Quarterly Review

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Ohio Association *of* Civil Trial Attorneys

A Quarterly Review of Emerging Trends in Ohio Case Law and Legislative Activity...

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President's Note

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NOVEMBER 2018

Product Liability is defined by Black's Law Dictionary as "the general obligation or liability of the producer or supplier of goods and services in order to adjust for the loss associated with its utilization, such as damage of property or personal injury. Usually, the affected party need not prove that the supplier or producer was negligent as the defect is associated with the product or service." Just by virtue of this definition alone, it is clear how complicated and challenging these cases can be to defend. OACTA's Product Liability committee has compiled an informative and useful Fall Quarterly to assist you in wading through those waters. And even if your practice does not include product liability defense, it is a great read!

C. Darcy Jalandoni and Abigail Chin kick it off with a discussion regarding how to defend a manufacturing client in a products liability lawsuit regarding a product that was sold over ten years ago using Ohio's product liability statute of repose, RC 2305.10(C) (The Product Liability Statute of Repose: Jurisdictional or Affirmative Defense?). Next is an article from David Oberly regarding injuries caused by the unforeseen use of a product that is incompatible with the product's design, and tips on how to defend such cases. (Utilizing the Unforeseeable Misuse Defense To Dispose of Product Liability Claims). Chad Eggspuehler writes about Ohio's narrow approach to contract-specifications defense, which exempts makers of certain custom-made products from strict liability, as opposed to adopting the Second Restatement, which exempts contract manufacturers from product liability when their customers provide the product design. (Ohio's Alternative to the Contract-Specification Defense: Queen City Terminal and the OPLA "Manufacturer"/"Supplier" Two-Step). Finally, James McCrystal and Ashley Wakefield provide a detailed analysis on the complicated issue of economic losses to property caused by defective properties and how Ohio has historically addressed such actions. (How Ohio Law Addresses Economic Losses to Property Caused by Defective Products).

Last but not least, please plan on attending our Annual Meeting on November 15 and 16 in downtown Columbus. We have worked very hard to put together a great program and provide plenty of opportunities for networking and connecting with colleagues and friends from around the state. I really hope to see you there!

Introduction

Product Liability Committee

Mark F. McCarthy, Esq., Committee Chair
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The Product Liability Committee of the Ohio Association of Civil Trial Attorneys is pleased to present to our members, and, our readership at-large, four scholarly articles from seasoned and veteran defense practitioners with practical and useful information on cutting-edge topics.

Jim McCrystal and Ashley Wakefield survey the history of how Ohio law addresses economic losses to property caused by defective products.

Chad Eggspuehler illuminates Ohio's alternative to the contract specification defense delving into an overview of the defense and Ohio's approach with custom products and the manufacturer/supplier distinction after the enactment of the Ohio Product Liability Act.

Darci Jalandoni discusses the status of the Ohio Statute of Repose.

David Oberly enlightens us with tips on utilizing the product misuse defense to dispose of product liability claims under Ohio law with the review of three recent Ohio decisions that demonstrate the broad applicability of the defense.

The Product Liability Committee actively seeks practitioners in this field for membership and networking throughout the state to coordinate and collaborate in molding Ohio's evolving law in this area. I would ask anyone interested in the Committee to contact me. Our Committee is great way to consult with colleagues who are experienced and knowledgeable in this area and also a great way to access information regarding qualified technical experts who are knowledgeable in engineering and scientific fields essential to the defense of these cases.

The Product Liability Statute of Repose: Jurisdictional or Affirmative Defense?

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A plaintiff files suit against your manufacturer client, alleging that the client's product caused an accident six months ago. As you begin your investigation, however, you learn that your client first sold the product *eleven* years ago. How do you proceed?

If available, Ohio's product liability statute of repose, R.C. 2305.10(C), can be a valuable tool for defense counsel to obtain early dismissal of claims against manufacturers and suppliers. The statute prevents a plaintiff from bringing suit against a manufacturer or supplier of a product more than ten years after the product was delivered to its first purchaser or lessee, thereby removing the product from the manufacturer or supplier's control.[1] The statute's status as a procedural vehicle, however, is unclear: although the Supreme Court of Ohio has indicated that the product liability statute of repose implicates subject matter jurisdiction, it has made no express ruling on the topic and, in the absence of explicit guidance, many courts continue to view the statute of repose as an affirmative defense, like the statute of limitations. This distinction informs which party has the burden of proving the elements of the statute, as well as whether the defense can be waived. This article will discuss these differing perspectives and offer practice pointers to protect manufacturer and supplier defendants from liability beyond the statute of repose period.

Statute of Repose as a Jurisdictional Vehicle

Ohio's product liability statute of repose provides, subject to certain exceptions that are not the subject of this article:

> **[N]o cause of actio**n based on product liability **shall accrue** against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product.[2]

The body of case law interpreting Ohio's product liability statute of repose is not large; however, the Supreme Court of Ohio upheld the statute as constitutional in 2008 in *Groch v. GMC*.[3] In so doing, the Supreme Court found that R.C. 2305.10(C), like other statutes of repose, "operates to potentially bar a plaintiff's suit before a cause of action arises. Thus, the statute can prevent claims from ever vesting if the product that allegedly caused an injury was delivered to an end user more than ten years before the injury occurred."[4] The Court went further, suggesting that when the injury occurs beyond a statue of repose time period, the "injured party literally has no cause of action."[5] The Court's language indicates, without explicitly holding, that a court is divested of subject matter jurisdiction over claims that arise more than ten years after a product's delivery to its first purchaser or lessee.[6]

The Supreme Court's logic in *Groch* is consistent with other courts' treatment of statutes of repose generally, both in Ohio and in sister jurisdictions: statutes of repose operate to divest

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courts of jurisdiction by eliminating causes of action altogether after a certain amount of time has elapsed.[7] In *State v. Brown*, for example, the defendant appealed his guilty plea to aggravated robbery on grounds that it was time-barred.[8] The question at issue was whether a statute barring prosecutions of felonies unless commenced within six years was "a statute of repose so that a court has no jurisdiction over the prosecution of a felony six years after it was committed, or a statute setting forth limitations of time within which a prosecution must be commenced, the effect of which can be waived by a defendant by a plea of guilty."[9] In its analysis, the First District Court of Appeals discussed the differences between the structure of a statute of limitation and a statute of repose.[10] While statutes of limitation contain provisions for the lifting and extending of time—thus, making them waivable—statutes of repose are "entirely different in structure and design."[11] Statutes of repose eliminate claims, disallow for any continuance of time, and nullify all actions.[12] Thus, because statutes of repose are an absolute bar and can nullify all claims, they divest a court of subject matter jurisdiction. [13]

Statute of Repose as an Affirmative Defense

Despite the case law distinguishing between statutes of limitation and statutes of repose, Ohio courts still confuse the two concepts, thereby complicating the procedural role of the product liability statute of repose. In his opinion dissenting in part and concurring in part with the majority in *Groch*, Justice Pfeifer plainly characterized the product liability statute of repose as an affirmative defense on which the manufacturer has the burden of proof: "the expiration of the statute of repose is an affirmative defense. Thus, the burden will sit on the manufacturer to produce records showing that the product in question has been out of its hands for a period of more than ten years. In the absence of such a showing, there can be no affirmative defense."[14] At least one appellate court—the Eighth District Court of Appeals in *Fazio v. Gruttadauria*—has cited Justice Pfeifer's language in summarily overruling an appellant's assignment of error that the claims against him were barred by the statute of repose on the grounds that the statute of repose was an affirmative defense and had been waived.[15] As observed by Justice Pfeifer and by the *Fazio* court, when characterized as an affirmative defense, the statute of repose can be waived and the manufacturer bears the burden of proving its elements.

Practice Pointers

Given the unclear procedural status of the product liability statute of repose under Ohio law, defense counsel should exercise caution and take the following measures to preserve all arguments in favor of a manufacturer or supplier client:

1. Assert both subject matter jurisdiction and the statute of repose as affirmative defenses in the answer to the complaint.

2. If the manufacturer or supplier client has available information showing the product at issue was delivered to its first purchaser or lessee more than ten years before the claim arose, file an early motion to dismiss for lack of subject matter jurisdiction pursuant to Ohio Rule of Civil Procedure 12(B)(1). Unlike a motion to dismiss under Rule 12(B)(6), courts may consider evidence outside the pleadings when ruling on Rule 12(B)(1) motions, allowing parties to attach as exhibits any evidence of the product's first date of delivery.

3. If the manufacturer does not have the evidence in its possession to support a Rule 12(B)(1) motion, serve early discovery requests including, if necessary, third party subpoenas directed at obtaining the information needed to establish the first date of delivery. Make sure to obtain information about the chain of title, warranty, and repairs made to the product, as the plaintiff may attempt to raise arguments related to these issues to modify the repose period.

4. Assuming the court has not granted an earlier motion to dismiss, move simultaneously to dismiss for lack of subject matter jurisdiction under Rule 12(B)(1) (treating the statute of repose as jurisdictional) and, in the alternative, for summary judgment (treating the statute of repose as an affirmative defense). Emphasize that if the statute of repose implicates subject matter jurisdiction, the plaintiff bears the burden of proving the court's jurisdiction—not the manufacturer defendant.

5. If there appear to be factual questions regarding the product's first date of delivery, request an evidentiary hearing to resolve this dispositive and/or jurisdictional issue in advance of trial.

Endnotes

1 R.C. 2305.10(C).
2 *Id.* (emphasis added).
3 *Groch v. GMC*, 117 Ohio St. 3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶¶ 5-8 (2008).
4 *Id.* at ¶ 149.
5 *Id.* at ¶ 116 (citing *Sedar v. Knowlton Const. Co.*, 49 Ohio St.3d 193, 201-202, 551 N.E.2d 938 (1990) (upholding construction contract statute of repose as constitutional)).
6 *See also Legge v. Nucor Steel Marion, Inc.*, N.D.Ohio No. 3:08 CV 255, 2008 U.S. Dist. LEXIS 96473, *5 (Nov. 25, 2008) ("if the statute of repose for products liability is ten years from the date of delivery of the product to the end user, and the injury occurs eleven years after the delivery, then the end user's products liability **claim will never arise**").
7 *See, e.g., Acierno v. New Castle Cty.*, Civil Action No. 1173-N, 2006 Del. Ch. LEXIS 114, at *24 (Del. Ch. June 8, 2006) (granting the defendants' motion to dismiss for lack of subject matter jurisdiction on the grounds that the applicable statute of repose barred plaintiff's claims); *Angersola v. Radiologic Assocs. of Middletown, P.C.*, Case No. MMXCV146012179, 2015 Conn. Super. LEXIS 2198, at *8-11, 27 (Conn. Super. Ct. Aug. 20, 2015) (same); *Daniel v. United States*, 977 F. Supp. 2d 777, 779 (N.D. Ohio 2013) (considering a motion to dismiss for lack of subject matter jurisdiction on statute of repose grounds, among others); *Kennedy v. United States VA*, Case No. 2:11-cv-150, 2011 U.S. Dist. LEXIS 145173, at *12-13 (S.D. Ohio Dec. 16, 2011) (granting motion to dismiss for lack of subject matter jurisdiction on statute of repose grounds), *rev'd on other grounds* 526 Fed. App'x 450 (6th Cir. 2013).
8 *State v. Brown*, 43 Ohio App. 3d 39, 40, 539 N.E.2d 1159 (1st Dist. 1988).
9 *Id.* at 39.
10 *Id.* at 42.
11 *Id.* at 42.
12 *Id.* at 42-43 (comparing language of statutes of repose for medical malpractice and construction improvements to statutes of limitation, noting how statutes of repose use language such as "no action…shall be brought" and "in no event shall any…claim").
13 *Id.* at 40, 43. The Supreme Court of Ohio cited favorably to *Brown* in *Daniel v. State*, 98 Ohio St. 3d 467, 2003-Ohio-1916, ¶ 17, noting that a violation of a statute of limitations, unlike a statute of repose, does not affect the jurisdiction of the court.
14 *Groch*, 2008-Ohio-546, ¶¶ 251 (Pfeifer, J., concurring in part and dissenting in part).
15 *Fazio v. Gruttadauria*, 8th Dist. Cuyahoga No. 90562, 2008-Ohio-4586, ¶ 23 ("A statute of limitations is an affirmative defense that is waived unless pled in a timely manner. The statute of repose is likewise considered an affirmative defense.") (internal citations omitted).

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Utilizing the Unforeseeable Misuse Defense To Dispose of Product Liability Claims

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I. Why It Matters

The unforeseeable misuse defense applies to preclude a plaintiff from maintaining an actionable product liability in Ohio where the plaintiff uses a product in a capacity which is unforeseeable and incompatible with the product's design. Importantly, unforeseeable misuse can be used as a complete defense to a broad array of product liability causes of action. Three recent Ohio decisions demonstrate the broad applicability of the defense with respect to this particular area of civil litigation, and exemplify how the misuse defense can be deployed in litigation to dispose of an action favorably and efficiently, oftentimes without having to undergo the time, effort, and expense of fully litigating a dispute through trial.

II. Ohio Law

To prevail on a product liability claim against a manufacturer, a plaintiff must establish that: (1) the product was defective in manufacture or construction, was defective in design or formulation, was defective due to an inadequate warning, or was defective because it did not conform to a manufacturer's representation; (2) the defective aspect of the product was a proximate cause of the harm to the plaintiff; and (3) the manufacturer designed, formulated, produced, constructed, created, assembled, or rebuilt the actual product that caused the harm. Moreover, in any product liability case, whether based in common law or statute, a plaintiff must prove that a product defect proximately caused his or her injury. The rule of proximate cause requires that the injury sustained shall be the natural and probable consequence of the negligence alleged; that is, such consequence as under the surrounding circumstances of the particular case should have been foreseen or anticipated by the wrongdoer as likely to follow his or her negligent act. Importantly, it is well-established in Ohio that foreseeability must be present in connection with a product liability claim in order to establish proximate cause.

A manufacturer must neither anticipate all product uses nor guarantee that the product is incapable of causing injury in all of its possible uses. Only those circumstances which the manufacturer perceived or should have perceived at the time of its respective actions should be considered. The foreseeable risks associated with the design of a product are determined by considering, among other factors, the likelihood that the design would cause harm in light of the intended and reasonably foreseeable uses, modifications, or alterations of the product.

Accordingly, an otherwise strictly liable defendant in a product liability action is provided with a complete defense if the plaintiff misused the product in an unforeseeable manner. Unforeseeable misuse is an affirmative defense, which means that even if the product were defectively designed, the plaintiff's unforeseeable misuse would prevent liability from attaching. Judgment as a matter of law is appropriate where the product is used in a capacity which is unforeseeable by the manufacturer and completely incompatible with the product's design. "Misuse" of a product suggests a use which was unanticipated or unexpected by the product manufacturer, or unforeseeable and unanticipated. With that said, an unreasonable use—unlike an unforeseeable misuse—is not a complete defense to a negligence/product liability claim.

III. Successful Applications of the Misuse Defense to Defeat Product Liability Claims

Three significant Ohio decisions exemplify how defense practitioners can attack product liability claims by leveraging the unforeseeable misuse defense to conclusively dispose of a wide array of product liability causes of action.

In *McLaughlin v. Andy's Coin Laundries, LLC*, 2018-Ohio-1798 (1st Dist.), the court found that the unforeseeable misuse defense applied to preclude a plaintiff from maintaining an actionable product liability claim stemming from an injury sustained when the plaintiff misused a laundromat washing machine. In that case, Seth McLaughlin took a comforter to a laundromat, where he placed the item inside a front-loading machine and initiated a wash cycle. The front of the washing machine bore a warning label that warned patrons of the risk of serious injury that could result from trying to open the door while the drum was still turning. Midway through the wash, McLaughlin noticed that the machine was stuck in the wash cycle, and that the display on the machine was flashing the error message "F-10." Unaware of what an "F-10" error was, on the advice of other patrons McLaughlin pried the washing machine doors open. While the machine's drum continued to spin, McLaughlin then attempted to grab the comforter to pull it out of the washer. In doing so, McLaughlin's arm was pulled into the machine as the drum continued to turn. McLaughlin's wrist was crushed and disconnected internally from his arm, ultimately causing his hand to be amputated at the wrist. Under these facts, the court found that McLaughlin's acts of forcing open a locked washing machine door with a screwdriver while the machine's drum was visibly rotating and still contained water, and then reaching into the rotating machine drum, constituted misuse of the product. Such actions, which included the purposeful disabling of a safety device on the machine, were completely incompatible with the product's design. In addition, the court further concluded that the manufacturers' employees had no prior knowledge of this misuse and, as such, the misuse was not foreseeable. Combined, McLaughlin's misuse of the washing machine in an unforeseeable manner mandated summary judgment in favor of the machine's manufacturers on McLaughlin's product liability claims.

Likewise, in *Dinsio v. Occidental Chem. Corp.*, 126 Ohio App.3d 292, 710 N.E.2d 326 (7th Dist. 1998), the court also found that the unforeseeable misuse defense applied to bar a product liability claim in its entirety. In that case, Vincent Dinsio, Jr. purchased caustic soda beads from supplier Superior Chemical Products Co. Superior purchased the beads from manufacturer Occidental Chemical Corp. The product contained warnings and instructions that appeared on the bag of the beads cautioning users that the beads could react violently with water, acids, and other substances. In addition, further warnings were also included advising users to always wear protective clothing when handling the beads. After buying the product, Dinsio poured a cup of undiluted beads into a floor drain for the purpose of cleaning it out. An upward explosion occurred, causing bodily injury to Dinsio. Subsequently, Dinsio filed a product liability action alleging a claim of inadequate warning and labeling against Superior and Occidental. In his deposition, Dinsio admitted that he did read the warnings on the bag when he initially purchased the product. Dinsio further admitted that after reading the warnings, he poured a cup of the undiluted beads into the floor drain and, without wearing any protective clothing, returned to attend to the drain when a liquid exploded out of the drain, causing him bodily injury. Taken together, the court found that Superior and Occidental were not liable for Dinsio's injuries because Dinsio failed to heed the explicit warnings and instructions on the package, which triggered the complete defense of unforeseeable misuse as a matter of law.

Finally, in *Richards v. C. Schmidt Co.*, 54 Ohio App.3d 123, 561 N.E.2d 569 (1st Dist. 1989), the court likewise applied the unforeseeable misuse defense to dispose of a product liability claim. In that case, Dennis Richards worked for C. Schmidt Company, which manufactured foam-insulated refrigeration boxes. During his work, Richards used an Olin Autofroth foam machine. Richards used methylene chloride supplied by Ashland Chemical Company to clean the machine. In addition, Richards also used the chemicals supplied by Ashland to clean himself after work. Richards filed suit against Ashland, among others, alleging that Ashland failed to provide adequate warnings with their chemicals, causing Richards to sustain injuries due to

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his use of the chemicals to wash himself. Importantly, the label on the drums containing the Ashland chemicals provided a warning in bold print that cautioned users to avoid prolonged or repeated contact with skin. The label also advised the user to wear chemical safety glasses, gloves, and other necessary protective equipment when handling the chemicals. Richards admitted that he read the warnings on the labels and understood them, but that he ignored the warnings and washed his hands and his face with the chemicals. Accordingly, the court found that Richards improperly used the chemicals to clean himself after work, even though he read the warnings cautioning against repeated contact with skin. As such, the court concluded that this improper use, which was done contrary to clear warnings, removed the existence of any genuine issue of material fact relative to the alleged failure to warn, and mandated the award of summary judgment in favor of Ashland based on the unforeseeable misuse defense.

IV. The Final Word

As the above cases demonstrate, Ohio courts have not hesitated to apply the unforeseeable misuse defense to bar a wide range of product liability claims and actions in their entirety. Accordingly, defense practitioners must carefully analyze the potential applicability of the unforeseeable misuse doctrine at the outset of any product liability suit, as this stringent defense can serve to completely dispose of product liability claims where the doctrine applies. As a general rule of thumb, where a product contains a clear and unambiguous warning, and a plaintiff reads and understands the warning, but nonetheless proceeds to use the product in a manner that runs directly contrary to the product's warnings and instructions, the unforeseeable misuse defense can be applied to conclusively defeat a product liability claim.

Where the defense appears to be potentially applicable, counsel should formulate an effective strategy to obtain the necessary factual evidence during discovery and depositions that will allow defense counsel to successfully utilize the defense as part of a well-supported summary judgment motion. In particular, defense counsel should seek to elicit admissions on the part of the plaintiff that he or she read and understood the product's warnings and instructions, but nonetheless improperly used the product contrary to the product's clear warnings which cautioned against the plaintiff's course of conduct.

Armed with the right evidence, the successful assertion of the unforeseeable misuse defense via summary judgment can pay huge dividends for defense practitioners and their clients, allowing both to avoid not only the time and expense of trial, but also the payment of any settlement dollars as well. Moreover, in addition to conclusively disposing of a lawsuit altogether, the unforeseeable misuse defense can be strategically leveraged to alter the playing field and significantly reduce the overall value of a claim during settlement negotiations. As such, product liability defense practitioners are well advised to make the unforeseeable misuse defense a mainstay in their litigation tool belts, and should seek to utilize this game-changing defense whenever possible.

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Ohio's Alternative to the Contract-Specification Defense: Queen City Terminal and the OPLA "Manufacturer"/"Supplier" Two-Step

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The contract-specifications defense adopted by numerous jurisdictions and recognized in Comment (a) to Section 404 of the Restatement (Second) of Torts, exempts contract manufacturers from product liability when their customers provide the product design. It reflects the common-sense principle that a contractor should not be liable for following the material and design instructions of the product designer. *See Bloemer v. Art Welding Co.*, 884 S.W.2d 55, 59 (Mo. App. E.D. 1994) ("[T]o hold [a contractor] liable for defective design would amount to holding a non-designer liable for design defect. Logic forbids any such result."). Think of it like putting together a piece of furniture—Ikea is generally responsible for the product design and warnings, *not* the person who follows the instructions to build the dresser drawers, unless that person fails to follow the instructions.

Yet, despite adopting other aspects of the Second Restatement, Ohio's courts have yet to embrace the defense, instead opting for a narrower approach that exempts the makers of certain custom-made products from strict liability. *See Queen City Terminals v. Gen. Am. Transp. Corp.*, 653 N.E.2d 661 (Ohio 1995). One possible explanation: the Ohio Product Liability Act's (OPLA) competing liability regimes for "manufacturer[s]" and "supplier[s]." *See* O.R.C. §§ 2307.71(A)(9) & (15)(a), 2307.73 (manufacturer liability), 2307.78 (supplier liability).

Though full adoption of the contract-specifications defense likely will require legislative action, key OPLA provisions and some Ohio authority leave room to achieve some of the same results under the OPLA.

I. Overview: The Contract-Specifications Defense

"With a few exceptions, most jurisdictions apply the contract specifications defense regardless of the theory of liability." *Herrod v. Metal Powder Prod.*, 886 F. Supp. 2d 1271, 1275 (D. Utah 2012) (collecting authority from Indiana, Ohio, Massachusetts, and New York, and concluding that Utah would apply doctrine to bar strict product liability claims); *see also Hatch v. Trail King Indus., Inc.*, 656 F.3d 59, 69 (1st Cir.2011) (noting that a "growing majority of courts have [held] that even in strict liability a manufacturer who merely fabricates a product according to the purchaser's design is not responsible," such that "the soundness of a contract specifications defense . . . does not depend on the underlying theory of liability"). The defense recognizes the common-sense rule that a contractor "cannot be held liable for producing a product with specifications that are beyond its control." Am. Jur. Products Liability § 1385. In other words, a "contractor is not required to sit in judgment on the plans and specifications or the materials provided by his employer." Restatement (Second) of Torts § 404 cmt. a (1965).

Depending on the jurisdiction, the defense may bar both negligence and strict liability claims against contract manufacturers, *e.g.*, *Hopfer v. Neenah Foundry Co.*, 477 S.W.3d 116, 124 (Mo. App. 2015), and, "[i]n the absence of [a separate] duty to evaluate the adequacy or safety of customer-provided designs, it follows that [the contract manufacturer] likewise ha[s] no duty to warn of alleged defects," *Bloemer*, 884 S.W.2d at 60. *Cf. Herrod*, 886 F. Supp. 2d at 1278 (separately considering whether contract manufacturer had a continuing duty to warn the customer about the risks associated with the trailer wheel nuts the customer requested, but finding it "had no duty to undertake a more detailed investigation of a product it did not manufacture" and thus "no duty to warn").

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The defense, however, is not limitless. The contractor assumes liability when it proceeds with design specifications that "[are] so obviously bad that a competent contractor would realize that there was a grave chance that his product would be dangerously unsafe." Restatement (Second) of Torts § 404 cmt. a; *accord Bloemer*, 884 S.W.2d at 58–59; *Johnston v. United States*, 568 F. Supp. 351, 354 (D. Kan. 1983).

II. Ohio's Approach: Custom Products Under *Queen City Terminal*

At least one federal court has construed Ohio authority as supporting the contract specifications defense, *see Herrod*, 886 F. Supp. 2d at 1275, but the Ohio case it cites stands for a much narrower custom-products rule. In *Queen City Terminals*, the Ohio Supreme Court concluded that strict liability for defective seals and gaskets did not attach to Trinity, the company that manufactured custom-order "Tanktrain" train cars for the delivery of benzene. The court reasoned that Trinity's customer, GATX, controlled the product specifications, including the alleged design defect—the decision to include "washout" holes covered by gaskets that would make it easier to clean and reuse the specialty train cars. Such control over the specifications, the court explained, defeated the safety rationale for strict liability: "It does not promote product safety to hold manufacturers strictly liable for the decisions of their consumers." Further, the uniqueness of the product in Trinity's product line cut against the cost-shifting justification for strict liability. Because "Trinity fulfilled a specific, limited, custom-made order for one client," the court explained, there was "no opportunity to spread the costs throughout its many customers, because no other customers exist."

Though *Queen City Terminal* predated the OPLA, subsequent Ohio cases have viewed its holding through the lens of the OPLA's definition of "product," O.R.C. § 2307.71(A)(12). *E.g.*, *Lucio v. Edw. C. Levy Co.*, No. 15-cv-613, 2017 WL 2017 WL 1928058, at *4–5 (N.D. Ohio May 10, 2017); *Estep v. Rieter Auto. N. Am., Inc.*, 774 N.E.2d 323, 328–29 (Ohio Ct. App. 2002). Specifically, these cases look to the statutory definition's requirement that *products* be manufactured "for introduction into trade or commerce." O.R.C. § 2307.71(A)(12)(a)(ii). The *Queen City Terminal* rule, per the *Estep* court: "[a] product which is custom-made at the express request and design of the purchaser and which is not launched into the stream of commerce to consumers is not a 'product' for purposes of imposing strict liability upon the maker." 774 N.E.2d at 328.

So understood, *Queen City Terminal* is narrower that the Second Restatement's contract-specification defense; it seemingly would not exempt an independent contractor that manufactures to specification the entire supply of a customer's product line—*e.g.*, a powder blending factory that blends and packages the toothpaste product line for a brand name toothpaste company using the materials, specifications, packaging, and product warnings requested by that company. *Cf. Zuniga v. Norplas Indus. Inc.*, 974 N.E.2d 1252, 1260 (Ohio Ct. 2012) (describing *Queen City Terminal* as a "rare" exception for custom products, and that it did not exempt contract manufacturer of conveyor belt who had previously prepared such products for customers).

III. Enactment of the OPLA and the Manufacturer / Supplier Distinction

With the passage of the OPLA and subsequent amendments, the Ohio General Assembly abrogated and effectively replaced common law product liability claims with the statutory claims provided by the Act. O.R.C. § 2307.71(B); *Miles v. Raymond Corp.*, 612 F. Supp. 2d 913, 918–22 (N.D. Ohio 2009). Under this regime, there are product *manufacturers* and *suppliers*, and each is subject to distinct measures of liability. Whereas manufacturers are subject to a form of strict liability, *see* O.R.C. § 2307.73(A), suppliers typically are subject to only negligence claims and claims based on their own misrepresentations, *id.* § 2307.78(A)(1) & (2).

Though it provides separate definitions for the terms, the Act does not clearly delineate their contours. "Manufacturer" refers to "a person engaged in a business to design, formulate, produce, create, make, construct, assemble, or rebuild a product or a component of a product," O.R.C. § 2307.71(A)(9), "Supplier" identifies, *inter alia*, one who "sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce," *id.* § 2307.71(A)(15)(a)(i). Further, the Act provides that the two terms are mutually exclusive. O.R.C. § 2307.71(A)(15)(b)(i) (noting that a supplier cannot be a manufacturer).

But what about independent contractors whose customers design the product and provide detailed specifications for the product, the materials, the packaging, and the product warnings? The contract manufacturer for the brand name toothpaste? Such independent contractors arguably "produce, create, make, construct, [or] assemble" the product, per the

statutory definition of "manufacturer." But they also "prepare[], blend[], package[], [and] label[]" like a "supplier"; that is the extent of their participation "in the placing of a product in the stream of commerce." The statutory definitions leave one wondering whether the term "manufacturer" implicitly connotes a degree of creative discretion in the product manufacturing process—some contribution to the product or component design, some decision-making as to materials or warnings used, *etc.*

The Act itself provides some support for this interpretation. In the section concerning "supplier" liability, the Act states that suppliers will be subject to the same liability as manufacturers when the supplier, *inter alia*, "created or furnished a manufacturer with the design or formulation that was used to produce, create, make, construct, assemble, or rebuild that product or . . . component of that product" or "altered, modified, or failed to maintain th[e] product" in such a way as to "render[] it defective." O.R.C. § 2307.78(B)(5) & (6).

So do some cases involving fast-food franchises. For instance, in *Brown v. McDonald's Corp.*, both the parties and the court presumed that McDonald's Corporation and Keystone Food Corporation, the co-developer of a specific McDonald's sandwich, were "manufacturers." 655 N.E.2d 440, 442 (Ohio Ct. App. 1995). In rejecting the plaintiffs' argument that the two entities also qualified as suppliers, the court observed that the plaintiffs "correctly argue that, because both McDonald's and Keystone admit to participating in the development of the [sandwich], they meet the statutory definition of "manufacturer." *Id.* The court addressed the owner of the McDonald's franchise that made and served the sandwich, however, in terms of supplier liability, even though it *assembled* and *produced* the allegedly defective product. *Id.* at 444–46. Meanwhile, in the hot-coffee case *Nadel v. Burger King Corp.*, the court of appeals looked to the fact that the Burger King Corporation set coffee serving temperatures for its franchises in determining that it was a manufacturer. 695 N.E.2d 1185, 1192 (Ohio Ct. App. 1997), *overruled on other grounds*. While hardly definitive explications of the manufacturer/supplier dichotomy, these cases—like *Queen City Terminal* and its progeny—reflect that some courts and parties are distinguishing between entities that determine product materials, specifications, and packaging (manufacturers) and third-party companies that prepare, blend, package, or label those products according to those specifications (suppliers).

IV. Conclusion

Contrary to the court's statement in *Herrod*, it does not appear that Ohio has endorsed the contract-specification defense applied in other jurisdictions and adopted by the Second Restatement. Rather, *Queen City Terminal* and its progeny stand for a narrow rule exempting certain custom-made items from the OPLA definition of "product" and the scope of product liability actions altogether. Still, the OPLA product liability regime for "manufacturers" and "suppliers," and some cases interpreting these provisions, leave some room to argue that independent contractors must assert some discretion in product or component design, assembly, materials, packaging, or warnings in order to qualify as "manufacturers" subject to strict liability.

Strong policy reasons support the contract-specification defense, and the General Assembly would do well to consider legislation expressly adopting and the defense and clearly defining its limits in Ohio. Until that time, however, defense counsel for such contractors should consider the following options for minimizing their clients' potential liability:

- whether the customer controls all facets of product design, usage, and whether or not it enters the stream of commerce, under the *Queen City Terminal* custom-goods exception; or alternatively
- whether the independent contractor's role more closely resembles that of a "manufacturer" or "supplier," under the OPLA definitions of those terms and § 2307.78(B)'s standard for imputing "manufacturer" liability to "suppliers."

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How Ohio Law Addresses Economic Losses to Property Caused by Defective Products

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Ohio has had long history of addressing claims involving damages to property caused by a product and economic losses related to product defects. Those decisions have involved both the law of contracts and the law of torts. Since 1962, the law of contracts in Ohio concerning products has been found in the Uniform Commercial Code. The law of torts has been a matter of both common law and, since 1988, has partially been governed by R.C. 2307.71 – R.C.2307.80. This article will review how Ohio law has evolved over the years when a product causes property damage or economic losses and how the right to such a recovery depends on whether the plaintiff is a consumer or a commercial entity.

First, a bit of background on the development of the law regarding what we now call product liability law. Until 1958, a party in privity with a manufacturer could use express or implied warranties in the contract for sale of the product to sustain a successful claim for damages, but, for those consumers without privity with the manufacturer, their only remedy was a negligence claim.

For example, a house fire was allegedly caused in 1946 when an electric blanket manufactured by General Electric caught fire. The plaintiff brought two claims against GE, first a claim that it breached an implied warranty of merchantability and the implied warranty the blanket was reasonably fit for use as an article of bed clothing and the second, that the blanket was negligently manufactured and that GE failed to properly inspect or warn. The first claim was brought in hopes of avoiding contributory negligence from defeating their damage claim as a result of the fire.

The jury instructions set out contributory negligence as a defense to both the implied warranty claim and the negligence claim. The jury found the plaintiffs were negligent and returned a defense verdict. The Court of Appeals reversed the verdict on the breach of implied warranty and ordered a new trial, because they found the contributory negligence charge should not have applied to the breach of implied warranty claims.

That outcome was appealed to the Ohio Supreme Court in 1953, which decided the appeal in *Wood v. General Electric Co.*, 159 Ohio St. 273, 112 N.E.2d 273 (1953). The Supreme Court ruled in its second syllabus, that a "sub purchaser of an inherently dangerous article may recover from its manufacturer for negligence, in the making and furnishing of the article, causing harm to the sub purchaser or his property from a latent defect therein, no action may be maintained against a manufacturer for injury, based upon implied warranty of fitness of the article so furnished" (Syllabus 2). So as late as 1953, the only remedy for someone not in privity with the manufacturer was a negligence action with the risk, as was the case here, that contributory negligence would defeat the claim, even where the manufacturer was careless in its design or manufacture of a consumer product.

Five years later, in 1958, the Ohio Supreme Court became one of the earliest high courts to expand consumer remedies when it decided *Rogers v. Toni Home Permanent*

Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958). In that case, the plaintiff bought a Toni Home Permanent set labeled "Very Gentle" and had her mother give her a permanent wave. However, what resulted was unsatisfactory because her hair was caused to "assume a cottonlike texture and become gummy; that her hair refused to dry; and that when the curlers furnished by defendant were attempted to be removed, her hair fell off to within one-half inch of her scalp." *Id.* at *1. Her complaint was based on theories of negligence, breach of an express warranty, and breach of an implied warranty. The latter two claims were dismissed by the trial court and, as was the practice before the adoption of the Civil Rules, she appealed those dismissals. While the appellate court reinstated the express warranty claim, it sustained the dismissal of the implied warranty claim. The decision to reinstate the express warranty claim was in conflict with a decision of another court of appeals, so the Supreme Court took up the issue.

The Supreme Court held that a manufacturer who makes representations which the consumer relies upon can be sued even though there was no direct contractual relationship between them. In other words, a consumer can sue a manufacturer for breach of an express warranty. The decision was grounded on the conclusion that such a breach was allowed as a matter of tort law and is not based on contract law, so that the lack of privity did not defeat the claim.

In 1965, the Supreme Court further expanded consumer rights in *Inglis v. American Motors Corp.*, 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965), to allow consumers not in privity with the manufacturer to recover damages from the manufacturer for breach of an express warranty made in advertising that Rambler automobiles were trouble-free, economical in operation, and built and manufactured with high quality of workmanship and to recover damages for the diminution of value of an automobile attributable to the latent defects in the vehicle that breached those representations. The specific allegations were that "the cargo-area door was out of line, could not be opened, and continually squeaked and rattled; that the trimming about the door was torn; that the doors were out of line and squeaked and rattled, and that the door handles were loose; that the motor was extremely noisy, had been defectively cast and seeped substantial quantities of oil; that the steering gear was improperly set and creaked when turned; that the transmission emitted a groaning noise; that the brakes squeaked and grated; that the oil pump assembly was defective; that the front seat squeaked and rocked; and that loose parts inside of the car fell out from time to time endangering occupants of the car" *Id.* at 134. In other words, the purchaser of the car could recover for his or her economic loss caused by breach of an express warranty. However, because there was no privity between the buyer and the manufacturer, the breach of an implied warranty claim concerning quality and fitness of said automobile was denied, as was a negligence claim against the manufacturer by the buyer to recover the diminished value of the car for the manufacturer's alleged failure to discover or correct the defects in the car before sale.

In 1966 in *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966), the Ohio Supreme Court brought their prior decisions together and held that manufacturers were liable in tort when their products were defective because they were not fit for their ordinary purpose, even to those consumers who were not in privity with the manufacturer. No longer was a party not in privity with the manufacturer limited to pleading their damages were the result of a breach of an express warranty, now they could base their claim on a breach of the implied warranty that the product was safe for its ordinary use.

In 1975, the Supreme Court had to decide whether the cause of action for breach of implied warranty in tort was available in a case of property damages only. In *Iacono v. Anderson Concrete Corp.*, 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975), the Supreme Court recognized the right of a homeowner who hired a cement contractor to install a drive way to recover damages from the concrete supplier from whom the homeowner's contractor purchased the concrete, after the concrete failed to withstand the winter because soft shale was included in the mix by the concrete company.

Whether a commercial entity could pursue a similar recovery was decided in *Chemtrol Adhesives v. Am. Mfrs. Mut. Ins. Co.,* 42 Ohio St. 3d 40, 537 N.E.2d 624 (1989). Chemtrol was in privity with the product manufacturer but the contract did not have remedy covering the damages to the industrial dryer it purchased from the manufacturer, or the costs to repair the dryer or for the increased production costs while the dryer as out of service. So it attempted to recover those

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damages from the manufacturer using the breach of an implied warranty in tort theory approved in *Iacono*.

Adopting the analysis of damages offered in *Mead Corp. v. Allendale Mut. Ins. Co.*, 465 F. Supp. 355, 363 (N.D. Ohio 1979), the Supreme Court recognized there are three types of damages which could be caused by a defective product; the first two were physical injury to persons or property. The third type of damage was economic loss, which had two components: 1) direct economic loss, the loss attributable to the decrease in value of the product because of the defect, and 2) indirect economic loss, the consequential damages caused by the defective product. Both of the latter economic loss claims existed in this case.

The court observed, "the determination of whether recovery in tort is available for damage to the defective product itself requires more than a simple labeling of that damage as 'property' or 'economic'" *Chemtrol Adhesives v. Am. Mfrs. Ins. Co., supra* at 44. It recognized "the law of negligence does not extend the manufacturer's duty so far as to protect the consumer's economic expectations, for such protection would arise not under the law but rather solely by agreement between the parties.... [T]he duty to provide a working arch dryer arose not under the law of negligence but rather under its contract with Chemtrol. Accordingly, it is the law of contracts, and not the law of negligence, to which Chemtrol must look for a remedy." *Id.* at 45.

The *Chemtrol* court concluded "a commercial buyer seeking recovery from the seller for economic losses resulting from damage to the defective product itself may maintain a contract action for breach of warranty under the Uniform Commercial Code; however, in the absence of injury to persons or damage to other property the commercial buyer may not recover for economic losses premised on tort theories of strict liability or negligence." Id. at paragraph 2 of the syllabus.

The court also noted a key distinction here from the prior cases. The plaintiffs in its prior decisions addressing economic loss, *Inglis* and *Iacono*, were not in privity with the manufacturing defendant. This was a critical difference of position, since the parties were not free to bargain over the quality of the goods.

So since 1989, while commercial buyers in privity with the manufacturer are limited to contractual remedies, what remedies are available for economic losses caused to commercial parties who are not in privity with the manufacturer?

The Ohio Supreme Court has not addressed this issue but in 1997, the Ninth District did address the issue in *Midwest Ford v. C.T. Taylor Co.*, 118 Ohio App. 3d 798, 694 N.E.2d 114 (9th Dist. 1997). Midwest had hired a general contractor to remodel the dealership and a flooring company subcontracted to install tile it would purchase from a flooring dealer (OBrien Cut Stone). The tile turned out to be defective and Midwest sued for the diminished value of the flooring and other damages as a result of the defects in the flooring.

The *Midwest* court reasoned that "Midwest has bargaining power at least equal to that of Contractor or O'Brien. Presumably, Midwest could have purchased warranty protection for the value of the floor from Contractor, but chose not to do so. Through this suit, Midwest seeks a better bargain than it struck. Permitting suit against O'Brien for strict liability for purely economic damages potentially shifts costs to O'Brien's other customers, be they non-commercial buyers or commercial buyers who manage contractual economic risks more conservatively than Midwest." *Id.* at 805.

However, in 2000, the Tenth District Court of Appeals addressed the same issue in a case involving a defective roof insulation supplied by a vendor to a subcontractor of the general contractor hired by the state to build a State Highway Department garage. The court in *Ohio Dep't of Admin. Servs. v. Robert P. Madison Int'l.*,138 Ohio App. 3d 388, 741 N.E.2d 551 (10th Dist. 2000), reviewed Midwest's reasoning but found no basis for distinguishing between so-called commercial and noncommercial buyers, thereby upholding the state's right to pursue the insulation manufacturer on a breach of an implied warranty in tort for economic damages resulting from the defect. That holding has been followed by the Fourth District Court of Appeals in *Caterpillar Fin. Servs. Corp. v. Harold Tatman & Son's, Enters.*, 2015-Ohio-4884, 50 N.E.3d 955 (4th Dist.), but by no other Ohio courts.

The other courts to consider whether a commercial plaintiff who is not in privity with the manufacturer can recover for economic loss have all rejected the claim. First, in

2003, the Third District Court of Appeals in *Norcold, Inc. v. Gateway Supply Co.*, 154 Ohio App.3d 594, 2003-Ohio-4252, 798 N.E. 2d 618, ¶35 (3d Dist.), for reasons similar to M*idwest Ford*, held that the "policies of product liability law as articulated by Ohio courts would not be served by extending a strict-liability cause of action to commercial plaintiffs" and declined to follow the reasoning in Department of Administrative Services decision.

The Sixth Circuit also addressed this issue and reasoned consistent with the *Midwest Ford* decision, rejecting the analysis in the Department of Administrative Services decision. In *HDM Flugservice GmbH v. Parker Hannifin Corp.*, 332 F.3d 1025 (6th Cir. 2003), the court concluded that allowing commercial buyers not in privity with the manufacturer to seek these remedies would undermine the provisions of the Uniform Commercial Code governing commercial transactions. "Among commercial parties, the U.C.C. provides a comprehensive scheme for parties to recover their economic losses. Permitting commercial parties to recover economic losses in tort would allow a purchaser to reach back up the production and distribution chain, thereby disrupting the risk allocations that have been worked out in the transactions comprising the chain. Moreover, policies underlying Ohio's strict liability are forcing manufacturers to internalize and redistribute the cost of injuries because they are in the best position to do so and relieving average consumers of the burden of proving negligence. These policies do not favor allowing commercial parties to recover their economic losses. [Citations omitted.] *Id*. at 1030.

In *Apostolos Group, Inc. v. BASF Constr. Chems., LLC*, 9th Dist. Summit No. 25415, 2011-Ohio-2238, the Ninth District reevaluated its Midwest decision in view of the Department of Administrative Services decision, but ended its analysis noting: "while the relative bargaining power of a commercial consumer will vary from case to case, the commercial consumer functions in a different capacity than the average customer. The fact that Thomarios did not have an opportunity to negotiate the warranty and product formulation of the Sonoguard does not mean that it was similarly situated as a member of the general public making a purchase for personal use. As a commercial consumer, Thomarios was presumably aware of the inherent risks involved in entering into a commercial endeavor. By making the decision to engage in the commercial endeavor of applying the deck coating at the Fowler apartments, Thomarios entered into an arrangement where Rasmussen could specify the type of deck coating used for the project. As the policies underlying the strict liability doctrine would not be served by allowing Thomarios to assert an implied warranty claim, the trial court did not err in following Midwest Ford." *Id.* at ¶16.

So at this point in the development of the law in Ohio remains clear consumers not in privity with the product manufacturer can recover in tort for economic losses caused by product defects, but there are two conflicting views concerning whether commercial parties have tort rights to recover economic losses caused by defects in the product against a manufacturer.

Having read this article you might ask "doesn't the Ohio Product Liability Act have something to say about these claims?"

The answer is not much. R.C. 2307.71(A)(13) says product liability claims include "claims for physical damage to property other than the product in question," and that is the only reference to non-personal injury claims defined as a "product liability claim." So claims for damage to the product, itself, and non-physical damages to other products, are outside the coverage of the product liability statutes in Ohio.

This point is made clear by these additional terms, defined in that same section of Revised Code. Part (A) (2) of the statute defines "economic loss" to mean "direct, incidental, or consequential pecuniary loss, including, but not limited to, damage to the product in question, and nonphysical damage to property other than that product. Harm is not "economic loss." As for the term "harm," it is defined in Part (A)(7) to mean "death, physical injury to person, serious emotional distress, or physical damage to property other than the product in question. Economic loss is not 'harm.'"

Finally, to make the intent more clear, R.C. 2307.72(C) states "Any recovery of compensatory damages for economic loss based on a claim that is asserted in a civil action, other than a product liability claim, is not subject to sections 2307.71 to 2307.79 of the Revised Code, but may occur under the common law of this state or other applicable sections of the Revised Code."

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Section 2307.79 of the Revised Code makes it clear that while economic loss is not recoverable under the product liability statutes, if compensatory damages are awarded for "harm" (as defined in R.C. 2307.71(A)(7) as, personal injuries and physical damage to property other than the product), the claimant may recover from the product manufacturer "compensatory damages for any economic loss that proximately resulted from the defective aspect of the product in question (R.C. 2307.79(A)) and "for any economic loss that proximately resulted from the negligence of that supplier or from the representation made by that supplier and the failure of the product in question to conform to that representation" (R.C. 2307.79(B)). So when compensatory damages are awarded for "harm," manufacturers and suppliers are also liable for "economic loss" as that term is defined in R.C.2307.71(A)(7).

At this time it is unclear whether this phrase, in R.C. 2307.79, "compensatory damages for any economic loss that proximately resulted from the defective aspect of the product in question" will allow a consumer or a commercial plaintiff suffering physical damages to other property as the result of a product defect to recover for "direct, incidental, or consequential pecuniary loss, including, but not limited to, damage to the product in question" by claiming those damages are among those defined in R.C.2307.71(A)(4) as economic loss and hence those damages become recoverable, by virtue of the language in R.C.2307.79. A commercial plaintiff, in privity with the manufacturer, but without a contractual right to those damages, may argue R.C. 2307.79 allows these damages to be recovered, as may a consumer or a commercial plaintiff not in privity with the manufacturer. There are no reported cases addressing how to apply R.C. 2307.79 as of this writing.

So while the rights of consumers to recover for economic losses when not in privity with the manufacturer is relatively settled in Ohio, the rights of commercial plaintiffs to recover against manufacturers for economic losses sustained as the result of a defective product remain unclear.

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