine.<sup>52</sup>

A breach of warranty action, which is a hybrid tort and contract action,<sup>53</sup> has long been recognized in Anglo-American tort law, beginning with common law warranties and the Uniform Sales Act,<sup>54</sup> and culminating in the UCC,<sup>55</sup> which has been adopted in all states, including Virginia.<sup>56</sup>

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49. See generally Swisher, *supra* note 7.

50. See *supra* Part II.C.

51. See MASS. ANN. LAWS ch. 106, § 2-316A (LexisNexis 1998 & Cum. Supp. 2008).

52. See ME. REV. STAT. ANN. tit. 11 § 2-316(5) (1995 & Cum. Supp. 2007).

53. See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 636 (4th ed. 1971) ("Whether it be tort or contract, a breach of warranty gives rise to strict liability, which does not depend on any knowledge of defects on the part of the seller, or any negligence.").

54. See *id.* at 634-39.

55. See U.C.C. §§ 2-101, 2-313 to -316, 2-719 (2007).

56. See VA. CODE ANN. §§ 8.2-101, -313 to -316, -719 (Repl. Vol. 2001 & Cum. Supp. 2008).

There are three underlying public policy rationales supporting breach of warranty strict liability actions for defective consumer products. First, “[t]he public interest in human life and safety demands the maximum possible protection that the law can give against dangerous defects in products which consumers must buy, and against which they are helpless to protect themselves . . . .”<sup>57</sup> This justifies the imposition of full responsibility for the harm they cause upon all suppliers of such products.<sup>58</sup> Second, the product manufacturer or seller, by placing goods in the market, represents to the public that such products are suitable and safe for use; by packaging, advertising, and otherwise, they do everything they can to induce that belief.<sup>59</sup> When the defective product causes injury to the consumer, the seller “should not be permitted to avoid the responsibility by saying that he has made no contract with the consumer.”<sup>60</sup> Third, it is currently possible to enforce strict liability breach of warranty actions “in which the retailer is first held liable on a warranty to his purchaser, and indemnity on a warranty is then sought successively from other suppliers” and from the product manufacturer.<sup>61</sup>

Unfortunately, breach of warranty actions under the UCC present serious drawbacks for the consumer-plaintiff in tort-related actions. Warranties on the sale of goods under the UCC have two significant problems for plaintiffs who suffer personal injuries from defective products.

First, the plaintiff-buyer must give notice to the defendant-seller within a reasonable time after he or she knows, or should know, of the breach of warranty.<sup>62</sup> When applied to personal injuries, this notice requirement to a remote seller becomes a “booby trap” for the unwary consumer<sup>63</sup> who “is seldom ‘steeped in the business practice [between commercial buyers and sellers] which justifies this rule.’”<sup>64</sup>

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57. PROSSER, *supra* note 53, at 651.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*; see also Richard C. Ausness, *Replacing Strict Liability with a Contract-Based Products Liability Regime*, 71 TEMP. L. REV. 171, 195–98 (1998).

62. See U.C.C. § 2-607(3) (2006); VA. CODE ANN. § 8.2-607(3) (Repl. Vol. 2001 & Cum. Supp. 2008).

63. *Greenman v. Yuba Power Prods.*, 377 P.2d 897, 900 (Cal. 1963).

64. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 691 (5th ed.

The second serious drawback of the UCC is that of sanctioning disclaimers by the seller, which would defeat the warranty:<sup>65</sup>

The other [troubling] provision of the [UCC in tort-related actions] is that of sanctioning disclaimers by the seller, which will defeat the warranty. This means that he is free to insert in his contract of sale an effective agreement that he does not warrant at all, or that he warrants only against certain consequences or defects, or that his liability shall be limited to particular remedies, such as replacement, repair, or return of the purchase price. Commercially this may not be at all an unreasonable thing, particularly where the [commercial] seller does not know the quality of what he is selling, and the [commercial] buyer is really willing to take his chances. Commercial buyers are usually quite able to protect themselves. It is another thing entirely to say that the consumer who buys at retail is to be bound by a disclaimer which he has never seen, and to which he would certainly not have agreed if he had known of it, but which defeats a duty [of reasonable care] imposed by the law for his protection.<sup>66</sup>

A number of commentators have persuasively argued, therefore, that any limitation or disclaimer of an implied warranty of merchantability or fitness that involves personal injury or wrongful death should be judicially construed to be unconscionable and unenforceable based upon strong underlying public policy reasons.<sup>67</sup> Consequently, a substantial majority of American courts

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1984); see Ausness, *supra* note 61, at 200 ("The [UCC's] notice requirements appear to work well in commercial transactions between experienced and knowledgeable parties. However, the Code's notice requirements have sometimes proved to be 'booby traps for the unwary' when they have been enforced too strictly against ordinary consumers. The drafters of the UCC tacitly acknowledged the existence of this problem when they declared that the purpose of [UCC] section 2-607 was to defeat commercial bad faith, not to deprive consumers who act in good faith of their remedies."); see also Shooshanian v. Wagner, 672 P.2d 455, 463 (Alaska 1983) (holding that "[a] consumer unfamiliar with commercial practices should not be barred from pursuing a meritorious claim because he was unaware of the need to notify a remote seller of breach [of warranty] before bringing suit"); Maybank v. S.S. Kresge Co., 273 S.E.2d 681, 685 (N.C. 1981) (holding that "[f]airness to the consumer dictates that he be given a reasonable time to learn of and to comply with this requirement"); Riley v. Ken Wilson Ford, Inc., 426 S.E.2d 717, 721 (N.C. Ct. App. 1993). *But see* Branden v. Gerbie, 379 N.E.2d 7, 9 (Ill. Ct. App. 1978) (barring suit by an injured IUD user against a manufacturer because of a fifteen-month delay in giving notice to the manufacturer).

65. See U.C.C. § 2-316 (2006); VA. CODE ANN. § 8.2-316 (Repl. Vol. 2001 & Cum. Supp. 2008).

66. KEETON ET AL., *supra* note 64, at 691 (citations omitted); see also Ausness, *supra* note 61, at 202-06 (describing the disclaimers and warranty limitations authorized by the UCC).

67. See, e.g., Michael J. Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers*, 62 CHI.-KENT L. REV. 199, 267 (1985) ("By now, implied warranty disclaimers can be readily attacked under [UCC] section 2-302's all-purpose ban on unconscionable contract clauses. Still, the courts applying section 2-302 to implied warranty disclaimers

are of the opinion that disclaimers of warranties that meet the requirement of UCC section 2-316 may, nevertheless, be found to be unconscionable in any action involving personal injury or wrongful death.<sup>68</sup>

Virginia law currently holds that a warranty limitation to repair or replacement of the product under Virginia Code section 8.2-719 (UCC § 2-719) is unconscionable whenever personal injuries or wrongful death result to the buyer-consumer.<sup>69</sup> However, how the Supreme Court of Virginia would interpret a disclaimer of implied warranties under Virginia Code section 8.2-316 (UCC § 2-316) involving personal injury or wrongful death is uncertain. On one hand, Virginia courts might interpret any disclaimer of implied warranties involving personal injuries or wrongful death to be unconscionable, as a majority of other American courts have done.<sup>70</sup> On the other hand, Virginia courts might uphold such

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have sometimes been tentative in their use of this regulatory tool. The general movement of products liability law, and the policy considerations underlying that movement, however, argue for a more aggressive judicial stance in this area.”). See generally M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 814–15 (1969) (arguing the importance of the admittedly vague unconscionability standard).

68. See George W. Fahlgren, *Unconscionability: Warranty Disclaimers and Consequential Damage Limitations*, 20 ST. LOUIS U. L.J. 435, 471–72 (1976) (“Clearly, a majority of those courts that have considered the question are of the opinion that disclaimers of warranties that meet the requirement of [UCC] section 2-316 may, nevertheless, be found unconscionable. Indeed, in cases in which personal injury has occurred and has not been covered by an express warranty, the cases have nearly all been resolved in the plaintiff’s favor. The buyer has rarely been successful, however when no personal injuries had been suffered and the parties were of equal bargaining power. Decisions concerning limitation or exclusion of consequential damages [under UCC section 2-719] have followed a similar pattern.”); see *Ford Motor Co. v. Tritt*, 430 S.W.2d 778, 781 (Ark. 1968) (disclaimer of implied warranty of merchantability was held to be unconscionable in a wrongful death case); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 97 (N.J. 1960) (invalidating a disclaimer of an implied warranty of merchantability because it was against public policy); *Walsh v. Ford Motor Co.*, 298 N.Y.S.2d 538, 539–40 (N.Y. Sup. Ct. 1969) (disclaimer of implied warranty of merchantability was held to be unconscionable and unenforceable when the buyer was injured due to a defect in the automobile throttle linkage); see also *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 172 (Cal. 1964) (en banc); *State Farm Mut. Auto. Ins. Co. v. Anderson-Weber Inc.*, 110 N.W.2d, 449, 455–56 (Iowa 1961); *Crown v. Cecil Holland Ford, Inc.* 207 So.2d 67, 68–69 (Fla. Dist. Ct. App. 1968). But see *Ford Motor Co. v. Moulton*, 511 S.W.2d 690, 694 (Tenn. 1974) (disclaimer of implied warranty of merchantability was upheld, and not declared unconscionable, even though the plaintiff had suffered personal injuries).

69. See, e.g., *Matthews v. Ford Motor Co.*, 479 F.2d 399, 402 (4th Cir. 1973) (applying Virginia law) (holding that the plaintiff was entitled to recover damages for injuries because Ford failed to rebut the presumption of unconscionability); see also *Martin v. Am. Med. Sys., Inc.*, 116 F.3d 102, 105 (4th Cir. 1997) (holding that Virginia law prohibits the exclusion of consequential damages where such an exclusion is unconscionable).

70. See *supra* note 68 and accompanying text.

disclaimers, even in cases involving personal injury or wrongful death.<sup>71</sup>

To help alleviate this interpretive conundrum in Virginia, I would respectfully submit the following legislative proposal to further protect Virginia consumers against defective or unreasonably dangerous consumer products. My proposed amendment to Virginia Code section 8.2-316 (2) and (3) appears in italics below:

*Virginia Code § 8.2-316. Exclusion or modification of warranties.*

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it, the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

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71. See, e.g., *Moulton*, 511 S.W.2d at 692-94 (upholding a properly drafted disclaimer of implied warranty). In an attempt to clarify this interpretive conundrum and to harmonize products liability law in tort and warranty, a revised UCC section 2-319 has been proposed, providing, in pertinent part, "[a]ny agreement, however expressed, that excludes or limits consequential damages for injury to the person is unenforceable." U.C.C. § 2-319(c)(2) (Proposed Draft 1996), available at <http://www.law.upenn.edu/bll/archives/ulc/ucc2/ucc2sale.pdf>. However, after extensive debate during July of 1996, the UCC Drafting Committee announced that it would withdraw Revised Section 2-319 in its entirety, in large part because most states (but not Virginia) already had enacted comprehensive strict liability in tort consumer remedies. Curtis R. Reitz, *Manufacturers' Warranties of Consumer Goods*, 75 WASH. U. L.Q. 357, 384-85 (1997). Consequently, various "[p]roblems of disparate sales and warranty law in the field of products liability remain to be resolved." *Id.* at 385.

(d) *However, any warranty agreement, however expressed, that excludes or limits consequential damages for injury or wrongful death to a person is unenforceable.*<sup>72</sup>

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this title on liquidation or limitation of damages and on contractual modification of remedy (§§ 8.2-718 and 8.2-719).

This statutory amendment and clarification to Virginia Code section 8.2-316 is a viable, necessary, and eminently reasonable legislative remedy that the Virginia General Assembly should enact for legitimate and pressing public policy reasons to protect Virginia consumers against defective or unreasonably dangerous products.<sup>73</sup>

In the alternative, if the Virginia General Assembly is unwilling, or unable, to amend section 8.2-316 to provide that any warranty agreement that excludes or limits consequential damages for injured consumer-buyers is unconscionable and unenforceable, then the Supreme Court of Virginia, interpreting section 8.2-316 in conjunction with section 8.2-302, should judicially hold, as many other American courts have previously held,<sup>74</sup> that any warranty disclaimer or limitation involving personal injuries or wrongful death would be unconscionable and unenforceable.

#### IV. CONCLUSION

The overwhelming majority of American states, and most European countries, currently recognize a strict liability legal remedy to protect their citizens against defective or unreasonably dangerous consumer products. However, Virginia consumers currently do *not* have these almost universally recognized legal protections against defective consumer products, based either on a strict liability in tort action or a breach of warranty action under the UCC.

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72. This statutory language is similar to the language in the proposed revision of UCC § 2-319(c)(2). *See* U.C.C. § 2-319(c) (Proposed Draft 1996). It is also consistent with similar U.C.C. § 2-316 legislation passed in other states. *See, e.g.*, ME. REV. STAT. tit. 11, § 2-316(5) (Cum. Supp. 2007). MASS. ANN. LAWS ch. 106, § 2-316A(4) (LexisNexis 1998 & Cum. Supp. 2008).

73. *See supra* Part II.A for explanation of public policy reasons to adopt a strict liability remedy in Virginia products liability actions.

74. *See supra* note 68 and accompanying text.

This article recommends a viable, necessary, and eminently reasonable legislative amendment to Virginia Code section 8.2-316 of Virginia's UCC, providing that any warranty agreement, however expressed, that excludes or limits consequential damages for injury or wrongful death to a person would be unenforceable, and thereby finally bring the Commonwealth of Virginia into the mainstream of twenty-first century American—and transnational—products liability law.

Contrary to unsupported concerns of some critics of consumer-based products liability tort reform in Virginia,<sup>75</sup> this legislative proposal would *not* be harmful to Virginia business interests, as demonstrated by the strong underlying business climate in Virginia and by other pro-business states that also have enacted strict liability remedies targeting defective or unreasonably dangerous consumer products.

Moreover, this proposal is a pro-consumer legislative one, *not* an anti-Virginia business legislative proposal, as some might argue. Indeed, most products manufactured and sold to Virginia consumers come from out-of-state, and increasingly out-of-country, manufacturers. Virginia consumers should be entitled to the same legal rights and the same legal protections currently enjoyed by American consumers in the overwhelming majority of other states. If the Virginia General Assembly will not speak for the Virginia consumer, who will?

In the alternative, if the Virginia General Assembly is unwilling or unable to amend Virginia Code section 8.2-316, then the Supreme Court of Virginia should judicially hold, as many other American courts have held, that any warranty disclaimer or limitation involving personal injury or wrongful death would be unconscionable and unenforceable in the commonwealth.

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75. See *supra* notes 37–42 and accompanying text.