

SOLELY A SAVINGS CLAUSE, NOT AN EXCEPTION:  
KEEPING THE ALABAMA INNOCENT SELLER  
ACT AS INTENDED BY THE LEGISLATURE

*Harlan I. Prater IV, Jeffrey P. Doss, Bridget E. Harris, & Amber N. Hall*

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## I. INTRODUCTION

While watching television in her two-story home, a woman dozes off on the couch, wrapped in a heavy wool blanket with a space heater running in front of her. She awakens in a daze, throws the blanket on the arm of the couch, and retreats upstairs to bed, forgetting to turn off the space heater. Part of the blanket falls on the space heater's cord, which is running alongside the arm of the couch. The space heater teeters as the weight of the blanket slowly pulls the cord out of its socket. The space heater does not unplug but rather falls face-forward onto the front of the couch. A fire erupts. The house is completely destroyed by the fire, and the woman is severely burned.

The injured woman brings suit, claiming that the space heater should have come with a safety feature that automatically turns it off when it falls forward. Although her claims are grounded in the theory that the space heater had a design defect, she sues both the manufacturer *and the retailer* that sold the space heater to her. Under Alabama common law principles, this collection of defendants would be expected. The Alabama legislature, however, has enacted a statute that shields a retail defendant from liability in suits such as this one.<sup>1</sup>

The Alabama legislature enacted the Innocent Seller Act<sup>2</sup> to protect retail sellers from product liability claims based upon simply selling the product.<sup>3</sup> The statute includes four narrow provisions that set out a seller's potential liability when an allegedly defective product causes injury.<sup>4</sup> One of the provisions is a

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\* Harlan I. Prater IV and Jeffrey P. Doss are partners at Lightfoot, Franklin & White, LLC, in Birmingham, Alabama. Bridget E. Harris and Amber N. Hall are associates at Lightfoot, Franklin & White, LLC. The authors thank Molly Drake and Thomas Geeker for their contributions to this piece.

1. See ALA. CODE § 6-5-501 (2014).

2. This statute has been coined the "Alabama Innocent Seller Act" in several court opinions. See, e.g., *Jackson v. Wal-Mart Stores, Inc.*, No. 2:17-CV-00634-AKK, 2018 WL 497073, at \*2 (N.D. Ala. Jan. 22, 2018), *rev'd*, 753 F. App'x 866 (11th Cir. 2018).

3. See ALA. CODE § 6-5-501.

4. *Id.* § 6-5-501(2)a.1.–4.

savings clause, which states that sellers can be held liable for their own “independent acts unrelated to the product design or manufacture, such as independent acts of negligence, wantonness, warranty violations, or fraud.”<sup>5</sup>

Courts should find that the Alabama Innocent Seller Act’s savings clause is not a catchall for a seller to be held liable for the actions of the manufacturer. Instead, the savings clause is a common-sense provision evincing that a seller may not use the Alabama Innocent Seller Act as a shield for its independent negligent, reckless, or wanton actions that are not the fault of the manufacturer.

Part II provides an overview of the Alabama Innocent Seller Act. Applying principles of statutory interpretation, Part III demonstrates that courts should not construe the Act’s savings clause as an avenue for imposing liability against innocent sellers of products. Part IV delineates the intent of the statute by comparing it to similar statutes in other states. Part V uses public policy to suggest that courts should interpret the statute’s savings clause narrowly.

## II. OVERVIEW OF THE STATUTORY TEXT

Under common law, the seller of an allegedly defective product potentially faced liability even when the seller had no role in causing the injury and exercised reasonable care in distributing the product.<sup>6</sup> Courts generally relied on the theory of warranty because fault is not required for a seller to be liable under this theory.<sup>7</sup> Sellers in Alabama were shielded from liability only if the “no causal relation” defense applied.<sup>8</sup> Under the “no causal relation” defense, a seller could establish that there is no causal connection between the seller, its actions, and the defective condition of the product.<sup>9</sup>

Now, abrogating the common law, the Alabama legislature has passed legislation providing greater protection for sellers than the “no causal relation” defense. Alabama is one of several states<sup>10</sup> to take steps to protect sellers from product liability actions through the enactment of innocent seller legislation. Alabama’s statute, § 6-5-501 of the Code of Alabama, defines a product liability action as “[a]ny action brought by a natural person for personal injury, death, or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, or labeling of a manufactured product.”<sup>11</sup> These actions may be “based upon (a) negligence, (b) innocent or negligent misrepresentation, (c) the

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5. *See id.* § 6-5-501(2)a.4.

6. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (AM. LAW INST. 1998).

7. *Id.* § 1 cmt. a.

8. *See Atkins v. Am. Motors Corp.*, 335 So. 2d 134, 143 (Ala. 1976), *superseded by statute*, ALA. CODE § 6-5-501 (2014), *as recognized in* *McCuistian v. LG Elecs. U.S.A., Inc.*, No. 1:15-CV-279-JA-GMB, 2016 WL 8729835 (M.D. Ala. Dec. 2, 2016).

9. *Id.*

10. *See infra* notes 45–55 and accompanying text.

11. *See* ALA. CODE § 6-5-501(2) (2014).

manufacturer's liability doctrine, (d) the Alabama extended manufacturer's liability doctrine, . . . (e) breach of any implied warranty, or (f) breach of any oral express warranty."<sup>12</sup>

The statute defines an original seller as “[a]ny person, firm, corporation, association, partnership, . . . which . . . sells or otherwise distributes a manufactured product (a) prior to or (b) at the time [that] product is first [used] by any person or business entity who did not acquire the manufactured product for either resale or other distribution in its unused condition.”<sup>13</sup>

Section 6-5-501 goes on to prohibit product liability actions “against any distributor, wholesaler, dealer, retailer, or seller of a product,” unless:

1. The distributor is also the manufacturer or assembler of the final product and such act is causally related to the product's defective condition.
2. The distributor exercised substantial control over the design, testing, manufacture, packaging, or labeling of the product and such act is causally related to the product's condition.
3. The distributor altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought.
4. It is the intent of this subsection to protect distributors who are merely conduits of a product. This subsection is not intended to protect distributors from independent acts unrelated to the product design or manufacture, such as independent acts of negligence, wantonness, warranty violations, or fraud.<sup>14</sup>

These conditions distill to a single premise: if a seller had substantial and meaningful control over a product's production that was causally related to the product's allegedly defective condition, then the seller has no recourse under the Alabama Innocent Seller Act because it is not just a seller—it effectively is a product manufacturer or designer.

Additionally, § 6-5-501(2)b. allows a product liability action to be brought against a seller “if a claimant is unable, despite a good faith exercise of due diligence [evidenced by an affidavit], to identify the manufacturer of an allegedly defective and unreasonably dangerous product.”<sup>15</sup> In response to a claim under subsection (b), however, the seller may, “upon answering or otherwise pleading, . . . file an affidavit certifying the correct identity of the manufacturer of the product that allegedly caused the claimant's injury. Once the claimant has received an affidavit, the claimant shall exercise due diligence to file an action and obtain jurisdiction over the manufacturer.”<sup>16</sup> The seller should be dismissed from the action unless one of the requirements of paragraph (2)a. is satisfied.<sup>17</sup>

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12. *Id.*

13. *Id.* § 6-5-501(1).

14. *Id.* § 6-5-501(2)a.1.–4.

15. *Id.* § 6-5-501(2)b.

16. *Id.* § 6-5-501(2)c.

17. *Id.*

Despite the statute's attempt to protect sellers from liability, some plaintiffs have argued that the savings clause included in § 6-5-501(2)a.4. is a liberal catchall that provides a loophole to file suits against retailers. The plain meaning of the statute, the purpose behind the statute, and existing case precedent, however, all say otherwise.

### III. INTERPRETATION OF THE STATUTORY TEXT: "INDEPENDENT"

A plaintiff who argues that the savings clause of the Alabama Innocent Seller Act applies must show that the seller committed "*independent acts unrelated to the product design or manufacture, such as independent acts of negligence, wantonness, warranty violations, or fraud.*"<sup>18</sup> What constitutes an "independent" act is the main topic of debate surrounding this statute, but when viewing the plain meaning of the statute, it is evident that its savings clause is not a "fourth exception."

#### *A. Plain Meaning*

When interpreting a statute, a court should first "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."<sup>19</sup> A statute's correct interpretation is determined by "reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."<sup>20</sup> A plain, common-sense interpretation of the statutory text, along with the purpose behind passing the statute, supports a finding that courts should narrowly interpret this provision.

First, the statute does not define the term *independent*. When a statutory term is undefined, courts give the term its ordinary meaning.<sup>21</sup> Courts may look to dictionaries to determine a term's common meaning.<sup>22</sup> *Independent* is defined as: "1. Not subject to the control or influence of another . . . 2. Not associated with another (often larger) entity . . . [and] 3. Not dependent or contingent on something else."<sup>23</sup>

Consider the space heater hypothetical posed at the beginning of this Essay. When attempting to invoke the savings clause of the Alabama Innocent Seller Act, the plaintiff may argue that the retailer she purchased the space heater from had "actual, subjective knowledge" of the dangerousness of a space heater that

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18. *Id.* § 6-5-501(2)a.4. (emphasis added).

19. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

20. *Id.* at 341 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992)).

21. *Hamilton v. Lanning*, 560 U.S. 505, 513 (2010) (quoting *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)).

22. *See, e.g., Crawford v. Metro. Gov't*, 555 U.S. 271, 276 (2009).

23. *Independent*, BLACK'S LAW DICTIONARY (10th ed. 2014).

does not automatically turn off when falling forward, and the retailer made the willful, wanton, or reckless decision to endanger the safety of consumers, users, and bystanders by selling the product. When defending the argument that the retailer of the space heater had actual, subjective knowledge, the plaintiff may argue that the retailer knew that the space heater in question was dangerous because the National Fire Protection Association found that “heating equipment is the second-leading cause of U.S. home fires and the third-leading cause of home fire deaths.”<sup>24</sup> In addition, it has been found that “[m]ore than half (53 percent) of all home heating fire deaths resulted from fires that began when heating equipment was too close to things that can burn, such as upholstered furniture, clothing, mattresses or bedding.”<sup>25</sup>

First, these arguments are simply disguised indictments of a product’s design and pinpoint no “independent” act by the seller. Returning to the definition of “independent,” this argument is inextricably connected with the plaintiff’s contention that the space heater should automatically shut off when falling forward and is dependent on the actions of the manufacturer. There is no separate or distinct action taken by the retailer who sold the space heater.

Even if one were to believe that “actual, subjective knowledge” of the dangerousness of a product is enough to trigger the Act’s savings clause, the contentions presented by the plaintiff likely would be contradicted by the statistics provided in her own complaint. While it is true that more than half of house fires caused by space heaters are a result of the product being too close to flammable objects, having a safety feature that turns the space heater off automatically when it falls forward is not likely to prevent a majority of the space heater fire incidents that occur. No statistic supports an assertion that the proposed safety feature will lead to a lower number of space heater house fires, and quite frankly, retailers should not be obligated to investigate theories and the feasibility of proposed alternative designs, such as the one pitched by the plaintiff, before placing a product on their shelves. To impose that obligation—which does not otherwise exist under Alabama law—would defeat the express protections afforded by the Alabama Innocent Seller Act and convert the statute from a *limitation* on liability to an *expansion* of liability.

The hypothetical plaintiff’s testing theory illustrates this point. The pre-market testing burden should rest exclusively with the product’s designer or manufacturer, a result that accords with the statutory design. Alabama Code § 6-5-50192)a.1.–2. generally prohibits liability claims without a seller’s control over the product’s design, assembly, or manufacture. Conspicuously absent from the legislature’s identification of liability-triggering acts is, for example,

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24. *Space Heaters Account for 43 Percent of U.S. Home Heating Fires and 85 Percent of Associated Deaths*, NAT’L FIRE PROT. ASS’N (Jan. 9, 2018), <https://www.nfpa.org/News-and-Research/News-and-media/Press-Room/News-releases/2018/Space-heaters-account-for-43-percent-of-US-home-heating-fires-and-85-percent-of-associated-deaths>.

25. *Id.*

failing to conduct adequate testing prior to sale. In fact, each statutory override is affirmative activity—such as exercising substantial control over “design[ing],” “testing,” “manufactur[ing],” “packaging,” or “labeling”—not a *failure* to do any of those things or even knowledge of potential risks.

The Alabama legislature expressly identified those acts sufficient to transform a seller’s mere passivity into active, tortious conduct. For instance, the legislature could have added “failing to test for safety risks” or “knowingly selling an unreasonably dangerous product” as exceptions. But applying the principle of *expressio unius est exclusio alterius*, there is a strong inference that the Alabama legislature “excluded by deliberate choice” those scenarios from the statute’s ambit.<sup>26</sup> Confirming that inference is the savings clause itself: sellers who are “merely conduits of a product”—without regard to their imputed or even actual knowledge of risks—should be shielded from liability.<sup>27</sup> This again shows how instrumental a court’s decision on the savings provision of the Alabama Innocent Seller Act will be for future product liability actions against sellers. If a seller’s knowledge of general statistics is all that a court requires to constitute an “independent” act by the seller triggering liability—a construction that would require rewriting the statute by engrafting a novel condition for liability—the seller would receive hardly any protection under the statute, and a dangerous precedent would be set.

Any other interpretation of the statute would render it meaningless because a plaintiff could argue that nearly anything constitutes an “independent act” by the retailer. “It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”<sup>28</sup> A broad, liberal interpretation of “independent” would make the phrase “unrelated to the product design or manufacture”<sup>29</sup> void for purposes of the statute.

This Essay’s hypothetical illustrates this point. The plaintiff could theoretically hang her hat on an argument of “actual, subjective knowledge” when arguing that the savings provision should apply.<sup>30</sup> There were no new underlying facts presented by the plaintiff, however, to support this claim distinct from a defective design claim.<sup>31</sup> If there were no new underlying facts alleged when the plaintiff attempted to invoke the Alabama Innocent Seller Act’s savings provision, there is no way that her allegations of the actions the retailer took, or failed to take, could be “unrelated to the product design or manufacture.”<sup>32</sup> If courts

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26. 2A NORMAN J. SINGER & J.D. SHAMBLE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:23 (7th ed. 2007).

27. ALA. CODE § 6-5-501(2)a.4. (2014).

28. TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001) (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)); see also Marks v. Gen. Revenue Corp., 568 U.S. 371, 386 (2013).

29. ALA. CODE § 6-5-501(2)a.4.

30. See *supra* notes 24–25 and accompanying text.

31. See *supra* Part I.

32. ALA. CODE § 6-5-501(2)a.4.

allow claims—similar to the hypothetical plaintiff's claims—to fall under the savings clause of the Alabama Innocent Seller Act, the statute in its entirety will not protect sellers in the way it was intended.

*B. Purpose and Intent*

When interpreting statutes, courts should consider not only the statutory text but also the statute's purpose and context.<sup>33</sup> Courts should interpret the language with the intent of preserving the Act's purpose.<sup>34</sup>

The purpose of the Alabama Innocent Seller Act provides evidence that the savings clause should be construed narrowly. The intent of the Alabama legislature is reflected by the following statement:

The Legislature finds that product liability actions and litigation have increased substantially, and the cost of such litigation has risen in recent years. The Legislature further finds that these increases are having an impact upon consumer prices, and upon the availability, cost, and use of product liability insurance, thus, affecting the availability of compensation for injured consumers.<sup>35</sup>

This statement illustrates that the savings provision of the Alabama Innocent Seller Act savings clause should be construed narrowly to give effect to the statute's purpose. If the savings provision were construed broadly, there would be no decrease in litigation. Plaintiffs would make arguments about retailers having “actual, subjective knowledge”<sup>36</sup> and not be forced to couple any underlying facts with that allegation. Further, if sellers are forced to defend litigation beyond the motion-to-dismiss phase of the suit, the negative impact to consumers will continue

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33. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7 (2011).

34. *Shapiro v. United States*, 335 U.S. 1, 31 (1948).

35. See ALA. CODE § 6-5-500.

36. See *supra* notes 24–25 and accompanying text.



## C. Precedent

Precedent in Alabama—both state and federal—supports the assertion that the term “independent” should be narrowly construed in favor of sellers.<sup>37</sup> For example, in *Reyes v. Better Living, Inc.*,<sup>38</sup> the plaintiff argued that the retailer “was obligated to do more than simply display the product for sale,” and the savings clause of the Alabama Innocent Seller Act applied because of the retailer’s responsibility to keep consumers safe.<sup>39</sup> The court granted the retailer’s motion to dismiss because neither the exceptions clause nor the Act’s savings clause applied.<sup>40</sup>

Some Alabama decisions seem to cut the other way.<sup>41</sup> These cases, however, are distinguishable from the typical product liability claim against a seller. These cases all evaluate the statute in the context of a motion to remand, following removal on fraudulent joinder grounds.<sup>42</sup> A “no possibility standard” is applied in the fraudulent joinder analysis, and courts do not need to rule on issues that are ones of first impression.<sup>43</sup> These cases, therefore, are procedurally and substantively inapposite.

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37. See *McCustian v. LG Elecs. U.S.A., Inc.*, No. 1:15-CV-279-JA-GMB, 2016 WL 8729835, at \*7 (M.D. Ala. Dec. 2, 2016) (granting summary judgment in favor of the distributor–defendant when the plaintiff’s “whole case [was] based on a supposed manufacturing defect, not an act ‘unrelated’ to manufacture”); see also *Estate of Reynolds v. Proctor & Gamble Distrib., LLC*, No. 3:17CV864-SRW, 2018 WL 6070345, at \*5 (M.D. Ala. Nov. 20, 2018) (stating that “while the Innocent Seller Statute does not preclude an individual claim against [defendant] for negligence or wantonness, ‘[p]roximate cause is an essential element of both negligence claims and wantonness claims’” and stating that “the Eleventh Circuit [has] found that [when] plaintiffs [do] not present[] any evidence that the defendant knew or should have known about the risks of a product, [they] could not reasonably be found to have breached a duty” (first alteration in original)); *Cooper v. Nissan Motor Co.*, No. 2:18-CV-00483-KOB, 2018 WL 3109612, at \*3 (N.D. Ala. June 25, 2018) (stating that “unless [the seller] engaged in ‘independent acts unrelated to the product design or manufacture,’ Alabama’s ‘Innocent Seller’ statute precludes [plaintiff’s] claims against [seller]”); *Gardner v. Aloha Ins. Servs.*, No. 2:11-CV-3450-RDP, 2013 WL 839884, at \*7–8 (N.D. Ala. Mar. 4, 2013) (granting summary judgment in favor of Wal-Mart and finding them immune from liability under the Alabama Innocent Seller Act), *aff’d on other grounds*, 566 F. App’x 903 (11th Cir. 2014).

38. 174 So. 3d 342 (Ala. 2015).

39. Brief of Appellants at 26, *Reyes*, 174 So. 3d 342 (No. CV-2012-900646.00), 2014 WL 3953678, at \*26.

40. *Id.* at 1–2, 2014 WL 3953678, at \*1–2.

41. *E.g.*, *Barnes v. Gen. Motors, LLC*, No. 2:14-CV-00719-AKK, 2014 WL 2999188, at \*5–6 (N.D. Ala. July 1, 2014) (“The decision to stock and sell a product that was known to be likely or probable to cause injury could constitute an independent act of wantonness that is separate from any act related to the design or manufacture of the product itself.” (quoting *Lazenby v. ExMark Mfg. Co.*, No. 3:12-CV-82-WKW, 2012 WL 3231331, at \*3 (M.D. Ala. Aug. 6, 2012))); see also *Robinson v. Invacare Corp.*, No. 13-0290-W5-C, 2013 WL 5567084, at \*2 (S.D. Ala. Oct. 9, 2013).

42. *E.g.*, *Barnes*, 2014 WL 2999188, at \*5–6 (remanding because the defendants did not provide clear and convincing evidence to meet their burden to establish fraudulent joinder). Compare *Robinson*, WL 5567084, at \*1, with *Lazenby*, 2012 WL 3231331, at \*3.

43. *Lazenby*, 2012 WL 3231331, at \*3.

As the Middle District of Alabama has suggested, Section 6-5-501(2)a.4. is a “statement of legislative intention” and not “a basis for liability.”<sup>44</sup> It is important for courts to narrowly construe savings provisions contained in innocent seller legislation to ensure that these statutes continue to protect sellers.

#### IV. OTHER STATES’ INNOCENT SELLER STATUTES

The relevance of courts narrowly interpreting the Alabama Innocent Seller Act comes to light when looking at similar provisions in other states.

Colorado’s statute states that “[n]o product liability action shall be commenced or maintained against any seller of a product unless said seller is also the manufacturer of said product or the manufacturer of the part thereof giving rise to the product liability action.”<sup>45</sup> Colorado allows jurisdiction over a product’s distributor or seller when “jurisdiction cannot be obtained over a particular manufacturer of a product or a part of a product alleged to be defective.”<sup>46</sup> Several states have adopted this approach.<sup>47</sup>

Some states, such as Mississippi, however, do not include such provisions in their innocent seller statutes. Mississippi’s code reads:

In any action alleging that a product is defective pursuant to paragraph (a) of this section, the seller or designer of a product other than the manufacturer shall not be liable unless the seller or designer exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; or the seller or designer altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; or the seller or designer had actual or constructive knowledge of the defective condition of the product at the time he supplied the product. *It is the intent of this section to immunize innocent sellers who are not actively negligent, but instead are mere conduits of a product.*<sup>48</sup>

A number of states’ laws also specifically address product liability actions brought against sellers based on strict liability claims.<sup>49</sup>

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44. *McCuistian v. LG Elecs. U.S.A., Inc.*, No. 1:15-CV-279-JA-GMB, 2016 WL 8729835, at \*7 (M.D. Ala. Dec. 2, 2016).

45. COLO. REV. STAT. ANN. § 13-21-402(1) (West 2014); *see also* *Carter v. Brighton Ford, Inc.*, 251 P.3d 1179 (Colo. App. 2010) (interpreting Colorado’s innocent seller statute and deciding which claims satisfy the provision’s product liability requirements).

46. COLO. REV. STAT. ANN. § 13-21-402(2).

47. *See, e.g.*, WASH. REV. CODE ANN. § 7.72.040 (West 2017); W. VA. CODE § 55-7-31 (LexisNexis Supp. 2018).

48. MISS. CODE ANN. § 11-1-63(h) (2014) (emphasis added); *see also* KAN. STAT. ANN. § 60-3306 (2005 & Supp. 2017); MICH. COMP. LAWS ANN. § 600.2947 (2010).

49. *See, e.g.*, GA. CODE ANN. § 51-1-11.1(b) (2017) (“For purposes of a product liability action based in whole or in part on the doctrine of strict liability in tort, a product seller is not a manufacturer as provided in Code Section 51-1-11 and is not liable as such.”); NEB. REV. STAT. ANN. § 25-21,181 (1995) (“No product liability action based on the doctrine of strict liability . . . shall be commenced or maintained against any

Other states have likewise cabined their innocent seller legislation. Missouri, for example, allows “[a] defendant whose liability is based solely on his status as a seller in the stream of commerce” to be dismissed from a product liability action as long as another defendant, such as the manufacturer, is properly before the court and the seller follows certain procedures laid out in the statute.<sup>50</sup> Connecticut is another state with narrow legislation regarding liability of sellers. Its provision states:

A product seller shall not be liable for harm that would not have occurred but for the fact that his product was altered or modified by a third party unless: (1) The alteration or modification was in accordance with the instructions or specifications of the product seller; (2) the alteration or modification was made with the consent of the product seller; or (3) the alteration or modification was the result of conduct that reasonably should have been anticipated by the product seller.<sup>51</sup>

Finally, there are a few states that, while not barring seller liability outright through legislation, have passed laws that require manufacturers to indemnify innocent sellers in product liability actions. For example, Texas’s statute provides: “A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller’s negligence, intentional misconduct, or other act or omission,”<sup>52</sup> so long as the seller “give[s] reasonable notice to the manufacturer of [the] product claimed in a petition or complaint to be defective.”<sup>53</sup> Oklahoma’s provision is identical to the Texas statute, except for an additional subsection that states: “Nothing contained in this section shall operate to permit or require dismissal of a party with a right of indemnification arising under this section and nothing in this section shall be used as a basis for dismissal of a plaintiff’s claim against the seller.”<sup>54</sup>

Mississippi is unique because its product liability statute both bars liability and provides for indemnification to sellers. Its relevant provision providing for indemnification, § 11-1-63(g)(i), reads:

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seller . . . of a product which is alleged to contain . . . a defective condition unreasonably dangerous to the buyer . . . unless the seller . . . is also the manufacturer of the product . . .”); S.D. CODIFIED LAWS § 20-9-9 (1995) (“No cause of action based on the doctrine of strict liability in tort may be asserted or maintained against any distributor . . . of a product which is alleged to contain or possess a latent defective condition unreasonably dangerous to the buyer . . . unless said distributor . . . is also the manufacturer or assembler of said product . . .”).

50. See MO. ANN. STAT. § 537.762 (West 2008); see also *Gramex Corp. v. Green Supply, Inc.*, 89 S.W.3d 432, 445–46 (Mo. 2002) (examining § 537.762 and holding that the provision did not allow the downstream seller to be dismissed from the suit because plaintiffs would not have been able to make a total recovery).

51. CONN. GEN. STAT. § 52-572p(a) (West 2013).

52. TEX. CIV. PRAC. & REM. CODE § 82.002(a) (West 2017).

53. *Id.* § 82.002(f).

54. See OKLA. STAT. ANN. tit. 12, § 832.1H. (West 2015); see also *Honeywell v. GADA Builders, Inc.*, 271 P.3d 88 (Okla. Civ. App. 2012) (applying § 832.1 to require a manufacturer to indemnify a seller for a products liability action).

The manufacturer of a product who is found liable for a defective product pursuant to paragraph (a) shall indemnify a product seller or designer for the costs of litigation, any reasonable expenses, reasonable attorney's fees and any damages awarded by the trier of fact unless the seller or designer exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller or designer altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller or designer had actual knowledge of the defective condition of the product at the time he supplied same; or the seller or designer made an express factual representation about the aspect of the product which caused the harm for which recovery of damages is sought.<sup>55</sup>

Though the language is different across state statutes, the intent and the plain meaning of the text are the same: sellers should not be held liable for the actions of manufacturers related to the product design or manufacture. Even in states where there is not an absolute bar on suits against sellers, states are attempting to pass some form of legislation to protect sellers.<sup>56</sup> Courts should analyze savings clauses, such as the one in the Alabama Innocent Seller Act, narrowly for innocent seller statutes across the country to remain effective and protect sellers from liability.

## V. PUBLIC POLICY

The implications of a broad interpretation of the Alabama Innocent Seller Act's savings clause are significant. First, litigation will increase, which is something that the Alabama legislature sought to combat.<sup>57</sup> Naturally, this is a dangerous course, especially when dealing with large retail chains. A plaintiff wants to include any possible defendant with substantial assets or insurance coverage, especially when most cases settle.<sup>58</sup> Retailer defendants would still be forced to pay hundreds of thousands of dollars in instances where no cognizable wrong on their part can be identified by the plaintiff aside from simply carrying a product on their shelves.<sup>59</sup>

Further, there are other effects of increased litigation. Retailers, in an attempt to avoid litigation, may stop carrying products that have historically been

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55. MISS. CODE ANN. § 11-1-63(g)(i) (2014).

56. See *supra* notes 52–54 and accompanying text.

57. See ALA. CODE § 6-5-500 (2014).

58. Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, N.Y. TIMES (Aug. 7, 2008), <https://www.nytimes.com/2008/08/08/business/08law.html> (“The vast majority of cases do settle – from 80 to 92 percent by some estimates, Mr. Kiser said – and there is no way to know whether either side in those cases could have done better at trial.”).

59. *Id.* (“[M]ost of the plaintiffs who decided to pass up a settlement offer and went to trial ended up getting less money than if they had taken that offer.”).

attacked in product liability actions.<sup>60</sup> They may also have to limit the pay of their employees and the number of employees they have on hand to offset litigation costs. Ultimately, this will have an adverse economic impact on consumers because businesses will be forced to increase prices to defray their litigation costs.<sup>61</sup>

In 2008, for example, the average annual litigation costs for a large retailer were approximately \$115 million.<sup>62</sup> This was up 73% from 2000, when a retailer's annual litigation costs, on average, were \$66 million.<sup>63</sup> This is an "increase of 9 percent each year."<sup>64</sup> This same study found that "litigation costs as a percent of revenues increased 78 percent" from 2000 until 2008.<sup>65</sup>

Lastly, and perhaps most important, construing the Alabama Innocent Seller Act's savings clause broadly furthers the idea that our legal system does not hold accountable only those who have done wrong but rather serves as a forum for litigants to blame their injuries on entities that have *any* connection to the products that caused them harm.

## VI. CONCLUSION

A consumer deserves relief when a product causes him or her injury through no fault of his or her own. Retail defendants, however, should not have to bear the cost of product liability actions without having substantially and causally contributed to the design or manufacture of the product that causes the injury. Courts should narrowly construe the exceptions and savings clause contained within the Alabama Innocent Seller Act in order to provide the protection to retail defendants that the legislature intended.

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60. Steven Garber, *Economic Effects of Product Liability and Other Litigation Involving the Safety and Effectiveness of Pharmaceuticals*, RAND, <https://www.rand.org/pubs/monographs/MG1259.html> (last visited Oct. 1, 2019) ("Opponents of product liability claim that liability reduces product availability, increases prices, discourages innovation, and undermines economic efficiency . . .").

61. See ALA. CODE § 6-5-500.

62. LAWYERS FOR CIVIL JUSTICE ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES 2 (2010), [https://www.uscourts.gov/sites/default/files/litigation\\_cost\\_survey\\_of\\_major\\_companies\\_0.pdf](https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf).

63. *Id.*

64. *Id.*

65. *Id.* at 3.