

COMMENT

EVERY DOG CAN HAVE ITS DAY: EXTENDING LIABILITY BEYOND THE SELLER BY DEFINING PETS AS “PRODUCTS” UNDER PRODUCTS LIABILITY THEORY

By
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Is a pet a “product”? A pet is a product for purposes of products liability law in some states, and, as this article will show, the remaining states should follow suit. Every year, thousands of “domesticated” animals are sold to consumers who are uninformed as to the animals’ propensities or to the proper method of animal care. In some instances, these animals are unreasonably dangerous in that they spread disease to humans or attack, and possibly kill, unwitting victims. Improper breeding and training techniques and negligence in sales have led to horrific injury. This comment will demonstrate how merely considering pets as products opens up new theories of liability for the plaintiff’s lawyer, offering a deeper base of defendants who are both morally and legally at fault. From the standpoint of a consumer advocate and with concern for both human and animal welfare, the author proposes employing products liability theory to the sale of domesticated animals. By making sellers of “defective” animals accountable for personal injury that these animals cause, the quality of the animals bred and sold will likely improve. Where it does not improve and injury results, the victim may have recourse beyond the confines of contract remedies. Products liability theory is a lawful and needed method for preventing future harm and providing for a healthier human and animal kingdom.

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But the poor dog, in life the firmest friend,
 The first to welcome, foremost to defend;
 Whose honest heart is still his master's own,
 Who labors, fights, lives, breathes for him alone,
 Unhonour'd falls, unnoticed all his worth,
 Denied in heaven the soul he held on earth:
 While man, vain insect, hopes to be forgiven,
 And claims himself a sole exclusive of Heaven.¹
 A pet is not an inanimate thing that just receives affection; it also re-
 turns it.²

I. INTRODUCTION

When a goldfish dies on the same day of purchase, the pet store might replace the goldfish free of charge.³ The problem would be solved at the store owner's expense, quickly and efficiently. When an eleven-month-old Persian or Pomeranian dies of leukemia,⁴ the costs are more burdensome—veterinary bills, expenses for additional care, replacement costs, and the loss of what many would consider a family member.⁵ Who should bear these costs? When an inadequately trained assistive animal leads its master into a busy intersection, liability cer-

¹ *McCallister v. Sappingfield*, 144 P. 432, 433 (Or. 1914) (quoting George Gordon, Lord Byron, *Inscription on the Monument of a Newfoundland Dog*).

² *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. City Civ. Ct. 1979).

³ For example, Fish Express, a world-wide shipper of goldfish and koi, even guarantees that a fish will make a transnational journey safely, ending in one's fishbowl or the fish is replaced for free. Fish Express, *Guarantee*, <http://www.fish-express.com/guarant.html> (accessed Feb. 7, 2006). However, the company will still charge the buyer for boxing and shipping costs associated with the dead fish. *Id.*

⁴ See e.g. *State v. Lazarus*, 633 So. 2d 225 (La. App. 1st Cir. 1993) (vacating animal cruelty convictions of breeders of many diseased Persian and Himalayan cats on basis of illegal search and seizure).

⁵ See Geordie L. Duckler & Dana M. Campbell, *Nature of the Beast: Is Animal Law Nipping at Your Heals*, 61 Or. St. B. Bull. 15, 17 (June 2001) ("[T]he law now recognizes that pet owners and their pets can have a 'relationship,' and that that relationship has an intrinsic worth which can be valued and compensated if destroyed."); but see *Soucek v. Banham*, 524 N.W.2d 478, 478 (Minn. App. 1994) ("[D]amages for the loss of a pet are limited to replacement cost.").

tainly cannot lie with the master.⁶ Who should be responsible? When an overly aggressive pit bull, trained to fight by its indigent owner, massacres a small child, the loss imposed upon the child's family is immeasurable and unbearable.⁷ To whom can the family turn to right the wrong done to it?

These issues are commonplace and nationwide in scope. Goldfish are easy—there are plenty of fish in the sea. But when a human factor is added—when loss is something more than just mere numbers—things become complex. Although human loss can never truly be recovered, its associated financial burdens can be compensated.

Products liability is a potential answer to the problem of financial compensation. By simply labeling a domesticated animal a “product” for the purposes of products liability theory, tort, and contract law, all of the above situations are financially compensable, often by unorthodox parties with more culpability (and deeper pockets) than one might imagine. Many pet owners undoubtedly feel uncomfortable applying the term “product” to describe a creature to which they have a special and lifelong bond. However, to do so will equally benefit animal and owner alike.

This comment will demonstrate how merely considering pets as products opens new theories of liability for the plaintiff's lawyer, offering a deeper base of defendants who are both morally and legally at fault. Part II of this comment discusses the term “product” as defined through statute and case law. It proves that pets comfortably fit within any definition of the term and, thus, are susceptible to products liability theories. Part III incorporates pets into negligence, strict liability, and warranty claims, the primary claims under the guise of products liability law. Part IV discusses the multi-faceted implications of deeming pets as products, its public policy concerns and its adverse effects. Finally, the conclusion of this comment advocates a nationwide policy of applying products liability theory to the sale of all domesticated animals and offers some solutions to properly institute and enforce this proposal.

Simply conceding that a pet is a product will likely reduce the horrors of animal attacks and unnecessary human and animal deaths tenfold. An appropriate and lawful interpretation of a single word can improve our courts in such a manner that every dog will have its day.

⁶ See *Meacham v. Loving*, 285 S.W.2d 936, 937 (Tex. 1956) (overturning a Court of Appeals ruling that a blind pedestrian was contributorily negligent as a matter of law when she was struck by a car while crossing a street with her seeing eye dog).

⁷ See *Chase v. City of Memphis*, 971 S.W.2d 380, 381 (Tenn. 1998) (Two pit bulls viciously attacked and killed a woman.); *County of Spokane v. Bates*, 982 P.2d 642, 643 (Wash. App. 1999) (A pit bull mauled a three-year-old girl.).

II. ANIMALS AS “PRODUCTS”

A. *Animals and Restatements*

Since the inception of the American legal system, one principle has remained unchanged: animals are property, “in many ways no different than a chair or car or other chattel.”⁸ Further, “[t]he classification of animals as property to be owned and used by humans has had ramifications throughout the law—for example, in the permissible degradation of the environment, the sanctioning of hunting, the legal use of animals in scientific experiments, and the underenforcement of anti-cruelty laws.”⁹ Some states have this classification expressly embedded in their statutes.¹⁰ Pets, too, are considered property, but undoubtedly this alone is an inadequate classification:

[A] pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property [Property,] while it might be the source of good feelings is merely an inanimate object and is not capable of returning love and affection To say [a dog] is a piece of personal property and no more is a repudiation of our humaneness.¹¹

Although most pet owners might not consider their animals as mere property, considering animals as property, and further equating “property” with “product,” would benefit the average pet owner.

The unfortunate truth is that some courts short-change the pet owner in two ways. First, since pets are considered property under the law, owners are entitled only to replacement costs or the objective “fair market value” when the animal is negligently destroyed by another.¹² Second, because pets are not “products” for the purposes of products liability theory, plaintiff pet owners, as well as victims of animal vio-

⁸ Duckler & Campbell, *supra* n. 5, at 16; Soucek, 524 N.W.2d at 481 (“Soucek cannot recover punitive damages for the loss of his pet because he only suffered property damage.”); see *infra* nn. 168–174 and accompanying text (for a discussion of animals as “chattels” in negligence).

⁹ Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 Neb. L. Rev. 783, 783–84 (2004).

¹⁰ Or. Rev. Stat. Ann. § 609.020 (2003) (“Dogs are hereby declared to be personal property.”); Ariz. Rev. Stat. § 1-215(30) (2006) (“‘Personal Property’ includes money, goods, chattels, dogs”); Cal. Penal Code Ann. § 491 (West 1999) (“Dogs are personal property, and their value is to be ascertained in the same manner as the value of other property.”).

¹¹ Corso, 415 N.Y.S.2d at 183.

¹² *Anzalone v. Kragness*, 826 N.E.2d 472, 476–77 (Ill. App. 1st Dist. 2005); but see *McCallister v. Sappingfield*, 144 P. 432, 434 (Or. 1914) (“The true rule being that the owner of a dog wrongfully killed is not circumscribed in his proof to its market value, for, if it has no market value, he may prove its special value to him by showing its qualities, characteristics and pedigree, and may offer the opinions of witnesses who are familiar with such qualities.”). This doctrine has since evolved into the “value to the owner” rule. See *Mitchell v. Heinrichs*, 27 P.3d 309, 313 (Alaska 2001) (“The majority rule holds that the proper measure of recovery for the killing of a dog is the dog’s fair market value at the time of its death. But other courts have recognized that the actual value to the owner, rather than the fair market value, may sometimes be the proper measure of the dog’s value.”).

lence or disease, are foreclosed from using product liability principles in court.¹³ The terms “property” and “product” are not legally synonymous, especially for purposes of products liability. While all products certainly are someone’s property, only in some jurisdictions is the converse true of pets for product liability purposes.¹⁴

Arguably, the Uniform Commercial Code (UCC) and proposed amendments thereto place animals into an entirely different context.¹⁵ Under the UCC, animals comfortably fit into the definition of “goods.”¹⁶ Livestock have been analyzed under UCC provisions,¹⁷ but cases involving house pets are few and far between; however, some courts expressly find dogs and cats classifiable as “goods.”¹⁸

The UCC defines “goods” as “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale.”¹⁹ Certainly, even an elephant is a movable thing when it is bought and sold. Further, the UCC specifically includes “the unborn young of animals” within its definition of “goods.”²⁰ Thus, animals may be considered both “property” and “goods.” It is unclear whether “products” are included within the “specially manufactured goods” to which the code refers.²¹

¹³ See generally *Whitmer v. Schneble*, 331 N.E.2d 115, 119 (Ill. App. 2d Dist. 1975); *Anderson v. Farmers Hybrid Cos., Inc.*, 408 N.E.2d 1194, 1199 (Ill. App. 3d Dist. 1980). *Whitmer* is the leading case for the line of cases reasoning that animals are not products for the purposes of strict products liability. *Infra* nn. 66–71.

¹⁴ See e.g. *Beyer v. Aquarium Supply Co.*, 404 N.Y.S.2d 778, 778–79 (N.Y. Misc. 2d 1977) (denying defendant’s motion to dismiss based on defendant’s claim that a hamster is not a product, thus ruling that a hamster may be a product); *Worrell v. Sachs*, 563 A.2d 1387, 1387–89 (Conn. Super. 1989) (holding that a puppy sold to plaintiff (i.e. his property) was a “product”); but see *Whitmer*, 331 N.E. 2d at 119–20 (holding that a dog, though property of its master, was not a product for purposes of strict products liability).

¹⁵ See generally U.C.C. § 2-105, 1 U.L.A. 379 (2005); U.C.C. § 2-103, 1 U.L.A. 372 (2005) (proposed amended version).

¹⁶ See e.g. *Wang v. Miss Ark Fisheries*, 1996 U.S. Dist. LEXIS 21489 (N.D. Miss. Oct. 11, 1996) (applying state version of the Uniform Commercial Code to dispute over sale of striped bass fingerlings); *Alpert v. Thomas*, 643 F. Supp. 1406, 1413 (D. Vt. 1986) (“The provisions of the Uniform Commercial Code are applicable to the sale of the [Arabian] stallion in this case.”); *Clifton Cattle Co. v. Thompson*, 117 Cal. Rptr. 500, 504 n.3 (Cal. App. 2d Dist. 1974) (citing Ann. Cal. Com. Code § 215) (in a case about a contract for the sale of cattle, stating that “[g]oods’ of course includes animals.”); *Bazzini v. Garrant*, 455 N.Y.S.2d 77, 78 (N.Y. Misc. 2d 1982) (upholding District Court’s application of the Uniform Commercial Code to the sale of a bird); *Dempsey v. Rosenthal*, 468 N.Y.S.2d 441, 443 (N.Y. Misc. 2d 1983) (“Mr. Dunphy, a pet dog, is considered a ‘good’ as defined by” the Uniform Commercial Code.).

¹⁷ See e.g. *Anderson*, 408 N.E.2d at 1199 (holding that swine are not “products” under products liability law or the Restatement (Second) Torts § 402A).

¹⁸ See e.g. *O’Brien v. Wade*, 540 S.W.2d 603 (Mo. App. 1976) (holding seller liable under the U.C.C. for breach of warranty regarding the sale of a dog).

¹⁹ U.C.C. § 2-105(1).

²⁰ *Id.*

²¹ *Id.*

Products liability law has been around for nearly half a century.²² Yet legal definitions of the term “product” are hard to come by, leaving unclear exactly what is included in its definition.²³ The Restatement (Second) of Torts and the works of tort experts are void of any viable definition.²⁴ The lack of a concrete definition has led to many, often inequitable, interpretations of the term. “Courts in a number of jurisdictions have wrestled with this problem, alternatively turning to the applicable case law, public policy considerations, the Restatement (Second) of Torts, and other sources for guidance.”²⁵ To this day, there is no nationally accepted definition of “product.”²⁶

With courts issuing different rulings on similar facts,²⁷ the need for a concrete definition of “product,” accepted by a majority of jurisdictions, is clear. Animals sold to consumers must be included in that definition. The controversial Restatement (Third) of Torts: Products Liability attempts to provide a modern definition:

- (a) A product is tangible personal property distributed commercially for use or consumption. Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in this Restatement.
- (b) Services, even when provided commercially, are not products.
- (c) Human blood and human tissue, even when provided commercially, are not subject to the rules of the Restatement.²⁸

²² See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1962) (“A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 461–68 (Cal. 1944) (concurring in judgment that the defendant is liable for an exploding bottle, but expressing a desire to have done so using strict liability theory).

²³ Christopher H. Hall, *Live Animal as “Product” for Purposes of Strict Products Liability*, 63 A.L.R.4th 127, 130 (2004).

²⁴ See e.g. *Lowrie v. City of Evanston*, 365 N.E.2d 923, 925–26 (Ill. App. 1st Dist. 1977) (“In comment d to section 402A, what appears to be an attempt to define the meaning of the phrase ‘sale of any product’ resulted in a mere listing of various types of products [We] note also that no definition of the term ‘product’ appears in the works of Prosser, the driving force behind strict products liability.”).

²⁵ Hall, *supra* n. 23, at 130.

²⁶ *Id.*

²⁷ *Id.* at 130–32.

²⁸ *Restatement (Third) of Torts: Products Liability* § 19(a)–(c) (1998); Andrew C. Spacone, *Strict Liability in the European Union – Not a United States Analog*, 5 Roger Williams U. L. Rev. 341, 341 n. 2 (2000) (“In 2(b), the American Law Institute adopted a definition for design defect, which moves away from the ‘consumer expectation’ test set forth in the previous Restatement, towards a test which centers on the feasibility of an alternate design. Such a test is much closer to a negligence concept than to traditional strict liability.”); Kristen David Adams, *The Folly of Uniformity? Lessons From the Restatement Movement*, 33 Hofstra L. Rev. 423, 441 n.73 (2004) (“James Henderson and Aaron Twerski, for example, served as Reporters for the highly controversial *Restatement (Third) of Torts: Products Liability*. Henderson and Twerski have stated unequivocally that, ‘In no meaningful sense of the term did we “play politics” in our roles as

A few terms in this definition are ambiguous. For example, Merriam-Webster defines “tangible” as “capable of being perceived especially by the sense of touch.”²⁹ Undoubtedly, even a pet sea monkey meets this definition, as do all live pets. Obviously, pets are also distributed commercially, such as in pet stores and through breeders.³⁰ Further, one certainly does not purchase a service when buying an animal. Yet, in many of the jurisdictions that have addressed the issue, pets are still not regarded as “products” under the law.³¹

The problem must arise from the provision “for use or consumption.”³² Clearly, food is a product,³³ and courts implicitly recognize it as such.³⁴ Yet, while a live cow is not a “product,” it becomes so once killed for human use. Perhaps this oversimplifies the issue, but pets are bought “for use” much like their stuffed toy versions are bought for children. Many buy live pets for the same purpose as a doll or toy—for the enjoyment of the purchaser or ultimate consumer. Further, animals are also bought for work purposes, be it a horse-and-carriage ride around Central Park³⁵ or a husky-pulled sled race across the Alaskan tundra.³⁶ Therefore, even under a conservative reading, animals fall within the Restatement’s definition of “product.”³⁷

Perhaps the exemption of human blood from the Restatement’s provisions causes courts to deny animals as “products.”³⁸ Blood has been the source of much debate in the area of products liability,³⁹ and

drafters of the new Restatement.’ Henderson and Twerski go on to state that ‘law, fairly articulated and evenly applied must, of necessity, impose constraints’ ‘Thus,’ they argue, ‘political opposition to the Products Restatement may stem not so much from what it says than from the fact that it says anything at all.’ (citations omitted).

²⁹ Merriam-Webster’s Online Dictionary, *Tangible*, <http://www.webster.com/dictionary/tangible> (accessed Feb. 24, 2006).

³⁰ Hundreds of thousands of cats and dogs are sold commercially in the United States every year; for example, statistics from the Pet Industry Joint Advisory Council (PIJAC) estimate that pet stores sell approximately four hundred thousand puppies annually. Humane Socy U.S., *Get the Facts on Puppy Mills*, http://www.hsus.org/pets/issues_affecting_our_pets/get_the_facts_on_puppy_mills/index.html (accessed Feb. 21, 2006).

³¹ See generally *Whitmer v. Schneble*, 331 N.E.2d 115, 119 (Ill. App. 2d Dist. 1975); *Anderson v. Farmers Hybrid Cos., Inc.*, 408 N.E.2d 1194, 1199 (Ill. App. 3d Dist. 1980). *Whitmer* is the leading case for the line of cases reasoning that animals are not products for the purposes of strict products liability. *Infra* nn. 63–67.

³² *Restatement (Third) of Torts: Products Liability* § 19(a).

³³ *Restatement (Second) of Torts* § 402A cmt. b (1965).

³⁴ Charles E. Cantu, *A Continuing Whimsical Search for the True Meaning of the Term “Product” in Products Liability Litigation*, 35 St. Mary’s L.J. 341, 355 (2004).

³⁵ See e.g. New York Focus, *Central Park Carriage Rides*, http://www.centralpark2000.com/touring/sports_recreation/carriage_rides.htm (accessed Feb. 18, 2006) (showing photos of carriage rides in Central Park, N.Y.C., N.Y.).

³⁶ See e.g. Iditarod Trail Committee, *Iditarod Trail Sled Dog Race*, <http://www.iditarod.com> (accessed Feb. 18, 2006) (for information about dogsled race across arctic terrain in Alaska).

³⁷ *Restatement (Third) of Torts: Products Liability* § 19(a)–(c).

³⁸ *Id.* at § 19(c).

³⁹ Daniel A. Harvey, *The Applicability of Strict Products Liability to Sales of Live Animals*, 67 Iowa L. Rev. 803, 809–10 (1982).

“[m]ost states have enacted ‘Blood Shield Statutes’ which explicitly state that blood is not a product.”⁴⁰ It is important to note, however, that some of these statutes look at a blood transfusion as providing a service rather than a product.⁴¹ Typically, the ordinary sale of an animal should not be construed as providing a service. The transaction fits better when characterized as the sale of a product. When the subject of the sale induces the purchase, then the subject sold is a product.⁴² Therefore, under the Restatement (Third) of Torts: Products Liability, animals sold in commerce are products.

At least, the language seems to support that conclusion. However, comment (b) of the Restatement should end all debate. It states that “when a living animal is sold commercially in a diseased condition and causes harm to other property or persons, the animal constitutes a product for purposes of this Restatement.”⁴³ Therefore, an animal is a product, but only clearly so for a limited number of situations in which that animal can cause harm.

B. State Legislative and Judicial Constructions

The Restatement (Third) of Torts: Products Liability offers a useful definition of product.⁴⁴ But courts and legislatures continue to ignore the only nationally acknowledged definition of “product”⁴⁵ and the only law review article relating to the subject, which may be the

⁴⁰ Cantu, *supra* n. 34, at 343 n. 7; *see e.g.* Ala. Code § 7-2-314(4) (Supp. 2005) (Medical use of human blood and blood products is considered rendition of a service and not the sale of such blood or blood products.); Ark. Code Ann. § 4-2-316(3)(d)(i) (2001) (Human blood and related products are not considered commodities but are considered as medical services.); Colo. Rev. Stat. § 13-22-104(2) (2005) (Medical use of human tissues and blood is the performance of a medical service and does not constitute a sale.); Conn. Gen. Stat. § 19a-280 (2003) (Human blood and tissues are not commodities subject to sale, but are considered as medical services.).

⁴¹ *See supra* n. 40 and accompanying text (discussing various blood shield statutes and their treatment of blood as services).

⁴² Cantu, *supra* n. 34, at 353.

⁴³ *Restatement (Third) of Torts: Products Liability* § 19 cmt. b.

⁴⁴ *Restatement (Third) of Torts: Products Liability* § 19(a)–(c).

⁴⁵ *Id.* The ill-received Model Uniform Product Liability Act and the Consumer Product Safety Act (CPSA) also provide definitions of “product,” both of which arguably include live animals. Model Uniform Product Liability Act, § 102(C) (reprinted in 44 Fed. Reg. 62,714, 62,717 (Oct. 1, 1979)) (“‘Product’ means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce.”); 15 U.S.C. § 2052(a)(1)(I) (2000) (excluding food from CPSA definition of “product” but not addressing live animals); *see also* 15 U.S.C. § 2052(a)(1) (defining “product” as: “any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise.”); *Sease v. Taylor’s Pets, Inc.*, 700 P.2d 1054 (Or. App. 1985) (holding that a rabid skunk is a “product” under product liability law).

most logical and common sense approach to viewing animals sold in commerce.⁴⁶

Unfortunately, restatements, law reviews, and even common sense do not always accurately state the law. As such, the term “product” is subject to widely differential interpretations and “must be examined on a state by state, and sometimes even court by court basis.”⁴⁷ The broadest legislative definitions are found in the statutes of Arkansas and Tennessee.⁴⁸ Nearly identical, the two statutes define “product” as any “tangible object or goods produced.”⁴⁹ These states seem to adhere to section 19(a) of the Restatement (Third) of Torts: Products Liability.⁵⁰

Louisiana and Indiana created their own definitions of “product.”⁵¹ Louisiana’s statute refers to a product as a “corporeal moveable,” but exempts human organs, tissue, and blood, as well as certain animal tissues.⁵² Indiana, on the other hand, “equates a product with ‘personalty’ at the time it is conveyed, and restricts the application of the term to a transaction which is predominantly a service.”⁵³ However, state legislatures that actually define “product” are rare;⁵⁴ if a state legislature chooses to be silent, its courts often do the speaking.⁵⁵

The Restatement (Third) of Torts makes strict products liability simple. In one sentence, the model code sums up the modern trend in products liability theory: “One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by

⁴⁶ Harvey, *supra* note 39 (Harvey advocates strict liability in animal sales ahead of its time; unfortunately the law has yet to catch up.).

⁴⁷ Louis R. Frumer & Melvin I. Friedman, *Products Liability* § 1.03 (Matthew Bender & Co., Inc. 2005).

⁴⁸ Ark. Code Ann. § 16-116-102(2)(1987); Tenn. Code Ann. § 29-28-102(5)(1980).

⁴⁹ *Id.*

⁵⁰ *Restatement (Third) of Torts: Products Liability* § 19(a)–(c).

⁵¹ La. Rev. Stat. Ann. § 9:2800.53(3)(West 1997); Ind. Code Ann. § 34-6-2-114(a)(LEXIS 1998).

⁵² La. Rev. Stat. Ann. § 9:2800.53(3).

⁵³ Ind. Code Ann. § 34-6-2-114(a).

⁵⁴ Anita Bernstein, *How Can a Product Be Liable?* 45 Duke L.J. 1, 51 n. 252 (1995) (citing Ariz. Rev. Stat. Ann. § 12-681 (1982); Ark. Code Ann. § 16-116-102; Del. Code Ann. tit. 18, § 7001 (1989); Idaho Code § 6-1402(3) (2006); Ill. Rev. Stat. ch. 110, ¶ 13-213 (1989 & Supp. 1990); Ind. Code Ann. § 33-1-1.5-2 (West 1983 & Supp. 1991); Md. Cts. & Jud. Proc. Code Ann. § 5-311 (1995); Ohio Rev. Code Ann. § 2307.71 (Anderson 1991); Tenn. Code Ann. § 29-28-102; Wash. Rev. Code Ann. § 7.72.010 (West 1992) (1990)) (“Several states have defined ‘product’ for purposes of strict liability in their statutes.”). Other states entirely fail to define the term “product.” Frumer & Friedman, *supra* n. 47, at § 1.03 (Connecticut, New Jersey, and Kentucky are just a few of the states that do not define the term at all.).

⁵⁵ See e.g. *Sanders v. Acclaim Entertainment, Inc.*, 188 F. Supp. 2d 1264, 1279 (D. Colo. 2002) (holding that the intangible thoughts, ideas, and expressive content in games and movies were not “products” as contemplated by the strict liability doctrine); *Condos v. Musculoskeletal Transplant Foundation*, 208 F. Supp. 2d 1226, 1229–30 (D. Utah 2002) (human bone tissue was not a “product” subject to products liability law).

the defect.”⁵⁶ But not all jurisdictions have adopted strict products liability;⁵⁷ few adopt it for the sale of animals.⁵⁸ As such, the focus should simply be to include animals as products for the purposes of all claims, not just for the purposes of strict liability.

“The modern rule of strict liability for defective products that turn out to be unreasonably dangerous would, at first blush, appear to afford a basis for relief” from damages caused by living organisms.⁵⁹ After Illinois first denied “product” status to animals,⁶⁰ other states followed suit. These include Colorado,⁶¹ Missouri,⁶² Ohio,⁶³ South Dakota,⁶⁴ and, only recently, Georgia.⁶⁵

Illinois’ justifications for the rule were first enumerated in *Whitmer v. Schneble*.⁶⁶ There, a female doberman pinscher who had just given birth bit a child in the defendant-owner’s home.⁶⁷ The defendant, however, filed a third-party complaint against the dog’s previous owner, alleging strict liability for selling the defendant an “inherently dangerous” (or defective) product, among other claims.⁶⁸ To be successful on this claim, the defendant had to convince the court that the doberman pinscher was, in fact, a product.⁶⁹

The court ruled that for the doberman to be deemed a product, it must meet the following criteria:

[I]ts nature must be fixed when it leaves the manufacturer’s or seller’s control. And the product must reach the user without substantial change. The purpose of imposing strict liability is to insure that the costs of injuries resulting from defective products are borne by those who market such products rather than by the injured persons, who are powerless to protect themselves. This purpose would be defeated if [strict liability] were to be

⁵⁶ *Restatement (Third) of Torts: Products Liability* § 1.

⁵⁷ Massachusetts, Delaware, Michigan, Virginia, and North Carolina are all hold-outs. David G. Owen et al., *Products Liability and Safety* 170 (4th ed., Foundation Press 2004).

⁵⁸ For examples of the few jurisdictions that have adopted strict liability for the sale of animals, see *Beyer*, 404 N.Y.S.2d at 778 (strict products liability applied to the sale of diseased hamsters); *Worrell v. Sachs*, 563 A.2d 1387, 1387–89 (Conn. Super. 1989) (strict products liability applied to the sale of a puppy with a parasitic infection).

⁵⁹ J. W. Looney, *Serving the Agricultural Clients of Tomorrow*, 2 Drake J. Agric. L. 225, 226–27 (1997) (pointing out that courts may have difficulty applying traditional liability rules when the “harmful thing” is a living organism).

⁶⁰ *Whitmer*, 331 N.E.2d at 119; *Anderson*, 408 N.E.2d at 1199.

⁶¹ *Kaplan v. C Lazy U Ranch*, 615 F. Supp. 234, 238 (D. Colo. 1985).

⁶² *Latham v. Walmart Stores, Inc.*, 818 S.W.2d 673, 676 (Mo. App. 1991).

⁶³ *Malicki v. Koci*, 700 N.E.2d 913, 915 (Ohio App. 8th Dist. 1997).

⁶⁴ *Blahe v. Stuard*, 640 N.W.2d 85, 88 (S.D. 2002) (arguably overruling the Supreme Court of South Dakota’s prior decision in *Sybesma v. Sybesma*, 534 N.W.2d 355, 357 (S.D. 1995), which upheld a cause of action for injuries sustained from a domestic animal under negligence or strict liability theory).

⁶⁵ *Coogle v. Jahangard*, 609 S.E.2d 151, 153 (Ga. App. 2005).

⁶⁶ 331 N.E.2d 115.

⁶⁷ *Id.* at 117.

⁶⁸ *Id.*

⁶⁹ *Id.* at 119.

applied to products whose character is shaped by the purchaser rather than the seller.⁷⁰

In assuming that a dog's character is shaped by the owner rather than the seller, the court ruled that the doberman pinscher was not a product.⁷¹ However, given current knowledge and scientific advancement in genetics,⁷² one could imagine the seller or a third party being at fault as a result of genetically shaping an animal's character. Then again, under some of today's laws, an animal is not always an "animal," much less a "product."⁷³

Illinois followed the same logic in *Anderson v. Farmers Hybrid Cos., Inc.*, stating that products liability should not be applied "to products whose character is easily susceptible to changes wrought by agencies and events outside the control of the seller."⁷⁴ Further, the court added that animals are not part of "the extensive list of products" enumerated in the commentary of the Restatement (Second) of Torts section 402A and that courts should refrain from using a dictionary to define "product."⁷⁵ Section 402A does not exclude animals as products, but nor does it include many items universally accepted as "products."⁷⁶ Further, comment (c) of the Restatement seems to interchange "products" and "goods" as if the two are synonyms.⁷⁷ This could mean that animals, as "goods," are also "products" under the Restatement.

⁷⁰ *Id.* at 119 (citations omitted).

⁷¹ *Id.*

⁷² Today,

[n]early all breeding of domestic animals is selective as opposed to random. Years ago, before the era of scientific genetics, breeding was done more by phenotype than by pedigree. Race horses tended to be bred by the stopwatch. That was where the money was. Dairy cattle were bred by the volume and quality of their milk, meat animals, by the speed of maturation and ratio of feed to meat, and so on. Later, it was recognized that breeding together closely related animals tended to speed up the process of "fixing" the desired traits within a few generations.

Catherine Marley, *Breeding-Dogs or Pedigrees*, <http://www.canine-genetics.com/Assort2.htm> (1997). The more knowledge we gain of a particular species' "defective genes," the sooner we can use that knowledge to eliminate these defects through selective breeding. *Id.*

⁷³ See Duckler & Campbell, *supra* n. 5, at 15–16 (explaining how varying definitions of "animal" are found in laws and statutes as well as providing examples of states' definitions).

⁷⁴ 408 N.E.2d 1194, 1199.

⁷⁵ *Id.* at 1198.

⁷⁶ *Restatement (Second) of Torts* § 402A. Section 402A does not expressly denote many things as "products," such as blood, surgical pins, and electricity, which are products in other contexts. See e.g. *N. Suburban Blood Ctr. v. NLRB*, 661 F.2d 632, 638 n.9 (7th Cir. 1981) (explaining that several states recognize blood as a product and a service); *Bowles v. Zimmer Mfg. Co.*, 277 F.2d 868, 875 (7th Cir. 1970) (while the manufacturer of a surgical pin is not an insurer of his "product," he is liable for harm caused by the pin's negligent manufacture); *Bryant v. Tri-County Elec. Membership Corp.*, 844 F.Supp. 347, 352 (W.D. Ky. 1994) (holding that "ordinary electricity" is a product).

⁷⁷ *Restatement (Second) of Torts* § 402A cmt. c ("[T]he public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods . . .") (emphasis added).

Though the court may be uncomfortable using a dictionary to define products, this hesitancy is unwarranted. Merriam-Webster defines “product” as “something produced.”⁷⁸ Granted, this definition is vague, but when two animals mate we say that they “produce” offspring.⁷⁹ Building on this broad dictionary definition, perhaps the court should define “product” according to the current Illinois statutory definition: “any tangible object or goods distributed in commerce.”⁸⁰

The later cases from Colorado, Missouri, Ohio, and South Dakota⁸¹ solidified a name for the principle used to deny animals “product” status—“mutability.”⁸² “Mutability” is the “constant process of internal development and growth” affecting living creatures as well as their “constant interaction with the environment around them.”⁸³ Though this argument is not entirely without merit, it completely ignores the fact that when a person buys an animal there are certain qualities he or she justifiably expects the animal to always have. For example, a person likely does not expect to buy a dog that only has three legs from a pet shop. The buyer expects the dog to have four legs, to always have four legs, and to not have a pre-existing condition that will cause the dog to lose a leg. This example may seem absurd, but less obvious defects such as a cat with leukemia⁸⁴ or an animal with a disease transferable to humans are not so absurd.⁸⁵ This comment will show that even a dog bite may be the result of a defective product. One buys an animal with the expectation that it is in good health and of sound mind at the time of purchase.⁸⁶ If the animal is not, then one can argue that the seller sold a defective product.⁸⁷

On the other side of the argument, New York paved the trail for “product” status for animals,⁸⁸ followed by Oregon⁸⁹ and Connecti-

⁷⁸ Merriam-Webster Online Dictionary, *Product*, <http://www.webster.com/dictionary/product> (accessed Feb. 19, 2006).

⁷⁹ Conversely, when an animal is spayed or neutered, it is no longer capable of “producing offspring.” Janet Tobiassen Crosby, *Veterinary Q&A—Neutering (Castration) in Dogs and Cats*, <http://vetmedicine.about.com/cs/diseasesall/a/neutering.htm> (accessed Mar. 26, 2006).

⁸⁰ 735 Ill. Comp. Stat. § 5/13-213(a)(2) (2006).

⁸¹ *Blaha*, 640 N.W.2d at 88.

⁸² *Latham*, 818 S.W.2d. at 676.

⁸³ *Id.*

⁸⁴ *Lazarus*, 633 So. 2d at 227.

⁸⁵ *Sease*, 700 P.2d at 1055.

⁸⁶ *Infra* n. 125.

⁸⁷ “Defective condition” is defined in *Restatement (Second) of Torts* § 402A, comment g: “The rule stated in this Section applies only where the product is, at the time it leaves the seller’s hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.” Assuming a rabid skunk sold by a pet store is a product, the skunk most certainly seems to fall comfortably within this definition of “defective condition.” See *Sease*, 700 P.2d 1054, 1055 (a rabid skunk sold by pet store treated as a product).

⁸⁸ *Beyer*, 404 N.Y.S. 2d at 779.

⁸⁹ *Sease*, 700 P.2d at 1058.

cut.⁹⁰ In *Beyer v. Aquarium Supply Co.*, the plaintiff became ill after having contact with diseased hamsters sold by the defendant.⁹¹ She brought a strict products liability action against the defendant.⁹² The Supreme Court of New York denied the defendant's motion to dismiss, reasoning:

The purpose for imposing this doctrine in the products liability field is to distribute fairly equitably the inevitable consequences of commercial enterprise and to promote the marketing of safe products. Accordingly, there is no reason why a breeder, distributor or vendor who places a diseased animal in the stream of commerce should be less accountable for his actions than one who markets a defective manufactured product.⁹³

The court further pointed out that a disease in an animal can be just as difficult to detect, if not more so, than a defect in a manufactured product.⁹⁴

Oregon expounded upon the ruling in *Beyer* when a rabid pet skunk was sold to an unsuspecting plaintiff.⁹⁵ Consequently, the Court of Appeals of Oregon took an opposite view to that of *Anderson*⁹⁶ regarding the Restatement (Second) of Torts section 402A:

Comment e [to section 402A] makes clear that a "product" need not be manufactured or processed:

"Normally the rules stated in this section [402A] will be applied to articles which already have undergone some processing before sale, since there is today little in the way of consumer products which will reach the consumer without such processing. The rule is not, however, so limited, and the supplier of poisonous mushrooms which are neither cooked, canned, packaged, nor otherwise treated is subject to the liability here stated."⁹⁷

If a naturally growing, untreated fungi—a living organism—can be a "product" under the Restatement (Second) of Torts,⁹⁸ then so should other living organisms.

Further, the Oregon court refused to accept the mutability rule promulgated by Illinois case law and its progeny.⁹⁹ The court held that states' strict products liability statutes, which mirror section 402A, "cover products that are subject to both natural change and intentional alteration."¹⁰⁰

⁹⁰ *Worrell*, 563 A.2d at 1389; *Johnson v. William Benedict, Inc.*, 1993 Conn. Super. LEXIS 2605, *2 (Conn. Super. Ct. Oct. 5, 1993).

⁹¹ 404 N.Y.S.2d at 778.

⁹² *Id.*

⁹³ *Id.* at 779.

⁹⁴ *Id.*

⁹⁵ *Sease*, 700 P.2d at 1056.

⁹⁶ *Anderson*, 408 N.E.2d at 1199 (holding "gilts . . . are not products for purposes of imposing strict liability in tort under Section 402A").

⁹⁷ *Sease*, 700 P.2d at 1058.

⁹⁸ *Restatement (Second) of Torts* § 402A cmt. e.

⁹⁹ *Sease*, 700 P.2d at 1058.

¹⁰⁰ *Id.*

Connecticut took its views against the mutability doctrine even further.¹⁰¹ The Superior Court of Connecticut scoffed at the Illinois-based doctrine, stating that cases following it “inadequately analyze the interrelationship between mutability and product status.”¹⁰² Thus,

While § 402A makes mutability of the product highly significant on the issue of liability in any particular case, it does not speak to the question of product status. Since liability provisions require that the product reach the consumer without substantial change in its condition, a plaintiff cannot prove a case under this theory in the face of such change. But it does not necessarily follow logically, that inability to prove a case because of mutability means that an animal is not a product at all. Rather it means that liability may not attach to that particular product. The argument confuses proof of liability with status.

Not all product change provides exemption—only substantial change. Moreover . . . analogous product statutes do apply to products which are susceptible to change in character over time (e.g., food products, pressurized bottles, etc.).¹⁰³

The court further compares “products” to “goods” under the UCC, recognizing the latter’s inclusion of “the unborn young of animals.”¹⁰⁴

In 2005, Georgia weighed in on the issue, deciding, like Illinois and its followers, against application of products liability doctrine to pets.¹⁰⁵ But all hope is not lost, as many jurisdictions have yet to rule on the issue, and others, such as Wisconsin,¹⁰⁶ may be headed in the right direction.

The rules for each jurisdiction appear to have been established on a case-by-case analysis.¹⁰⁷ Depending on the grotesque or common-

¹⁰¹ *Worrell*, 563 A.2d at 1387.

¹⁰² *Id.*

¹⁰³ *Id.* at 1387–88.

¹⁰⁴ *Id.* at 1388. This is the converse of South Dakota. See *Blaha* 640 N.W.2d at 88–89 (adopting the holding of the courts of Illinois, Colorado, and Missouri, which have all held that animals, including dogs, cannot be “products” under the Restatement of Torts).

¹⁰⁵ See *Coogle*, 609 S.E.2d at 153 (“We are not persuaded by Coogle’s attempts to analogize this case involving the transfer of dog ownership to cases involving product liability and the placement of defective products into the stream of commerce. The inherent differences between a pet dog and a manufactured product are obvious, including whether the performance or behavior of these two is reasonably predictable.”). Is it not predictable that a dog will bite if provoked? That a young dog will chase a cat? That a dog will kick its leg if one scratches it in just the right spot? The point is that a consumer can reasonably expect a dog to have certain characteristics and not to have others, such as diseases or an overly-aggressive nature. See *infra* n. 125 (explaining consumer expectations).

¹⁰⁶ See *Griffin v. Miller*, 417 N.W.2d 196 (table), 1987 WL 29615 (Wis. App. 1987) (denying plaintiff’s strict liability claim for the sale of diseased cattle, completely bypassing the issue of whether cattle constitute “products,” as if assuming this to be so).

¹⁰⁷ Hawaii has literally adopted a case-by-case analysis, refusing to define “product” in any concrete form. Frumer & Friedman, *supra* n. 47, at § 1.03. Cantu states:

In short, the courts had employed a backdoor approach. They did not start with the issue of whether a product was involved. Instead, they determined whether

place nature of the facts of the first case addressing the issue, the court in question will adopt either the New York or Illinois view. By applying the New York rule to the facts of *Whitmer*, a court, although finding a dog to be a “product,” would still find no defect in the doberman pinscher. As the Illinois court provided, “[i]t is common knowledge that dogs bite,” especially when a child is viewing its newborn puppies.¹⁰⁸ Thus, as in *Whitmer*, a dog that bites is not always unreasonably dangerous. Applying the Illinois rule, however, to the rabid skunk in *Sease*,¹⁰⁹ reasonable people could not disagree that it is good public policy to hold a seller of a rabid skunk strictly liable. Again, it seems the rule adopted by the jurisdiction correlates strongly to the lack or presence of egregious facts.

If one considers the “tales of the heinous puppy farms where cages are periodically moved, and breeding takes on the characteristics of a breeding assembly line, one could reason that we do in fact have a product.”¹¹⁰ As the next section will show, establishing a pet as a product opens doors to new claims, more defendants, and higher damage awards.

III. PRODUCTS LIABILITY CLAIMS

“[P]laintiffs in most states typically ground a claim for injuries arising from a product’s design on any [or all] of the conventional triumvirate of negligence, breach of implied warranty of merchantability, and strict liability in tort.”¹¹¹ In this section, the author will address each of these claims individually, pointing out the benefits and disadvantages of each claim. As noted in part II(B) of this comment, courts are split as to strict products liability for animal defects. Negligence and warranty claims, however, are more common (although far from commonplace), but they fail to apply products liability law or to view animals as “products.”¹¹² Not surprisingly, the jurisdictions in which claims are brought most often and in which such claims are likely to

the transaction was one which should come under the umbrella of strict products liability, and then concluded if necessary that they were dealing with goods . . . [leading] to some unusual results.

Cantu, *supra* n. 34, at 348–49.

¹⁰⁸ *Whitmer*, 331 N.E.2d at 118.

¹⁰⁹ *Sease*, 700 P.2d at 1057–58.

¹¹⁰ Cantu, *supra* n. 34, at 362.

¹¹¹ Owen et al., *supra* n. 57, at 235.

¹¹² See e.g. *Radoff v. Hunter*, 323 P.2d 202 (Cal. Dist. App. 1958) (negligence applied to dog bite); *Slack v. Villari*, 476 A.2d 227 (Md. Spec. App. 1984) (negligence applied to unleashed dog); *Cahill v. Blume*, 801 N.Y.S.2d 776 (table), 2005 WL 1422133 (N.Y.C. Civ. Ct. 2005) (breach of contract applied to puppy sold with health problems); *Dempsey*, 468 N.Y.S.2d 441 (breach of contract applied to defective poodle); *Bazzini*, 455 N.Y.S.2d 77 (U.C.C. applied to defective bird).

succeed are the same jurisdictions in which animals fit within the definition of “product.”¹¹³

A. *Strict Liability in Tort*

Strict liability as applied to animals is not a new phenomenon. The concept has been invoked in any one of three distinct scenarios. One centers upon animals that possess distinct barnyard characteristics and that trespass upon the land of another. The second involves domesticated animals with known vicious tendencies, and the third includes animals that are described as being *ferae naturae*, or those whose natural habitat is the wild. The law has never hesitated to impose strict liability in these cases. In fact, it is one of the seven areas of law in which strict liability has been traditionally applied.¹¹⁴

Yet the law hesitates to apply strict products liability to the sale of domesticated animals.¹¹⁵ The trespass and wild animal statutes are formidable pieces of legislation,¹¹⁶ but they do nothing to help those injured by the sale of a pet or other domesticated animal. Similarly, the vicious or dangerous animal statutes have awarded some plaintiffs

¹¹³ New York is the forerunner in successful claims against pet stores under a host of theories. *See e.g. Cahill*, 2005 WL 1422133 (Plaintiff recovered medical costs against pet store owner for puppy sold with health problems.); *Dempsey*, 468 N.Y.S.2d 441 (Plaintiff recovered purchase price for defective poodle.); *Bazzini*, 455 N.Y.S.2d 77 (Plaintiff recovered purchase price for defective bird.); *Beyer*, 404 N.Y.S.2d 778 (plaintiff allowed to proceed in action against distributor after becoming ill from contact with diseased hamsters). On the contrary, Illinois is the trendsetter for denying claims that apply products liability theories to animals. *See e.g. Whitmer*, 331 N.E.2d 115 (plaintiff's strict products liability claim denied on the ground that a dog is not a “product”); *Anderson*, 408 N.E.2d 1194 (plaintiff's claims under products liability theory denied because baby pigs are not “products”).

¹¹⁴ Cantu, *supra* n. 34, at 359–60, n. 58 (citations omitted). The seven different areas of law that apply strict liability are: (1) trespassing, wild or vicious animals (*see e.g. Lindsay v. Cobb*, 627 P.2d 349 (Kan. App. 1981); *May v. Burdett*, 115 Eng. Rep. 1213 (Q.B. 1846)); (2) abnormally dangerous activities (*see e.g. Fletcher v. Rylands*, 159 Eng. Rep. 737 (Q.B. 1865)); (3) libel (*see e.g. E. Hulton Co. v. Jones*, [1910] A.C. 20 (H.L. 1909)); (4) trespass (*see e.g. Burns Philp Food, Inc. v. Cavalea Cont'l Freight, Inc.*, 1999 U.S. App. LEXIS 21583 (7th Cir. 1999)); (5) vicarious liability (*see e.g. Oke Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768 (9th Cir. 2002)); (6) nuisance (*see e.g. Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001)); (7) misrepresentation (*see e.g. Herzog v. Arthrocare Corp.*, 2003 U.S. Dist. LEXIS 5224 (D. Me. 2003)).

¹¹⁵ *Supra* n. 13.

¹¹⁶ The Restatement (Third) of Torts provides:

- (a) An owner or possessor of a wild animal is subject to strict liability for physical harm caused by the wild animal.
- (b) A wild animal is an animal that belongs to a category of animals that have not been generally domesticated and that are likely, unless restrained, to cause personal injury.

Restatement (Third) of Torts: Liability for Physical Harm § 22(a)–(b) (Proposed Final Draft No. 1 2005). How does this apply to tropical birds, snakes, tarantulas, and ferrets, all of which are sometimes pets?

compensation for their injuries, primarily in dog bite cases,¹¹⁷ but the statutes are narrow in scope and exclude liability from all other potential parties other than the owner or possessor of the animal.¹¹⁸

Strict products liability, where enacted,¹¹⁹ largely incorporates the Restatement (Second) of Torts section 402A.¹²⁰ This provision states:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.¹²¹

Under this provision, the court must not only find that an animal is a “product,” but that it was also sold in a defective condition rendering it unreasonably dangerous to the consumer or user.¹²² “Unreason-

¹¹⁷ See e.g. *Hamby v. Haskins*, 630 S.W.2d 37, 38 (Ark. 1982) (affirming judgment awarding plaintiff \$12,000 in damages for injuries received from a dog bite); see also *County of Spokane*, 982 P.2d at 645 (noting that through its statute Spokane County clearly wanted to make dog owners criminally liable for the vicious acts of their dogs).

¹¹⁸ 510 Ill. Comp. Stat. 5/15 (2005) (setting forth a complex process to determine whether a dog is vicious: a thorough investigation, veterinarian reports, and court proceedings which must result in clear and convincing evidence of viciousness, while providing several exceptions to the law when a dog cannot be found vicious); see *Restatement (Third) of Torts: Liability for Physical Harm* § 23 (Proposed Final Draft No. 1 2005) (“An owner or possessor of an animal that the owner or possessor knows or has reason to know has dangerous tendencies abnormal for the animal’s category is subject to strict liability for physical harms caused by the animal which ensue from that dangerous tendency.”).

¹¹⁹ See Owen et al., *supra* n. 57, at 170 (noting that only five states, Massachusetts, Delaware, Michigan, Virginia, and North Carolina, have yet to enact strict products liability).

¹²⁰ See e.g. *Worrell*, 563 A.2d at 1387–88 (holding that seller of a puppy that infected buyer with a disease may be held liable under strict product liability if the puppy was sold in the diseased condition); *Phipps v. Gen. Motors Corp.*, 363 A.2d 955, 963 (Md. 1976) (Adopting § 402A of the Restatement (Second) of Torts, the Maryland court held that an automobile manufacturer who placed a defective automobile into the stream of commerce is liable for injuries caused by that automobile.); see also *Vincer v. Esther William All-Aluminum Swimming Pool Co.*, 230 N.W.2d 794, 799 (Wis. 1975) (noting that while the court adheres to strict liability theory in § 402A, a swimming pool manufacturer was not liable for child’s injuries from falling into pool when the condition was an obvious one of which the consumer should have been aware).

¹²¹ *Restatement (Second) of Torts* § 402A.

¹²² Looney, *supra* n. 59, at 227.

ably dangerous” is defined in comment i of § 402A.¹²³ “The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”¹²⁴ Courts have held that an ordinary consumer should not expect an animal bought from a pet store to be diseased or rabid.¹²⁵ In many jurisdictions, however, this “consumer expectation” test is but one factor in an overall risk-utility analysis.¹²⁶ The existence of feasible, safer alternative products, as well as regulations and standards within the trade, also contribute to the ultimate decision of whether a product sold is unreasonably dangerous.¹²⁷ “There is no duty to produce an accident-proof product or one that is foolproof.”¹²⁸ All products are potentially dangerous; the standard is whether the product is unreasonably dangerous.¹²⁹

Further, open and obvious dangers may foreclose a successful strict liability claim.¹³⁰ As the *Whitmer* court stated:

A reasonable man is required to have such knowledge of the habits of animals as is customary in his community. Thus, he should know that certain objects are likely to frighten horses and that frightened horses are likely to run away. He should know that cattle, sheep and horses are likely to get into all kinds of danger unless guarded by a human being, that bulls and stallions are prone to attack human beings and that even a gentle bitch, nursing her pups, is likely to bite if disturbed by strangers.¹³¹

In short, “when man and other animals interact, it is usually man that gets the short end of the stick.”¹³² The *Whitmer* court’s point is welltaken; however, disease, parasites, and even aggressive tendencies may not be open and obvious to the pet buyer. Breeders, trainers, and sellers are privy to knowledge of an animal’s heritage, pedigree, demeanor, characteristics, and suitability that the buyer often cannot hope to amass prior to purchasing the animal. As Part IV of this comment will show, all of these parties play an important role in animal

¹²³ *Restatement (Second) of Torts* § 402A cmt. i.

¹²⁴ *Id.*

¹²⁵ See generally *Worrell*, 563 A.2d at 1389 (citing the “Pet Lemon Law,” Conn. Gen. Stat. Ann. § 22-344b (1997)) (suggesting that when the consumer purchased a diseased puppy from a pet store, she should not expect that it might have a dangerous disease); *Sease*, 700 P.2d at 1058 (suggesting that the consumer should not expect that skunk purchased from pet store was rabid because at the time of purchase, the disease was in the incubation stage).

¹²⁶ *Nichols v. Union Underwear Co., Inc.*, 602 S.W.2d 429, 433 (Ky. 1980).

¹²⁷ *Owen et al.*, *supra* n. 57, at 68.

¹²⁸ *Whitmer*, 331 N.E.2d at 119 (citing *Fanning v. LeMay*, 230 N.E.2d 182 (Ill. 1967)).

¹²⁹ *Restatement (Second) of Torts* § 402A(1).

¹³⁰ *Brown v. Sears, Roebuck & Co.*, 328 F.3d 1274, 1282–83 (10th Cir. 2003) (a riding lawn mower going in reverse is an open and obvious danger that precludes strict liability for injury to a small child standing behind it).

¹³¹ *Whitmer*, 331 N.E.2d at 118.

¹³² *Blaha*, 640 N.W.2d at 88.

development which, if negligently handled, could produce an unreasonably dangerous animal.

The elements of a strict products liability claim are fairly straightforward. The plaintiff must establish that:

(1) the product at issue was in a defective condition at the time it left the possession or control of the seller, (2) that [the product] was unreasonably dangerous to the user or consumer, (3) that the defect [in the product] was a cause of [plaintiff's injuries or damages], and (4) that the product was expected to and did reach the consumer without substantial change in its condition.¹³³

Often, the first two elements are essentially the same, as a defective condition is unreasonably dangerous in many products. Once a defect is established, the rest can almost always be proved by circumstantial evidence.¹³⁴

Of course, a claim under section 402A is not immune to affirmative defenses. Misuse of a product, in this case inadequate training or control over one's pet, for example, could stave off liability for the seller.¹³⁵ Where a buyer is adequately warned about an animal's dangerous propensities or characteristics, the seller may have another defense if the buyer fails to act in accordance with the seller's warnings.¹³⁶ Further, as in *Whitmer*, the buyer may assume the risks of known or obvious dangers.¹³⁷ In addition, if the seller is not "engaged in the business of selling such a product," a strict liability claim is barred.¹³⁸ Finally, if the product undergoes *substantial* change after sale, the seller is not liable for a resulting, unreasonably dangerous condition.¹³⁹

Perhaps the most important aspects of strict products liability are that there is no fault requirement,¹⁴⁰ there is no privity requirement,¹⁴¹ and awards for physical harm and property damage are attainable.¹⁴² By shifting "the risk of loss to those better able financially to bear the loss," strict products liability is an equitable means of protecting consumers who justifiably rely on sellers and manufacturers to provide a reasonably safe product.¹⁴³ This reasonable reliance "is better fulfilled by the theory of strict liability than by traditional negligence or warranty theories."¹⁴⁴ The importance of strict liability may

¹³³ *Phipps*, 363 A.2d at 958 (interpreting § 402A).

¹³⁴ *Cantu*, *supra* n. 34, at 369.

¹³⁵ *See Phipps*, 363 A.2d at 960; *Restatement (Second) of Torts* § 402A cmt. h. (A seller is not liable for abnormal use or handling.).

¹³⁶ *Id.*; *Restatement (Second) of Torts* § 402A cmt. j.

¹³⁷ *Whitmer*, 331 N.E.2d at 118; *Phipps*, 363 A.2d at 960; *Restatement (Second) of Torts* § 402A cmt. n.

¹³⁸ *Restatement (Second) of Torts* § 402A(1)(a).

¹³⁹ *Worrell*, 563 A.2d at 1388; *Restatement (Second) of Torts* § 402A(1)(b).

¹⁴⁰ *Restatement (Second) of Torts* § 402A(2)(a).

¹⁴¹ *Id.* at § 402A(2)(b).

¹⁴² *Id.* at § 402A(1).

¹⁴³ *Phipps*, 363 A.2d at 958.

¹⁴⁴ *Id.*

be most evident when used as a third alternative to impose liability, used with or without warranty and negligence claims, because strict liability does not carry all the limitations of warranty and negligence claims.¹⁴⁵ “For example, in situations in which the seller gives no express warranty and conspicuously disclaims all implied warranties, the contributorily negligent buyer’s recourse under contract and negligence theories is foreclosed.”¹⁴⁶ So when in doubt, bring them all and see which one sticks.

Another issue is choosing the terminology for strict liability claims for defective animals. Of the three categories of product defect—manufacturing, design, and warning—it seems likely that, in considering an animal as a “product,” a buyer could claim a manufacturing defect in an animal born with a congenital disease.¹⁴⁷ It certainly “departs from its intended design,” as the breeder likely intended healthy young.¹⁴⁸ Likewise, a parasitic bird may very well be a design defect, as it certainly has a “reasonable alternative design” (a healthy bird) and the omission of that “alternative design renders the product unreasonably safe.”¹⁴⁹ Failure to warn a buyer of the viciousness of a particular animal may render that animal unreasonably dangerous, so warning defects are applicable to animal sales, as well.¹⁵⁰ Thus, strict products liability should be available for all possible animal defects. The terminology, however, is not the important consideration. A defect is a defect, and when one purchases an unreasonably dangerous appliance, automobile, food product, herbicide, or animal, injury is inevitable. The consumer should be protected from all injuries from defect in the same manner, regardless of the product.

B. Negligence

For those courts that believe strict products liability for animal sales would “yield the harsh result of holding [defendants] responsible

¹⁴⁵ Harvey, *supra* n. 39, at 804.

¹⁴⁶ *Id.*

¹⁴⁷ *Restatement (Third) of Torts: Products Liability* § 2. A product:

(a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product; (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe; (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Id.

¹⁴⁸ *Id.* at § 2(a).

¹⁴⁹ *Id.* at § 2(b).

¹⁵⁰ *Id.* at § 2(c).

as absolute insurers of the health of a living organism . . . [l]iability may, however, still be imposed upon such defendants for the sale or distribution of animals under a theory of negligence.”¹⁵¹ Under a standard negligence claim, a plaintiff must prove four elements: (1) a legal duty, (2) a breach of that duty, (3) causation, and (4) damages.¹⁵² Under this theory, one who sells animals must, at a minimum, maintain a standard of ordinary care when conducting transactions with buyers.¹⁵³ This duty is applicable to all sellers throughout the vertical chain of distribution.¹⁵⁴

The amount of care that is “ordinary” or “reasonable” is “proportionate to the extent of the risk involved.”¹⁵⁵ This is best illustrated by Judge Learned Hand’s famous formula:

$$B < P \times L = N^{156}$$

In not-so-simple terms, if the burden or costs for a defendant to provide a safer product (B), is less than the probability of injury from the current incarnation of the product (P), multiplied by the loss or value in damages of each injury sustained (L), then the defendant is negligent in providing that product (N).¹⁵⁷ In simpler terms, if it is

¹⁵¹ *Malicki*, 700 N.E.2d at 915. Strict liability does not have the affect of making defendants absolute insurers. Many feel, and this comment agrees, that “the requirement of proof of a defect rendering a product unreasonably dangerous is a sufficient showing of fault on the part of the seller to impose liability without placing an often impossible burden on the plaintiff of proving specific acts of negligence.” *Phipps*, 363 A.2d at 958.

¹⁵² Dan B. Dobbs & Paul T. Hayden, *Torts and Compensation: Personal Accountability and Social Responsibility for Injury* 108 (4th ed., West 2001).

¹⁵³ *Malicki*, 700 N.E.2d at 915 (citing plaintiff’s expert’s opinion that pet store owners should inform buyers of potential diseases the animal could carry and should recommend that the buyer have the animal examined by a veterinarian). Arguably, the standard of care for the pet seller is one of a reasonable seller of animals, a more specialized standard specific to the trade rather than mere ordinary care. See *Rhoads v. Serv. Mach. Co., Inc.*, 329 F. Supp. 367, 376 (E.D. Ark. 1971) (stating that the “real issue” for negligence is whether a person of “ordinary prudence” exercising “ordinary care” would have taken certain measures to protect buyers from an item’s dangers); *Roach v. Ivari Intl. Ctrs., Inc.*, 822 A.2d 316, 322 (Conn. App. 2003) (“The standard of care in the ordinary negligence case is the care that a reasonably prudent person would exercise under the same circumstances.”).

¹⁵⁴ See *Malicki*, 700 N.E.2d at 915 (stating that no evidence was given as to the wholesaler’s, manufacturer’s, or breeder’s negligence, thus only the retailer could be found negligent in this case). “A legal duty is one arising from contract between the parties or the operation of law.” *Coogle*, 609 S.E.2d at 152.

¹⁵⁵ *Restatement (Second) of Torts* § 395 cmt. g.

¹⁵⁶ *U.S. v. Carroll Towing Co., Inc.*, 159 F.2d 169, 173 (2d Cir. 1947).

¹⁵⁷ *Id.* Extended to strict liability, “N” could signify a “defect,” an “unreasonably dangerous product,” or “strict liability.” Some courts, as in *Malicki*, could be denying strict liability but allowing potential negligence claims on the same facts, in essence, allowing strict liability via negligence. 700 N.E.2d at 915 (declining to extend product status to a parrot, but stating that “[l]iability may, however, still be imposed upon the defendants for the sale or distribution of animals under a theory of negligence.”). Practically speaking, there may not be much difference in proving fault than in proving a product defect. The risk-utility analysis “has proved over the years to be helpful when attempting to

cheaper to make something safer than it would be to pay out foreseeable damages for the product in its current state, the manufacturer or supplier is negligent.¹⁵⁸

However, suppliers may be negligent in numerous situations. In addition to instances in which the product itself is unreasonably dangerous, sellers ought to have “a duty to warn of a latent defect, which, if known or constructively known, constitutes a breach of duty of ordinary care to a business invitee.”¹⁵⁹ This includes the failure to instruct on proper use of a product where such a duty may be owed.¹⁶⁰ Thus, it seems “reasonably foreseeable that if a person places into the stream of commerce an animal or other instrumentality known by him to be dangerous, without disclosing the dangerous nature of the animal or object, injury to a third party can result.”¹⁶¹ Such a third party certainly should be entitled to recompense from the person placing the animal into the stream of commerce. Further, in some jurisdictions, negligence claims may call for the “recovery of damages for mental distress absent physical injury . . . where there is an ‘independent basis of liability.’”¹⁶²

The Restatement (Second) of Torts section 518 provides for liability in negligence for domesticated animals that are not abnormally dangerous:

Except for animal trespass, one who possesses or harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, is subject to liability for harm done by the animal if, but only if,

- (a) he intentionally causes the animal to do the harm, or
- (b) he is negligent in failing to prevent the harm.¹⁶³

This provision only covers owners or possessors of animals and has no impact on the transaction between an animal seller and a buyer.¹⁶⁴

determine whether the defendant was negligent, as well as in strict products liability cases where we are attempting to prove that the product at issue has been mis-designed or mis-marketed.” Cantu, *supra* n. 34, at 372.

¹⁵⁸ Cantu, *supra* n. 34, at 373–74.

¹⁵⁹ *Malicki*, 700 N.E.2d at 916 (The latent defect at issue was a bird’s “parrot fever.”).

¹⁶⁰ *Sease*, 700 P.2d at 1059.

¹⁶¹ *Coogle*, 609 S.E.2d at 152.

¹⁶² *Sease*, 700 P.2d at 1058 n. 7 (citing *Meyer v. 4-D Insulation Co.*, 652 P.2d 852, 854 (Or. App. 1982)).

¹⁶³ *Restatement (Second) of Torts* § 518(a)–(b) (1977).

¹⁶⁴ The type of negligence that exposes an animal owner who is unaware of the animal’s dangerous propensities occurs in the failure to control the creature or prevent the harm caused by it. The degree of control required is generally held to be that which would be exercised by a ‘reasonable person.’

Slack, 476 A.2d at 231 (citing *Arnold v. Laird*, 621 P.2d 138, 141 (Wash. 1980) (en banc); *Restatement (Second) of Torts*, § 518).

Negligence is a broad term, encompassing potentially unlimited relationships and situations.¹⁶⁵ However, it is not without its downsides. Negligence requires “proof of lack of ordinary care and proximate cause, both of which [are] questions of fact for the jury.”¹⁶⁶ The degree of control over an animal, subject to its own behavioral processes, that constitutes ordinary care may prove difficult for a jury to determine. Further, in the case of an animal bite, a jury may likely hold the animal itself as the proximate cause of an injury. Finally, injuries must be foreseeable for a negligence claim to succeed.¹⁶⁷

Perhaps the best status to be given an animal for the purposes of negligence, and the view this author advocates, is that of a “chattel.”¹⁶⁸ The Sixth District Court of New York adopted this view in the sadly humorous case of *Bazzini v. Garrant*:

This is a sad tale (or is it a tail) of the noble, but late toco toucan bird (hereinafter Bird) . . . Bird suffered a seizure. (There was no evidence of fowl play.) The plaintiff contacted the veterinarian who advised her to coax Bird back to health by having him sip Gatorade. Like a champion, Bird seemed to recover. But this recovery enjoyed only the reign of a lame duck politician. Seven days later Bird was dead . . . In life Bird was a bird – an animal of feelings, of flesh and blood and feathers. It is one of the sad aspects of the law that the heat and passion of life so often translate to cold, unfeeling words upon a page. This is such an instance for in death, notwithstanding his memory, Bird is a chattel.¹⁶⁹

And it is logical to deem an animal a chattel. If an animal is both a “good” and mere property, then it stands to reason that an animal can be described as a chattel, since courts indiscriminately use all three terms to describe animals.¹⁷⁰

To consider animals “chattels” would give new depth to negligence claims. The Restatement (Second) of Torts section 388 provides:

¹⁶⁵ *Restatement (Third) of Torts* § 3 (“A person acts negligently if the person does not exercise reasonable care under all the circumstances.”).

¹⁶⁶ *Cantu*, *supra* n. 34, at 364; *Webster v. Pacesetter Inc.*, 259 F. Supp. 2d 27, 38 (D.D.C. 2003) (Plaintiff must prove defendant’s lack of due care.); *Timmons v. Ford Motor Co.*, 982 F. Supp. 1475, 1480 (S.D. Ga. 1997) (Speeding, not the automobile’s design, was the proximate cause of the accident.).

¹⁶⁷ *Winnet v. Winnet*, 310 N.E.2d 1, 4 (Ill. 1974).

¹⁶⁸ See *Bazzini*, 455 N.Y.S.2d at 78; *Nashville C. & St. L. Ry. v. Bingham*, 62 So. 111, 112 (Ala. 1913); *Boswell v. Laird*, 8 Cal. 469, 496 (Cal. 1857); *Chicago & Aurora R.R. Co. v. Thompson*, 19 Ill. 577, 584 (Ill. 1858) (“Chattels personal are animals, household stuff, money, jewels, corn, garments, and everything else that can properly be put in motion, and transferred from place to place.”).

¹⁶⁹ *Bazzini*, 455 N.Y.S.2d at 78. If one can get past the court’s “fowl” attempts at humor, the court introduces a new term into the discussion. An animal may be a product, a good, property, or a chattel. See *supra* nn. 44–45 and accompanying text (concluding that animals can be products); *supra* n. 10 and accompanying text (discussing animals as property similar to chattel); *supra* n. 16 and accompanying text (discussing animals as goods).

¹⁷⁰ See e.g. *People v. Dyer*, 95 Cal. App. 4th 448, 456 (Cal. App. 4th Dist. 2002) (“We recognize that dogs are considered personal property or chattels for some purposes.”).

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

- (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
- (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
- (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.¹⁷¹

This all encompassing provision could find a supplier of animals, either a breeder or store owner, liable for negligently placing dangerous or harmful animals into the stream of commerce.¹⁷² Similar to liability under section 518,¹⁷³ a showing of the supplier's knowledge or constructive knowledge of the animal's dangerous condition, as well as a lack of knowledge on the buyer's part, is essential to establishing a claim per section 388.¹⁷⁴ All intended uses of animals—as a household pet, a workhorse, or even dinner—require the animal to be healthy. If not under a theory of strict products liability, a supplier of animals should be held liable for negligently providing the consumer with an unhealthy or dangerous animal. The Restatement (Second) of Torts section 388 could provide an alternative to standard negligence claims involving animals and may be the solution for healthier animals and, in turn, healthier human purchasers.

C. Warranty

The tragedy of the chattel Bird in the foregoing section, however, was not decided on tort grounds; rather, the court turned to contract principles to provide an adequate remedy for Bird's melancholic owner.¹⁷⁵ There are three warranties of quality: (1) express warranty;¹⁷⁶ (2) implied warranty of merchantability;¹⁷⁷ and (3) implied warranty of fitness for a particular purpose.¹⁷⁸ Each of them covers the sale of animals, "goods" under the UCC,¹⁷⁹ in a unique fashion.

¹⁷¹ *Restatement (Second) of Torts* § 388 (1965).

¹⁷² *Id.*

¹⁷³ See *Restatement (Second) of Torts* § 518(a)–(b) (The provision presumes that the owner of an animal does not know and should not know that the animal is abnormally dangerous.).

¹⁷⁴ *Restatement (Second) of Torts* § 388(a)–(b).

¹⁷⁵ *Bazzini*, 455 N.Y.S.2d at 78.

¹⁷⁶ See e.g. U.C.C. § 2-313 (2005), 1A U.L.A. 482 (2004).

¹⁷⁷ U.C.C. § 2-314, 1A U.L.A. 669.

¹⁷⁸ U.C.C. § 2-315, 1B U.L.A. 8.

¹⁷⁹ *Bazzini*, 455 N.Y.S.2d at 78; *Key v. Bagan*, 221 S.E.2d 235, 235 (Ga. Ct. App. 1975) ("This transaction for the purchase of a horse, apparently for recreational use, while possibly a casual sale, nevertheless, is provided for in the Uniform Commercial Code which applies to transactions in goods.").

Unlike the risk-utility analysis that often controls strict liability and negligence claims, warranty claims focus “on the expectations for the performance of the product when used in the customary, usual [or] reasonably foreseeable manners.”¹⁸⁰ Like strict liability, however, “breach of express warranty requires no showing of fault,” just a failure to conform to the seller’s or supplier’s representations need be shown.¹⁸¹

“Transactions involving the sale of domestic animals have been among the most fruitful sources of litigation giving rise to the claim that affirmations as to the soundness of the animals constituted a warranty.”¹⁸² Express warranties are generally easy to spot. They usually consist of factual representations (written or oral) by the seller to the buyer that relate to the characteristics or performance of a product and which induce the buyer to purchase that product.¹⁸³ Also, express warranties “can be created when given in response to a specific question or when given in the context of a specific averment of fact.”¹⁸⁴ Mere “puffing,” or sales talk that gives the seller’s opinion of the product, generally does not constitute an express warranty.¹⁸⁵ General representations of safety, however, can create express warranties.¹⁸⁶ But if a seller states, “I expressly warrant that this puppy will not bite,” the buyer does not have an express warranty claim if the dog, in fact, bites because “[e]ven a docile dog is known and expected to bite under certain circumstances.”¹⁸⁷

For the implied warranties of merchantability and fitness for a particular purpose, perhaps the case of Mr. Dunphy, a pedigree poodle whose pedigree was flawed by an undescended testicle, best illustrates the application of these warranties to animal sales.¹⁸⁸ In *Dempsey v. Rosenthal*, the Civil Court of the City of New York addresses both merchantability and fitness warranties in connection with Mr. Dunphy’s inadequate reproductive organs.¹⁸⁹ The plaintiff bought Mr. Dunphy for \$541.25 from the defendant’s pet store.¹⁹⁰ The “congenital

¹⁸⁰ *Denny v. Ford Motor Co.*, 639 N.Y.S.2d 250, 256 (N.Y. 1995).

¹⁸¹ Owen et al., *supra* n. 57, at 97.

¹⁸² Lee R. Russ, *Extent of Liability of Seller of Livestock Infected with Communicable Disease*, 14 A.L.R.4th 1096 (2004).

¹⁸³ U.C.C. § 2-313(1)(a), 1A U.L.A. 482.

¹⁸⁴ *Blaha*, 640 N.W.2d at 90.

¹⁸⁵ *Cf. Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 901 (Pa. 1975) (Advertisements touting a helicopter as a “safe, dependable helicopter” that was “easy to fly” constituted puffing.).

¹⁸⁶ Owen et al., *supra* n. 57, at 98 (referring to *Drayton v. Jiffee Chem. Corp.*, 395 F. Supp. 1081 (N.D. Ohio 1975) (A caustic drain cleaner was advertised as safe for household use.)).

¹⁸⁷ *Whitmer*, 331 N.E.2d at 118 (cited with approval in *Blaha*, 640 N.W.2d at 91). Further, “[t]he law will not lend itself to the creation of an implied warranty which patently runs counter to the experience of mankind or known forces of nature. It will not read into any sale or bailment a condition or proviso which is unreasonable, impossible or absurd.” *Meester v. Roose*, 144 N.W.2d 274, 276 (Iowa 1966).

¹⁸⁸ *Dempsey*, 468 N.Y.S.2d at 441.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 442.

defect” was discovered five days later by the plaintiff’s veterinarian.¹⁹¹ Outraged, the plaintiff rejected poor Mr. Dunphy and attempted to return the hapless poodle, declaring that she “assumed it would be suitable for breeding but it’s defective—it can’t breed.”¹⁹² In truth, Mr. Dunphy was entirely capable of continuing his proud heritage, although future litters would likely carry the same defect.¹⁹³ Further, any dog with such a condition could never be a show dog.¹⁹⁴ Alas, with his pride hurt and his manhood questioned, Mr. Dunphy’s value, though priceless as a pet and friend, was somewhat diminished for one who wished to breed or show the poodle or its offspring.

Finding no applicable express warranties, the court turned to the implied warranty of merchantability.¹⁹⁵ Under the UCC section 2-314 implied warranty of merchantability cause of action, a plaintiff must prove: (1) the seller is a merchant with respect to the goods sold; (2) the goods were not “merchantable” at the time of sale; (3) the defect in the goods caused, and (4) damages.¹⁹⁶ In *Dempsey*, the defendant was a merchant in the business of regularly selling pets.¹⁹⁷ The court employed the first test of merchantability, set out in section 2-314(2)(a), to determine whether Mr. Dunphy would “pass without objection in the trade under the contract description.”¹⁹⁸ The court stated that this provision “sums up all the various ‘definitions’ of merchantable quality since the principal function of the warranty of merchantability [is] to give legal effect to a buyer’s reasonable expectations based on the trade understanding of the quality of goods normally supplied under such a contract.”¹⁹⁹ Understanding that when one buys a purebred dog, he or she rightfully assumes the dog is of show quality, or at least of breedable quality, the court held Mr. Dunphy “would not pass without objection in the trade.”²⁰⁰ As such, Mr. Dunphy was not merchantable.²⁰¹

Another clause of UCC section 2-314 often implicated in animal sales is subsection 2-314(2)(c), which states that goods are merchantable if they “are fit for the ordinary purposes for which such goods are used.”²⁰² Recalling the case of Bird, the toucan sold with a congenital defect, the Sixth District Court of New York held that “Bird was not fit

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Dempsey*, 468 N.Y.S.2d at 442.

¹⁹⁵ *Id.* at 443–45.

¹⁹⁶ U.C.C. § 2-314, 1A U.L.A. 669 (2000). The term “merchantability” is defined within § 2-314(2)(a)–(f) with six different standards, serving as the minimal requirements. See also § 2-314 Official Comment 6. Trade usage may also define what is considered “merchantable.” J. White & R. Summers, *Uniform Commercial Code* 360–368 (5th ed., West 2000).

¹⁹⁷ 468 N.Y.S.2d at 443.

¹⁹⁸ *Id.* (citing U.C.C. § 2-314(2)(a)).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 444.

²⁰¹ *Id.*

²⁰² U.C.C. § 2-314(2)(c), 1A U.L.A. 669.

for the ordinary purposes for which toco toucans are used.”²⁰³ The court bluntly stated that at least one such ordinary purpose of a pet toucan “is to stay around as a live bird.”²⁰⁴ The “ordinary purpose” of an animal likely depends on the type of animal involved and who the buyer and seller are. Certainly a pet store patron’s ordinary purpose for an animal bought from the pet store would be, in most cases, as a household pet. As costs increase with the pedigree of the animal, ordinary purposes may entail breeding or showing the animal. But questions such as whether a cow is bought for milk or for meat, a horse is bought for racing or for riding, or a dog is bought for companionship or for aiding the disabled, may be better served by an implied warranty of fitness for a “particular purpose” analysis.

UCC section 2-315 states:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.²⁰⁵

This “particular purpose” differs from ordinary purposes for goods “in that it envisages a specific use to the buyer which is peculiar to the nature of his business,”²⁰⁶ rather than “uses which are customarily made of the goods in question.”²⁰⁷ For a claim under this warranty, a plaintiff must prove: (1) the seller had reason to know of the plaintiff’s particular purpose for the goods; (2) the seller knew or should have known the plaintiff was relying on the seller’s skill or judgment; and (3) the plaintiff did rely on such skill or judgment to his or her detriment.²⁰⁸

The *Dempsey* court held that the sale of Mr. Dunphy also breached the implied warranty of fitness for a particular purpose.²⁰⁹ The plaintiff specified to the seller that she wanted a dog suitable for breeding.²¹⁰ “Further, it is reasonable for a seller of a pedigree dog to assume that the buyer intends to breed it.”²¹¹ Thus, the seller knew of

²⁰³ *Bazzini*, 455 N.Y.S.2d at 79.

²⁰⁴ *Id.* The court explained that “the inference is permissible that Bird was not of merchantable quality at the time of sale since he ceased to function as a merchantable bird so soon thereafter.” *Id.*

²⁰⁵ U.C.C. § 2-315, 1B U.L.A. 8 (2006).

²⁰⁶ *Id.* § 2-315 cmt. 2.

²⁰⁷ *Id.*

²⁰⁸ *Van Wyk v. Norden Laboratories, Inc.*, 345 N.W. 2d 81, 84 (Iowa 1984) (explaining the elements of Iowa’s warranty of fitness for a particular purpose, which is based on U.C.C. § 2-315).

²⁰⁹ 468 N.Y.S.2d at 445.

²¹⁰ *Id.*

²¹¹ *Id.* “The fact that Mr. Dunphy’s testicle later descended and assumed the proper position is not relevant. The parties were entitled to get what they bargained for at the time that they bargained for it. . . . The parties['] rights are not to be determined by subsequent events.” *Id.* (quoting *White Devon Farm v. Stahl*, 389 N.Y.S.2d 724, 727 (Sup. Ct. N.Y. Co. 1976)).

the plaintiff's particular purpose, the plaintiff relied upon the seller's assurance that Mr. Dunphy was suitable for breeding, and this reliance was reasonable, fulfilling the requirements of an implied warranty of fitness for a particular purpose.²¹²

The trouble with warranty claims, however, is that they are subject to a number of limitations. First, privity still plays an important part in contract law, and serves as an "ongoing obstacle to injured persons seeking to reach a remote seller through the law of warranty."²¹³ Also, per the UCC section 2-607(3)(a), "the buyer must within a *reasonable time* after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."²¹⁴ Hence, if the buyer fails to give notice to the seller of any warranty claim prior to filing suit, that suit may be barred.²¹⁵ Further, under certain conditions, warranty claims may be disclaimed and damages may be limited in any manner the seller sees fit (if not unconscionable).²¹⁶ Finally, incidental or consequential damages are not often available to the buyer who brings suit for breach of warranty, as in the case of Bird's autopsy costs²¹⁷ and the veterinary costs for examination of a defective Mr. Dunphy.²¹⁸

IV. IMPLICATIONS

As this comment has shown, it makes a huge difference whether an animal is a product, chattel, good, property, or in some other legal category. "[T]he 'legal, social, or biological nature of animals' is an important element of cases and statutes in nearly every category of the law."²¹⁹ In addition to the potential negligence claim under the "chat-

²¹² U.C.C. § 2-315, 1B U.L.A. 8 (2004).

²¹³ Owen et al., *supra* n. 57, at 94.

²¹⁴ U.C.C. § 2-607(3)(a), 1B U.L.A. 701 (2004) (emphasis added).

²¹⁵ "Most courts have refused to bar recovery for unreasonable delay of notice in consumer injury cases, but some courts still apply the rule even in this context." Owen et al., *supra* n. 57, at 114.

²¹⁶ See U.C.C. §§ 2-316, 2-718, 2-719, 1B U.L.A. 141, 1C U.L.A. 437, 1C U.L.A. 454 (addressing exclusion and modification of warranties, liquidation, and limitation of damages; and contractual modification and limitation of remedies, respectively); see also *Hininger v. Case Corp.*, 22 F.3d 124, 128 (5th Cir. 1994) (allowing buyer no recovery for negligence claim and affirming dismissal of buyer's implied warranty claim); *Rynders v. E.I. Du Pont, De Nemours & Co.*, 21 F.3d 835, 840 (8th Cir. 1994) (holding that no warranty could be implied because the buyer did not rely on the seller's skill and knowledge and that the buyer had disclaimed the warranty); *Bowdoin v. Showell Growers, Inc.*, 817 F.2d 1543, 1545 (11th Cir. 1987) (holding that the buyer was not bound by a post-sale disclaimer); *Paramount Aviation Corp. v. Agusta*, 288 F.3d 67, 74 (3d Cir. 2002) (holding that a seller can limit liability to third parties with a disclaimer in an agreement with a buyer); *Schlenz v. John Deere Co.*, 511 F. Supp. 224, 229 (D. Mont. 1981) (holding that a seller's disclaimer did not overcome the express safety warranty in the equipment's operating manual).

²¹⁷ *Bazzini*, 455 N.Y.S.2d at 79.

²¹⁸ *Dempsey*, 468 N.Y.S.2d at 446.

²¹⁹ Duckler & Campbell, *supra* n. 5, at 19.

tel” provisions of the Restatement (Second) of Torts,²²⁰ what status courts give to animals has a tremendous impact on the claims a plaintiff may bring, the defendants who may be held liable, and the damages that may be awarded. As previously mentioned, the strict liability statutes for wild animals and abnormally dangerous animals are only somewhat effective in holding owners liable for the actions of their animals.²²¹ But the narrow scope of these statutes, the limited pool of potentially liable defendants, and the insignificant deterrence factor, requires an attack at the source of the problem.²²²

A. Diseases and Dog Bites

The question arises as to who should be liable for an animal, diseased from birth, when the disease causes health problems amongst its ultimate purchasers and owners. One hopes the seller would be liable, and that the seller could, in turn, hold the breeder from which it received the animal liable for the costs of the animal itself. As it now stands in many jurisdictions, a buyer has no right of action against a breeder and sometimes no right to consequential damages²²³ because these jurisdictions do not consider the animal a “product.”²²⁴

In *State v. Lazarus*, for example, under a Louisiana statute, two breeders of Persian and Himalayan cats were charged with ten counts of animal cruelty.²²⁵ The cats were alleged to have been infected with ulcerated eyes, feline leukemia, herpes, ringworm, and salmonella.²²⁶

²²⁰ Restatement (Second) of Torts § 388(a)–(c), discussed *supra* part II. B.

²²¹ See *supra* nn. 116–118 and accompanying text (discussing wild animal statutes).

²²² See *Kaplan*, 615 F. Supp. at 236–37 (strict liability further limited by Colorado statute precluding strict liability claims against most lessors and bailors). Conversely, some animals that many think of as pets may still be considered “wild animals” for the purposes of statutes governing such animals. See *Gallick v. Barto*, 828 F. Supp. 1168, 1170 (M.D. Pa. 1993) (“[A] ferret is a wild animal.”).

²²³ See e.g. *Moreland v. Austin*, 330 P.2d 136 (Colo. 1958) (consequential damages reversed for costs of medicines, labor, and lost production when buyer purchased brucellosis-infected cows); cf. *Chaplinski v. Gregory*, 559 P.2d 1244 (Okla. 1977) (upholding consequential damages for loss of cattle, medicines, and profits lost because of seller’s misrepresentations about quality of the cows sold).

²²⁴ In many states,

the ordinary or basic measure of damages for the seller’s breach of warranty or fraud in the sale of an animal, due to its being infected with a communicable disease, is the difference between the actual or market value of the animal in its diseased condition at the time of delivery to the buyer and the amount the animal would have been worth had it been in the condition that the seller had represented or warranted it to be.

Russ, *supra* n. 182, at 1103.

²²⁵ 633 So.2d at 227.

²²⁶ *Id.* (The actual physical condition of ten cats taken into evidence was suppressed on illegal search and seizure grounds.); see also The Goldfish Sanctuary, *Fish Abuse by Wal-Mart and What You Can Do*, <http://www.petlibrary.com/goldfish/walmart.htm> (accessed Feb. 26, 2006) (The website attacks Wal-Mart for selling defective animals. The Goldfish Sanctuary currently runs a campaign against the corporation “for their atrocious treatment of all kinds of fishes” and selling of diseased fish.).

One buying these cats should be entitled to all products liability theories in pursuit of a damage award from these breeders, regardless of whether he or she bought a cat directly from the breeder or from an intermediary seller. Further, the buyer should be entitled to any resulting damages, such as the spread of feline leukemia to other household cats or the veterinary bills associated with the cat's maintenance. Under traditional warranty theory, such damages may be foreclosed.²²⁷

Further the breeder should be charged with knowledge of his or her animals' defects. "The motto of the responsible breeder . . . is 'Breed to Improve.'"²²⁸ The scientific term encompassing this motto is "selective breeding," which is the process of breeding animals of the highest quality in an effort to produce offspring with the most desirable traits.²²⁹

Responsible breeders do not breed unless they are convinced that their knowledge, experience, and devotion to their favorite breed will result in a mating that will produce an exceptional litter of puppies, with qualities that are as near as possible to the ideal for that breed. They breed to preserve and to enhance the characteristics that make their breed unique. In short, they breed to improve The goal of breeding, after all, is to produce a better dog.²³⁰

Responsible breeders do not breed animals with inheritable defects or animals that are overly aggressive.

Selective breeding is by no means a new concept.²³¹ Genetic engineering and selective breeding in the laboratory "has potential benefits for animal health – for producing vaccines and antibodies and for conferring resistance to disease."²³² But professional breeders already know the dangers of negligent breeding and the benefits of selective breeding; amateur breeders should be required to learn. Under negligence principles, the breeding and selling of a diseased animal shows a lack of reasonable care, ordinary care, due care—a lack of any care whatsoever. Under strict liability concepts, such a breeder should be held liable for introducing a defective product into the stream of commerce.

²²⁷ See U.C.C. § 2-719(3), 1C U.L.A. 455 (addressing limits on consequential damages).

²²⁸ Amer. Kennel Club, *Responsible Breeding Steps*, http://www.akc.org/breeders/resp_breeding/steps_2.cfm (accessed Sept. 13, 2005).

²²⁹ Prof. Breeders, *About Professional Breeders*, <http://www.probreeders.com/html/professional.html> (accessed Feb. 27, 2006) (advertising commercially bred reptiles with "distinctive traits and progressive quality improvements accomplished through selective breeding").

²³⁰ Amer. Kennel Club, *supra* n. 228.

²³¹ Food & Agric. Org. U.N., *Animals: Unexpected Products?* "The health question," <http://www.fao.org/english/newsroom/focus/2003/gmo4.htm> (accessed Sept. 13, 2005).

²³² *Id.*

For some diseases, such as the polycystic kidney disease affecting primarily Persian cats, selective breeding is the veterinary world's only hope for disease elimination.²³³

Veterinarians hope that breeders act conscientiously and consult with a veterinarian before breeding their Persian cat. A combined effort of veterinarians and owners will aid people . . . who want to see this gene and this disease eliminated from the Persian cat population.²³⁴

If altruism does not encourage breeders to breed responsibly, perhaps products liability claims could deter them from breeding improperly.

One jurisdiction may in the future reconsider strict products liability in some potential animal-related cases based on the following language: "[a] diseased condition of an animal is a defect more relevant to an animal as a product than is an animal's behavior."²³⁵ Although a disease is clearly a defect, an animal's behavior may be a defect, as well. In the breeding of certain dogs, particularly the American pit bull, the principles of selective breeding have been used to create a hunter, a fighter, and maybe even a monster.²³⁶

Pit bulls get a bad rap. Perhaps the many dog bite cases, such as *Chase v. City of Memphis* where a woman was mauled to death by two pit bulls, contribute to their poor reputation.²³⁷ Similar cases likely led the Ontario legislature to ban its citizens from acquiring pit bulls.²³⁸ Likewise, several American jurisdictions have adopted breed-specific laws regulating ownership of dogs.²³⁹ People generally believe that pit

²³³ Sarah Probst, *Selective Breeding Only Solution to Feline Genetic Disease*, <http://www.cvm.uiuc.edu/petcolumns/showarticle.cfm?id=104> (accessed Feb. 7, 2006). Selective breeding is used across the animal kingdom. For example, "[t]he eastern oyster industry along much of the Atlantic coast has been devastated by two pathogens." Haskins Shellfish Research Laboratory, *Selective Breeding for Disease Resistance in the Eastern Oyster*, <http://vertigo.hsrl.rutgers.edu/breeding.html> (accessed Feb. 7, 2006). Selective breeding has been employed to produce several lines of pathogen-resistant oysters. *Id.*

²³⁴ Probst, *supra* n. 233, at <http://www.cvm.uiuc.edu/petcolumns/showarticle.cfm?id=104>.

²³⁵ *Worrell*, 563 A.2d at 1388.

²³⁶ See Real Pit Bull, *Dog Fighting*, <http://www.realpitbull.com/fight.html> (accessed Feb. 7, 2006).

²³⁷ 1998 Tenn. LEXIS 435, *2 (July 21, 1998); see also *County of Spokane*, 982 P.2d at 643 (young child bit in the face by a pit bull).

²³⁸ CBC Canada News, *Ontario Passes Ban on Pit Bulls*, <http://www.cbc.ca/story/canada/national/2005/03/01/pit-bull-ban050301.html> (accessed Feb. 7, 2006).

²³⁹ See e.g. Colo. Code of Ordinances for the City of Commerce City § 4-8 (2005) ("*Unlawful to keep vicious animals* [pit bull terriers or wolf hybrids]. It is unlawful for any person, except for a duly authorized agent or employee of the city acting in his/her official capacity in conformance with the duties and obligations of this chapter, to own, keep, possess, harbor or maintain any pit bull terrier, pit bull terrier mix, or wolf hybrid within the city [unless] the animal [is] confined in a pen with a lockable latch surrounded by a fence at least six (6) feet in height with a secure top and a concrete base to a depth not less than six (6) inches below grade or on a secure leash under the control at all times by a person at least eighteen (18) years of age or older."); *In re Pourdas*, 206 B.R. 516, 517 (Bankr. S.D. Ill. 1997) (Granite City, Ill. Ordinance 6.10.020(A) (1989)

bulls are aggressive animals²⁴⁰ because they were bred to be fighting dogs throughout American history:

Fighting dogs fight because that is what they were bred to do. The “training” they receive is physical conditioning, aimed at building strength and stamina. The dogs know how to fight, are born knowing how to fight. The truth of the matter is that the desire to scrap with other animals is in the breed’s genes, built up through selective breeding for the traits that allowed them to excel at tasks they were routinely used for.²⁴¹

If breeders truly caused the pit bull dilemma, they should be encouraged to breed a more docile pit bull. Two good ways to effectuate this result would be to allow the victim of a pit bull attack to proceed against the breeder with either a strict products liability claim for the production of an unreasonably dangerous animal or an extended claim beyond the owner and encompassing the breeder under strict liability for an abnormally dangerous animal.

Of course, there are many responsible breeders,²⁴² and a pit bull can be a great pet with extensive and proper training and control. This, however, brings up another potential products liability claim. If a breeder is producing overly aggressive pit bulls,²⁴³ rabid skunks,²⁴⁴ diseased felines,²⁴⁵ canines with hip dysplasia,²⁴⁶ or sickly gilts,²⁴⁷ he or she ought to have a duty to warn consumers of these defects. A fail-

“provides that no person shall possess a pit bull dog within city limits for a period of more than forty-eight hours without obtaining a license.” (footnote omitted).

²⁴⁰ See Animal Control Center, *Types of Dogs*, <http://www.pethelp.net/dogbreeds.html#pit> (accessed Feb. 24, 2006) (suggesting the media is partly responsible for the public perception that pit bulls are more dangerous than any other breed of dog).

²⁴¹ Real Pit Bull, *supra* n. 236, at <http://www.realpitbull.com/fight.html>; cf. Official Pit Bull Site of Diane Jessup, *Are Pit Bulls “Naturally Aggressive?”* <http://www.workingpitbull.com/aboutpits.htm> (accessed Feb. 6, 2006) (“Many working breeds have antipathy towards other animals - coonhounds go mad at the sight of a raccoon, foxhounds will not hesitate to tear a dog-like fox to shreds, greyhounds live to chase and maul rabbits and will eagerly kill cats. They are still used today to chase down and slaughter coyotes. Even the ever-friendly beagle will ‘murder’ a rabbit, given the chance. And yet the greyhound, coon and foxhound and beagle are among the friendliest of breeds towards humans. And it is the same with the well bred pit bulldog.”).

²⁴² The author owns a two-year-old Pembroke Welsh Corgi and could not be happier with the breeder’s care and attentiveness to her trade.

²⁴³ See *Chase* (1998 Tenn. LEXIS 435 *2-4) (The plaintiff could potentially have asserted a strict liability claim against the trainer (here, the owner) of two overly vicious pit bulls that mauled the decedent, since the trainer failed to properly control or train the dogs).

²⁴⁴ See *Sease*, 700 P.2d at 1058 (holding breeder, Taylor’s Pets, strictly liable for the seller’s sale of a rabid skunk).

²⁴⁵ See *Lazarus*, 633 So. 2d at 227 (The defendants, breeders of diseased cats, should have been liable to each and every person to whom they sold the cats under strict products liability.).

²⁴⁶ See *generally Cahill*, 2005 WL 1422133 (Buyer successfully sued pet store owner after discovering puppy had hip dysplasia; owner failed to warn of the condition, which breached the implied warranty of merchantability.).

²⁴⁷ *Anderson*, 408 N.E.2d at 1195 (Ill. App. 3d Dist. 1980) (products liability claims barred against the breeder and seller of gilts). Other jurisdictions may rule differently.

ure to warn, especially where human injury or even death could occur, is almost *per se* a warning defect. Of course, a dog need not come with an actual warning label, but maybe it should come with proper instructions and warnings. The reasonable breeder and seller of animals should have a duty to educate buyers about the characteristics and qualities of the animals and of the breed in general. The breeder is in a better position to have such knowledge.

In cases where the injury-causing animal is trained by the seller or owner, the breeder should be free from liability because training constitutes a “substantial change” in the product, which would effectively terminate the breeder’s liability under section 402A.²⁴⁸ This would hold particularly true in cases where dogs are trained as fighters or guard dogs.²⁴⁹

B. Other Implications

One particular group of animals would face unique treatment if considered a “product” for products liability purposes—assistive animals. In *Meacham v. Loving*, a near-blind woman was struck and injured by a car when she and her guide dog walked into traffic.²⁵⁰ In *Slack v. Villari*, a service dog allegedly attacked a stranger.²⁵¹ In *Meacham*, perhaps the seeing eye dog was not fit for its particular purpose, but it does not follow that a strict products liability claim attaches.²⁵² But if strict products liability were proper, and if it were the case that the accident was caused by a physical defect in the seeing eye dog or its inadequate training, a claim could be brought against the animal’s trainer for producing a defective assistive animal. An assistive animal trainer could possibly be held strictly liable for selling an improperly trained animal that causes injury to a client. This, in turn, would potentially improve the quality of service animals and the safety of their owners and those around them.

Animal shelters could also face liability if animals are “products.” Animal rescue services and shelters, which rescue animals and find homes for them at little cost to the buyer, cannot possibly know the history of each animal rescued and can only gauge an animal’s temperament from its often minimal stay at the shelter. If a rescued animal turns out to be “defective,” courts may deem this to be an open and obvious danger of purchasing a rescued animal. Further, a rescue league has no reason to know of a rescued animal’s vicious propensities. Certainly, that an animal may be aggressive is foreseeable, but if it does not show this trait while in the shelter’s care, it would be difficult to

²⁴⁸ *Restatement (Second) of Torts* § 402A.

²⁴⁹ See *Radoff*, 323 P.2d at 203–05 (personal injury action where German shepherd, acting as a guard dog, attacked a trespasser in a parking lot).

²⁵⁰ *Meacham*, 285 S.W.2d at 937–38.

²⁵¹ 476 A.2d at 229–30.

²⁵² *Meacham*, 285 S.W.2d at 931 (Plaintiff hit by car while crossing street with seeing eye dog.).

show the shelter was culpable if the animal causes harm. Perhaps the sale of a used car is a helpful analogy. One buying a new car would undoubtedly expect it to have less defects than one buying a used car, notwithstanding that the used car could be equally dependable. Similarly, reasonable care in the context of shelter animals is less burdensome on the shelter than is reasonable care in the context of sales through breeders and pet store owners—both of whom possess much more knowledge of an animal's temperament, training and pedigree.

However, express warranty claims and strict liability are equally applicable to “used” products.²⁵³ By selling animals “as is” and simply not making any express warranties, animal shelters can avoid warranty litigation entirely.²⁵⁴ Conversely, shelters would probably be exempt from strict liability claims if either (depending on the jurisdiction): (1) no reasonable consumer would expect the animal to be free of potential defects or (2) the burden on the shelter to guarantee reasonably safe animals outweighs the risks to potential buyers. Of course, the burden to warn of potential “defects” in shelter animals is minimal when compared to the risks of public harm. Therefore, shelters should have a duty to disclose to prospective buyers any pertinent information that may assist the buyer in avoiding potential harm.

Finally, horse and greyhound racers may be entitled to strict products liability claims for animals that cannot win races. In *Sessa v. Reigle*, however, the plaintiff lost on a similar argument brought under express and implied warranty claims.²⁵⁵ The horse involved had temporary tendonitis; when it recovered, it won three out of thirteen races in one year.²⁵⁶ Although the horse did not win as many races as the owner would have liked, “such disappointments are an age old story in the horse racing business.”²⁵⁷ Similarly, if a horse or greyhound can run, it likely is not defective. However, perhaps it is good public policy to allow products liability claims against owners who abandon greyhounds when they can no longer race, if the dogs subsequently cause any damage whatsoever. Products liability, combined with stricter penalties for greyhound termination, would hopefully deter further cruelty to these benign and lovable dogs.²⁵⁸

V. CONCLUSION

Sooner or later, every jurisdiction will be forced to answer the question whether an animal is a “product” for the purposes of products

²⁵³ See *Jordan v. Sunnyslope Appliance Propane & Plumbing Supplies Co.*, 660 P.2d 1236, 1236 (Ariz. App. Div. 1 1983) (“We hold that a dealer in used goods may be held strictly liable under the Restatement (Second) of Torts § 402A (1965) . . .”).

²⁵⁴ See U.C.C. § 2-316(3)(a) (selling “as is” negates any implied warranties).

²⁵⁵ 427 F. Supp. 760 (E.D. Pa. 1977).

²⁵⁶ *Id.* at 763–64.

²⁵⁷ *Id.* at 770.

²⁵⁸ See generally Grey2KUSA, *Cruelty of Dog Racing*, <http://www.grey2kusa.org/Racing/cruelty.html> (accessed Feb. 7, 2006). The treatment of these animals by their owners is appalling.

liability. “In fact, animal law is one of the fastest growing emerging practice areas in the country today.”²⁵⁹ With its growth, one can expect creative lawyers to look for new methods for imposing liability on irresponsible breeders and sellers. Perhaps the necessary answers already exist within the contemporary doctrines of products liability.

Adopting the methodology of New York, Oregon, and Connecticut is not enough. Adopting the Restatement (Third) of Torts: Products Liability section 19 is a good start, but it, too, is not enough. The full application of products liability theory must be employed to the sale of defective or unreasonably dangerous animals. Most agree that animals are property in the eyes of the law. It is not a stretch to consider animals bred and sold for commercial gain as products.

By simply labeling an animal a product in this context, the law would impose responsibility on the part of the breeder and seller. Instituting a strict products liability claim would encourage sellers to provide full disclosure of all breed or animal specific propensities, full pedigree information, medical examination of the animal, and training certification.

Education and communication are key to proper animal handling and healthier, well adjusted pets. Without giving full disclosure of known or probable animal propensities to the buyer, the seller has negligently sold the animal. If that animal is unreasonably dangerous and harms the buyer, strict liability should be invoked. And if an animal is bred to be abnormally vicious or sold in a diseased state, the animal should be held defective and not merchantable.

The law must do what it can to encourage responsibility amongst the parties to these transactions or, conversely, to deter them from supplying consumers with defective animals that have and will continue to cause injury and death. Products liability theory, in its many incarnations, is an appropriate, lawful, and needed method for preventing future harm and providing for a healthier human and animal kingdom.

²⁵⁹ Laura Ireland Moore, *A Review of Animal Rights: Current Debates and New Directions*, 11 *Animal L.* 311, 311–12 (2005) (detailing the impressive and expansive growth of the field of animal law). The breadth of the subject also indicates room for further growth: “Animal law is, in its simplest (and broadest) sense, statutory and decisional law in which the nature—legal, social or biological—of nonhuman animals is an important factor.” Sonia S. Waisman et al., *Animal Law: Cases and Materials* xvii (2d ed., Carolina Academic Press 2000).

