INDEMNITY ACTIONS IN ALABAMA PRODUCTS LIABILITY CASES

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I. INTRODUCTION

Few areas of Alabama law are more muddled than that governing rights to indemnity. No case contains a clear analysis of indemnity rights, and some cases confuse the concept of indemnity with that of contribution.[1] With the recent explosion in products liability litigation, this situation has become particularly troublesome. Indemnity issues arise more frequently, in more complex situations, and over larger amounts of money than ever before. Yet recent cases have not cleared the murky indemnity picture, but, at least superficially, have only compounded earlier confusion.

Consider the following hypothetical, which illustrates the problem of indemnity in products liability cases:

> Plaintiff, an Alabama resident[2] operating an unincorporated painting business, was injured in March 1981 when a scaffold on which he was standing while painting the second story of a building collapsed. As a result of his fall Plaintiff received severe, permanent injuries to his back. He sued Retailer, from whom he purchased the scaffold,

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1. The Alabama courts' unfortunate tendency to link indemnity and contribution appeared as early as 1855. *See* Moore v. Appleton, 26 Ala. 633, 638 (1855). In 1895 the Alabama Supreme Court stated that the rule against contribution among joint tortfeasors, and the exception to that rule when a party entertains a bona fide belief that his act is innocent, applies to indemnity as well as contribution. W.F. Vandiver & Co. v. Pollak, 107 Ala. 547, 553, 19 So. 180, 182 (1895). The court's early lack of clarity resulted in its later use of the term "contribution" when referring to what could more properly be termed "indemnity." *See, e.g.*, Alabama Power Co. v. Curry, 228 Ala. 444, 448, 153 So. 634, 638 (1934) ("[I]f one is a wrongdoer to the other, but the other is not to the former, and they both are responsible to a third person, as between themselves the wrongdoer is responsible for contribution to the other."). *See generally infra* notes 95-196 and accompanying text.

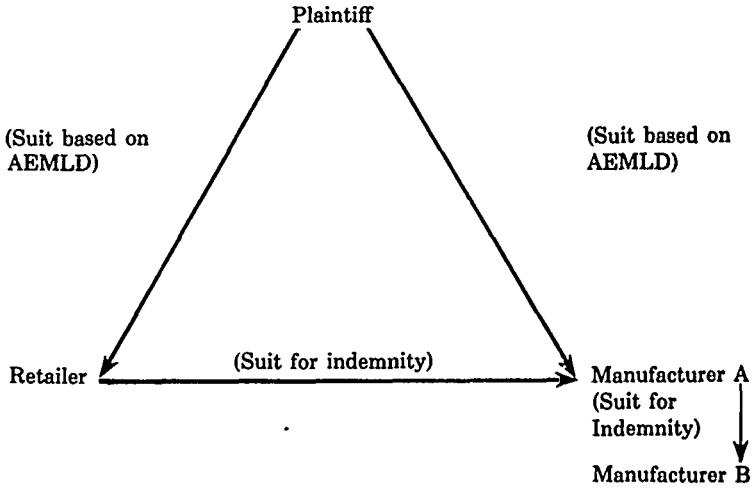
2. To avoid conflict of laws problems, this hypothetical includes only Alabama parties.

and *A*, the manufacturer of the scaffold, alleging liability under the Alabama Extended Manufacturer's Liability Doctrine (AEMLD).[3] *A*'s investigation reveals that *A* manufactured the scaffold in 1971 and sold it to Retailer in 1972. Retailer sold it to Plaintiff later that year. The investigation also indicates that a defect in an aluminum support, which *A* purchased in 1970 from Manufacturer *B* and later incorporated unchanged into its scaffolding, caused the accident. *A*'s attorneys, assuming that *A* will be forced to pay a judgment to Plaintiff, are investigating any indemnity theories that might support an action against *B*.[4]

This hypothetical depicts a common fact situation, yet it raises precisely the legal issues that presently are so confused under Alabama law. Although Plaintiff's claims against Retailer and against Manufacturer *A*, Retailer's claims against Manufacturer *A*, and *A*'s claims against Manufacturer *B* each implicates a distinct bundle of legal rights, each is unavoidably related to, and sometimes even dependent upon, the others. Courts and lawyers understandably become confused attempting to sort out in a single case these intertwined relationships. Much of this confusion could

3. The Alabama Supreme Court promulgated AEMLD in the 1976 companion cases of Atkins v. American Motors Corp., 335 So. 2d 134 (Ala. 1976) and Casrell v. Altec Indus., Inc., 335 So. 2d 128 (Ala. 1976). A typical products liability action also would assert liability based upon negligence and breach of warranty. *See* Hare & Hare, *Principal Alabama Actions in Tort: Part II*, 22 ALA. L. REV. 361, 376 (1970).

4. A diagrammatical representation of the hypothetical follows:



be avoided by focusing on the simple question that should form the core of all products liability litigation: Which party should bear ultimate responsibility for Plaintiff's injury?

In addressing that question this Article first examines Plaintiff's rights under AEMLD and then explores the effect these rights should have on any actions for indemnity by Manufacturer *A* against Manufacturer *B*. By analyzing existing Alabama law on indemnity and offering suggestions on how theories of indemnity should operate to accommodate the modern products liability problem, this Article seeks to develop a coherent analysis of indemnity claims to aid attorneys faced with a multi-party products liability case.

II. The Alabama Extended Manufacturer's Liability Doctrine

The Alabama Supreme Court recently considered indemnity in a products liability setting in *Consolidated Pipe & Supply Co. v. Stockham Valves & Fittings, Inc.*[5] The court, relying on the Alabama rule against contribution among joint tortfeasors,[6] upheld a directed verdict in favor of a defective valve's manufacturer on cross-claims for indemnity filed by the intermediate and local distributors of the valve, who had been found liable under the Alabama Extended Manufacturer's Liability Doctrine.[7] Understanding why the supreme court in *Consolidated Pipe* viewed parties liable under AEMLD as joint tortfeasors is crucial to an understanding of indemnity rights under Alabama law. The search for this answer best begins with a review of the background of AEMLD.

A. *Origins of AEMLD*

The law of products liability originated[8] in the famous case of *Winterbottom v. Wright*,[9] which established the common-law rule requiring privity of contract between plaintiff and manufacturer in order to hold manufacturer liable in negligence for injuries caused

5. 365 So. 2d 968 (Ala. 1978).
6. *See id.* at 970.
7. *See id.*
8. W. Prosser, Handbook of the Law of Torts, § 96, at 641-42 (4th ed. 1971).
9. 152 Eng. Rep. 402 (Ex. 1842).

by a defective product.[10] Numerous articles[11] and cases[12] recount in detail the gradual retreat from the *Winterbottom* rule and the concomitant advance toward the modern concept of products liability. Because AEMLD, Alabama's theory of recovery, is slightly different from the strict liability available in many states, however, the development of that doctrine merits discussion here.

In Alabama, as in other states, the movement from the *Winterbottom* rule first manifested itself in a series of exceptions that, under limited circumstances, allowed an injured plaintiff to bring suit directly against a negligent manufacturer or producer even absent privity of contract.[13] Often these fact situations concerned injuries from unwholesome food or inherently dangerous products.[14]

One of the earliest Alabama cases to discuss these exceptions was *Birmingham Chero-Cola Bottling Co. v. Clark*.[15] Plaintiff became ill after drinking from a bottle of defendant's cola, which was contaminated with flies.[16] After a jury verdict for plaintiff, defendant appealed on the grounds that the trial court had erroneously instructed the jury that plaintiff was the beneficiary of an implied warranty of fitness made by defendant,[17] with whom plaintiff was not in privity.[18] The supreme court agreed with defendant and reversed, relying on the common-law rule.[19] Although the court recognized the existence of exceptions to the common-law rule for in-

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10. *See id.* at 405; Note, *Torts—Products Liability—A Manufacturer, Supplier, or Seller Who Markets a Product Not Reasonably Safe When Applied to Its Intended Use in the Usual and Customary Manner Is Negligent as a Matter of Law*, 28 ALA. L. REV. 747, 748 & n.9 (1977).

11. *See, e.g.*, Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966) [hereinafter cited as Prosser, *The Fall*]; Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960) [hereinafter cited as Prosser, *The Assault*].

12. *See, e.g.*, Atkins v. American Motors Corp., 335 So. 2d 134, 137-38 (Ala. 1976); Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

13. *See generally* Prosser, *The Assault*, *supra* note 11, at 1103-10 (discussing the early food and drink exception to the requirements of privity and negligence).

14. *See infra* notes 15-33 and accompanying text.

15. 205 Ala. 678, 89 So. 64 (1921).

16. *Id.* at 679, 89 So. at 64.

17. *See id.*, 89 So. at 64-65.

18. Plaintiff bought the drink from an intermediate dealer. *See id.* at 680, 89 So. at 65.

19. "[I]t is well settled as a common-law rule that the benefit of a warranty does not run with the chattel on its resale so as to give the subpurchaser any right of action thereon as against the original seller." *Id.*

herently dangerous products and unwholesome foods, it emphasized that these exceptions were based on a negligence theory and did not apply to actions based on a warranty or contract theory.[20] The manufacturer's liability in the exceptional cases, the court declared, was founded upon a breach of the manufacturer's duty to the public not to market unreasonably dangerous articles.[21] This tort-based manner of thinking became, and remains, the core of Alabama products liability theory.

The Alabama Supreme Court first recognized in a holding the inherently dangerous product exception in *Merchant's Bank v. Sherman.*[22] Plaintiff[23] brought suit against a wholesale dealer in lamp oils, alleging that defendant negligently mixed gasoline with the lamp oil, causing it to explode and kill plaintiff's intestate.[24] Although plaintiff's intestate purchased the lamp oil from an intermediate retailer[25] and hence was not in privity with defendant, the court allowed the complaint.[26] Defendant was "duty bound to such purchasers to exercise a reasonable amount of care not to sell such oils as are of a dangerously explosive nature."[27] Echoing the theme of *Clark*, the court stressed that the complaint was allowed because defendant breached a duty of care that he owed all potential purchasers of the product because of the product's inherently dangerous nature;[28] the court did not rely on breach of warranty.[29]

In the years following *Sherman* the court recognized duty-

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20. *See id.*

21. *Id.* The court, on application for rehearing, refused to follow Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913) (establishing an implied warranty of fitness running from food manufacturers to consumers). Birmingham Chero-Cola Bottling Co. v. Clark, 205 Ala. at 680-81, 89 So. at 66.

22. 215 Ala. 370, 110 So. 805 (1926).

23. Plaintiff acted as administrator of an intestate's estate. *Id.* at 371, 110 So. at 806.

24. *See id.*

25. *Id.* at 372, 110 So. at 807.

26. *See id.* at 373-74, 110 So. at 808.

27. *Id.* at 372, 110 So. at 807.

28. *See id.* at 372-73, 110 So. at 807.

29. *See* Merchant's Bank v. Sherman, 215 Ala. 370, 110 So. 805 (1926). The requirement of privity in consumer suits based on warranty continued until Alabama adopted its version of the Uniform Commercial Code. After the adoption of the UCC, privity still is necessary in all cases except personal injuries caused by a breach of warranty in sales of consumer goods. *See* ALA. CODE § 7-2-318 (1975); *infra* note 65 and accompanying text; *cf.* Dudley v. Bayou Fabricators, Inc., 330 F. Supp. 788, 791 (S.D. Ala. 1971) (construing Alabama law) (privity required to enforce a warranty in cases alleging economic loss). *See generally* McDonnell, *The New Privity Puzzle: Products Liability Under Alabama's Uniform Commercial Code*, 22 ALA. L. REV. 445 (1970).

based exceptions to the *Winterbottom* rule for other potentially dangerous products, including automobiles,[30] wringer washing machines,[31] refrigerators,[32] and tires.[33] Gradually, this group of exceptions evolved into an identifiable theory of recovery called "the manufacturer's liability doctrine." Although similar terms appeared in earlier cases,[34] the doctrine was not formally set out until 1958, when the Alabama Supreme Court decided *Defore v. Bourjois, Inc.*[35]

Plaintiff in *Defore* cut her hand severely when the perfume bottle she was trying to open broke.[36] Plaintiff's complaint against the manufacturer of the perfume alleged liability for negligently failing to inspect or select the perfume bottle.[37] In denying recovery[38] the court specifically set forth the requirements for recovery under the manufacturer's liability doctrine. A plaintiff must establish: (1) that the manufacturer and ultimate user were not in privity of contract;[39] (2) that the manufacturer negligently placed on the market a product that is inherently or imminently dangerous to human life or health or that becomes so when put to its intended use; (3) that the user sustained an injury that was the natural and proximate result of the negligence; and (4) that the manufacturer could reasonably have anticipated that his negligence would result in injury to an ultimate user.[40]

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30. *See* Miles v. Chrysler Corp., 238 Ala. 359, 362-63, 191 So. 245, 247-48 (1939).

31. *See* Altorfer Bros. Co. v. Green, 236 Ala. 427, 429-30, 183 So. 415, 418 (1938).

32. *See* Sterchi Bros. Stores v. Castleberry, 236 Ala. 349, 350-53, 182 So. 474, 477 (1938).

33. *See* Greyhound Corp. v. Brown, 269 Ala. 520, 525-26, 113 So. 2d 916, 920-21 (1959).

34. *See* Crane Co. v. Davies, 242 Ala. 570, 573, 8 So. 2d 196, 199 (1942) (" 'The Manufacturers Liability Doctrine' "); Miles v. Chrysler Corp., 238 Ala. 359, 361, 191 So. 245, 247 (1939) ("doctrine of 'manufacturers' liability' ").

35. 268 Ala. 228, 105 So. 2d 846 (1958).

36. *Id.* at 229, 105 So. 2d at 847.

37. *See id.* at 230, 105 So. 2d at 847.

38. *See id.* at 234, 105 So. 2d at 852.

39. This requirement merely limits the doctrine's use to products liability cases. *See* W. PROSSER, *supra* note 8, § 96, at 641 ("Products liability is the name currently given to the area of case law involving the liability of sellers of chattels to third persons with whom they are not in privity of contract.").

40. Defore v. Bourjois, Inc., 268 Ala. at 230-31, 105 So. 2d at 848. The court ruled that a perfume bottle is not inherently or imminently dangerous, and hence denied liability. *See id.* at 232-33, 105 So. 2d at 849, 851-52. *But cf.* Florence Coca Cola Bottling Co. v. Sullivan, 259 Ala. 56, 65-66, 65 So. 2d 169, 177 (1953) (plaintiff allowed to recover for injuries sustained when soft drink bottle exploded and cut her leg). The stricter standard for manufac-

The *Defore* court apparently excluded defendant retailers and suppliers from the manufacturer's liability doctrine, since the court's exposition of the doctrine spoke only of manufacturers.[41] The later case of *Sears, Roebuck & Co. v. Morris*[42] served to expand the doctrine's reach. Plaintiff was injured when a wheel on a boat trailer he was servicing exploded in his face.[43] Neither the trailer nor its wheels were manufactured by defendant retailer, but retailer sold the trailer and wheels together under its trade name "Elgin."[44] The court, quoting the Restatement of Torts,[45] held that because defendant retailer sold the trailer under its own trade name, its liability would be determined as if it were the manufacturer of the wheel.[46]

Norton Co. v. Harrelson[47] suggested that the manufacturer's liability doctrine applied to sellers as well as manufacturers of defective products.[48] Because defendant in *Harrelson* was a manufacturer,[49] however, the court's inclusion of sellers was dictum only. The court never directly addressed the question of the manufacturer's liability doctrine's applicability to sellers, probably because use of the tort-based doctrine became less attractive after Alabama adopted the breach of warranty provisions[50] of the Uniform Com-

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turers dealing with food products, *see* McDonnell, *supra* note 29, at 466-67, may explain the disparate results in these two exploding bottle cases.

41. *See* Defore v. Bourjois, Inc., 268 Ala. at 231, 105 So. 2d at 848.

42. 273 Ala. 218, 136 So. 2d 883 (1961).

43. *Id.* at 220-21, 136 So. 2d at 883-84.

44. *Id.* at 221, 136 So. 2d at 884. Defendant purchased the trailer, complete with wheels manufactured by Kamin Die Casting & Manufacturing, Inc., from Dunbar Kapple, Inc. *Id.*

45. *See id.* at 222, 136 So. 2d at 885. "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." RESTATEMENT OF TORTS § 400 (1934) (adopted unchanged in RESTATEMENT (SECOND) OF TORTS § 400 (1965)).

46. Sears, Roebuck & Co. v. Morris, 273 Ala. at 222, 136 So. 2d at 885.

47. 278 Ala. 85, 176 So. 2d 18 (1965).

48. "[The manufacturer's liability] doctrine is applicable in a limited number of situations. The defendant must be either the manufacturer or seller of the injury-producing article." *Id.* at 88, 176 So. 2d at 20.

49. *Id.* at 87, 176 So. 2d at 19.

50. *See infra* notes 61-65 and accompanying text. Alabama's version of the UCC provides in part that:

> A sellers' [sic] warranty, whether express or implied, extends to any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

ALA. CODE § 7-2-318 (1975).

mercial Code.

The preceding discussion summarizes the development and application of the manufacturer's liability doctrine prior to 1976. Applying the pre-1976 law to the hypothetical set forth earlier[51] and ignoring possible warranty theories,[52] Plaintiff could maintain a negligence suit against Retailer unhampered by the *Winterbottom* rule because Plaintiff and Retailer are in privity. Plaintiff also could allege negligence against *A*, manufacturer of the scaffold, under the inherently dangerous product exception to the *Winterbottom* rule. Plaintiff's greatest handicap would be his burden of proving that Retailer or Manufacturer *A* was negligent in allowing the scaffold to reach the market. In the pre-1976 era proof of negligence normally would require a showing of a defect in the product traceable to *A*'s negligence or the negligent failure of Retailer or *A* to discover a defect in the product.[53] In other words, Plaintiff had to prove a defendant's culpable conduct. This proof often was difficult to obtain, even with the aid of the res ipsa loquitur doctrine.[54] In post-1976 cases, however, AEMLD makes this task much simpler.

B. AEMLD as a Modern Theory of Liability

Prosser called the gradual move from the *Winterbottom* rule the "assault upon the citadel."[55] This "assault" took two forms: a tort-based wing, exemplified in Alabama by the manufacturer's liability doctrine, and a warranty-based wing, exemplified by the breach of warranty provisions of the Uniform Commercial Code.[56] The problems with the tort-based wing of the assault[57] prompted many plaintiffs to follow the lead of *Henningsen v. Bloomfield Motors, Inc.*[58] and allege liability based on a warranty theory. In *Henningsen* both the manufacturer of an automobile and the dealer

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51. *See supra* notes 2-4 and accompanying text.

52. *See generally* McDonnell, *supra* note 29 (discussing recovery under a warranty theory).

53. *See* Wade, *On the Nature of Strict Liability for Products*, 44 Miss. L.J. 825, 825-26 (1973).

54. *Id.* at 826.

55. *See* Prosser, *The Assault, supra* note 11, at 1099-1100.

56. *See* Prosser, *The Fall, supra* note 11, at 791.

57. *See supra* notes 51-54 and accompanying text.

58. 32 N.J. 358, 161 A.2d 69 (1960).

who sold it were held liable to plaintiff on a theory of an implied warranty of merchantability,[59] which extended to plaintiff even though she, as the wife of the purchaser, was not in privity with either defendant.[60]

Alabama's adoption of the Uniform Commercial Code[61] cleared the way for warranty-based recovery in products liability cases, but several difficulties with the approach often render it an unsatisfactory theory of recovery. First, a plaintiff proceeding under the breach of warranty provisions of Alabama's version of the UCC must give the defendant notice of the breach within a reasonable time after he knew or should have known of its existence.[62] Notice ordinarily must be given no more than four years from tender of delivery to the buyer.[63] Second, Alabama allows significant disclaimers of warranty,[64] which may defeat recovery altogether. Third, Alabama relaxed the privity requirement in warranty actions for personal injury claims only.[65]

The difficulty of proving negligence under a manufacturer's liability doctrine tort theory and the technical requirements of the UCC under a warranty theory precluded many plaintiffs with otherwise meritorious claims from recovering in products liability cases. These problems do not exist under the strict liability approach of the Second Restatement of Torts.[66] Section 402A of the

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59. *See id.* at ____, ____, 161 A.2d at 84, 96-97.

60. *See id.* at ____, 161 A.2d at 99-100. The Alabama Supreme Court rejected a similar warranty-based theory disregarding privity in Birmingham Chero-Cola Bottling Co. v. Clark, 205 Ala. 678, 89 So. 64 (1921). *Compare id. and supra* note 21 *with* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) *and supra* text accompanying notes 58-60.

61. Act of Aug. 25, 1965, Pub. Act No. 549, 1965 Ala. Acts 811 (codified as amended at ALA. CODE §§ 7-1-101 to -10-104 (1975 & Supp. 1982)). The Alabama Code provides for two types of implied warranties: merchantability, *see* ALA. CODE § 7-2-314 (1975), and fitness for a particular purpose, *see id.* § 7-2-315. The Code additionally removes in part the privity barrier concerning these warranties. *See id.* § 7-2-318; *infra* note 65 and accompanying text.

62. ALA. CODE § 7-2-607(3)(a) (1975); *see also* W. PROSSER, *supra* note 8, § 97, at 655.

63. The statute of limitations for a breach of warranty action ordinarily runs in four years from tender of delivery. *See* ALA. CODE § 7-2-725(1)-(2) (1975); *see also infra* notes 135-46 and accompanying text.

64. *See* ALA. CODE § 7-2-316 (1975). *But see id.* § 7-2-316(5) (restricting the seller's ability to limit his liability in cases of personal injury from defective consumer goods).

65. *See id.* § 7-2-318.

66. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

> 1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

Second Restatement shifts the focus of the cause of action from the seller's conduct to the performance of the product, eliminating the problem of proving negligence. If the product is unreasonably dangerous when applied to its intended use, the seller is liable regardless of his care in producing or handling the product.[67] The Second Restatement solves the privity problem simply by deleting any privity requirement.[68] With these far-reaching changes, section 402A effectively imposes strict liability on sellers of goods, a development that has revolutionized products liability law.[69]

The Alabama Supreme Court in 1976 formally recognized the products liability revolution in the companion cases of *Casrell v. Altec Industries, Inc.*[70] and *Atkins v. American Motors Corp.*[71] In each case plaintiff invited the court to adopt the form of strict products liability set out in section 402A,[72] and in each case the court declined to do so.[73] Instead, the court expanded its own manufacturer's liability doctrine,[74] renaming it the "Alabama Extended Manufacturer's Liability Doctrine."[75]

Adoption of AEMLD revolutionized Alabama products liability law by making three radical changes in the manufacturer's liability doctrine. First, AEMLD allows a plaintiff to proceed against defendants that were not liable under the earlier doctrine. Previ-

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(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

2. The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

67. *See* Note, *supra* note 10, at 756 & n.33.

68. *See* RESTATEMENT (SECOND) OF TORTS § 402A(2)(b) (1965).

69. *See generally* Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965); Note, *Products Liability and Section 402A of the Restatement of Torts*, 55 GEO. L.J. 286 (1966).

70. 335 So. 2d 128 (Ala. 1976).

71. 335 So. 2d 134 (Ala. 1976).

72. The complaint in each case was substantially identical in form to a complaint alleging strict liability in tort under section 402A. *See id.* at 136 n.1.

73. *See id.* at 137; Casrell v. Altec Indus., Inc., 335 So. 2d at 132.

74. Atkins v. American Motors Corp., 335 So. 2d at 137; Casrell v. Altec Indus., Inc., 335 So. 2d at 132.

75. Casrell v. Altec Indus., Inc., 335 So. 2d at 133 n.1.

ously, only the final manufacturer of a product or a retailer that sold the product under its own brand name could unquestionably be a proper defendant.[76] In contrast, AEMLD expressly allows recovery against the supplier or seller, as well as the manufacturer, of a product.[77] In the hypothetical,[78] Plaintiff could proceed against both Manufacturer *A* and Retailer under AEMLD. Under the former manufacturer's liability doctrine, Plaintiff could pursue only Manufacturer *A*.[79]

Second, AEMLD expands the range of products that enable a plaintiff injured by the product to proceed directly against a defendant with whom the plaintiff is not in privity. Under the old manufacturer's liability doctrine, a plaintiff could not qualify for an exception to the privity rule unless the product causing his injury was considered inherently or imminently dangerous.[80] In contrast, AEMLD permits recovery against a manufacturer, seller, or supplier for injuries caused by any product that the factfinder declares to be "unreasonably dangerous" when put to its intended use.[81]

Third, and at the theoretical core of the new doctrine, AEMLD alters the manner of proving negligence. Like section 402A, AEMLD shifts the emphasis from proving fault in the traditional sense, through the manufacturer's conduct in negligently producing or designing a product or through the manufacturer's failure to provide adequate warnings of dangers inherent in the product's use.[82] Again like section 402A, AEMLD focuses on the quality and performance of the product.[83] Unlike section 402A, however, AEMLD does not dispense with the requirement of negligence;[84] rather, it deems negligent as a matter of law the placement on the market of a product that proves unreasonably dangerous

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76. *See supra* notes 41-50 and accompanying text.

77. Casrell v. Altec Indus., Inc., 335 So. 2d at 132.

78. *See supra* notes 2-4 and accompanying text.

79. *See supra* notes 41-50 and accompanying text.

80. *See supra* notes 13-33 and accompanying text.

81. Atkins v. American Motors Corp., 335 So. 2d at 142; Casrell v. Altec Indus., Inc., 335 So. 2d at 133.

82. *Compare* Atkins v. American Motors Corp., 335 So. 2d at 139 *and* Casrell v. Altec Indus., Inc., 335 So. 2d at 132 *with* RESTATEMENT (SECOND) OF TORTS § 402A comment a (1965) *and supra* note 67 and accompanying text.

83. *Compare* Atkins v. American Motors Corp., 335 So. 2d at 139, 142 *and* Casrell v. Altec Indus., Inc., 335 So. 2d at 132-33 *with* RESTATEMENT (SECOND) OF TORTS § 402A comments h, i (1965).

84. *See* Note, *supra* note 10, at 756.

when applied to its intended use.[85]

Although AEMLD resembles the Second Restatement's approach, the Alabama Supreme Court modified its doctrine to avoid two related objectionable aspects of section 402A. First, the court quarreled with the no-fault liability precept embodied in section 402A, which imposes liability on sellers regardless of causal relation to the product's defective condition.[86] The supreme court opined that to hold a seller liable for injuries arising from a defective product absent the seller's active fault would conflict with Alabama's allegiance to a tort-based theory of recovery.[87] AEMLD's retention of a negligence concept enabled the court to fashion an affirmative defense unavailable under the Second Restatement: a defendant may avoid liability by showing that "there is no causal relation in fact between his activities in connection with handling the product and its defective condition."[88] A retailer or distributor may avoid liability by showing that: (1) he received the product already defective; (2) he did not contribute to and was not aware of the defect; and (3) he did not have an opportunity superior to that of the injured consumer to inspect the product.[89] In addition, AEMLD affords a defendant three defenses[90] available under the Second Restatement.[91]

The court also objected to the Second Restatement's effective abolition of the traditional distinctions between the tort and contract forms of remedies.[92] This distinction is important under Ala-

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85. *Id.* at 747-48.

86. *See* Atkins v. American Motors Corp., 335 So. 2d at 138-39.

87. *See id.* at 139.

88. *Id.* at 143.

89. *Id.*

90. These defenses include (1) a general denial, which allows, for example, a manufacturer to show that the defect in the product was introduced after it left the manufacturer's control; (2) assumption of risk, which allows a defendant to show that the product was unavoidably unsafe and that the consumer was sufficiently warned of the dangers of its use; and (3) contributory negligence. *Id.*; Casrell v. Altec Indus., Inc., 335 So. 2d at 134.

91. *Compare* Atkins v. American Motors Corp., 335 So. 2d at 143 *and* Casrell v. Altec Indus., Inc., 335 So. 2d at 134 *with* RESTATEMENT (SECOND) OF TORTS § 402A comments g, k, *l* (1965). The defense of contributory negligence is sharply limited under the Second Restatement, *see id.* comment n; indeed, the Alabama Supreme Court interpreted the Restatement's limited acknowledgement of contributory negligence as describing the defense of assumption of risk. *See* Atkins v. American Motors Corp., 335 So. 2d at 143. Many jurisdictions that employ strict liability recognize product misuse, a form of contributory negligence, as a defense. Note, *supra* note 10, at 764-65.

92. *See* Atkins v. American Motors Corp., 335 So. 2d at 138.

bama law both because it preserves the existing system of electing remedies and because it avoids confusion over what substantive and procedural law, such as statutes of limitations,[93] applies to a given action.[94] In the field of products liability the distinction is crucial for yet another reason. By adopting AEMLD as a tort-based theory of recovery, the court saddled indemnity actions in Alabama products liability cases with all the confusion that invariably accompanies the rule against contribution among joint tortfeasors.

III. Indemnity Actions Under AEMLD

In *Consolidated Pipe & Supply Co. v. Stockham Valves & Fittings, Inc.*,[95] three defendants were jointly liable under AEMLD,[96] and the Alabama Supreme Court considered them joint tortfeasors that, under Alabama law, could not bring suit for contribution.[97] This conclusion was assured since AEMLD merely extends the earlier negligence-based manufacturer's liability doctrine. In denying indemnity, however, the court again clouded the distinction between the doctrines of indemnity and contribution. Contribution is an equitable concept that empowers courts to require two or more parties jointly at fault to share in the payment of damages to the injured party.[98] In contrast, indemnity does not embrace an equitable division but rather provides for an otherwise innocent party that has been required to pay a judgment for reasons of public policy to shift the entire loss from payment of the judgment to the party actually at fault.[99] Indemnity, unlike contribution, is not a

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93. The Alabama Supreme Court recently struck down on other grounds a statute that, inter alia, established a uniform limitations period for products liability actions regardless of the underlying theory of recovery, *see* Ala. Code §§ 6-5-502, -521 (Supp. 1982). *See* Lankford v. Sullivan, Long & Hagerty Corp., 416 So. 2d 996 (Ala. 1982).

94. Note, *supra* note 10, at 758. For example, the court in Wright v. Cutler-Hammer, Inc., 358 So. 2d 444 (Ala. 1978), emphasized the difference between tort and contract actions in determining when a cause of action accrues. *See id.* at 445-46.

95. 365 So. 2d 968 (Ala. 1978).

96. *See id.* at 970.

97. *See id.*

98. Phillips, *Contribution and Indemnity in Products Liability*, 42 Tenn. L. Rev. 85, 89-90 (1974); *see also* Gobble v. Bradford, 226 Ala. 517, 519, 147 So. 619, 619 (1933).

99. *See* Phillips, *supra* note 98, at 93; *see also* Sherman Concrete Pipe Mach., Inc. v. Gadsden Concrete & Metal Pipe Co., 335 So. 2d 125, 126-27 (Ala. 1976) (recognizing that indemnity shifts the entire liability while contribution distributes the liability ratably

separate action. Instead, it allows a defendant that has been forced to pay damages to a plaintiff to recoup those damages from a third party on the basis of some independent legal theory. Indemnity may be based on an express agreement, a breach of an implied warranty, or a negligence theory. When one of these theories for indemnity is present, the no contribution rule should not control.

A. Express Agreements

Express contractual indemnity[100] is the simplest form of indemnity.[101] When two parties have agreed that the first party will compensate the second for any losses, even those caused by the second party's negligence, the agreement is "enforceable if the contract clearly indicates an intention to indemnify against the consequences of the indemnitee's negligence, and such provision was clearly understood by the indemnitor, and there is not shown to be evidence of a disproportionate bargaining position in favor of the indemnitee."[102] Courts will enforce contracts for indemnity subject to the same limitations that apply to all contracts;[103] that the agreement provides for indemnity is largely irrelevant except, perhaps, if one party is performing a "public service."[104] One party may not contract to indemnify another, however, for the other's intentional wrongdoing.[105]

If the hypothetical[106] Manufacturer *B*, in conjunction with the sale of aluminum supports to Manufacturer *A*, agreed in writing to

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among the defendants).

100. This type of indemnity may be based upon an express warranty as well as on a separate contract for indemnity. *See* 3A L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 44.01, at 15-2 to -3 (1982).

101. Comment, *Indemnity Among Joint Tortfeasors*, 43 MISS. L.J. 670, 676 (1972).

102. Industrial Tile, Inc. v. Stewart, 388 So. 2d 171, 175 (Ala. 1980), *cert. denied*, 449 U.S. 1081 (1981). *See generally* Roedder, *Contractual Indemnity in Alabama*, 33 ALA. L. REV. 31 (1981).

103. Comment, *supra* note 101, at 676. For example, the Alabama Supreme Court in United States Fidelity & Guar. Co. v. Mason & Dulion Co., 274 Ala. 202, 145 So. 2d 711 (1962), construed an ambiguity in an indemnity contract against the party that drafted the contract. *See id.* at 210, 145 So. 2d at 717.

104. *See, e.g.*, Housing Authority v. Morris, 244 Ala. 557, 14 So. 2d 527 (1943). *See generally* Roedder, *supra* note 102, at 33-39 (discussing Alabama indemnity contracts favoring public corporations).

105. *E.g.*, Pruet v. Dugger-Holmes & Assocs., 276 Ala. 403, 406, 162 So. 2d 613, 615 (1964).

106. *See supra* notes 2-4 and accompanying text.

"pay all judgments and costs, including that of defense, charged to *A* because of defective supports sold by *B*," *A* could claim indemnity under the contract. Unfortunately for *A*, express indemnity agreements seldom appear in products liability settings.[107] Therefore, a party in *A*'s position usually must rely on indemnity rights implied in law to obtain relief.

B. Indemnity Based on Implied Warranty

Commentators discussing indemnity rights implied in law often do not consider indemnity based on implied warranty.[108] The obvious reason is that when a seller sues a prior seller under a warranty theory, his cause of action is not for indemnity as that term normally is used. Rather, the suit actually is one for breach of warranty to obtain indemnity; any payment made to an injured consumer is recoverable from the prior seller, if at all, as part of the consequential damages resulting from that breach.[109]

The earlier hypothetical[110] illustrates the breach of warranty remedy and its shortcomings. Assume that in early 1970 Manufacturer *A* negotiated with Manufacturer *B* for the purchase of aluminum tubing from *B*. During the negotiations *A* told *B* how the tubing would be used and the strength requirements it should meet. *B* then suggested a particular type of tubing, and *A* purchased the tubing on the strength of *B*'s suggestion. Under these facts *B* made no express warranties,[111] but *B* probably created a pair of implied warranties. Section 7-2-314 of the Alabama Code creates an implied warranty that the tubing will be of merchantable quality if *B* is shown to be a merchant[112] in aluminum tubing.[113] Section 7-2-315 of the Alabama Code creates an implied warranty of fitness for

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107. Phillips, *supra* note 98, at 89.

108. *See, e.g., id.* at 89-93; Comment, *supra* note 101, at 678-79.

109. *See* DiGregorio v. Champlain Valley Fruit Co., 127 Vt. 562, ____, 255 A.2d 183, 185 (1969).

110. *See supra* notes 2-4 and accompanying text.

111. *See* ALA. CODE § 7-2-313 (1975).

112. "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or a person to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Id. § 7-2-104(1).

113. *See id.* § 7-2-314.

a particular purpose[114] if *A* proves that *B* knew or should have known of the particular use *A* intended for the tubing and that *A* relied on *B*'s recommendation and expertise.[115] *A* probably can establish a breach of either warranty by showing that the tubing supplied by *B* was defective and that it caused Plaintiff's injury.[116]

Section 7-2-714 of the Alabama Code describes the damages recoverable for a breach of warranty: loss of the bargain and consequential.[117] Loss of the bargain damages are measured by the difference between the value of the goods when accepted and the value of the goods if they were as warranted.[118] This component of damages usually allows the buyer to recover at most the purchase price of the nonconforming goods.[119] Consequential damages for breach of warranty include injury to both persons and property.[120]

Manufacturer *A* is little interested in recovering loss of the bargain damages since these are apt to be relatively slight compared to *A*'s liability to Plaintiff. Any payment that *A* is required to make to Plaintiff for Plaintiff's injuries caused by the defective tubing, however, is recoverable as consequential damages. Unfortunately for *A*, several code sections raise complications that often render warranty-based indemnity unavailable.

1. Disclaimers.—The seller may disclaim all implied warranties.[121] He may exclude the warranty of merchantability either orally or in writing, but he must expressly refer to "merchantability."[122] He may disclaim the warranty of fitness for a particular purpose only by conspicuous language in writing such as: "There are no warranties which extend beyond the description on the face hereof."[123] In addition, either warranty may be disclaimed by lan-

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114. The "particular purpose" in the example is the tubing's incorporation into scaffolding.

115. *See* ALA. CODE § 7-2-315 (1975); *cf.* Wesson Oil & Snowdrift Co. v. Orr, 274 Ala. 463, 466, 149 So. 2d 462, 464 (1962) (applying pre-UCC law).

116. *See* Vinyard v. Duck, 278 Ala. 687, 180 So. 2d 522 (1965) (applying pre-UCC law).

117. *See* ALA. CODE § 7-2-714(2)-(3) (1975).

118. *Id.* § 7-2-714(2).

119. *See* Winchester v. McCulloch Bros. Garage, 388 So. 2d 927, 929 (Ala. 1980).

120. ALA. CODE § 7-2-715(2)(b) (1975).

121. *Id.* § 7-2-314(1), -315.

122. *Id.* § 7-2-316(2). *But see* Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962) (upholding a disclaimer of warranty that did not include the word "merchantability"). A written disclaimer must be conspicuous. ALA. CODE § 7-2-316(2) (1975).

123. ALA. CODE § 7-2-316(2) (1975).

guage such as "with all faults" and "as is."[124] The Alabama Supreme Court has indicated that it will enforce disclaimers that comply with the statute.[125]

2. Limitation of Remedy.—More common than disclaimers of warranties are contractual limitations on the remedies available upon their breach.[126] Section 7-2-719 of the Alabama Code provides that a seller may limit the remedy for a breach of warranty, for example, to refund of the purchase price or repair or replacement of defective goods,[127] and the seller also may exclude consequential damages.[128] Such limitations will not bind the purchaser of the product, however, in several situations. First, the buyer may employ other remedies available under Alabama's commercial code if the contract does not specify that the remedy given is exclusive.[129] The buyer also may resort to the remedies available under Alabama's commercial code if the warranty as limited fails of its essential purpose.[130] Finally, an unconscionable limitation or exclusion of consequential damages is unenforceable.[131]

3. Notice.—If a buyer that is sued by an injured plaintiff intends to bring an action against his seller for breach of warranty, he must notify the seller of the breach within a reasonable time after the breach is or should have been discovered.[132] Failure to notify the seller bars any recovery for the breach.[133] That plaintiff's suit against buyer arises under AEMLD does not affect the notice requirement. The buyer's action against the seller remains one for breach of warranty, and no special rules apply to it.[134]

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124. *Id.* § 7-2-316(3)(a). Such a disclaimer need not be conspicuous. Gilliam v. Indiana Nat'l Bank, 337 So. 2d 352, 355 (Ala. Civ. App. 1976).

125. *See* Tiger Motor Co. v. McMurtry, 284 Ala. 283, 288, 224 So. 2d 638, 642 (1969).

126. Section 7-2-316(4) of the Alabama Code provides that remedies may be limited in accordance with sections 7-2-718 and 7-2-719 of the Alabama Code, *see* ALA. CODE § 7-2-316(4) (1975), but only the latter section is implicated often in products liability situations.

127. *Id.* § 7-2-719(1)(a).

128. *Id.* § 7-2-719(3).

129. *See id.* § 7-2-719(1)(b).

130. *Id.* § 7-2-719(2).

131. *See id.* § 7-2-719(3).

132. *Id.* § 7-2-607(3)(a). The buyer also may require his seller to come in and defend the original action by the injured plaintiff. *See id.* § 7-2-607(5)(a).

133. *Id.* Courts have construed the notice requirement as a condition precedent to maintaining an action for breach of warranty. Redman Indus. v. Binkley, 49 Ala. App. 595, 599, 274 So. 2d 621, 624 (Civ. App. 1973); Lindsey v. International Shoe Co., 45 Ala. App. 566, 568, 233 So. 2d 507, 508-09 (Civ. App. 1970).

134. *See* Consolidated Pipe & Supply Co. v. Stockham Valves & Fittings, Inc., 365 So.

4. Statute of Limitations.—A breach of contract action must be brought within four years of the cause of action's accrual.[135] A cause of action for breach of warranty accrues upon tender of delivery, regardless of the buyer's knowledge of the breach.[136] In *Wright v. Cutler-Hammer, Inc.*[137] the Alabama Supreme Court emphasized that only two exceptions apply to this rule.[138] The first exception delays the running of the four-year period until the breach is or should have been discovered.[139] The warranty must explicitly extend to future performance of the goods,[140] however, and the *Wright* court concluded that this limitation restricts the exception's applicability to express warranties.[141]

The second exception provides that in suits for personal injuries caused by defects in consumer goods, the limitations period begins to run from the date of injury.[142] The supreme court in *Simmons v. Clemco Industries*[143] refused to expand this exception, unparalleled in any other state adopting the Uniform Commercial Code,[144] to encompass all actions for personal injury, whether or not resulting from consumer goods.[145] Although *Simmons* concerned a suit by an injured user against the manufacturer and distributor of defective equipment,[146] the decision manifests the court's unwillingness to enlarge the exception in an indemnity setting.

2d 968, 971 (Ala. 1978).

135. ALA. CODE § 7-2-725(1) (1975).

136. *Id.* § 7-2-725(2).

137. 358 So. 2d 444 (Ala. 1978).

138. *See id.* at 446 ("[B]ecause neither exception applies, this case falls under the general limitations stated in the statute.").

139. ALA. CODE § 7-2-725(2) (1975).

140. *Id.*

141. Wright v. Cutler-Hammer, Inc., 358 So. 2d at 445.

142. ALA. CODE § 7-2-725(2) (1975). But compare Rodibaugh v. Caterpillar Tractor Co., 225 Cal. App. 2d 570, 572-73, 37 Cal. Rptr. 646, 647 (Dist. Ct. App. 1964), holding in a non-UCC case that a cause of action for personal injuries from construction equipment accrued on the date of injury. To reach this result the California court apparently disregarded the distinction between contract and tort actions in products liability cases, *see id.* at 573, 37 Cal. Rptr. at 647, a concession that the Alabama court is unlikely to make in view of its avowed intention to keep the contract and tort theories conceptually distinct. *See supra* notes 92-94 and accompanying text.

143. 368 So. 2d 509 (Ala. 1979).

144. *See id.* at 512.

145. *See id.*

146. *See id.* at 511.

Returning to the hypothetical,[147] Manufacturer *B* apparently neglected to disclaim any implied warranties or to limit Manufacturer *A*'s remedies. Additionally, *A* probably still can give timely notice of the breach to *B* since *A* could not reasonably have discovered the breach before being sued by Plaintiff. Because *A*'s cause of action against *B* accrued upon tender of delivery to *A* in 1970, however, the statute of limitations bars *A*'s breach of warranty action against *B*.

C. Indemnity Based on a Negligence Theory

Although Manufacturer *A* failed to qualify for indemnity under either an express agreement or breach of an implied warranty, with appropriate facts *A* could have obtained indemnity from *B* employing either theory, regardless of the Alabama rule[148] against contribution among joint tortfeasors. It seems axiomatic that if *A* meets the requirements of negligence-based indemnity[149] he also should recover from *B*, notwithstanding the no contribution rule. That argument, which constitutes the central focus of this Article, must be reconciled with the Alabama Supreme Court's opinion in *Consolidated Pipe & Supply Co. v. Stockham Valves & Fittings, Inc.*[150]

In *Consolidated Pipe* plaintiffs brought suit under AEMLD for the wrongful deaths of two men killed when an underground steam valve exploded; plaintiffs joined as defendants the manufacturer, intermediate distributor, and local distributor of the valve.[151] The local distributor cross-claimed for indemnity against the intermediate distributor and the manufacturer, and the intermediate distributor similarly cross-claimed for indemnity against the manufacturer;[152] each cross-claim was based on a negligence theory of

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147. *See supra* notes 2-4 and accompanying text.

148. *See supra* note 1.

149. Writers have given this form of indemnity a variety of names. *See, e.g.*, Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 146 (1932) ("quasi-contractual" indemnity); Phillips, *supra* note 98, at 121 ("common law" indemnity).

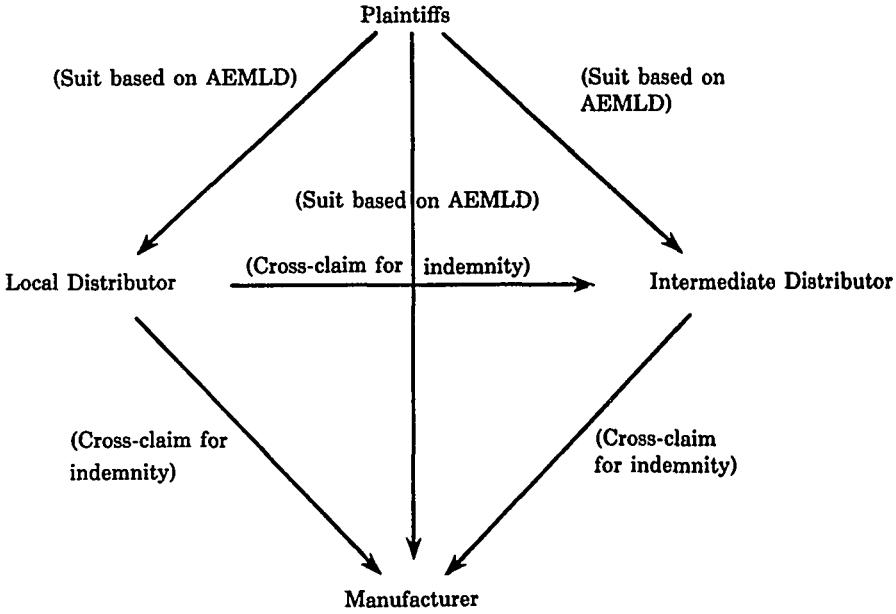
150. 365 So. 2d 968 (Ala. 1978).

151. *Id.* at 969-70.

152. *Id.* The following diagram illustrates the configuration of the suit:

indemnity.[153] The trial court directed verdicts against all cross-claimants, and the jury then returned a verdict for plaintiffs against all three defendants.[154]

The *Consolidated Pipe* court began its decision with an incantation of the Alabama rule against contribution among joint tortfeasors[155] and woodenly applied the principle to deny indemnity.[156] The court noted that the three defendants were joint tortfeasors; consequently, none could recover indemnity from another without invoking an exception to the no contribution rule. Because neither intermediate distributor nor local distributor successfully asserted the "no causal relation" defense available under AEMLD,[157] neither could seek negligence-based indemnity from



153. The local distributor also alleged breach of warranty in its cross-claim against the intermediate distributor. The court summarily rejected this theory because the local distributor failed to comply with the notice requirements of ALA. CODE § 7-2-607 (1975). *See* Consolidated Pipe & Supply Co. v. Stockham Valves & Fittings, Inc., 365 So. 2d at 971. *See generally supra* notes 132-34 and accompanying text (discussing notice requirements of an action for liability under a breach of warranty).

154. Consolidated Pipe & Supply Co. v. Stockham Valves & Fittings, Inc., 365 So. 2d at 970.

155. *See id.*

156. *See id.* at 970-71.

157. *See generally supra* notes 88-89 and accompanying text.

any party further up the chain of distribution.[158]

The court's approach offers an unnecessarily vague method of analyzing indemnity problems. The court began its inquiry by considering the no contribution rule to determine whether indemnity was appropriate. A more sensible approach is to determine first whether indemnity is appropriate. If indemnity is appropriate, the claims of the party seeking indemnity necessarily fall either outside the scope of the no contribution rule altogether or within a recognized exception to the rule. Both the contract-based and warranty-based theories of indemnity are examples of indemnity actions outside the no contribution rule; the negligence-based theory, by definition, should be considered within an exception to the rule.[159]

The hypothetical[160] helps illustrate this point. If Retailer fails to assert successfully against Plaintiff a "no causal relation" defense, Retailer may not claim negligence-based indemnity from Manufacturer *A*. If, however, Retailer successfully asserts this defense and is dismissed from the case, and Plaintiff recovers a judgment against *A* alone, *Consolidated Pipe* has no effect on *A*'s indemnity claim against Manufacturer *B*. *Consolidated Pipe* says only that a defendant who fails to assert successfully the "no causal relation" defense is barred from recovering indemnity.[161] Since a manufacturer cannot assert the "no causal relation" defense against claims for injuries caused by defective component parts,[162] *Consolidated Pipe* does not bar Manufacturer *A* from seeking negligence-based indemnity from Manufacturer *B*, the supplier of the defective component part. An analysis of three leading Alabama indemnity cases[163] demonstrates why Manufacturer *A* should recover from Manufacturer *B*.

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158. *See* Consolidated Pipe & Supply Co. v. Stockham Valves & Fittings, Inc., 365 So. 2d at 970-71.

159. A second, less important, form of negligence-based indemnity falls outside the scope of the no contribution rule. *See infra* notes 193-95 and accompanying text.

160. *See supra* notes 2-4 and accompanying text.

161. *See* Consolidated Pipe & Supply Co. v. Stockham Valves & Fittings, Inc., 365 So. 2d at 970-71.

162. Atkins v. American Motors Corp., 335 So. 2d 134, 143 (Ala. 1976); Casrell v. Altec Indus., Inc., 335 So. 2d 128, 134 (Ala. 1976).

163. City of Mobile v. George, 253 Ala. 591, 45 So. 2d 778 (1950); Walter L. Couse & Co. v. Hardy Corp., 49 Ala. App. 552, 274 So. 2d 316 (1972), *cert. denied*, 290 Ala. 134, 274 So. 2d 322 (1973); Mallory S.S. Co. v. Druhan, 17 Ala. App. 365, 84 So. 874 (1920); *see infra* notes 164-86 and accompanying text.

The earliest and best known of the cases is *Mallory Steamship Co. v. Druhan.*[164] Plaintiff stevedore's employee was injured when a derrick supplied by defendant steamship company collapsed. Plaintiff's insurance company settled the injured employee's claim against plaintiff and, under rights obtained by subrogation, brought an action against defendant for indemnity.[165] The court's opinion is not entirely clear,[166] but it contains what has become the classic Alabama statement of the indemnity exceptions to the no contribution rule:

> The exceptions to the rule that indemnity will not be allowed among joint wrongdoers are that a joint wrongdoer may claim indemnity where he has not been guilty of any fault, except technically or constructively, or where both parties are at fault, but the fault of the party from whom indemnity is claimed was the efficient cause of the injury. Where an injury results from a violation of a duty which one owes to another, the parties are not in pari delicto.[167]

The *Mallory Steamship Co.* court's exposition of the indemnity exceptions lists two particular situations in which indemnity should be allowed and then states a general rule applicable to all indemnity situations. Indemnity allowable because the party seeking it is not at fault[168] lies, along with contract-based and warranty-based indemnity, beyond the scope of the no contribution rule.[169] Indemnity allowable because the party seeking it, though at fault, is not the effective cause of the injury[170] creates an exception to the no contribution rule that aptly describes the AEMLD situation: though one party is held liable for public policy reasons, that party did not cause the defect and should have rights of indemnity against the party that was the "efficient cause of the injury."[171] The general rule states the factor common to all cases in which

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164. 17 Ala. App. 365, 84 So. 874 (1920).

165. *See id.* at 368, 84 So. at 876.

166. The court purported to base its opinion on breach of warranty, but discussed the rights of the parties in tort language. *See id.* at 369, 84 So. at 877.

167. *Id.*

168. "[A party] may claim indemnity where he has not been guilty of any fault, except technically or constructively . . . ." *Id.*

169. *See infra* notes 193-95 and accompanying text.

170. "[A party] may claim indemnity . . . where both parties are at fault, but the fault of the party from whom indemnity is claimed was the efficient cause of the injury." Mallory S.S. Co. v. Druhan, 17 Ala. App. at 369, 84 So. at 877.

171. *Id.*

negligence-based indemnity is appropriate: one party must have breached a duty owed to the party seeking indemnity.[172]

A two-part analysis emerges from the *Mallory Steamship Co.* opinion that offers a coherent rule for deciding indemnity claims based on a negligence theory. First, a party may be entitled to indemnity if he was held liable (1) constructively, without fault, for a wrong committed by another, or (2) directly, for his own fault, when another party's fault actually caused the harm. Second, the party seeking indemnity may recover from another party that breached a duty owed him. The first part of the test indicates whether a party is entitled to negligence-based indemnity; the second part indicates the parties from whom indemnity may be recovered.

The facts of *Mallory Steamship Co.*[173] fit well within the exception to the no contribution rule. Although plaintiff stevedore may have been at fault in failing to discover the danger posed by the defective derrick, defendant steamship company supplied the derrick and hence efficiently caused the injury to plaintiff's employee. Further, defendant breached its duty to plaintiff of furnishing safe equipment.

The second leading Alabama indemnity case also fits this two-step analysis of negligence-based indemnity. *City of Mobile v. George*[174] arose from the death of a Mobile police officer killed when the motorcycle he was riding struck a hole in a city street.[175] His widow obtained a judgment for wrongful death against the city, but the court dismissed her claim against a construction company installing a sewer line at the site of the accident because she did not prove the company's negligence.[176] The city instituted a separate action for indemnity from the construction company, grounded on a contract in which the construction company expressly agreed to indemnify the city against the construction com-

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172. "Where an injury results from a violation of a duty which one owes to another, the parties are not in pari delicto." *Id.*

173. . *See supra* notes 164-65 and accompanying text.

174. 253 Ala. 591, 45 So. 2d 778 (1950). *George* is the only one of the three leading indemnity cases, *see supra* note 163 and accompanying text, decided by the Alabama Supreme Court.

175. City of Mobile v. Reeves, 249 Ala. 488, 492, 31 So. 2d 688, 691 (1947).

176. *See id.* at 493-94, 31 So. 2d at 692-93, *cited in* City of Mobile v. George, 253 Ala. at 593, 45 So. 2d at 779.

pany's negligence.[177] The court denied recovery because the company was contractually obligated to indemnify the city only for the company's negligence;[178] the earlier adjudication that the company was not negligent bound the city in its contractual indemnity action.[179]

Despite its holding, the court recognized that if the construction company had been negligent, the city could have received indemnity.[180] In that situation the city would be liable merely for its negligence in failing to discover a defect in the street. The city therefore could claim indemnity from the construction company, whose negligence both caused the injury and constituted a breach of duty owed the city.[181]

In the third leading indemnity case, *Walter L. Couse & Co. v. Hardy Corp.*,[182] a pedestrian injured as a result of defects in a public sidewalk sued both the contractor and the subcontractor engaged in construction at the accident site.[183] The contractor settled the claim and brought suit against the subcontractor for negligence-based indemnity;[184] the court of appeals agreed that the contractor stated a cause of action.[185] The contractor was liable only because it breached a duty imposed by law of maintaining the public sidewalk in a safe condition, a duty that it could not delegate even though the subcontractor's negligence actually caused the injury.[186] Thus, the case followed the familiar pattern: the contractor

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177. City of Mobile v. George, 253 Ala. at 593, 45 So. 2d at 779.

178. *See id.* at 594, 45 So. 2d at 780.

179. *See id.* at 597, 45 So. 2d at 783.

180. *See id.* at 595, 45 So. 2d at 781.

181. *See id.; see also* Mallory S.S. Co. v. Druhan, 17 Ala. App. 365, 369, 84 So. 874, 877 (1920).

182. 49 Ala. App. 552, 274 So. 2d 316 (Civ. App. 1972), *cert. denied*, 290 Ala. 134, 274 So. 2d 322 (1973).

183. *See id.* at 555, 274 So. 2d at 318-19.

184. *Id.*, 274 So. 2d at 319. The contractor sued as well on an express contractual indemnity provision. *Id.*, 274 So. 2d at 318.

185. *See id.* at 558, 274 So. 2d at 321-22.

186. *See id.* at 557, 274 So. 2d at 320-21. The court began its discussion of negligence-based indemnity as a respondeat superior question, then addressed the general rule that a contractor cannot be held liable for the negligence of a subcontractor. The rule generally precludes a contractor from obtaining indemnity from the subcontractor because the contractor's liability is not based on the subcontractor's negligence. The contractor in *Walter L. Couse*, however, came under an exception to that rule. Since the contractor was performing a public service, it could not delegate its duty to keep the sidewalk safe and consequently was potentially liable for harm done by the subcontractor, who performed the work. Thus, the contractor could be liable for negligent acts of the subcontractor. *See id.* at 557-58, 274

was liable for the subcontractor's wrong, but could obtain indemnity because the subcontractor breached a duty to the contractor.

Hypothetical Manufacturer *A*'s position fits this pattern exactly. Assuming that *A* is liable to Plaintiff under AEMLD, *A* is at fault because he placed a defective product on the market, even though Manufacturer *B* is responsible for the defect. *A* may recover indemnity from *B*, however, because *B*'s fault in supplying *A* with defective tubing constituted the efficient cause of Plaintiff's injury, and because *B* breached a duty to *A* of supplying *A* with safe components. By satisfying the *Mallory Steamship Co.* test for negligence-based indemnity, Manufacturer *A*'s situation comes within an exception to the no contribution rule—that of indemnity based on a breach of duty.

To clarify the point, compare the hypothetical situation to a typical joint tortfeasor case[187] in which two or more parties breach a duty to the injured party, but none of the tortfeasors breaches a duty to another tortfeasor. Any action one tortfeasor might bring against another would be primarily equitable in nature—a contribution action not allowed in Alabama.[188] In true indemnity cases, however, each tortfeasor breaches a duty to the injured party, and in addition at least one tortfeasor breaches a duty owed the tortfeasor seeking indemnity. Indemnity is recoverable as the result of a legal action based on contract, warranty, or breach of duty; contribution, on the other hand, is an equitable action. Beginning the inquiry with an examination of the claimant's indemnity theories may avoid the lack of precision inherent in any equitable rule.

This indemnity-oriented approach differs from, but is perfectly consistent with, *Consolidated Pipe & Supply Co. v. Stockham Valves & Fittings, Inc.*[189] *Consolidated Pipe* held that because the three defendants were joint tortfeasors under AEMLD, none of them was entitled to contribution.[190] The same result occurs in the posed hypothetical:[191] Manufacturer *A*, a tortfeasor

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So. 2d at 320-21.

187. *See, e.g.*, Gobble v. Bradford, 226 Ala. 517, 147 So. 619 (1933).

188. *See id.* at 519, 147 So. at 620.

189. 365 So. 2d 968 (Ala. 1978); *see supra* notes 5-7, 95-97 & 151-58 and accompanying text.

190. *See* Consolidated Pipe & Supply Co. v. Stockham Valves & Fittings, Inc., 365 So. 2d at 970-71; *supra* notes 95-97 and accompanying text.

191. *See supra* notes 2-4 and accompanying text.

under AEMLD, is not entitled to contribution from Manufacturer *B*. But the inquiry should not end here. As Manufacturer *B* should indemnify *A* only if *A* establishes that *B* breached a duty owed *A*, so in *Consolidated Pipe* the defective valve's manufacturer should not be required to indemnify the valve's distributors because, by failing to assert successfully the "no causal relation" defense, they failed to show that the manufacturer breached a duty owed them. The supreme court's shortcoming in *Consolidated Pipe* was not its result, but that it reached its result by a vague application of the no contribution rule rather than by concluding that the distributors failed to establish one part of a legal test for indemnity.

This breach of duty requirement also applies to negligence-based indemnity cases falling outside the no contribution rule.[192] The respondeat superior situation the court discussed in *Walter L. Couse & Co. v. Hardy Corp.*[193] provides an example. Under respondeat superior, the employer is not directly at fault. Rather, public policy demands that the employer be held vicariously liable for the torts of his employees.[194] *Sherman Concrete Pipe Machinery, Inc. v. Gadsden Concrete & Metal Pipe Co.*[195] provides a second common fact situation. The court in dictum stated that an employer who pays worker's compensation to an employee injured by defective equipment may recover indemnity from the manufacturer of the defective equipment.[196] The party seeking indemnity is not actually a tortfeasor in either of these situations. The party seeking indemnity is liable to the injured party under agency principles in the first situation and by statute in the second. In both situations indemnity is available because the party from whom it is sought breached a duty owed the party held liable.

IV. Conclusion

The Alabama decisions concerning indemnity, including those

192. *See supra* notes 168-69 and accompanying text.

193. 49 Ala. App. 522, 274 So. 2d 316 (Civ. App. 1972), *cert. denied*, 290 Ala. 134, 274 So. 2d 322 (1973); *see supra* notes 182-86 and accompanying text.

194. *See* Hampton v. Brackin's Jewelry & Optical Co., 237 Ala. 212, 216, 186 So. 173, 177 (1939) (" '[H]e who expects to derive an advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it.' ") (quoting Hall v. Smith, 130 Eng. Rep. 265, 267 (C.P. 1824).

195. 335 So. 2d 125 (Ala. 1976).

196. *See id.* at 127.

rendered in a products liability setting, lack clarity and promote confusion. The courts have not developed a comprehensible distinction between the concepts of indemnity and contribution and consequently have nurtured the misconception of indemnity as a cause of action in itself rather than a result obtained by a separate cause of action.

Again, the central question in a products liability suit, posed in terms of the hypothetical, is stated simply: Who should be liable ultimately for Plaintiff's injury? Alabama products liability law quite properly focuses on ensuring that plaintiffs injured by defective products receive compensation, and accordingly both Manufacturer *A* and Manufacturer *B* should be held accountable to Plaintiff initially. But *B* should be held no less accountable to *A* than is *A* to Plaintiff. That both *A* and *B* are liable to Plaintiff should not affect their legal, as opposed to their equitable, rights against one another.

The indemnity analysis that this Article suggests is relatively clear and predictable, yet it does not entail any significant departure from precedent. With AEMLD, Alabama has a modern theory of recovery in a products liability setting that is superior in many respects to the strict liability theory of the Second Restatement of Torts. AEMLD's chief virtue is that it separates the tort and warranty aspects of products liability; the same conceptual separation can aid the analysis of indemnity claims. By fashioning the "no causal relation" defense as part of AEMLD, the Alabama Supreme Court demonstrated its distaste for a theory that holds one party liable when the real fault rests elsewhere. The court can and should extend the same protection to manufacturers by allowing and even encouraging products liability indemnity claims when a separate and independent cause of action supports the claim, whether that separate claim is for breach of contract, warranty, or negligence.