

THE NEGLIGENT COMMERCIAL TRANSACTION TORT: IMPOSING COMMON LAW LIABILITY ON MERCHANTS FOR SALES AND LEASES TO “DEFECTIVE” CUSTOMERS

I. THE EXPANDING LIMITS OF BUSINESS LIABILITY

Courts have described tort law as a sensitive balance between two opposing goals: compensating a plaintiff for injuries inflicted by another,¹ and limiting a tortfeasor’s liability to something less than the infinite consequences of his tortious act.² Tort law involves a combination of statutory and common law; however, some jurists have asserted that the “development of the law of torts is peculiarly a function of the judiciary.”³ That philosophy has led to judicial legislation in areas of tort law traditionally shaped by statute.⁴ Specifically, several courts have imposed judge-made tort liability on businesses for transactions involving the sale or lease of nondefective products⁵ to “incompetent” or “inexperienced” users.⁶

This new tort, which this Note labels “negligent commercial transactions,” arises when (1) a merchant negligently sells or leases a product (2) to a youthful, incompetent, or inexperienced user (3) who the merchant knows or should know is incompetent or inexperienced in the product’s use, and (4) the sold or leased product proximately causes in-

1. *See, e.g.*, *Dillon v. Legg*, 68 Cal. 2d 728, 739, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968) (“[W]e cannot let the difficulties of adjudication frustrate the principle that there be a remedy for every substantial wrong.”).

2. *See, e.g.*, *In re Kinsman Transit Co.*, 338 F.2d 708, 725 (2d Cir. 1964) (“Somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity.”), *cert. denied*, 380 U.S. 944 (1965).

3. *Brigance v. Velvet Dove Restaurant, Inc.*, 725 P.2d 300, 303 (Okla. 1986).

4. *See, e.g.*, *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959). In *Rappaport*, the New Jersey Supreme Court held that an illegal sale of liquor to a minor (and, the court said in dicta, to an intoxicated person) under circumstances in which the seller should have known that the buyer was underage (or drunk) constitutes negligence. *Id.* at 202, 156 A.2d at 9. The court reasoned that in the absence of a civil liability statute in New Jersey, imposing common law dram shop liability for sales of alcohol to minors and intoxicated persons “will strengthen and give greater force to the enlightened [criminal] statutory and regulatory precautions against such sales and their frightening consequences.” *Id.* at 205, 156 A.2d at 10. The court reached its result even though the New Jersey legislature had repealed the Prohibition-era statutes that had imposed strict liability for damages flowing from illegal sales. *See* 1932 N.J. Laws 453-54 (repealing Act of Mar. 29, 1921, 1921 N.J. Laws 184); 1934 N.J. Laws 83, 104 (repealing Act of Mar. 17, 1922, 1922 N.J. Laws 628).

5. “Products,” as used in this Note, refers to goods sold or leased in commercial transactions; the term does not refer to services.

6. *See infra* notes 91-94 and accompanying text.

jury to the customer's innocent employees or other third persons.⁷ The negligent commercial transaction tort is distinguishable from other torts involving commercial transactions in that it ignores issues of product liability and design defect,⁸ and it may lead to liability whether or not the transaction at issue is statutorily proscribed.⁹ Moreover, the negligent commercial transaction tort is unusually potent. In states such as California and Missouri, judges have granted relief to injured third parties far removed from the commercial transactions that preceded the third parties' actionable injuries.¹⁰

The negligent commercial transaction tort has found increasing judicial acceptance principally because of an imaginative tactic in personal injury litigation. Plaintiffs have learned to overcome restrictive principles of recovery, such as respondeat superior and workers' compensation, by arguing for an extension of the policies underlying statutory prohibition of certain business transactions.¹¹ For example, a plaintiff might argue that a state law proscribing the sale of guns to minors is logically designed to prevent merchants from selling weapons to *any* immature

7. See, e.g., *Dillon v. Suburban Motors, Inc.*, 166 Cal. App. 3d 233, 212 Cal. Rptr. 360, 365-66 (opinion omitted from *California Appellate Reports* at California Supreme Court's direction) (recognizing common law right of action against dealership that sold car to unlicensed 17-year-old), *dismissed as moot*, 705 P.2d 1260, 218 Cal. Rptr. 584 (1985) (en banc); *Henderson Bros. Stores v. Smiley*, 120 Cal. App. 3d 903, 918-20, 174 Cal. Rptr. 875, 883-84 (1981) (discussing elements of common law cause of action in suit by owner of damaged warehouse against merchant who sold tar kettle, which later exploded, to roofing contractor); *Johnson v. Casetta*, 197 Cal. App. 2d 272, 273-74, 17 Cal. Rptr. 81, 82-83 (1961) (seminal case recognizing common law right of action against used-car dealer who sold car to unlicensed and incompetent driver); *Fowler v. Park Corp.*, 673 S.W.2d 749, 761 (Mo. 1984) (en banc) (Donnelly, J., dissenting) (setting out necessary elements of tort claim against railroad yard owner for negligently leasing railroad engine to tenant); *Barnes v. General Diesel & Equip. Co.*, 383 N.W.2d 840, 842 (N.D. 1986) (upholding injured construction worker's common law claim against lessor of construction equipment for negligently leasing crane to inexperienced operator).

8. See, e.g., *Vic Potamkin Chevrolet, Inc. v. Horne*, 505 So. 2d 560, 562 (Fla. Dist. Ct. App. 1987) (no allegation that "negligently" sold car was defective), *aff'd*, No. 70,499, slip op. (Fla. Sept. 1, 1988) (Westlaw, 1988 WL 93694); see also *White v. Chrysler Corp.*, 421 Mich. 197, 198, 364 N.W.2d 619, 621 (1984) (employee's negligent entrustment action for damages after hands crushed by power-press dies not based on defective design or manufacture, although inherent danger of product considered); *Fredericks v. General Motors Corp.*, 411 Mich. 712, 720, 311 N.W.2d 725, 728 (1981) (products liability pleaded as alternative to negligent entrustment).

9. See, e.g., *Roland v. Golden Bay Chevrolet*, 161 Cal. App. 3d 102, 207 Cal. Rptr. 413 (1984) (opinion omitted from *California Appellate Reports*) (upholding cause of action against car dealer for selling vehicle to allegedly incompetent driver, although sale violated *no* statute), *dismissed as moot*, 704 P.2d 175, 217 Cal. Rptr. 415 (Cal. 1985) (en banc).

10. See, e.g., *Dillon*, 212 Cal. Rptr. at 363-64 (automobile accident occurred weeks after sale); *Fowler*, 673 S.W.2d at 751 (injury occurred eight days after entrustment of railroad engine).

11. Cf. *Woods, Negligent Entrustment Revisited: Developments 1966-76*, 30 ARK. L. REV. 288 (1976) (discussing extension of doctrine generally, and specifically in relation to respondeat superior).

person.¹² This approach allows some plaintiffs to avoid traditional barriers against recovery¹³ and thus tap into the deeper pockets of American business.¹⁴ So far, negligent commercial transaction suits have targeted the sellers or lessors of tar kettles,¹⁵ construction cranes,¹⁶ railroad engines,¹⁷ gasoline,¹⁸ and automobiles¹⁹ that have caused injury to persons other than buyers or lessees.

This Note will discuss the development of the negligent commercial transaction tort in light of recent judicial interpretation of section 390 of the *Restatement (Second) of Torts*, which defines the tort known as "negligent entrustment";²⁰ the common law precedent of dram shop liability;²¹ and the judicial perception that many injured plaintiffs deserve more compensation than traditional legal theories offer.²² The Note will

12. See, e.g., *Angell v. F. Avanzini Lumber Co.*, 363 So. 2d 571 (Fla. Dist. Ct. App. 1978). In *Angell*, a gun dealer sold a rifle to an adult female who had behaved oddly and unsafely while in the store. Shortly after the sale, the woman used the weapon to kill someone. The administratrix of the decedent's estate unsuccessfully attempted to state a cause of action against the gun dealer under FLA. STAT. ANN. § 790.17 (West 1976), which proscribes sales of weapons to minors and persons of unsound mind. The court, notwithstanding the failure of the statutory claim, recognized a common law action against the dealer for negligently selling the gun. 363 So. 2d at 572.

13. See *infra* notes 49-55 and accompanying text (discussing respondeat superior); *infra* notes 57-70 and accompanying text (discussing workers' compensation).

14. Cf. *Love v. New York Times Co.*, 691 F.2d 261, 262 (6th Cir. 1982) (would-be publisher, who failed to launch a magazine, tries to recoup financial losses from deep pocket of innocent publisher); *Monroe v. Interlock Steel Co.*, 128 Misc. 2d 28, 30, 487 N.Y.S.2d 1013, 1015 (Sup. Ct. 1985) (plaintiff sues successor corporation because, as court indicated, "the once deep pockets of the sole proprietor have, in all likelihood, been emptied into the now deep, but secure, pockets of the successor corporation").

15. *Henderson Bros. Stores v. Smiley*, 120 Cal. App. 3d 903, 174 Cal. Rptr. 875 (1981) (owner of damaged warehouse sues seller of tar kettle for selling to allegedly incompetent roofing contractor).

16. *Barsness v. General Diesel & Equip. Co.*, 383 N.W.2d 840 (N.D. 1986) (suit by injured construction worker against company that leased crane to inexperienced operator).

17. *Fowler v. Park Corp.*, 673 S.W.2d 749 (Mo. 1984) (en banc) (suit by railroad car sandblaster against lessor of switch engine who leased to inexperienced operator).

18. *O'Toole v. Carlsbad Shell Serv. Station*, 202 Cal. App. 3d 151, 247 Cal. Rptr. 663, 671 (ordered not published in *California Appellate Reports*; opinion appears in *California Reporter* advance sheets) (owner of gas station that sold gasoline to clearly intoxicated driver may be held liable for deaths caused in subsequent collision), *review denied*, [no docket number] (Cal. Aug. 18, 1988) (LEXIS, 1988 Cal. LEXIS 220); *Roberts v. Shop & Go, Inc.*, 502 So. 2d 915 (Fla. Dist. Ct. App. 1986) (suit by victims, burned when gasoline purchaser threw and ignited gasoline, against convenience store that sold gasoline).

19. *Roland v. Golden Bay Chevrolet*, 161 Cal. App. 3d 102, 207 Cal. Rptr. 413 (1984) (opinion omitted from *California Appellate Reports*) (suit by plaintiff, injured in ear accident with unlicensed reckless driver, against dealership that sold car to driver), *dismissed as moot*, 704 P.2d 175, 217 Cal. Rptr. 415 (Cal. 1985) (en banc); *Tosh v. Scott*, 129 Ill. App. 3d 322, 472 N.E.2d 591 (1984) (suit against father who sold automobile to his son).

20. See RESTATEMENT (SECOND) OF TORTS § 390 (1965); *infra* notes 31-44 and accompanying text. The *Restatement (Second)* does not use the term "negligent entrustment."

21. See *infra* notes 71-85 and accompanying text.

22. See *infra* notes 62-64 and accompanying text.

then analyze cases that have considered the tort.²³ Lastly, the Note will argue for judicial restraint in extending businesses' liability beyond limits already established by statute,²⁴ noting that in the course of compensating plaintiffs, courts can unwittingly impose unreasonable and uncertain duties on industries competing in American markets. These uncertain judge-made duties can, in turn, have an adverse impact on the national economy.²⁵

II. NEGLIGENCE INVOLVING THE SALE OR LEASE OF GOODS

The negligent commercial transaction tort has long existed in American law as a cause of action for injuries that arise from sales in violation of criminal statutes.²⁶ In the early twentieth century, statutes proscribed the sale or lease of such products as guns,²⁷ explosives,²⁸ and alcohol²⁹ to individuals not lawfully empowered to possess them. A violation of these statutes constituted negligence or a breach of duty; third parties injured by such illegally sold or leased products could recover damages from the merchants who had conducted the transactions.³⁰ Today, however, even

23. See *infra* notes 91-162 and accompanying text.

24. See *infra* notes 166-89 and accompanying text.

25. See *infra* notes 163-77 and accompanying text.

26. See, e.g., *Anderson v. Settergren*, 100 Minn. 294, 295-97, 111 N.W. 279, 279-80 (1907) (defendant negligently sold cartridges, in violation of statute, to 13-year-old boy who recklessly injured plaintiff); *Driess v. Verblauw*, 9 N.J. Misc. 173, 173, 176, 153 A. 388, 388-89, 390 (1931) (employee negligently sold rifle cartridges, in violation of statute, to 15-year-old boy who killed friend during horseplay); *Neff Lumber Co. v. First Nat'l Bank*, 122 Ohio St. 302, 304, 307, 171 N.E. 327, 328, 329 (1930) (defendant's clerk negligently sold shotgun, in violation of statute, to minor who wounded plaintiffs); *Bernard v. Smith*, 36 R.I. 377, 379, 90 A. 657, 658 (1914) (defendant storeowner negligently sold 22-caliber rifle and cartridges, in violation of statute, to 11-year-old boy who shot plaintiff in the arm); see also Comment, *Liability of Commercial Vendors, Employers, and Social Hosts for Torts of the Intoxicated*, 19 WAKE FOREST L. REV. 1013, 1015 (1983) (post-Civil War dram shop acts established civil causes of action against liquor vendors for injuries to third parties resulting from illegal sales of alcohol to minors, habitual drunks, or the obviously intoxicated).

27. E.g., ARIZ. REV. STAT. ANN. § 13-3102(5) (1982) (originally enacted in 1901, statute proscribes "[s]elling or transferring a deadly weapon to a prohibited possessor"); N.C. GEN. STAT. § 14-315 (1987) (originally enacted in 1893, statute proscribes sale of guns and other weapons to minors).

28. E.g., GA. CODE ANN. § 25-1-1 (1982) (enacted in 1958, statute prohibits sale of blasting caps to minors); MASS. GEN. L. ch. 148, § 16 (1986) (originally enacted in 1904, statute prohibits sale of explosives to nonlicensed individuals); N.Y. LAB. LAW § 458(11) (McKinney 1986) (originally enacted in 1949, statute proscribes sales of explosives to persons under 18 years old).

29. E.g., CAL. BUS. & PROF. CODE § 25,602(a) (West 1987) (originally enacted in 1935, statute proscribes sales of alcohol to drunks or obviously intoxicated people); CONN. GEN. STAT. § 30-86 (1987) (originally enacted in 1935, statute prohibits sales of alcohol to minors or drunks).

30. See, e.g., *Hetherington v. Sears, Roebuck & Co.*, 593 F.2d 526, 529-30 (3d Cir. 1979) (sale of ammunition in violation of Delaware statute constitutes negligence per se); *Holzer, Liability to the Injured Third Party for Negligent Entrustment of a Firearm*, 59 CHI. B. REC. 346, 347 (1978) (knowing violation of Illinois gun control statute, which proscribes sale of firearms to designated groups of individuals, constitutes breach of specific duty and gives rise to cause of action in negligence). In the

in the absence of statutory proscriptions, courts are creating broad common law duties for businesses to select appropriate customers.

A. *The Expanding Doctrine of "Negligent Entrustment."*

Sections 308 and 390 of the *Restatement (Second) of Torts* outline the tort of "negligent entrustment."³¹ The doctrine of negligent entrustment predates the publication of the first *Restatement of Torts*³² and to

interest of public safety, courts have recognized that the duty to investigate buyers of inherently dangerous instrumentalities is a reasonable requirement for doing business. *See, e.g.,* Hetherington v. Sears, Roebuck & Co., 652 F.2d 1152, 1160 (3d Cir. 1981) ("As a deterrent to our nation's escalating violence, certainly a legislature may prohibit the sale of handguns to individuals who have records . . . and certainly they can impose substantial civil liability on gun sellers like Sears who breach statutory obligations.").

31. *See* RESTATEMENT (SECOND) OF TORTS §§ 308, 390 (1965). Section 308 of the *Restatement (Second)*, entitled "Permitting Improper Persons to Use Things or Engage in Activities," states:

It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Id. § 308.

Section 390, entitled "Chattel for Use by Person Known to be Incompetent," states:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Id. § 390. Section 390 is described as a "special application" of section 308. *Id.* § 390 comment a. Courts have repeatedly held that the necessary elements of a negligent entrustment claim include:

(1) Proof that the trustee was incompetent, inexperienced or reckless; (2) that the entrustor "knew or had reason to know" of the trustee's condition or proclivities; (3) that there was an entrustment of the chattel; (4) that the entrustment created an appreciable risk of harm to the plaintiff and a relational duty on the part of the defendant; (5) that the harm to the plaintiff was "proximately" or "legally" caused by the negligence of the defendant.

Woods, *Negligent Entrustment: Evaluation of a Frequently Overlooked Source of Additional Liability*, 20 ARK. L. REV. & B. ASS'N J. 101, 101-02 (1966) (footnotes omitted), *quoted in* Collins v. Arkansas Cement Co., 453 F.2d 512, 514 (8th Cir. 1972), *and in* Evans v. Allen Auto Rental & Truck Leasing, 555 S.W.2d 325, 326 (Mo. 1977); *see also* Chiniche v. Smith, 374 So. 2d 872, 876 (Ala. 1979) (requiring similar elements); Williams v. Steves Indus., 699 S.W.2d 570, 571 (Tex. 1985) (same).

Maryland has generally led in the development of negligent entrustment doctrine, particularly in the area of motor vehicle torts. *See, e.g.,* Curley v. General Valet Serv., 270 Md. 248, 259-65, 311 A.2d 231, 237-40 (1973) (discussing doctrine's development in Maryland caselaw); Snowwhite v. State, 243 Md. 291, 311-15, 221 A.2d 342, 353-56 (1966) (same); Rounds v. Phillips, 168 Md. 120, 126-27, 177 A. 174, 176-77 (1935) (first case applying doctrine). The doctrine also has strong support in Alabama. *See* Keller v. Kiedinger, 389 So. 2d 129, 132 (Ala. 1980) (citing Note, *Negligent Entrustment in Alabama*, 23 ALA. L. REV. 733 (1971)).

32. *See, e.g.,* Gardiner v. Solomon, 200 Ala. 115, 117, 75 So. 621, 623 (1917) (mother who knew of adult son's incompetence may be held liable for permitting him to drive car); Allen v. Bland, 168 S.W. 35, 39-40 (Tex. Civ. App. 1914) (father may be held liable for entrusting automobile to 11-year-old son); Crowell v. Duncan, 145 Va. 489, 508-11, 134 S.E. 576, 581-82 (1926) (father liable for entrusting automobile to habitually intoxicated son).

day affords a civil cause of action in virtually every state.³³ The doctrine allows a third party to recover damages from a party who "entrusts" goods to a user if the user injures the third party through inexperience or incompetence in handling the goods.³⁴ The willingness of some courts to include virtually any product involved in commercial sales and leases within the scope of negligent entrustment,³⁵ along with the refusal of other courts to distinguish between a "user" of a product and a "buyer" of a product,³⁶ has fostered development of the negligent commercial transaction tort.³⁷

1. *Negligent Entrustment Principles as Applied to Sales and Leases.*

It is helpful to think of the negligent commercial transaction doctrine as a "commercial subset" of the more general doctrine of negligent entrustment. Both torts are associated with sections 308 and 390 of the *Restatement (Second) of Torts*.³⁸ Their application differs only in that negligent entrustment usually targets *entrusters*, such as lenders, donors, or bailors, while the negligent commercial transaction tort targets sellers and

Early court decisions generally interpreted the original *Restatement* to prevent the imposition of negligent entrustment liability on sellers. *See, e.g., Perez v. G & W Chevrolet, Inc.*, 274 Cal. App. 2d 766, 767-69, 79 Cal. Rptr. 287, 288-90 (1969) (dismissing parents' wrongful death action against seller of car to unlicensed and inexperienced 19-year-old who killed herself driving two weeks later); *Fuller v. Standard Stations, Inc.*, 250 Cal. App. 2d 687, 58 Cal. Rptr. 792 (1967) (dismissing accident victim's action against service station that sold gasoline to intoxicated driver who injured plaintiff and killed four family members in collision); *Tharp v. Monsees*, 327 S.W.2d 889 (Mo. 1959) (dismissing father's action against seller of gasoline to 12-year-old son burned when gasoline ignited during horseplay); *Rush v. Smitherman*, 294 S.W.2d 873 (Tex. Civ. App. 1956) (dismissing wrongful death action against dealer for selling car to unlicensed buyer who killed plaintiffs' father in collision).

33. *Douglas v. Hartford Ins. Co.*, 602 F.2d 934, 936 (10th Cir. 1979) ("Negligent entrustment is a common law tort, recognized in virtually every state.").

34. RESTATEMENT (SECOND) OF TORTS §§ 308, 390 (1965).

35. *Cf. Brown v. Vanity Fair Mills, Inc.*, 291 Ala. 80, 83, 277 So. 2d 893, 896 (1973) (noting that "the all-embracing term 'chattels' used in the Restatement is not restricted to automobiles").

36. *See, e.g., O'Toole v. Carlsbad Shell Serv. Station*, 202 Cal. App. 3d 151, 247 Cal. Rptr. 663 (ordered not published in *California Appellate Reports*; opinion appears in *California Reporter* advance sheets) ("supply" of gasoline by service station to drunk driver), *review denied*, [no docket number] (Cal. Aug. 18, 1988) (LEXIS, 1988 Cal. LEXIS 200); *cf. Rush*, 294 S.W.2d at 875 (holding RESTATEMENT OF TORTS § 390 (1934) inapplicable to automobile buyers).

37. *See, e.g., Dillon v. Suburban Motors, Inc.*, 166 Cal. App. 3d 233, 212 Cal. Rptr. 360 (opinion omitted from *California Appellate Reports* at California Supreme Court's direction) (recognizing common law action against dealership that sold car to unlicensed 17-year-old), *dismissed as moot*, 705 P.2d 1260, 218 Cal. Rptr. 584 (Cal. 1985) (en banc); *Barnes v. General Diesel & Equip. Co.*, 383 N.W.2d 840 (N.D. 1986) (applying RESTATEMENT (SECOND) OF TORTS § 390 to uphold injured construction worker's common law negligence action against company that leased crane to "inexperienced" customer).

38. *See supra* note 31 and accompanying text; *see also* RESTATEMENT (SECOND) OF TORTS § 390 comment a ("The rule stated applies to anyone who supplies a chattel for the use of another[,] . . . [including] sellers, lessors, donors or lenders, and . . . all kinds of bailors . . .").

lessors.³⁹ In fact, the *Restatement (Second) of Torts* indiscriminately applies the doctrine to all "suppliers" of goods, providing no technical definition of the term "supplier."⁴⁰

The substantive difference between the negligent commercial transaction and negligent entrustment torts stems from the failure of the first *Restatement of Torts* to state explicitly whether sections 308 or 390 applied to sellers and lessors.⁴¹ This omission initially prompted some courts to interpret the sections conservatively and to exclude merchants from liability.⁴² Recently, however, the revised language of section 390 of the *Restatement (Second) of Torts*⁴³ has inspired the development of a civil cause of action that applies to both sellers and lessors of products.⁴⁴

2. *How Negligent Entrustment Sidesteps Traditional Obstacles to Recovery.* In the past, courts have generally limited the reach of the negligent entrustment doctrine to cases involving automobiles or inherently dangerous instrumentalities.⁴⁵ Today, however, more and more courts are adopting the view that the doctrine's application "does not

39. *Cf. Vic Potamkin Chevrolet, Inc. v. Horne*, 505 So. 2d 560, 561-62 (Fla. Dist. Ct. App. 1987) (distinguishing between negligent loan or bailment situations and negligent sales), *aff'd*, No. 70,499, slip op. (Fla. Sept. 1, 1988) (Westlaw, 1988 WL 93694). Compare *Hartford Accident & Indem. Co. v. Abdullah*, 94 Cal. App. 3d 81, 156 Cal. Rptr. 254 (1979) (negligent entrustment action against owner of loaned automobile) with *Barsness*, 383 N.W.2d at 840 (negligent entrustment action against lessor of crane).

40. RESTATEMENT (SECOND) OF TORTS § 390 comment a.

41. See RESTATEMENT OF TORTS §§ 308, 390 (1934).

42. See, e.g., *Tharp v. Monsees*, 327 S.W.2d 889, 895 (Mo. 1959) (first *Restatement's* language does not apply to sale of gasoline to minors); *Rush v. Smitherman*, 294 S.W.2d 873, 875 (Tex. Civ. App. 1956) (same language does not include sellers of automobiles).

43. See *supra* notes 31, 38.

44. See, e.g., *Dillon v. Suburban Motors, Inc.*, 166 Cal. App. 3d 233, 212 Cal. Rptr. 360 (opinion omitted from *California Appellate Reports* at California Supreme Court's direction) (cause of action exists for negligent sale of automobile), *dismissed as moot*, 705 P.2d 1260, 218 Cal. Rptr. 584 (1985) (en banc); *Barsness v. General Diesel & Equip. Co.*, 383 N.W.2d 840 (N.D. 1986) (cause of action exists for negligent lease of construction crane); *cf. Vic Potamkin Chevrolet, Inc. v. Horne*, 505 So. 2d 560, 561 (Fla. Dist. Ct. App. 1987) ("The issue presented on appeal is whether this court should extend the law of negligent entrustment to include negligent sales."), *aff'd*, No. 70,499, slip op. (Fla. Sept. 1, 1988) (Westlaw, 1988 WL 93694).

45. Early cases involving entrustment of inherently dangerous instrumentalities include *McEldon v. Drew*, 138 Iowa 390, 116 N.W. 147 (1908) (gunpowder sold to 12-year-old boy); *Bosserman v. Smith*, 205 Mo. App. 657, 226 S.W. 608 (1920) (fireworks sold to children); *Gerbiuo v. Greenhut-Siegel-Cooper Co.*, 165 A.D. 763, 152 N.Y.S. 502 (1915) (airgun entrusted to minor); *Bernard v. Smith*, 36 R.I. 377, 90 A. 657 (1914) (rifle sold to 11-year-old boy). See generally 1 J. DOOLEY, MODERN TORT LAW § 23.01 (1982); W. PROSSER & W. KEETON, THE LAW OF TORTS § 33, at 200, § 73, at 522-24 (5th ed. 1984); *Holzer, supra* note 30, at 352.

For an example of how courts traditionally treated the issue of negligent entrustment of automobiles, see *Gardiner v. Solomon*, 200 Ala. 115, 117, 75 So. 621, 623 (1917) (parent may be held liable for entrusting automobile to reckless adult son); *Sanders v. Walden*, 214 Ark. 523, 526-27, 217 S.W.2d 357, 359 (1949) (car entrusted to brother, who was four feet, two inches tall); *Owens v. Carmichael's U-Drive Autos*, 116 Cal. App. 348, 2 P.2d 580 (1931) (car rented to unaccompanied

depend on the nature of the chattel."⁴⁶ These courts argue that the analysis should focus on the incompetence or inexperience of the user and the supplier's knowledge of that ineptitude.⁴⁷

Much of the modern popularity of the negligent entrustment doctrine—and of the narrower negligent commercial transaction tort—stems from its usefulness in overcoming well-settled limitations to tort recovery under workers' compensation statutes⁴⁸ and the theory of respondeat superior.⁴⁹ Respondeat superior allows third-party recovery against employers only when negligent employees act within their "scope of employment"; only then are employees considered agents of their employers.⁵⁰ Workers' compensation statutes likewise allow injured employees to recover damages against their employers only for "work-connected injuries."⁵¹ These theories limit recovery to the employment context, and as a result third parties and employees injured by a negligent employee acting outside the scope of employment normally cannot recover damages against the employer.⁵²

adult possessing only student permit); *Golembe v. Blumberg*, 262 A.D. 759, 27 N.Y.S.2d 692 (1941) (upholding action against father for giving car to epileptic son).

46. *Moning v. Alfonso*, 400 Mich. 425, 445 n.24, 254 N.W.2d 759, 768 n.24 (1977) (slingshot); see also *Pritchett v. Kimberling Cove, Inc.*, 568 F.2d 570 (8th Cir. 1977) (boats), cert. denied, 436 U.S. 922 (1978); *Brown v. Vanity Fair Mills, Inc.*, 291 Ala. 80, 83, 277 So. 2d 893, 896 (1973) (tools); *Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1984) (golf carts); *Fredericks v. General Motors Corp.*, 411 Mich. 712, 311 N.W.2d 725 (1981) (drill-press dies).

47. See, e.g., *Drummond v. Walker*, 643 F. Supp. 190, 191 (D.D.C. 1986); *Herbert v. Whittle*, 69 Md. App. 273, 279, 517 A.2d 358, 362-68 (1986), cert. denied, 309 Md. 49, 522 A.2d 393 (1987); *Fredericks*, 411 Mich. at 719, 311 N.W.2d at 727; *Denby v. Davis*, 212 Va. 836, 838-39, 188 S.E.2d 226, 229 (1972).

48. See *infra* notes 57-70 and accompanying text (discussing workers' compensation); see also *Woods*, *supra* note 31, at 120 (suit grounded in negligent entrustment can avoid fatal defenses and allow for broader admissibility of evidence).

49. The phrase means "let the master answer." The respondeat superior doctrine makes a master vicariously liable in tort for her servant's wrongful acts that injure third parties. See generally RESTATEMENT (SECOND) OF AGENCY § 219 (1957); 1 J. DOOLEY, *supra* note 45, ch. 16; W. PROSSER & W. KEETON, *supra* note 45, §§ 69-70.

50. See, e.g., *Abraham v. S.E. Onorato Garages*, 50 Haw. 628, 632, 446 P.2d 821, 825 (1968); *McNeill v. Spindler*, 191 Va. 685, 694-96, 62 S.E.2d 13, 17-18 (1950); see also *Woods*, *supra* note 11, at 294-99. For an explanation of the limitations of respondeat superior, see RESTATEMENT (SECOND) OF AGENCY §§ 219, 228 (1957); W. PROSSER & W. KEETON, *supra* note 45, § 70.

51. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 2.10 (1987).

52. *Id.*; W. PROSSER & W. KEETON, *supra* note 45, § 70, at 501; see, e.g., *Brown v. Vanity Fair Mills, Inc.*, 291 Ala. 80, 82, 277 So. 2d 893, 895 (1973) (plaintiff could not recover against employer of person who struck him in the head with a hammer because complaint did not allege that person was acting within scope of employment); *Mullins v. Harrell*, 490 So. 2d 1338, 1339 (Fla. Dist. Ct. App. 1986) (employer not liable for truck damage caused by employee because employee was using truck on personal errand outside scope of employment); cf. *Collins v. Arkansas Cement Co.*, 453 F.2d 512, 514 (8th Cir. 1972) ("Since [the employee] admittedly was not within the course of his employment when he was carousing around on Sunday afternoon and gave the cherry bombs to the children, the only basis for liability would be on the theory of negligent entrustment.").

In contrast, a negligent entrustment theory of recovery involves no issue of agency or employment and thus avoids the "scope of employment" and "work-connected" tests.⁵³ To incur negligent entrustment liability, an employer need only "entrust" a product to an inexperienced or incompetent employee who later injures a fellow worker or an innocent third party.⁵⁴ Negligent entrustment thus provides a powerful means of recovery from a solvent, insured employer for the acts of a poorly insured employee, irrespective of where or when the accident occurred.⁵⁵ Moreover, recent applications of the theory suggest that the full potential of negligent entrustment has yet to be realized.⁵⁶

Negligent entrustment theory has proven especially useful to injured workers who seek to avoid the strictures of workers' compensation statutes.⁵⁷ The statutes' guarantee of compensation for job-related injuries

53. See, e.g., *Pritchett v. Kimberly Cove, Inc.*, 568 F.2d 570, 578 & n.14 (8th Cir. 1977) (employer held liable for negligently entrusting boat to underage employee despite fact that employee acted outside scope of employment), *cert. denied*, 436 U.S. 922 (1978); *Collins*, 453 F.2d at 513-14 (employer held liable to injured child for entrusting employee with cherry bombs that employee subsequently gave to children, despite fact that accident and entrustment occurred outside scope of employment); see also *Breeding v. Massey*, 378 F.2d 171, 177-78 (8th Cir. 1967) (respondeat superior and negligent entrustment not mutually exclusive; recovery possible under both theories).

54. See *supra* notes 31-44 and accompanying text (discussing negligent entrustment generally and as applied to sales and leases).

55. See, e.g., *Denby v. Davis*, 212 Va. 236, 188 S.E.2d 226 (1972) (suit against employer of 20-year-old with congenital eye defect who killed child while on unauthorized driving trip). Plaintiffs have brought suits under similar theories against employers who negligently serve alcohol to employees at company social functions. See, e.g., *Chastain v. Litton Sys.*, 694 F.2d 957, 959, 962 (4th Cir. 1982) (Litton employee drove through red light after company Christmas party, killing plaintiff's decedent; remanded for trial to determine whether Litton negligently allowed alcohol to be served to intoxicated employee), *cert. denied*, 462 U.S. 1106 (1983); *Brockett v. Kitchen Boyd Motor Co.*, 264 Cal. App. 2d 69, 70 Cal. Rptr. 136, 137 (1968), *rev'd on other grounds*, 24 Cal. App. 3d 87, 88-89, 100 Cal. Rptr. 752, 754-56 (1972) (employee of defendant struck plaintiffs' automobile after underage employee became intoxicated at Christmas party; remanded for trial because serving alcohol to minor is negligence per se); *Dickinson v. Edwards*, 105 Wash. 2d 457, 459-60, 716 P.2d 814, 818-19 (1986) (employee of defendant, driving after becoming intoxicated at company banquet, struck plaintiff; verdict for plaintiff affirmed because employer's agent was in position and had duty to stop serving intoxicated employee).

56. See, e.g., *Buchanan v. Merger Enters.*, 463 So. 2d 121, 123-28 (Ala. 1984) (negligent entrustment theory used by court against liquor vendor after repeal of dram shop statute and before enactment of tougher version); *Fowler v. Park Corp.*, 673 S.W.2d 749, 753-54, 757-58 (Mo. 1984) (plaintiff recovered largest personal injury verdict in state history, using negligent entrustment theory); *Williams v. Steves Indus.*, 699 S.W.2d 570, 572 (Tex. 1985) (punitive damages may be awarded for grossly negligent entrustment); see also *Woods*, *supra* note 11, at 304 (noting weakening of doctrine that negligent entrustment is unavailable when respondeat superior is admitted by employer).

57. Statutory compensation for injured workers first appeared in the United States around 1902, when Maryland established an accident fund for employees in certain perilous occupations. See 1902 Md. Laws ch. 139. *But see* W. PROSSER & W. KEETON, *supra* note 45, § 80 (describing New York's 1910 law as first workers' compensation statute). All but eight states had adopted some form of statutory relief by 1920. Hawaii, in 1963, was the last of the 50 states to enact a workers' compensation law. 1 A. LARSON, *supra* note 51, §§ 5.20, 5.30.

has been regarded as a victory over common law defenses such as contributory negligence and assumption of risk.⁵⁸ Today, however, tort recovery has become easier to obtain,⁵⁹ and many workers might well regret the loss of their common law rights against employers.⁶⁰ More and more often, resourceful workers sue the sellers or lessors of the equipment involved in industrial accidents in the hope of supplementing their workers' compensation benefits.⁶¹

Workers' compensation benefits are often inadequate because they are designed to compensate only those injuries that affect earning power; nonvocational injuries such as pain and suffering and loss of consortium are ignored.⁶² Failure to adjust benefits for inflation and administrative delay and disagreement over the degree of a worker's impairment also compound the problem of inadequate recovery in some states.⁶³ These problems have led to a perception that benefits under the compensation acts are "not much higher than is necessary to keep the worker from destitution."⁶⁴

58. See W. PROSSER & W. KEETON, *supra* note 45, § 80, at 572-73 (workers' compensation laws nullified common law defenses that had impeded workers' recovery).

59. The development of the theories of comparative negligence and last clear chance has eroded the formidable defense of contributory negligence, see W. PROSSER & W. KEETON, *supra* note 45, §§ 66-67, which often completely barred workers from recovery, see 1 A. LARSON, *supra* note 51, § 4.30.

60. Cf. *Problems with Worker's Comp.*, Chicago Tribune, June 19, 1985, § 1, at 18, col. 3 (Collecting workers' compensation from a recalcitrant employer can be a long, expensive process, taking about 12 months for arbitrator decisions and as long as 36 months if appealed; as an injured worker complains, there is nothing guaranteed about workers' compensation's "guaranteed" payments.).

61. Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1641 (1983)..

62. 1 A. LARSON, *supra* note 51, § 2.40; see also *White v. Chrysler Corp.*, 421 Mich. 192, 196-97, 364 N.W.2d 619, 621 (1984) (in action by two workers for injuries to their hands caused by a power press, court noted that "[u]nless there is . . . a third person under a legal liability to the injured worker, he has no source of recovery for loss of the non-vocational use of the hand").

63. See Note, *supra* note 61, at 1643-44.

64. 1 A. LARSON, *supra* note 51, § 2.50. Most compensation acts award the worker a percentage of his average weekly wage; the type of disability suffered determines the percentage. The award is subject to a maximum total disbursement limit over a specified number of weeks. *Id.*; see also *White*, 421 Mich. at 206, 364 N.W.2d at 625 ("The absence of tort liability or other reparations for loss not covered by worker's compensation benefits . . . results in the undercompensation of many seriously injured workers."); Johnson & Heler, *Compensation for Death from Asbestos*, 37 INDUS. & LAB. REL. REV. 529, 532 tbl. 1 (1984) (study showed that widows of deceased workers recouped average of 36.2% of lost wages under workers' compensation); Note, *supra* note 61, at 1645 ("Workers whose injuries are compensable exclusively under workers' compensation can . . . be seriously disadvantaged relative to those with access to tort remedies."); *Self-Interest Dominates Worker's Compensation Debate*, L.A. Times, Aug. 13, 1986, § IV, at 1, col. 2 (state legislature debates whether to raise maximum benefits for workers with short-term disabilities from "ridiculously low" \$224 per week to \$800 per week).

Congress has noted the problem of undercompensation for workers. In 1979, legislation was proposed in response to a perception that many existing state statutes did not provide "adequate, prompt and equitable" systems of compensation for workers injured in the course of their employ-

To illustrate a typical situation in which an injured worker might bring a negligent commercial transaction suit against a merchant, consider the following example:

Worker *W* is employed as a laborer at a construction site by employer *E*. *E* recently purchased a construction crane from business *B*. *B* had recommended the particular model that *E* purchased because *E* had stated her need for equipment with simple operating procedures. *E*, in fact, had mentioned to *B* that her crews were inexperienced. Shortly after the sale, *W* is permanently paralyzed in a crane accident. The state industrial commission awards *W* statutory workers' compensation benefits amounting to 66.66% of *W*'s average weekly wage for 450 weeks. Both *W* and his attorney consider this relief minimal in comparison to today's million dollar tort recoveries. The state workers' compensation act, however, bars *W* and his dependents from suing *E*. How can *W*'s attorney find more compensation for his client's injuries? Is there a legal basis for recovery against *B* based on *B*'s awareness that *E*'s crane crew was inexperienced?⁶⁵

Although the purpose of all workers' compensation acts is to give injured employees an exclusive remedy⁶⁶ against their employers without the need for litigation on the issue of fault,⁶⁷ the exclusive remedy rule

ment. H.R. 5482, 96th Cong., 2d Sess. § 2(a)(6) (1979), reprinted in *National Workers' Compensation Standards Act of 1979: Hearings on H.R. 5482 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 96th Cong., 2d Sess. 3, 4 (1980).

65. This example derives from *Barsness v. General Diesel & Equip. Co.*, 383 N.W.2d 840 (N.D. 1986), and North Dakota's workers' compensation statutes, N.D. CENT. CODE §§ 65-05-09, 65-05-12 (1985 & Supp. 1987).

66. In an action by an employee or his dependents, the exclusivity rule of workers' compensation remedies generally insulates the employer from common law and statutory tort liability, as well as liability that may arise in contract or admiralty. See *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1467 (10th Cir. 1985) (plaintiff's claim for decedent's personal injuries from plutonium contamination barred under exclusivity rule of Oklahoma Workers' Compensation Act, but punitive damages allowed), *cert. denied*, 476 U.S. 1104 (1986); *U.S. Borax & Chem. Corp. v. Superior Court*, 167 Cal. App. 3d 406, 410, 213 Cal. Rptr. 155, 157 (1985) (wrongful death action against employer arising out of industrial accident barred by exclusivity rule); *Henderson v. State*, 110 Idaho 308, 309, 715 P.2d 978, 979 (claim for damages allegedly incurred in scope of employment barred by exclusive remedy provision of Idaho's compensation statutes), *cert. denied*, 477 U.S. 907 (1986); see also 2A A. LARSON, *supra* note 51, §§ 65.00, 65.11. One exception to the rule arises if the employer commits an intentional tort against his employee. *Id.* §§ 68.00, 68.11.

67. Early court challenges to compensation statutes found the principle of liability without fault to be an unconstitutional taking of employers' property without due process of law. See *Ives v. South Buffalo Ry. Co.*, 201 N.Y. 271, 294, 94 N.E. 431, 439 (1911), *overruled*, *Montgomery v. Daniels*, 38 N.Y.2d 41, 340 N.E.2d 444, 378 N.Y.S.2d 1 (1979). Professor Larson has noted that the fear of unconstitutionality forced legislatures "to pass over the ideal type of coverage, which would have been both comprehensive and compulsory." 1 A. LARSON, *supra* note 51, § 5.20, at 38. Under

does not apply to employee actions against a third party or "ultimate wrongdoer."⁶⁸ A common law negligent commercial transaction suit may thus avoid statutory restrictions and allow an injured worker to recover damages from merchants outside the employment relationship.⁶⁹ A merchant doing business with an employer may thus be exposed to greater potential liability than the employer.⁷⁰

B. *Dram Shop Liability as a Precedent for the Negligent Commercial Transaction Tort.*

The idea that judges can create a right of action to give relief to undercompensated third parties for injuries resulting from the sale of a nondefective product is not new. Indeed, judge-made liability for merchants who do business with incompetent or inexperienced clients already exists under the doctrine of "dram shop" liability.⁷¹

Originally established by statute in the nineteenth century,⁷² dram shop liability is the potential civil liability of liquor vendors to third parties for injuries caused by intoxicated or underage patrons.⁷³ Most of the early dram shop statutes were repealed or fell into disuse immediately

the eventual compromise, employers accepted workers' compensation coverage in exchange for relief from the risk of large tort verdicts. *Cf.* *Bradford Elec. Light v. Clapper*, 286 U.S. 145, 159 (1932) (Brandeis, J.) (purpose of workers' compensation laws in most states is to provide "not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate"); *accord* *Smither & Co. v. Coles*, 242 F.2d 220, 222 (D.C. Cir.), *cert. denied*, 354 U.S. 914 (1957) (exclusivity of remedy is keystone of worker's compensation law).

68. *See, e.g.*, *Burk v. Cities Serv. Oil Co.*, 266 F.2d 433, 435 (10th Cir. 1959) (Oklahoma's workers' compensation act preserves common law remedies against third-party tortfeasors); *Bowman v. Atlanta Baggage & Cab*, 173 F. Supp. 282, 285 (N.D. Fla. 1959) (workers' compensation does not preclude common law action against parties outside employer-employee relationship); *Price v. King*, 259 Iowa 921, 924, 146 N.W.2d 328, 329 (1966) ("[T]he [compensation] act does not deny an employee the common law right to recover damages caused by the negligence of a third person even though he has received workmen's compensation benefits for the same injury."). *See generally* 2A A. LARSON, *supra* note 51, §§ 67.21, 71.00, 71.10; Birnbaum & Wrubel, *Workers' Compensation and the Employer's Immunity Shield: Recent Exceptions to Exclusivity*, 5 J. PROD. LIAB. 119 (1982).

69. *See, e.g.*, *Fowler v. Park Corp.*, 673 S.W.2d 749 (Mo. 1984) (en banc) (injured worker sues railroad engine lessor); *Barsness v. General Diesel & Equip. Co.*, 383 N.W.2d 840 (N.D. 1986) (injured worker sues construction crane lessor).

70. For example, in *Fowler*, 673 S.W.2d at 757-58, a worker won a \$6 million verdict from a merchant, a sum far in excess of any state's employer-financed workers' compensation benefits.

71. Dram shops were nineteenth-century establishments that sold alcoholic beverages by a unit of measure called a "dram." Colman, Krell & Mosher, *Preventing Alcohol-Related Injuries: Dram Shop Liability in a Public Health Perspective*, 12 W. ST. U.L. REV. 417, 443 n.1 (1985).

72. Wisconsin passed the first dram shop law in 1849. The law required tavern owners to post a bond to pay civil or criminal judgments against them for illegal sales of alcohol. By the mid-1870s, 11 states had passed dram shop acts. Goldberg, *One for the Road: Liquor Liability Broadens*, A.B.A. J., June 1987, at 84, 86.

73. Comment, *supra* note 26, at 1015.

following Prohibition;⁷⁴ further, in jurisdictions where no dram shop statute was in force, courts generally did not impose liability.⁷⁵ Today, however, courts have increasingly rejected this position.⁷⁶

Since about 1970, dram shop liability has reemerged at a dramatic pace, coincident with society's increased concern for drunk driving and its victims.⁷⁷ Thirty states currently have some kind of dram shop act.⁷⁸

74. See, e.g., *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 500, 233 N.E.2d 18, 19 (1968); *Rappaport v. Nichols*, 31 N.J. 188, 200-01, 156 A.2d 1, 8 (1959). See generally Colman, Krell & Mosher, *supra* note 71, at 443.

75. See, e.g., *Fudge v. City of Kansas City*, 239 Kan. 369, 375-76, 720 P.2d 1093, 1100 (1986); see also *Ontiveros v. Borak*, 136 Ariz. 500, 504, 667 P.2d 200, 204 (1983) (en banc) (stating and rejecting traditional rule of nonliability); *Pike v. George*, 434 S.W.2d 626, 629 (Ky. 1968) (acknowledging general rule of nonliability but declining to apply it in all circumstances). The traditional rule of nonliability stemmed from three principal sources:

- (1) the presumption that consumption, and not the sale, of the alcoholic beverage is the proximate cause of injuries sustained;
- (2) traditional social mores, dating back to Prohibition, which hold the drinker morally and legally liable for his own actions; and
- (3) the constitutional doctrine that courts should defer questions of liability to the legislature.

Colman, Krell & Mosher, *supra* note 71, at 419; see also *Williamson v. Old Brogue, Inc.*, 232 Va. 350, 353-54, 350 S.E.2d 621, 623-24 (1986) (reaffirming Virginia's traditional common law rule of nonliability).

76. The seminal case rejecting the traditional common law rule of nonliability and adopting a new judge-made rule is *Rappaport*, 31 N.J. at 205-06, 156 A.2d at 10.

77. See generally Rinden, *Judicial Prohibition? Erosion of the Common Law Rule of Non-Liability for Those Who Dispense Alcohol*, 34 *DRAKE L. REV.* 937, 937-40 (1985-1986); cf. PRESIDENTIAL COMM'N ON DRUNK DRIVING, FINAL REPORT 1 (1983) (estimating that, over 10-year period, 50% of all U.S. highway fatalities involved alcohol, resulting in 250,000 American deaths and a \$21 billion annual economic loss).

This recent expansion of dram shop liability has been a welcome source of additional compensation for injured plaintiffs. Formerly, a plaintiff harmed by an intoxicated tortfeasor could recover only against that tortfeasor, who may or may not have been adequately insured. See, e.g., *Olsen v. Copeland*, 90 Wis. 2d 483, 491, 280 N.W.2d 178, 181-82 (1979) ("The problem presented by this issue is not one of adequate remedies for an injured plaintiff. There seems to be little reason to provide the person injured by an intoxicated driver with a deeper pocket than the person injured by the stupid driver, the careless driver or the drugged driver."), *overruled*, *Sorensen v. Jarvis*, 119 Wis. 2d 627, 646-48, 350 N.W.2d 108, 117-19 (1984); *Fugate v. Galvin*, 84 Ill. App. 3d 573, 577, 406 N.E.2d 19, 22 (1980) ("The fortuitous circumstance of one driver's inability to pay for damages he has caused should not be a reason to open new arenas of liability in search of perfect compensation schemes."). In today's liquor liability cases, however, plaintiffs may extract many times more in monetary damages from tavern owners than from individual drunk drivers. In Michigan, for example, a tavern's insurance company settled a wrongful death claim for over \$7 million (not in present value terms). *Cansler v. Pine Knob Invest. Co.*, No. 84-275551-NI (Mich. Cir. Ct. Oakland County, settled Oct. 25, 1985). Similarly, in Ohio, widows of two decedents killed by a drunk tavern patron sued the tavern for \$24 million. *Hargraves v. Brown*, No. CV85-09-1043 (Ohio C.P. Ct., Butler County, filed Sept. 25, 1985). Not surprisingly, the estimated annual growth rate for alcohol-server liability litigation is now approaching 300%. Goldberg, *supra* note 72, at 84.

78. ALA. CODE §§ 6-5-70, -71 (1975); ALASKA STAT. § 04.21.020 (1986); ARIZ. REV. STAT. ANN. §§ 4-311, -312 (Supp. 1986-1987); CAL. BUS. & PROF. CODE § 25,602.1 (West Supp. 1988); COLO. REV. STAT. § 12-46-112.5 (Supp. 1987); CONN. GEN. STAT. ANN. § 30-102 (West Supp. 1988); FLA. STAT. ANN. § 768.125 (West Supp. 1988); GA. CODE ANN. § 3-3-22 (1982); IDAHO CODE § 23-808 (Supp. 1988); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd 1986 & Supp. 1988); IND. CODE ANN. § 7.1-5-10-15.5 (Burns Supp. 1988); IOWA CODE ANN. § 123.92 (West 1987); ME.

The courts of ten other states and the District of Columbia, inspired by the national trend, have created dram shop liability by judicial decree.⁷⁹ Only ten states fail to give injured plaintiffs a statutory or judge-made cause of action against those who sell alcohol to underage or intoxicated tortfeasors.⁸⁰

Judicial development of dram shop liability in the absence of an applicable statute typically involves a process in which a court identifies a social problem, notes the legislature's failure to act, and then uses the common law to fashion a solution. For example, the dramatic shift in legislative and judicial opinion on dram shop liability stems from the spread of alcohol-related accidents on American roads.⁸¹ Courts have

REV. STAT. ANN. tit. 28-A, §§ 2501-19 (Supp. 1987); MICH. COMP. LAWS ANN. § 436.22 (West Supp. 1988); MINN. STAT. ANN. § 340A.801 (West Supp. 1988); MO. ANN. STAT. § 537.053 (Vernon 1988); MONT. CODE ANN. § 27-1-710 (1987); N.H. REV. STAT. ANN. §§ 507-F:1 to -F:8 (Supp. 1987); N.M. STAT. ANN. § 41-11-1 (Supp. 1987); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978 & Supp. 1988); N.C. GEN. STAT. §§ 18B-120 to -129 (1983); N.D. CENT. CODE § 5-01-06.1 (1987); OHIO REV. CODE ANN. § 4399.01-.09 (Anderson 1982 & Supp. 1987); OR. REV. STAT. ANN. §§ 30.950-.960 (Butterworth 1988 Repl.); PA. CONS. STAT. ANN. § 47-4-497 (Purdon 1969 & Supp. 1988); R.I. GEN. LAWS §§ 3-14-1 to -15 (Supp. 1986); UTAH CODE ANN. § 32A-14-1 to -2 (1986); VT. STAT. ANN. tit. 7, § 501 (1972 & Supp. 1987); WIS. STAT. ANN. § 125.035 (West Supp. 1987); WYO. STAT. §§ 12-5-502, 12-8-301 (1986).

Maine and Rhode Island have recently passed laws patterned after the Model Dram Shop Act, sometimes called the Liquor Liability Act. Authored by the Prevention Research Group under a federal grant, the Model Act appears in Colman, Krell & Mosher, *supra* note 71, at 442.

Many of the the 30 states that now have statutory dram shop liability recognized a common law cause of action before they adopted dram shop statutes. *See, e.g.,* *Ontiveros v. Borak*, 136 Ariz. 500, 513, 667 P.2d 200, 213 (1983); *Alegria v. Payonk*, 101 Idaho 617, 621, 619 P.2d 135, 139 (1980); *Lopez v. Maez*, 98 N.M. 625, 632, 651 P.2d 1269, 1276 (1982); *Sorensen v. Jarvis*, 119 Wis. 2d 627, 646, 350 N.W.2d 108, 115-17 (1984).

79. *See Rong You Zhou v. Jennifer Mall Restaurant, Inc.*, 534 A.2d 1268 (D.C. 1987); *Ono v. Applegate*, 62 Haw. 131, 138, 612 P.2d 533, 537-38 (1980); *Pike*, 434 S.W.2d at 629; *Chausse v. Southland Corp.*, 400 So. 2d 1199, 1203 (La. Ct. App.), *cert. and review denied*, 404 So. 2d 278 (La. 1981); *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 501, 233 N.E.2d 18, 20 (1968); *Munford, Inc. v. Peterson*, 368 So. 2d 213, 217 (Miss. 1979); *Rappaport*, 31 N.J. at 202-03, 156 A.2d at 9-10; *Brigance v. Velvet Dove Restaurant, Inc.*, 725 P.2d 300, 304 (Okla. 1986); *Mitchell v. Ketner*, 54 Tenn. App. 656, 665, 393 S.W.2d 755, 759 (1964) (*dicta*); *Poole v. El Chico Corp.*, 713 S.W.2d 955, 958 (Tex. Ct. App. 1986), *aff'd*, 732 S.W.2d 306 (Tex. 1987); *Young v. Caravan Corp.*, 99 Wash. 2d 655, 658-60, 663 P.2d 834, 837-38, *amended*, 672 P.2d 1267 (1983).

80. Delaware, Kansas, Maryland, and Virginia continue to follow the common law rule of nonliability for alcohol sellers. *See Wright v. Moffitt*, 437 A.2d 554 (Del. 1981) (no dram shop liability); *Fudge v. City of Kansas City*, 239 Kan. 369, 720 P.2d 1093 (1986) (no dram shop liability recognized); *Felder v. Butler*, 292 Md. 174, 438 A.2d 494 (1981) (no civil liability under statute proscribing sales to intoxicated persons); *Williamson v. The Old Brogue, Inc.*, 232 Va. 350, 350 S.E.2d 621 (1986). South Dakota has provided statutory civil immunity. *See S.D. CODIFIED LAWS ANN. §§ 35-4-78, 35-11-1* (1986 Rev. & Supp. 1988). To date, there are no cases or statutes addressing dram shop liability in Arkansas, Nebraska, Nevada, South Carolina or West Virginia.

81. *See Ontiveros*, 136 Ariz. at 507, 667 P.2d at 207 (common law rule of nonliability for tavern owners anachronistic in view of "frightful toll" of alcohol-related traffic fatalities and injuries); PRESIDENTIAL COMM'N ON DRUNK DRIVING, *supra* note 77, at 11; *cf. Kelly v. Gwinnell*, 96 N.J. 538, 545-46 & n.3, 476 A.2d 1219, 1222 & n.3 (1984) (noting huge cost to state of alcohol-related

noted the problem of inadequate compensation for victims of such accidents, and where legislatures have failed to confront this problem, some courts have been inspired to take judicial action.⁸²

In support of its action to abrogate the rule of nonliability, such a court could argue that: (1) dram shop liability is analogous to liability for negligent entrustment of firearms or automobiles to minors, intoxicated persons, and incompetents;⁸³ (2) the national trend toward dram shop liability should give suppliers of alcohol fair notice to carry adequate liability insurance;⁸⁴ and (3) there is a pressing need to compensate the innocent victims of alcohol-related accidents.⁸⁵ Based on these arguments, the court could claim that the rule of nonliability is "an anachronism, unsuitable to our present society, and . . . repugnant to modern tort

personal injuries and property damage, estimated at \$1,149,516,000 for 1978-1982, as a factor in favor of imposing liability on hosts for injuries caused by intoxicated guests).

When most people walked and few had horses or carriages, or even in the days when the horse and buggy was a customary mode of travel, it may have been that the common law rule of law of non-liability arising from the sale of liquor to an intoxicated person was satisfactory. But the situation then and the problem in today's society of the imbibing going upon the public highways and operating a machine that requires quick response of mind and muscle and capable of producing mass death and destruction are vastly different.

Meade v. Freeman, 93 Idaho 389, 400, 462 P.2d 54, 65 (1969) (Prather, J., concurring specially in result and dissenting in part), *overruled*, *Alegria v. Payonk*, 101 Idaho 617, 621, 619 P.2d 135, 139 (1980). In his *Meade* dissent, Judge Prather argued in favor of a common law cause of action. See *id.* at 395-403, 462 P.2d at 60-68. The Idaho Supreme Court overruled *Meade* "to the extent that it infers that under common-law rule and present statutes the vending of intoxicants can never be the proximate cause of damage to third parties resulting from the tortious or unlawful acts of the consumer." *Alegria*, 101 Idaho at 621, 619 P.2d at 139 (emphasis in original).

82. *E.g.*, *Brigance v. Velvet Dove Restaurant, Inc.*, 725 P.2d 300, 303 (Okla. 1986) ("Because the Legislature has failed to act to impose civil liability, for reasons unknown, does not unequivocally demonstrate legislative intent."); *Ontiveros*, 136 Ariz. at 512, 667 P.2d at 212 ("The legislature may well believe that when a judge-made common law rule has become obsolescent, anachronistic and unjust, the responsibility for change is ours, not theirs.").

83. See *Branuigan v. Raybuck*, 136 Ariz. 513, 516, 667 P.2d 213, 216 (1983); *Ontiveros*, 136 Ariz. at 509, 667 P.2d at 209 (citing seminal case involving negligent sale of automobile, *Johnson v. Casetta*, 197 Cal. App. 2d 272, 17 Cal. Rptr. 81 (1961)); *Jardine v. Upper Darby Lodge No. 1973, Inc.*, 413 Pa. 626, 631, 198 A.2d 550, 553 (1964) (serving alcohol to intoxicated patron with car akin to entrusting demoted individual with gun); cf. *Kelly*, 96 N.J. at 549, 476 A.2d at 1224-25 (social host's liability for serving intoxicated guest analogous to car owner's liability for lending car to intoxicated person).

84. See, *e.g.*, *Sorensen v. Jarvis*, 119 Wis. 2d 627, 647, 350 N.W.2d 108, 118 (1984). Presumably, vendors would pass the costs of additional insurance on to their customers.

85. See *Rappaport v. Nichols*, 31 N.J. 188, 205, 156 A.2d 1, 10 (1959) ("[R]ecognition of the plaintiff's claim will afford a fairer measure of justice to innocent third parties whose injuries are brought about by the unlawful and negligent sale of alcoholic beverages to minors and intoxicated persons . . ."); PRESIDENTIAL COMM'N ON DRUNK DRIVING, *supra* note 77, at 11 (recommending dram shop liability as way to reduce number of accidents); see also ME. REV. STAT. ANN. tit. 28-A, § 2502(2)(A) (Supp. 1987) (secondary purpose of Maine's Liquor Liability Act is to "[e]stablish a legal basis for obtaining compensation for those suffering damages as a result of intoxication-related incidents in accordance with this Act").

theories."⁸⁶ The court could then decide that it can no longer "escape responsibility behind the hoary doctrine of *stare decisis*,"⁸⁷ and it could rationalize that its abrogation of the rule of nonliability is not judicial legislation by asserting:

The common law, which is judge-made and judge-applied, can and will be changed when changed conditions and circumstances establish that it is unjust or has become bad public policy. In reevaluating previous decisions in light of present facts and circumstances, we do not depart from the proper role of the judiciary.⁸⁸

Several state legislatures have reacted with alarm to such assertions and to the courts' increased willingness to engineer solutions to social problems. In the case of dram shop liability, for example, some legislatures have overturned court decisions or clarified the limits of liability under existing dram shop acts.⁸⁹ These lawmakers have sought to restrain the judiciary from expanding common law liability too far, or to interdict the new judge-made rules before they become too entrenched.⁹⁰ The growth of the judge-made negligent commercial transaction doctrine, however, has yet to draw a rebuke from state legislatures.

III. NEGLIGENT COMMERCIAL TRANSACTION CASELAW

Today, some state courts no longer recognize any real distinction between merchants who violate statutory duties by selling alcohol or weapons to certain classes of individuals and merchants who sell or lease equipment to inexperienced or incompetent users without violating any

86. *Lewis v. Wolf*, 122 Ariz. 567, 570, 596 P.2d 705, 708 (Ct. App. 1979), *overruled*, *Ontiveros*, 136 Ariz. at 507-08, 667 P.2d at 207-08.

87. *Meade v. Freeman*, 93 Idaho 389, 401, 462 P.2d 54, 66 (1969) (Prather, J., concurring specially in result, dissenting in part), *overruled*, *Alegria v. Payonk*, 101 Idaho 617, 621, 619 P.2d 135, 139 (1980).

88. *Ontiveros*, 136 Ariz. at 504, 667 P.2d at 204.

89. See, e.g., CAL. BUS. & PROF. CODE §§ 25,602(c), 25,602.1 (West 1985 & Supp. 1988) (abrogating *Coulter v. Superior Court*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976); *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971), and providing civil immunity to commercial vendors, except in the case of sales to obviously intoxicated minors); MO. ANN. STAT. § 537.053 (Vernon 1988) (abrogating *Carver v. Schafer*, 647 S.W.2d 570 (Mo. Ct. App. 1983); *Nesbitt v. Westport Square, Ltd.*, 624 S.W.2d 519 (Mo. Ct. App. 1981); *Sampson v. W.F. Enter., Inc.*, 611 S.W.2d 333 (Mo. Ct. App. 1980), and providing civil immunity to commercial vendors, except in cases of sales to minors or obviously intoxicated persons); S.D. CODIFIED LAWS ANN. §§ 35-4-78, -11-1 (1986 Rev. & Supp. 1988) (abrogating *Walz v. City of Hudson*, 327 N.W.2d 120 (S.D. 1982), and providing complete civil immunity to commercial vendors).

90. Some courts that have held hosts liable for their drunken guests' torts have also faced legislative abrogation of their decisions. See, e.g., *Coulter*, 21 Cal. 3d at 152, 577 P.2d at 672, 145 Cal. Rptr. at 538, *abrogated by* CAL. BUS. & PROF. CODE § 25,602(c) (West 1985); *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 258 Or. 632, 643, 485 P.2d 18, 23 (1971), *limited by* 1979 Or. Laws ch. 801, § 2, *repealed by* 1987 Or. Laws ch. 774, § 14.

statutory duty. Inspired by the revision of section 390 in the *Restatement (Second) of Torts*, the recent trends in common law dram shop liability, and the notion that the judiciary can alleviate social problems through expanded tort liability, courts in Alaska,⁹¹ California,⁹² Missouri,⁹³ and North Dakota⁹⁴ have recognized a new common law cause of action against merchants. Under this new rule, a sale or lease of goods to a customer who the merchant knows or should know is inexperienced or incompetent establishes a prima facie case of negligence against the merchant in favor of third parties injured through the customer's use of the product.⁹⁵ The future of this cause of action is unclear. Although most of the current caselaw involves automobile sales to incompetent drivers,⁹⁶ the doctrine has been successfully applied in other contexts as well.⁹⁷ So far, only Florida has explicitly rejected the trend, noting the adverse commercial impact of the new action.⁹⁸

A. *Commercial Leases.*

Where leases are concerned, courts have traditionally limited the doctrine of negligent commercial transactions to cases involving car rentals to unlicensed or intoxicated drivers.⁹⁹ Two courts, however, have recently found this approach too restrictive and have extended the doctrine to commercial leases involving products other than autos.

First, in *Barsness v. General Diesel & Equipment Co.*,¹⁰⁰ the Supreme Court of North Dakota unanimously recognized a right of action against a construction crane lessor based on evidence that the lessee, who was the plaintiff's employer, may have had limited experience in

91. *See* *Flieger v. Barcia*, 674 P.2d 299, 301 (Alaska 1983) (owner of vehicle may become liable for negligent entrustment by selling vehicle to another).

92. *See* *O'Toole v. Carlsbad Shell Serv. Station*, 202 Cal. App. 3d 151, 247 Cal. Rptr. 663, 669-71 (ordered not published in *California Appellate Reports*; opinion appears in *California Reporter* advance sheets), *review denied*, [no docket number] (Cal. Aug. 18, 1988) (LEXIS, 1988 Cal. LEXIS 220); *Johnson v. Casetta*, 197 Cal. App. 2d 272, 274-75, 17 Cal. Rptr. 81, 82-83 (1961).

93. *See* *Fowler v. Park Corp.*, 673 S.W.2d 749, 753-54 (Mo. 1984) (en banc).

94. *See* *Barsness v. General Diesel & Equip. Co.*, 383 N.W.2d 840, 845-46 (N.D. 1986).

95. *See supra* note 7 and accompanying text.

96. *See infra* notes 108-25 and accompanying text.

97. *See supra* notes 15-19 and accompanying text.

98. *See* *Vic Potamkin Chevrolet, Inc. v. Horne*, 505 So. 2d 560, 562, 563 (Fla. Dist. Ct. App. 1987) (en banc), *aff'd*, No. 70,499, slip op. (Fla. Sept. 1, 1988) (Westlaw, 1988 WL 93694); *see also* *Jackson v. Turnipseed*, 512 So. 2d 213, 213 (Fla. Dist. Ct. App. 1987) (per curiam). A few states have refused to extend liability to sellers of automobiles, reasoning that such sales are simply outside the proper scope of negligent entrustment. *See, e.g.*, *Tosh v. Scott*, 129 Ill. App. 3d 322, 472 N.E.2d 591 (1984); *Kirk v. Miller*, 7 Kan. App. 2d 504, 644 P.2d 486 (1982).

99. *See, e.g.*, *Owens v. Carmichael's U-Drive Autos, Inc.*, 116 Cal. App. 348, 350-51, 2 P.2d 580, 581 (1931) (action against rental agent for leasing car to unlicensed driver).

100. 383 N.W.2d 840 (N.D. 1986).

operating such cranes. The plaintiff, a construction worker, was injured after a manbasket in which he was riding tumbled thirty-five feet to the ground. Both parties stipulated that the manbasket had been negligently rigged. The injured worker sought recovery based on negligent entrustment, to which the court replied, "we see no reason why the doctrine should not apply to . . . chattels [other than automobiles] which, if placed in the hands of an incompetent or inexperienced person, present a likelihood of unreasonable risk of harm to third persons."¹⁰¹ Despite the fact that the plaintiff's employer had previously leased a crane from the lessor without incident, the court held, on motion for summary judgment, that there existed a genuine issue of fact concerning the employer's experience with cranes and that the action should proceed to trial.¹⁰²

Second, in *Fowler v. Park Corp.*,¹⁰³ a divided Missouri Supreme Court relied on section 390 of the *Restatement (Second) of Torts* in affirming a six-million-dollar judgment in a negligence action. The case involved a corporate defendant that had leased part of an industrial park to the employer of the plaintiff, a nineteen-year-old sandblaster. The park contained a railroad engine, and during night shifts, the plaintiff's fellow employees customarily used the engine to conduct switching operations for the entire yard. These employees lacked formal instruction or training in switching, in the operation of engines, and in general safety procedures;¹⁰⁴ the employees' inexperience with the engine led to an accident that cost the plaintiff both his legs. In upholding the plaintiff's action against the lessor-defendant, the Missouri Supreme Court declared that the lessor "had a duty to make sure that [the lessee-employer] allowed only competent persons to operate [the engine]."¹⁰⁵ Noting the young worker's pitiful physical condition, the court affirmed the largest personal injury verdict ever awarded in Missouri.¹⁰⁶

B. *Common Law Negligent Sales.*

For years, California stood alone in recognizing a common law action for the negligent sale of a non-alcoholic, nonlethal product.¹⁰⁷ The seminal 1961 California case, *Johnson v. Casetta*,¹⁰⁸ involved the negligent sale of an automobile to an incompetent driver. Later cases, such as

101. *Id.* at 842.

102. *Id.* at 845.

103. 673 S.W.2d 749 (Mo. 1984) (en banc).

104. *Id.* at 751.

105. *Id.* at 753.

106. *Id.* at 757-58.

107. *Cf. supra* notes 26-30 and accompanying text (noting traditional focus of negligent commercial transaction doctrine on sales of alcohol and weapons in violation of statutes).

108. 197 Cal. App. 2d 272, 17 Cal. Rptr. 81 (1961).

*Roland v. Golden Bay Chevrolet*¹⁰⁹ and *Dillon v. Suburban Motors, Inc.*,¹¹⁰ reaffirmed California's commitment to providing a remedy for third parties injured by negligently sold automobiles.¹¹¹ These cases created the rule that a plaintiff can establish a prima facie case of negligence by presenting evidence that an automobile seller knew or should have known that the buyer who injured the plaintiff was an incompetent driver.

In *Johnson*, the plaintiff brought an action based on section 390 of the first *Restatement of Torts* against a used-car dealer for the wrongful death of their son and for other personal injuries.¹¹² In that case, the car dealership had sold an automobile to a non-English-speaking native of Mexico. Some weeks after the sale, the car buyer swerved across a center line and into the plaintiff's oncoming vehicle. The plaintiffs asserted that the buyer had virtually no driving experience and that the seller knew or should have known that the buyer was an incompetent driver.¹¹³ The *Johnson* court, relying principally on section 390 of the first *Restatement of Torts* and on negligent entrustment cases involving loaned automobiles, held that the plaintiffs could have established a cause of action against the seller of the automobile had they offered sufficient proof of their assertions.¹¹⁴

The *Roland v. Golden Bay Chevrolet* court cited *Johnson* in holding that a third party established a prima facie case of negligence against a car seller for injuries inflicted by a buyer's vehicle.¹¹⁵ The court admitted that car sellers have no duty to investigate a buyer's license,¹¹⁶ but held that if circumstances that alert a seller to a buyer's unlicensed status (and therefore his incompetence) fortuitously arise and the seller nevertheless

109. 161 Cal. App. 3d 102, 207 Cal. Rptr. 413 (1984) (opinion omitted from *California Appellate Reports*), *dismissed as moot*, 704 P.2d 175, 217 Cal. Rptr. 415 (Cal. 1985) (en banc).

110. 166 Cal. App. 3d 233, 212 Cal. Rptr. 360 (opinion omitted from *California Appellate Reports* at California Supreme Court's direction), *dismissed as moot*, 705 P.2d 1260, 218 Cal. Rptr. 584 (Cal. 1985) (en banc).

111. The California courts have been willing to recognize common law liability for negligent sales under *Johnson* and section 390 of the *Restatement (Second)* only for injuries to third persons. They have not been willing to grant a right of action to the estate of an unlicensed, injured buyer who, through her own negligence, kills herself. See *Perez v. G & W Chevrolet, Inc.*, 274 Cal. App. 2d 766, 79 Cal. Rptr. 287 (1969). Other states have taken the position that the sale of automobiles is simply beyond the scope of negligent entrustment doctrine. See *supra* note 98.

112. 197 Cal. App. 2d at 272, 17 Cal. Rptr. at 81.

113. *Id.* at 272-74, 17 Cal. Rptr. at 82.

114. See *id.* at 276, 17 Cal. Rptr. at 83; cf. *supra* note 45 (discussing negligent entrustment cases that involve entrustment—as opposed to sale—of automobiles and other dangerous instrumentalities by an owner to an incompetent).

115. *Roland v. Golden Bay Chevrolet*, 161 Cal. App. 3d 102, 207 Cal. Rptr. 413, 417-19 (1984) (opinion omitted from *California Appellate Reports*), *dismissed as moot*, 704 P.2d 175, 217 Cal. Rptr. 415 (Cal. 1985) (en banc).

116. 207 Cal. Rptr. at 416-17.

completes the sale, then a third party injured as a result of the buyer's incompetence as a driver has a cause of action.¹¹⁷ The court noted that Golden Bay's customary business practice included checking licenses and that the dealership claimed to have seen the buyer's license.¹¹⁸ As it turned out, the buyer had nothing but a passport.¹¹⁹

*Dillon v. Suburban Motors, Inc.*¹²⁰ expanded *Roland* by effectively imposing a duty on automobile sellers to demand that patrons produce a driver's license as evidence of their competence to drive¹²¹ and, if possible, to "unwind" financing deals and "retake possession" of vehicles should evidence of a buyer's incompetence later arise.¹²² In *Dillon*, a mother and son, both of whom held valid Missouri licenses, jointly purchased an automobile in California. The dealer knew that the minor son would operate the car about twenty-five percent of the time. The son, while speeding, caused an accident that killed three people and injured nine others. The injured plaintiffs sought to prove that the minor had failed California's written driver's examination and that the dealer had knowledge of this failure. The court noted that Suburban had violated its own financing procedures by delivering possession before the purchasers had obtained California licenses. It also noted that California law requires minors from other states who intend to drive to obtain California licenses within ten days after they establish state residency. At no time did Suburban attempt to ascertain whether the buyers were legal residents of California.¹²³ The court determined that Suburban should have discovered the minor's incompetence and held that Suburban's conduct gave rise to a cause of action.¹²⁴

The *Dillon* court seemed unimpressed by the fact that the financing agreement for the car in question apparently named only the mother, or

117. *Id.* at 418-19.

118. *Id.* at 418.

119. *Id.* at 415-16.

120. 166 Cal. App. 3d 233, 212 Cal. Rptr. 360 (opinion omitted from *California Appellate Reports* at California Supreme Court's direction), *dismissed as moot*, 705 P.2d 1260, 218 Cal. Rptr. 584 (Cal. 1985) (en banc).

121. 212 Cal. Rptr. at 369. Relying on *Hartford Accident & Indem. Co. v. Abdullah*, 94 Cal. App. 3d 81, 156 Cal. Rptr. 254 (1979), the *Dillon* court stated that car dealers who sell large numbers of cars must take "adequate precautions" to protect the public from harm, such as "requiring the production of evidence from a prospective user of competency to drive." 212 Cal. Rptr. at 369 (quoting *Abdullah*, 94 Cal. App. 3d at 94, 156 Cal. Rptr. at 262). The *Abdullah* case, however, is distinguishable from *Dillon*. In *Abdullah*, a used-car dealer entrusted an automobile to an individual for a test drive without first checking to see that the driver was licensed. The driver failed to return the car and, two days later, while driving the car, caused a collision that seriously injured third parties. The test driver lacked a valid license.

122. *Dillon*, 212 Cal. Rptr. at 367.

123. *Id.* at 363-64, 366.

124. *Id.* at 367.

by evidence indicating that the mother intended to use the vehicle seventy-five percent of the time.¹²⁵ *Dillon* seems to support the proposition that *any* knowledge on the part of a dealer that an unqualified driver intends to take part in the purchase and use of a vehicle creates a duty to avoid the transaction altogether.

California's tort of negligent sales has targeted other goods as well.¹²⁶ Until very recently, suits outside the auto sales context have failed in California not because one can negligently sell only automobiles, but because no plaintiff injured by a different product has been able to prove the elements necessary to establish liability.¹²⁷ For example, in *Henderson Brothers Stores, Inc. v. Smiley*, a plaintiff brought an action against a merchant after a tar kettle exploded during a roofing job and damaged a nearby warehouse.¹²⁸ The court held that the action based on section 390 failed because the buyer was a licensed, experienced roofer and a prior owner of tar kettles.¹²⁹

In *O'Toole v. Carlsbad Shell Service Station*, a California appellate court recently recognized a common law action against a seller for negligently selling (nondefective) gasoline to an incompetent, intoxicated driver.¹³⁰ *O'Toole* is the first California case in which a plaintiff successfully stated a common law cause of action for the negligent sale of a product other than an automobile.¹³¹

The facts of *O'Toole* evoke sympathy for the plaintiffs, children of a victim struck and killed by an intoxicated purchaser, and anger toward the merchant. Late one night, an obviously intoxicated woman drove into a Shell station, seeking to buy gasoline. The station's employees gave the woman several cups of coffee over the course of an hour and a

125. See *id.* at 362-63 (mother, seeking to finance car under her name, indicated to Suburban Motors manager that her son would use car 25% of time).

126. See, e.g., *Henderson Bros. Stores, Inc. v. Smiley*, 120 Cal. App. 3d 903, 174 Cal. Rptr. 875 (1981) (tar kettle); *Fuller v. Standard Stations, Inc.*, 250 Cal. App. 2d 687, 58 Cal. Rptr. 792 (1967) (gasoline).

127. For a discussion of the elements of a common law negligent sale action, see *supra* text accompanying note 7. In *Fuller*, the court refused to hold a vendor liable under section 390 of the *Restatement (Second) of Torts* for selling gasoline to an intoxicated driver because, at that time in California, one could not be held liable even for selling alcohol to an intoxicated driver. *Fuller*, 250 Cal. App. 2d at 690, 58 Cal. Rptr. at 793-94.

128. 120 Cal. App. 3d at 908, 174 Cal. Rptr. at 877.

129. *Id.* at 919-20, 174 Cal. Rptr. at 884.

130. 202 Cal. App. 3d 151, 247 Cal. Rptr. 663 (ordered not published in *California Appellate Reports*; opinion appears in *California Reporter* advance sheets), *review denied* [no docket number] (Cal. Aug. 18, 1988) (LEXIS, 1988 Cal. LEXIS 220). The court of appeal reversed a summary judgment in favor of the defendants and remanded for jury trial. 247 Cal. Rptr. at 671.

131. Two months after this important decision, pursuant to CAL. R. CT. 976, the court of appeal directed that its June 6, 1988, opinion not be published. The court's order appears at 1988 Cal. App. LEXIS 515.

half. They gave her money to call her mother for a ride and encouraged her not to drive. Nevertheless, the employees sold her gasoline, violating Shell's own policy with respect to drunk drivers. The inebriated woman ignored the employees' advice, proceeded to drive, and collided with a motorcycle, killing its driver and passenger.¹³²

The *O'Toole* court reasoned that a negligent sale of gasoline, the motive power of an automobile, to an obviously intoxicated driver is indistinguishable from providing alcohol to a drunk driver.¹³³ Concern with preventing drunk driving compelled the conclusion that the station's sale of gasoline to an intoxicated driver was negligent.¹³⁴ Moreover, the court noted, section 390 of the *Restatement (Second) of Torts* supports the proposition that supplying gasoline to an intoxicated driver is factually equivalent to giving her the car keys.¹³⁵ The court failed to recognize that selling goods is substantially different from loaning them. Instead, the court focused on the merchant's "supplying" the intoxicated driver with gasoline.¹³⁶

IV. THE CASE AGAINST JUDGE-MADE TORT LIABILITY FOR COMMERCIAL TRANSACTIONS

A. *The Doctrine's Rejection in Florida.*

A Florida appellate court, in *Vic Potamkin Chevrolet, Inc. v. Horne*,¹³⁷ recently became the first to recognize that the expansion of common law liability for negligent commercial transactions could present serious problems for American business. The court also expressly considered whether the theory of negligent entrustment should include a common law action for negligent sales of *any* product.¹³⁸ *Horne*, moreover, is the only case to advance economic arguments¹³⁹ in rejecting a

132. *O'Toole*, 247 Cal. Rptr. at 664.

133. *Id.* at 669, 671. Framing the argument in this manner, the court easily distinguished *Fuller v. Standard Stations, Inc.*, 250 Cal. App. 2d 687, 58 Cal. Rptr. 792 (1967), which held that furnishing gasoline to an intoxicated driver did not give rise to a cause of action because furnishing even alcohol to such a driver would not support a cause of action under California law at that time. *O'Toole*, 247 Cal. Rptr. at 665-66. The law in California on serving alcohol to intoxicated drivers has since changed, however. *See id.* at 666-67.

134. 247 Cal. Rptr. at 671.

135. *Id.* at 669.

136. *Id.* at 670.

137. 505 So. 2d 560 (Fla. Dist. Ct. App. 1987) (en banc), *aff'd*, No. 70,499, slip op. (Fla. Sept. 1, 1988) (Westlaw, 1988 WL 93694).

138. *Id.* at 561. For a recent discussion of the appellate court decision, see Note, *Who's Driving, Anyway?: The Status of Negligent Entrustment in Florida After Horne v. Vic Potamkin Chevrolet, Inc.*, 12 NOVA L. REV. 939 (1988).

139. *See infra* notes 163-65 and accompanying text.

negligent sales claim against a merchant.¹⁴⁰

On its own motion for rehearing en banc in view of the case's exceptional importance, the Florida District Court of Appeal withdrew a panel decision affirming a judgment of \$195,000 for an injured plaintiff,¹⁴¹ and certified the following, yet-to-be-answered,¹⁴² question to the Supreme Court of Florida:

SHOULD FLORIDA ADOPT SECTION 390 OF THE RESTATEMENT (SECOND) OF THE LAW OF TORTS AND, IF SO, SHOULD THE SECTION BE CONSTRUED SO AS TO EXTEND LIABILITY TO A *SELLER* OF A CHATTEL AS WELL?¹⁴³

Horne involved a young woman with a restricted driver's license who wanted to purchase an automobile. The license required that the woman drive only in the company of a licensed driver.¹⁴⁴ The plaintiff, a friend of the buyer, happened to be in the car lot at the time of the purchase and agreed to accompany the buyer out of the lot, although she had never driven with the buyer previously. During an earlier test-drive, the buyer had had difficulty in handling the car; at one point, a salesman had to grab the wheel to avoid hitting a bus. The salesman later predicted to a fellow employee that the buyer would cause an accident before she drove one block.¹⁴⁵ His prediction proved accurate. About one mile from the dealership, the buyer lost control of the car and hit a tree, injuring the plaintiff.

The plaintiff sued the dealership for negligently selling an automobile to a driver whom the dealership knew to be incompetent. She argued, in short, "that sellers have a duty to protect the world against incompetent product users."¹⁴⁶ The full court rejected this assertion, holding that the dealership had complied with state law by ensuring that a licensed driver accompanied the buyer from the lot.¹⁴⁷ The court con-

140. 505 So. 2d at 563.

141. 505 So. 2d at 561.

142. The Florida Supreme Court declined to address the broad question certified by the appellate court majority, choosing instead to address the much narrower question offered by the dissent:

IS A SELLER OF AN AUTOMOBILE NEGLIGENT UNDER SECTION 390 OF RESTATEMENT (SECOND) OF TORTS (1966) WHEN IT KNOWINGLY SELLS A CAR TO A DRIVER WHO, AFTER DEMONSTRATING DRIVING INCOMPETENCE, NEVERTHELESS INTENDS TO DRIVE THE VEHICLE?

Horne, No. 70,499, slip op. at 2 & n.1.

143. 505 So. 2d at 563-64. The court suggested that "if the law is to be extended to include liability for negligent sales, it is for the supreme court or the legislature to do it." *Id.* at 562.

144. *Id.* at 561. The purchaser's license was restricted because she had failed the driving part of the license exam. *Id.* at 564 (Baskin, J., dissenting).

145. *Id.* at 564.

146. *Id.* at 562.

147. *Id.* at 563; *see also id.* ("The fact that . . . the salesman[] thought [the customer] was less than competent is simply not relevant.").

cluded that it is for the state, not merchants, to determine who is qualified to drive,¹⁴⁸ and that a "seller cannot be held liable for harm caused by a 'defective' customer."¹⁴⁹

The Supreme Court of Florida affirmed the lower court's decision and answered a rephrased certified question in the negative.¹⁵⁰ The Supreme Court narrowed the question "of great public importance" to the facts of the case and held that a seller of an automobile cannot be held liable under section 390 of the *Restatement (Second) of Torts*.¹⁵¹ The Court relied on three arguments. First, it would be practically impossible to confine the negligent sale cause of action "to instances where the seller becomes aware of the purchaser's incompetency as an incidental by-product of the normal sales routine."¹⁵² Instead, to protect themselves from liability, merchants would have to investigate each customer's competence; by allowing such a situation to develop, the court would shirk its duty "to foster certainty in business relationships."¹⁵³ Second, under Florida law, the transfer of legal and equitable ownership of an automobile terminates the former owner's potential liability.¹⁵⁴ Third, the adoption of such a broad new public policy as holding automobile sellers liable for poor selection of customers requires legislative action, since only the legislature can effectively weigh the various interests involved.¹⁵⁵

The *Horne* dissent, however, was unimpressed by the majority's arguments; it insisted that "[u]nder the Restatement, Potamkin is undoubtedly liable."¹⁵⁶ The dissent claimed that adoption of section 390 "would be a logical, natural progression of the present law of negligent entrustment,"¹⁵⁷ and that no policy reason can justify holding liable one who *loans* automobiles, but not one who *sells* automobiles. The dissent then echoed the now-familiar dram shop argument that the public needs protection from dangerous drivers¹⁵⁸ and that the adoption of section 390 is

148. *Id.*

149. *Id.* at 562.

150. *Horne*, No. 70,499, slip op. at 5. The dissent's rephrased question is quoted *supra* note 142.

151. *Id.*, slip op. at 1-2. The court admitted that the *Restatement (Second)* clearly covers sellers and lessors, but the court nevertheless refused to apply negligent entrustment to sales of automobiles. *Id.* at 4.

152. *Id.* at 3.

153. *Id.* (quoting *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266, 270 (Fla. Dist. Ct. App. 1983)).

154. *Id.* at 2-3.

155. *Id.* at 4.

156. *Id.* at 7 (Kogan, J., joined by Barkett, J., dissenting).

157. *Id.* at 8.

158. *Id.* at 8-9.

therefore "compelling."¹⁵⁹ It invoked the shopworn example of a merchant selling a loaded gun to a child.¹⁶⁰

The dissenting opinion seems to support the proposition that a valid driver's license does not necessarily prove competence to buy an automobile. While disclaiming that a common law cause of action would give sellers a duty to investigate buyers, the dissent did say that a seller who observes "behavior which indicates an inability to operate an automobile" must decline to sell to licensed drivers who exhibit such behavior.¹⁶¹ It failed, however, to define what standards of competence a seller, who may be a sophisticated automobile dealer or merely a father selling the family car to a son, should apply. Conceivably, newly licensed teenagers, a group obviously inexperienced in driving, would not have the capacity to purchase an automobile under the dissent's reasoning.

The dissenting opinion also ignores the majority's apprehension that there is no practical way to restrict the *Restatement (Second)*'s future application to sellers if section 390 is adopted. While admitting that certainty in business is an admirable goal, it asserts that "[c]ertainty in business relationships should not take priority over the safety of our roads and highways."¹⁶²

B. *Problems with Judicial Regulation of Commerce.*

The appellate court in *Horne* recognized the serious commercial ramifications of a duty to protect the public against incompetent users: "The imposition of this new duty not to sell would create uncertainty and retard the free flow of commerce."¹⁶³ In addition, the "creation of a duty on the part of the seller to guarantee the acts of a buyer,"¹⁶⁴ which would effectively require independent investigation to establish each buyer's fitness to use each product, would be "manifestly unreasonable."¹⁶⁵ These sentiments persuaded the Supreme Court of Florida to reject the extension of common law liability to merchants who do business with "defective" customers.

Indeed, it would be unreasonable—especially in view of the lack of guidance as to which customers are sufficiently experienced or compe-

159. *Id.* at 8.

160. *Id.* at 9.

161. *Id.*

162. *Id.*

163. *Horne*, 505 So. 2d at 563.

164. *Id.*

165. *Id.*; see also *id.* at 563 n.2 ("To extend section 390 to cover negligent sales would effectively convert an arms length commercial relationship into a parental one."); cf. *Fowler v. Park Corp.*, 673 S.W.2d 749, 759 (Mo. 1984) (Welliver, J., dissenting); *infra* text accompanying notes 167-73.

tent¹⁶⁶—to create a duty for merchants not to sell or lease. The uncertainty of the definition of a “defective” customer not only leaves the duty at the heart of the negligent commercial transaction tort open to unlimited expansion; it poses an uncertain risk of liability that businesses might well find too great to assume or insure against.

In a vehement dissent in *Fowler v. Park Corp.*,¹⁶⁷ discussed above,¹⁶⁸ a Missouri judge claimed that the majority had given lessors of equipment an unprecedented new duty to actively and continuously investigate the competence of a lessee’s employees: “So extraordinary is the duty imposed by the majority today that I can only surmise they fail to comprehend its ramifications. . . . [I]t would appear that . . . lessors of equipment and other chattel must investigate the qualifications of every employee of the firm acquiring the equipment who may operate it.”¹⁶⁹ The judge expressed shock that a court would be willing to create such an amorphous and economically debilitating duty with so little forethought:

It boggles the mind to consider all of the ramifications of this new duty on the leasing industry in this state. . . .

. . . [T]he majority creates a theory of negligent entrustment never heretofore contemplated in the law and . . . in so doing, they jeopardize the future of the entire leasing and lease-financing industry of Missouri.¹⁷⁰

This judge seems to have realized that after *Fowler*, the duty to screen patrons will no longer be limited to transactions regulated by statutes, which provide reasonable and ascertainable guidelines.¹⁷¹ Instead, merchants will have to investigate their customers and then sell their products only to those whom judges will deem competent.¹⁷² Such judicial regulation of commerce will dramatically alter the way that business has traditionally been conducted in this country, harming the national economy by increasing the cost of producing goods and decreasing sup-

166. See, e.g., *Barsness v. General Diesel & Equip. Co.*, 383 N.W.2d 840, 844 n.4 (N.D. 1986) (implying that prior accident-free rental of crane to employer may not constitute sufficient “experience” to absolve lessor—begging question of how many prior rentals would constitute “sufficient” experience); cf. *Henderson Bros. Stores, Inc. v. Smiley*, 120 Cal. App. 3d 903, 919-20, 174 Cal. Rptr. 875, 884 (1981) (buyer’s prior ownership of tar kettle indicated experience, which helped to exonerate defendant-seller from liability for selling the kettle).

167. 673 S.W.2d 749 (Mo. 1984) (en banc).

168. *Supra* text accompanying notes 103-06.

169. 673 S.W.2d at 759 (Welliver, J., dissenting).

170. *Id.* at 759-60.

171. See, e.g., *supra* notes 27-29.

172. See *Fowler*, 673 S.W.2d at 759 (Welliver, J., dissenting).

ply of goods to consumers.¹⁷³

At a time when lawmakers are struggling to make American industries competitive in world markets again,¹⁷⁴ even minor judicial interference in commerce would be ill-advised. Certainty about potential legal liability is an important component of business relationships. It encourages entrepreneurs to invest new capital in projects, thus promoting economic growth, and it allows established businesses to accurately assess the cost of marketing present and future products.¹⁷⁵ Unstable, judge-made tort theories can make it more difficult for small businesses to absorb the risk of loss, crippling their ability to compete with larger businesses on the basis of price.¹⁷⁶ Moreover, the uncertainty associated with tort liability in the United States has recently prompted some European corporations to reconsider doing business with American firms at all.¹⁷⁷ This response by foreign businesses illustrates the impact that judicial regulation can have on the economy.

The judiciary is the branch of government least competent to regulate commerce, either directly or indirectly.¹⁷⁸ The national economy's sensitivity demands that only legislatures, after weighing competing social concerns, create the duties that underlie liability for negligent commercial transactions.

Holding merchants responsible for the actions of "defective" customers amounts to imposing a fiduciary duty¹⁷⁹ on an enormous class of

173. See *Vic Potamkin Chevrolet, Inc. v. Horne*, 505 So. 2d 560, 563 (Fla. Dist. Ct. App. 1987) (en banc) ("sellers would sell fewer products, or they would sell them at a higher cost"), *aff'd*, No. 70,499 (Fla. Sept. 1, 1988) (Westlaw, 1988 WL 93694).

174. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (sweeping trade bill, intended to enhance competitiveness of American industry).

175. See *The Real Tort Conspirators*, Wall St. J., Apr. 8, 1988, at 14, col. 1 ("Some moderate predictability in the law is necessary before anyone can assess risks and establish what insurance can cover and how much to charge.").

176. Cf. Saddler, *Struggle Looms Over Standards in Liability Law*, Wall St. J., Feb. 25, 1988, at 29, col. 3 (company president supports federal legislation to limit state tort liability after his company was held liable for \$6.2 million; company lost its insurance and had to lay off 80 workers).

177. See, e.g., *CBI to Fight U.S. Liability Ruling*, The Times (London), Apr. 28, 1986, at 17, col. 2 (reporting that European companies are finding it difficult to compete in American markets because of excessive tort liability against businesses); Fleet, *Nader Charges Unfounded*, The Times (London), Jan. 16, 1986, at 19, col. 1 (reporting that Lloyd's of London has lost all confidence in U.S. tort system).

178. See *Vic Potamkin Chevrolet, Inc. v. Horne*, No. 70,499, slip op. at 4 (Fla. Sept. 1, 1988) (Westlaw, 1988 WL 93694) (quoting *Shands Teaching Hosp. & Clinics, Inc. v. Smith*, 497 So. 2d 644, 646 (Fla. 1986), for proposition that judicial branch is the branch least competent to receive public input and resolve broad public policy questions).

179. See *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, J.) ("Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place.").

innocent third parties.¹⁸⁰ As discussed above, such a fiduciary duty has staggering commercial implications.¹⁸¹ When courts have imposed fiduciary obligations on sellers in other contexts,¹⁸² they have generally defined the obligations narrowly¹⁸³ and have enforced them for the benefit of a limited class of people.¹⁸⁴ In corporate law, for example, "under certain circumstances and for some purposes the majority stockholders, whether one or many, stand in a fiduciary relation to the corporation and to the minority stockholders."¹⁸⁵ Those majority stockholders are forbidden to sell their interests to "defective" purchasers who they know intend "to loot the corporation's treasury."¹⁸⁶ Selling to a looter would injure the minority stockholders of the looted corporation, violating the majority's fiduciary duty to those investors.¹⁸⁷ Although courts have been aggressive in imposing fiduciary obligations in some contexts,¹⁸⁸ they generally remain cautious in taking steps that would amount to judi-

180. See *Horne*, 502 So. 2d at 563 n.2 (a "parental relationship" would be created); cf. *Fowler v. Park Corp.*, 673 S.W.2d 749, 759 (Mo. 1984) (en banc) (Welliver, J., dissenting) ("[I]t would appear that . . . lessors of equipment and other chattel must investigate the qualifications of every employee of the firm acquiring the equipment who may operate it.").

181. See *id.* at 759-60 (future of leasing and lease-financing industry in Missouri will be jeopardized); *supra* notes 174-77 and accompanying text.

182. See, e.g., *Swinney v. Keebler Co.*, 480 F.2d 573, 577-78 (4th Cir. 1973) (in some circumstances, majority stockholders selling controlling interest in corporation have fiduciary duty to minority stockholders).

183. See, e.g., *id.* at 578 (With respect to shareholder liability, "the majority is not an absolute insurer against any wrongs which may be done to the corporation after the transfer of control or against any decisions by the new owners that may not be in the best interest of the minority.").

184. Cf. *Pepper v. Litton*, 308 U.S. 295, 307 (1939) (For directors and majority shareholders, the "fiduciary obligation is designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders." (footnote omitted and emphasis added)).

185. *Gerdes v. Reynolds*, 28 N.Y.S.2d 622, 650 (Sup. Ct. 1941); see also *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1971) ("The controlling stockholder owes the corporation a fiduciary obligation . . ."); *Swinney*, 480 F.2d at 577-78 ("majority stockholders who assume the management of the corporation . . . can be said to stand in fiduciary relation to the minority under certain circumstances").

186. *Gerdes*, 28 N.Y.S.2d at 652; see *Swinney*, 480 F.2d at 578.

[I]f the sellers of control are in a position to foresee the likelihood of fraud on the corporation . . . or on the remaining stockholders . . . their fiduciary duty imposes a positive duty to investigate the motives and reputation of the would-be purchaser; and unless such a reasonable investigation shows that to a reasonable man, no fraud is intended or likely to result, the sellers must refrain from the transfer of control.

Id. (citation and footnote omitted).

187. Cf. *Swinney*, 480 F.2d at 577 (sellers of controlling interests held liable based on breach of duty not to sell without adequate investigation when circumstances indicated possible fraud) (following *Insuranshares Corp. v. Northern Fiscal Corp.*, 35 F. Supp. 22 (E.D. Pa. 1940)).

188. See, e.g., *United States v. Carpenter*, 791 F.2d 1024, 1030 (2d Cir. 1986), *aff'd*, 108 S. Ct. 316 (1987) (noting in insider trading case the importance of enforcing "Congress' stated concern for the perception of fairness and integrity in the securities markets and the potential costs of forsaking such legislated concerns, including fewer market participants").

cial legislation.¹⁸⁹

V. CONCLUSION

The scope of section 390 of the *Restatement (Second) of Torts* and its effect on sellers and lessors of nondefective products will be the subject of increasing litigation. To date, few courts have specifically addressed the negligent commercial transaction tort; even fewer have recognized the potential commercial impact of this judge-made right of action. Most courts have instead focused on adequately compensating injured plaintiffs, ignoring the argument that a proliferation of negligent commercial transaction suits against merchants will have detrimental economic effects.

Congress and the state legislatures have the power to regulate the sale of certain goods to specific classes of buyers,¹⁹⁰ and legislative regulation of alcohol and inherently dangerous products is admittedly in the public interest. Imposing a judge-made duty on sellers to match all kinds of products with "acceptable" consumers, however, harms the industries

189. See, e.g., *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 12 (1985) (In determining meaning of "manipulative" under § 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e) (1982), the legislative purpose is controlling because "[i]nviting judges to read the term 'manipulative' with their own sense of what constitutes 'unfair' or 'artificial' conduct would inject uncertainty into the tender offer process."); cf. *Cannon v. University of Chicago*, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) (noting, in civil rights context, that "this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch").

In the context of SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1988), the Supreme Court, in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), considered whether to extend a private cause of action under the Rule to a stock offeree "in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5 (1988). The majority declined to do so. 421 U.S. at 755. In a concurring opinion, Justice Powell opposed broadening sellers' common law liability to offerees, citing many of the same economic considerations that weigh against imposing judge-made duties on merchants of chattels:

the courts already have inferred a private cause of action that was not authorized by the legislation. . . . If such a far-reaching change is to be made, with unpredictable consequences for the process of raising capital so necessary to our economic well-being, it is a matter for the Congress, not the courts.

Id. at 759-60 (Powell, J., concurring).

Justice Powell understood that commercial liability affects a wide range of interests, and that courts should allow legislatures to balance the concerns of undercompensated, sympathetic plaintiffs with the needs of our free-market economy.

190. See, e.g., U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . ."); MASS. CONST. pt. 2, ch. 1, art. IV, § 1 (state legislature has full power and authority to make laws "for the good and welfare of this commonwealth"); TEX. CONST. art. 3, § 1 ("The Legislative power of this State shall be vested in a Senate and House of Representatives . . .").

that the courts decide to regulate.¹⁹¹ Fewer goods will be produced, and they will be sold to consumers at higher prices. Moreover, small businesses will find it difficult to compete with large competitors who can more easily absorb the added risk of liability. In some markets, this risk may create a formidable barrier to entry for small businesses, harming competition.

The future direction of the negligent commercial transaction tort is unclear. However, under the sweeping language of cases like *Dillon, Barnes*, and *Fowler*, actions might conceivably be brought against an aircraft supplier on behalf of crash victims for the sale of passenger aircraft to an airline with a "poor" safety record, or against a passenger train supplier for leasing coaches to an operator with a recent history of train accidents.

In *Horne*, the Supreme Court of Florida considered economic principles that had previously been ignored in the debate over the negligent commercial transaction tort's scope. American industries that feel that jurists cannot or will not adequately address their interests when creating amorphous new duties will welcome *Horne*'s new approach. As the *Horne* court has recognized, the legislature is the branch of government best qualified to balance society's interests when an issue involves substantial economic impact. The judicial restraint of the Florida Supreme Court in *Horne* should serve as a model to other states forced to consider the proper scope of section 390 of the *Restatement (Second) of Torts* with respect to the sellers and lessors of nondefective goods.

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191. See *Horne v. Vic Potamkin Chevrolet, Inc.*, No. 70,499, slip op. (Fla. Sept. 1, 1988) (Westlaw, 1988 WL 93694) (automobile industry); *Fowler v. Park Corp.*, 673 S.W.2d 749, 759 (Mo. 1984) (en banc) (Welliver, J., dissenting) (leasing industry).