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NEW JERSEY PRODUCTS LIABILITY: ANALYZING AMBIGUITIES WHICH ARISE DURING PRODUCTS LIABILITY ACTIONS REGARDING COUNTERFEIT DRUGS

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INTRODUCTION

On December 6, 2023, the family of a 32-year-old man from Toms River, New Jersey found him unexpectedly deceased.[1] The man's death was traced back to his usage of a supplement referred to as "gas station heroin," more formally marketed as "Neptune's Fix Elixir," which he purchased from a market store in Point Pleasant Borough, New Jersey.[2] The primary ingredient within the "Elixir" is tianeptine, a drug that is unregulated by the U.S. Food and Drug Administration (FDA).[3]

As a result of consuming this product, the man suffered a "seizure, heart failure, cerebral anoxia, and other medical issues" leading to his death.[4] In outwardly recalling the product[5], the FDA has emphasized that tianeptine can interact with other medicines in a "life-threatening way," yet the marketing of the product is not displayed as such.[6]

This exemplifies only one situation where a product containing tianeptine has caused a consumer to experience adverse reactions, but there are several others that have occurred since 2023.[7] With many consumers who are harmed from scenarios like the abovementioned seeking

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[1] *J.D. Candidate, Rutgers Law School, 2026.

See Anthony G. Attrino, N.J. Man, 32, died after consuming Neptune's Fix Elixir from local market, lawsuit says, N.J.Com (Sep. 13, 2024 at 9:08 A.M.), https://www.nj.com/ocean/2024/09/nj-man-32-died-after-consuming-neptunes-fix-elixir-from-local-market-lawsui

[2] I*d*.

[3] *Id*.

[4] *Id*.

[5] FDA warns consumers not to purchase or use any tianeptine prod. due to serious risks, FDA (Oct. 1, 2024), https://www.fda.gov/drugs/drug-safety-and-availability/fda-warns-consumers-not-purchase-or-use-any-tianeptine-product-due-serious-risks.

[6] *See* Attrino, *supra* note 1.

[7] *See generally* Fred Charatan, *Fake Prescription Drugs are Flooding the U.S.*, 322 BRIT. MED. J. 1446 (Jun. 16, 2001), https://pmc.ncbi.nlm.nih.gov/articles/PMC1173338/. While this article is from 2001, the flooding of prescription drugs referenced within illustrates how many individuals are experiencing adverse effects of counterfeit drugs across the country, and that number has only increased since 2001. Several individuals, especially in the Northeast, are suffering adverse reactions to misrepresented defective/dangerous products such as Neptune's Fix Elixir.

relief via a product liability action, they will need to know which parties can be liable for their conduct. New Jersey product liability law has ambiguities of when sellers and/or distributors [within this context] can be held liable for their products and/or conduct. This article will further highlight the epidemic of counterfeit drugs harming consumers across New Jersey and will analyze the ambiguities of the state's product liability law for this niche issue.

Counterfeit drugs have found their way into the hands of several innocent consumers across the nation.[8] This has occurred throughout both the pharmaceutical industry and amongst drugs sold in convenience stores.[9] Many individuals who have suffered cognizable harm from consuming a product that did not contain what they thought/were told it did seek civil damages and are unsure where to start.[10]

In New Jersey, victims sustaining harm due to consumption or usage of a defective product are permitted to bring an action against the manufacturers, sellers or distributors of that product.[11] Whether a defendant is liable in products liability is circumstantial, as many aspects of law can be.[12] Those circumstances can include the manufacturer or sellers' knowledge of the

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[8] *Id*.

[9] *Id.* (emphasizing the increase in counterfeit pharmaceutical drugs); *see also* AnneMoss Rogers, *Gas Station Heroin, and Other Not-Yet-Regulated Drugs*, MENTAL HEALTH AWARENESS EDUC. (Jan. 26, 2024), https://mentalhealthawarenesseducation.com/gas-station-heroin-and-other-not-yet-regulated-drugs/ (highlighting the rise of unregulated/counterfeit substances being sold at convenience stores and gas station markets). Specifically, with the convenience store substances, they are highly addictive and do not provide adequate consumers. Often, typical consumers of these products are teens and young adults. Counterfeit drugs at convenience stores are highly predatory. Unregulated substances like that highlighted in the referenced article (which will be analyzed later on) are not yet regulated and are often marketed as "mood enhancing," "dietary supplements" or "focus aids." Both types of counterfeit substances referenced within are highly dangerous and the question presented in this piece will apply to both.

[10] *See generally Who Can be Responsible for the Sale of Counterfeit Medications?*, SHAPIRO LEGAL GROUP, PLLC (last visited Sep. 19, 2025), https://www.shapirolegalgroup.com/who-can-be-responsible-for-the-sale-of-counterfeit-medications.html. The referenced legal article underscores the importance of victims of this issue receiving justice and outlines the steps of who can be liable in a legal action. Specifically, it states "counterfeit medications have become increasingly prevalent, putting countless patients at risk. These fake drugs may leave consumers vulnerable to serious health consequences. In these situations, justice must be served…They [counterfeit drugs] may contain toxic or harmful ingredients that can cause adverse reactions, allergic responses, or even poisoning."

[11] *See* N.J. REV. STAT. § 2A:58C-2 (2024).

[12] *See* N.J. REV. STAT. § 2A:58C-3 (2024).

product being defective, their contribution to the defect(s), the nature of the product, the nature of the defect(s), labeling/failure to warn, etc.[13]

Under New Jersey Products Liability Law, manufacturers and sellers have a duty to patrons to make or sell a product that is "reasonably safe."[14] The term "reasonably safe" means that the product is "reasonably fit, suitable and safe for intended and foreseeable usage."[15] In addition, manufacturers and sellers owe this duty *only* to *foreseeable* consumers and users of the product.[16]

It is significantly more difficult for a manufacturer to escape a products liability action than it is for a seller, as sellers at minimum have the defense of providing that they were an "innocent seller."[17] The innocent seller defense immunizes a seller of a defective product if they can sufficiently prove that they were unaware of the defect and that they "should not have been aware" of said defect.[18] If a seller's innocence defense is insufficient, they can be subject to strict liability.[19] Within New Jersey law, there are complexities as to when sellers, specifically, of counterfeit drugs, are strictly liable or immunized from liability, as the nature of the defects differentiate.[20]

This article will address the following: **(1)** The difference between manufacturers, sellers and distributors under New Jersey Products Liability law; **(2)** the innocent seller defense and its applicability to the sale of counterfeit drugs under New Jersey law; **(3)** the applicability of strict

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[13] *See id*.

[14] *See* Model Civ. Jury Charge § 5.40A, Products Liability – Introduction: Caveats to Judges at 2.

[15] *See id.*

[16] *See id*.

[17] *See* N.J. REV. STAT. § 2A:58C-9(b) (2024).

[18] *See* Fabian v. Minster MacH. Co. 258 N.J. Super. 261, 272 (N.J. Super. Ct. App. Div. 1992).

[19] *See* N.J. REV. STAT. § 2A:58C-9(C) (2024).

[20] *See Prod. Liab. Claims: How N.J. L. Protect Consumers*, DRAZIN AND WARSAW P.C. (last visited Oct. 6, 2024), https://www.drazinandwarshaw.com/blog/product-liability-claims-how-new-jersey-laws-protect-consumers/.

liability under New Jersey law to sellers where there is a sale of counterfeit drugs; **(4)** identification of situations where this issue is applicable; and **(5)** an analysis of the complexities of which law is applicable and provide solutions to create a more uniform enforcement of the this issue within New Jersey Law.

I. MANUFACTURERS, SELLERS & DISTRIBUTORS

When evaluating a product liability suit, it is vital to establish when an individual in the stream of commerce is considered a manufacturer, seller or distributor. As mentioned previously, each individual based on their commercial role carries a different responsibility, duty of care, and/or liability.[21] Specifically, the distinction between a manufacturer and a "product seller" is especially important because of New Jersey Legislature's creation of statutes allowing sellers of defective products to be relieved of liability.[22]

A manufacturer is any person responsible for the design, formulation, production, creation, packaging, labeling or construction of any component. [23] Additionally, a product seller that is responsible for the design, formulation, production, creation, packaging, labeling and construction of the product before its sale is considered a manufacturer.[24] That is, a product seller can still be considered a manufacturer if they are responsible for creation of the product, and subsequently sell that product.[25]

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[21] *See Retailer vs Mfr. Liab. for Prod. Claims*, HILFER LAW (Jan. 28, 2020), https://kbhilferlaw.com/retailer-vs-manufacturer-liability-for-product-claims/.

[22] Smith v. Alza Corp., 400 N.J. Super. 529, 538 (N.J. Super. Ct. App. Div. 2008).

[23] N.J. REV. STAT. § 2A:58C-8 (2024).

[24] *See id*.

[25] *See id*.

A product seller is any individual who in the operation of their business "sells, distributes, leases, installs, prepares or assembles a manufacturer's product according to the manufacturer's plan, intention, design, specifications or formulations, blends, packages, labels, markets, repairs, maintains or otherwise involved in placing a product in the line of commerce."[26]

A distributor is typically the connecting resource between manufacturers and sellers, seen as an intermediary that facilitates movement of products from manufacturers to sellers or consumers.[27] Taking a step back, manufacturers and distributors are the beginning of the chain in the stream of commerce, with the seller typically at the end.[28] For this reason, manufacturers and distributors are subject to a greater magnitude of liability because they service a larger market, and "purposely conduct their activities to make their product available for purchase in as many forums as possible."[29]

In sum, manufacturers are primarily responsible for the initial creation of products, sellers are responsible for sale of the product and their placement in the market, and distributors are the intermediary in the chain of commerce.[30] Again, in a products liability action, establishing which role a particular defendant plays in the stream of commerce crucial because it will determine the scope of liability, therefore impacting the legal strategy and potential outcomes of the action.[31]

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[26] *Id*.

[27] *See* Charles Gendler & Co. v. Telecom Equip. Corp., 102 N.J. 460, 477 (N.J. Sup. Ct.1986).

[28] *See id*.

[29] *See id* (citing Nelson by Carson v. Park Indus., Inc., 717 F.2d 1120, 1125 (7th Cir. 1983)).

[30] *See* Smith v. Alza Corp., 400 N.J. Super. 529, 538, 545 (N.J. Super. Ct. App. Div. 2008).

[31] *See* Potwora Gray v. Grip, 319 N.J. Super 386, 397 (N.J. Super. Ct. App. Div. 1999) (displaying different scope of liability for manufacturers and sellers); *See also* Santiago v. E.W. Bliss Div., Gulf & Western Mfg. Co., 201 N.J. Super. 205, 215-16 (N.J. Super. Ct. App. Div. 1985) (differentiating between strict and absolute liability for manufacturer).

It is common for a plaintiff suffering tortious conduct at the hands of an entity in the stream of commerce to initially bring their action against each of them, because each party can have some form of liability.[32] Nevertheless, distinguishing which party is the manufacturer, distributor and/or seller identifies where the [majority of] liability lies.

II. THE INNOCENT SELLER DEFENSE

OVERVIEW

When a product seller is named a party in a New Jersey product liability lawsuit, they can attempt to immunize themselves by deeming themselves an "innocent seller."[33] To do this, the product seller must file an affidavit revealing the identity of the manufacturer of the product which allegedly caused the injury, death or damage to the victim.[34] However, the product seller has the burden of proving that they did not factor into the defect of the product causing harm, nor that they knew or "should have known" of the defect.[35]

A product seller can still be liable (or strictly liable) along with the manufacturer if they fail to prove by a preponderance of evidence that they did not have "significant control over the designing, manufacturing, packing, or labeling of the product relative to the defect, that they did not know or should not have known of the defect in the product or that they did not create the defect in the product which caused the harm or injury.[36]

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[32] *See generally Mass Torts Explained*, LAMINACK, PIRTILE & MARTINES: BLOG (last visited Feb. 15, 2025), https://www.lpm-triallaw.com/blog/mass-torts-explained.

[33] *See* N.J. REV. STAT. § 2A:58C-9 (2024).

[34] N.J. REV. STAT. § 2A:58C-9(a).

[35] N.J. REV. STAT. § 2A:58C-9(d)(2).

[36] N.J. REV. STAT. § 2A:58C-9(d).

The purpose of immunizing product sellers is to "reduce litigation costs borne by innocent retailers."[37] Furthermore, the innocent seller defense is designed to protect those not responsible for the defect or the subsequent harm and shifts the liability to the manufacturer who is more responsible for that defect.[38]

But the innocent seller defense is not uniform.[39] Approximately half of jurisdictions within the United States have a statute, rule or regulation in place that allows a product seller to immunize itself under differing criteria(s).[40]

Each jurisdiction varies on whether there is such a defense at the seller's fingertips, if strict liability is applicable to product liability actions and when either of those two options are applicable to product sellers.[41] Specifically, this article will highlight New Jersey's product liability law but will compare and contrast such to other jurisdictions around the United States.

DEFECTIVE PRODUCTS

A product seller must prove that they did not contribute to the defect of the product that caused a plaintiff harm or injury.[42] In New Jersey, defects within a product liability claim are classified into three categories: **(1)** design defects; **(2)** manufacturing defects; and **(3)** inadequate warnings.[43]

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[37] Smith v. Alza Corp., 400 N.J. Super. at 540 (citing Claypotch, *supra*, 360 N.J. Super. 485, 823 A.2d 844).

[38] *See* Springfield Imported Motors v. Jaguar Rover Triumph, 187 N.J. Super. 124, 126 (N.J. Super. Ct. Law Div. 1982).

[39] *See Selected Prod. Liab. Issues: A 50-State Surv.*, EVERYCRSREPORT (Oct. 13, 2005), https://www.everycrsreport.com/reports/RL32560.html.

[40] *See Prod. Liab. in All 50 States*, MATTHIESEN, WICKERT & LEHRER, S.C. (Last updated January 13, 2022), https://www.mwl-law.com/wp-content/uploads/2018/02/PRODUCT-LIABILITY-LAW-CHART.pdf.

[41] *See* EVERYCRSREPORT, *supra* note 39.

[42] N.J. STAT § 2A:58C-9(d) (2024).

[43] *See* Harvey L. Kaplan & Jon A. Strongman, *Developments in US Product Liability Law and the Issues Relevant to Foreign Manufacturers*, SHOOK, HARDY & BACON, LLP (Mar. 1, 2012), https://content.next.westlaw.com/practical-law/document/I4cf86d90ef2a11e28578f7ccc38d.

Design Defects

Design defects exist when both "**(1)** the foreseeable risks presented by the product could have been reduced or avoided by employing an alternative design; and **(2)** failure to use the alternative design render the product unreasonably dangerous."[44] Additionally, the requisite elements of a prima facie case regarding a design defect requires that:

> **(1)** the product design was defective;
>
> **(2)** the defect existed when the product was distributed by and under the control of defendant, and
>
> **(3)** the defect caused injury to a reasonably foreseeable user.[45]

The alternative design being compared to the design defect must be reasonable.[46] To determine reasonableness, a court "may consider, upon other things, the effect on production costs, durability, maintenance, and aesthetics."[47] Additionally, when considering reasonableness, an alternative design would not be reasonable if it also created risks similar to that of the defect.[48] Thus, the claimant bears the burden of establishing what a reasonable alternative design would have been, and whether it was available at the time of distribution.[49]

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[44] *Id*.

[45] Santiago v. E.W. Bliss Div., Gulf & Western Mfg. Co., 201 N.J. Super. 205, 215 (N.J. Super. Ct. App. Div. 1985) (citing Soler v. Castmaster, Div. of H.P.M. Corp., 98 N.J. 137, 145 (N.J. Sup. Ct. 1984)) (citing O'Brien v. Muskin Corp., 94 N.J. 169, 179 (N.J. Sup. Ct. 1983)).

[46] Kaplan, *supra* note 43.

[47] *Id*.

[48] *See id*.

[49] *Id*.

Manufacturing Defects

A manufacturing defect is "a deviation from the design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae."[50] Similar to design defects, a plaintiff must prove that the product was defective, that such defect existed when the product left the manufacturer's control, and that the defect was the actual and proximate cause of the injuries.[51] It is important to note that while a plaintiff is relieved of proving fault, they are still required to prove why/how the product was defective.[52]

Inadequate Warnings

A product contains an inadequate warning "when both the **(1)** foreseeable risks of the product could have been reduced or avoided by providing reasonable warnings or instructions; and **(2)** due to the absence of such information, the product is unreasonably dangerous."[53] When evaluating inadequate warnings as a design defect, there is a presumption that an adequate warning would have been read by the consumer.[54]

That presumption can work in favor of either the plaintiff or a manufacturer.[55] This presumption favors a manufacturer when a warning is present; however, when there is no warning, the presumption that a user would have read an adequate warning works in favor the plaintiff (consumer).[56]

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[50] Schweiger v. Standard Tile Supply, Co., No. A-1322-18T2, N.J. Super. Unpub. LEXIS 2268, at *6-7 (N.J. Sup. App. Ct. Nov. 6, 2019) (citing N.J. REV. STAT. § 2A:58C-2 (2024)).
[51] Myrlak v. Port Auth., 157 N.J. 84, 97 (N.J. Sup. Ct. 1999).
[52] *Id*.
[53] Kaplan, *supra* note 43.
[54] Coffman v. Keene Corp., 257 N.J. Super. 279, 285 (N.J. Sup. App. Ct. 1992) (citing RESTATEMENT (SECOND) OF TORTS § 402A, cmt. j (Am. L. Inst. 1965)).
[55] *See id*.
[56] *Id*.

It is important to note that the defect of inadequate warnings is not solely an issue for manufacturers.[57] Sellers and distributors are required to provide warnings when the circumstances call for it.[58] Sometimes, merely providing a warning may not be enough.[59] Courts have to weigh the circumstances to determine the adequacy of a warning, and if all present risks were accounted for when the warning was or was not provided.[60]

THE INNOCENT SELLER DEFENSE IN COUNTERFEIT DRUG ACTIONS

Products liability actions can be brought due to a [defective] counterfeit drug.[61] The innocent seller defense is commonly utilized by the product sellers of such drugs, arguing that they did not have knowledge of the drug being counterfeit; pointing the finger at the manufacturer to face liability.[62] However, the discussion is complex regarding counterfeit drugs as to whether innocent seller defense(s) are applicable or if strict liability should apply, because similar actions regarding pharmaceutical products liability actions exercise the use of strict liability.[63] The following analysis below will illustrate the innocent seller defense when the suit regards counterfeit drugs.

Liability for sellers of counterfeit drugs is circumstantial.[64] Pursuant to New Jersey statutory law, a drug manufacturer or wholesaler participating in the supply chain of drug acting

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[57] *See* Kaplan, *supra* note 43.

[58] *Id*.

[59] *See id*.

[60] *Id*.

[61] *See* Ashworth v. Albers Med., Inc., 410 F. Supp. 2d 471, 473 (S.D.W. Va. 2005) (highlighting product liability action regarding counterfeit drug); *see also* Fagan v. AmerisourceBergen Corp., 356 F. Supp. 2d 198, 205-07 (E.D.N.Y. 2004) (regarding a suit brought over counterfeit drug(s)).

[62] *See Fagan*, 356 F. Supp. 2d at 208.

[63] *See* N.J. REV. STAT. § 2A:58C-9 (2024) (providing N.J. law on product seller liability for product liability); *see also Fagan*, 356 F. Supp. at 219 (holding that CVS should have known of a defect with a product due to its packaging being facially defective (strict liability)).

[64] *See* N.J. REV. STAT. § 24:6M-5 (2024).

reasonably and in good faith shall be immune from civil and/or criminal liability or any ensuing harm/injury to a consumer in association of their purchase of a defective drug item.[65]

Further, sellers are not susceptible to liability for the sale of defective drugs if they sell the product in the original, unaltered package they received it or created it in.[66] Thus, if the seller or distributor can prove through extrinsic evidence that they were wholesaling the drug in good faith with a lack of knowledge of its defect, they could be immunized of liability.[67]

This issue with the abovementioned statutes is that they do not fully immunize innocent sellers. They merely provide "wiggle room" for sellers to defend themselves, but not all innocent sellers are fortunate enough to provide sufficient evidence of their "reasonableness" and "good faith." If such sellers cannot satisfy their burden of proof, they will be held liable for damages even if they truly did not have knowledge of the product being defective.[68] Without sufficient proof of innocence, the seller could be held civilly and criminally liable for knowingly selling or offering for sale.[69]

The legislative intent of the New Jersey statute was to prevent deceptive acts in commerce, even if that results in a burden for innocent vendors.[70] Thus, the statute(s) was designed to prioritize consumer protection over the seller's liability despite potential innocence.[71]

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[65] *See id*.

[66] *See* N.J. REV. STAT. § 24:5-2 (2024).

[67] *See* N.J. REV. STAT. § 24:6 M-5 (2024) (immunizing seller from civil/criminal liability if selling item in good faith); *See also* N.J. REV. STAT. § 24:5-2. (stating no liability for sellers if they lack knowledge of defect or did not sell item while defected).

[68] *See* N.J. REV. STAT. § 24:6D-2 (2024).

[69] N.J. REV. STAT.§ 24:6D-2(c)-(h) (2024).

[70] *See* State v. Newton, 50 N.J.L. 534, 535-37 (1888).

[71] *See id*.

Again, sellers of counterfeit drugs are not only susceptible to civil liability, but also criminal liability.[72] Knowledge and intent are the factors considered by both civil and criminal courts regarding this issue.[73] New Jersey Courts have illustrated this through case law.

Consider in *State v. Barnett*, where the New Jersey Supreme Court held that there was conclusive evidence that defendant knowingly sold and marketed counterfeit materials.[74] Defendant Barnett operated a wholesale drug business in Atlantic City.[75] Counterfeit prints were sent to him in New York City.[76] Packages and labels which he sold were counterfeited reproductions of a product.[77] However, the pills within were not made by the company that was marketed to have made it.[78] When Barnett had opened the packages, he displayed the contents and was aware they were counterfeited yet continued to sell them.[79]

In *Smith v. Alza Corp.*, the defendant's actions revealed in discovery were closely connected with the manufacturing process, which did not allow the seller to use any defense of immunity.[80]

In *State v. Marchiani*, the court indicted a potentially 'innocent' seller defendant in line with the legislative intent for consumer protection.[81] The judge in *Marchiani* appreciated that New Jersey products liability statutes are designed to protect consumers through the legislature's

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[72] *See* N.J. REV. STAT. § 2C:35-11.1(a) (2024).
[73] *See* N.J. REV. STAT. § 2C:35-5(a) (2024).
[74] *See* State v. Barnett, 109 N.J.L. 193, 196 (N.J. Sup. Ct. 1932).
[75] *Id*. at 195.
[76] *Id*.
[77] *Id*. at 196.
[78] *Id*.
[79] State v. Barnett, 109 N.J.L. 193, 196 (N.J. Sup. Ct. 1932).
[80] *See* Smith v. Alza Corp., 400 N.J. Super. at 542.
[81] *See* New Jersey v. Marchiani, 336 N.J. Super. 541, 551 (N.J. Super. Ct. App. Div. 2001).

intent at the time of drafting, specifically due to the fact (specifically, here, under the Trademark Counterfeit Act (TCA)) that the statutory law defines both "owner" and person."[82] Civil statutes authorize a trademark owner to sue a defendant for using a mark "without the consent of the owner.'[83] While this differs from the issue here, it is analogous in illustrating the legislative intent behind consumer protection.[84]

Overall, New Jersey law emphasizes the vitality of knowledge and intent when assessing whether a seller is "innocent." The seller will have to provide a court with substantial evidence illustrating that they acted reasonably and in good faith within the supply chain process of the counterfeit drug.

While this appears burdensome on sellers who could likely have been an innocent party (potentially having no knowledge of any defect in the product), it is more valuable to protect consumers, like the legislature intended.[85]

III. STRICT LIABILITY FOR THE SALE OF COUNTERFEIT/DEFECTIVE PRODUCTS

There are circumstances in New Jersey products liability actions where strict liability is imposed on sellers of a defective product, even if they argue they were not aware of the defect.[86] The difference between negligence and strict liability is that under the strict liability analysis, the defendant is "presumed to know the dangerous propensity of the product, whereas in a

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[82] *Id.* at 548.
[83] *Id.*
[84] *See id*.
[85] *See* State v. Newton, 50 N.J.L. at 535-37. Consumer protection is consistently prioritized over the burden of litigation on an entity in the stream of commerce throughout statutory law.
[86] *See* Feldman v. Lederle Lab'y., 97 N.J. 429 (N.J. Sup. Ct. 1984).

negligence case, the plaintiff must prove that the defendant knew or should have known of the danger."[87]

The court in *Feldman* opined that the principle of strict liability applies to those involved in the supply chain of prescription drugs.[88] Although this case specifically regards a manufacturer in a prescription drug action, the court's opinion implies that strict liability can apply to sellers of pharmaceutical drugs.[89] When drafting statutory law on products liability issues regarding a type of drug, the New Jersey legislature intended to protect consumers rather than the wholesalers or manufacturers.[90]

Therefore, it can be inferred that the New Jersey legislature would have intended for strict liability to be imposed on manufacturers, sellers and distributors of pharmaceutical drugs, as they are handling/supplying products with products *that have a greater likelihood of being dangerous*.[91]

Nevertheless, the court in *Feldman* highlights the policy arguments for why strict liability should not be applicable under these circumstances.[92] For example, when the essential nature of

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[87] *See id.* at 450 (citing Freund v. Cellofilm Props., Inc., 87 N.J. 229 (N.J. Sup. Ct. 1981)) (citing Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150 (N.J. Sup. Ct. 1979)) (citing Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 172 (N.J. Sup. Ct. 1978)). The case provided here is the seminal case regarding strict liability in product liability actions. In this case, a young child (plaintiff) took an antibiotic drug that defendant produced and manufactured which resulted in permanently discolored teeth. Plaintiff then sought recovery through strict liability, arguing that defendant had a duty to warn of potential side effects. The court found that the manufacturer "knew or should have known" of the danger and owed Plaintiff a duty to warn.

[88] *See id.* at 441-42.

[89] *See id*.

[90] *See Newton*, 50 N.J.L. at 535-37.

[91] *See id*.

[92] *See Feldman*, 97 N.J. at 442 (citing Magrine v. Krasnica, 94 N.J. Super. 228 (Super Ct. Hudson Cty. 1967)) (citing Newmark v. Gimbel's Inc., 54 N.J. 585 (N.J. Sup. Ct. 1969)) (citing Baptista v. Saint Barnabas Med. Ctr., 109 N.J. Super. 217 (Sup. Ct. App. Div. 1969)). The court also highlights that the most recent case acknowledging this principle is *O'Brien v. Muskin Corp.*, 94 N.J. 448 (N.J. Sup. Ct. 1975).

the transaction "involves a service rather than a product", public policy may force a court to hold that the general welfare is served better by inapplicability of the strict liability doctrine.[93]

Similarly, when the manufacturer/seller (provider) is a non-profit institution supplying a product beneficial for public health, strict liability is also inapplicable.[94] In those scenarios, the defendant providers can still be liable for negligence, but will not be held to the strict liability standard.[95] Overall, these exceptions appear rare, so the overwhelming majority of products liability claims over pharmaceutical drugs are subject to the strict liability doctrine.[96]

Comment k of the Restatement (Second) of Torts immunizes defendants from strict liability over the sale of some products (including drugs) that are deemed "unavoidably unsafe."[97] Defendant manufacturer cites to comment k in their argument in *Feldman*.[98] However, not all prescription drugs are "unavoidably unsafe."[99] Drugs can contain defects that can be avoided by its providers with the exercise of due care.[100] The court in *Feldman* emphasizes that comment k of the Restatement (Second) of Torts does not simply immunize providers of drugs.[101]

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[93] *See Feldman*, 97 N.J. at 442.

[94] *See id.* While prioritizing consumer protection has been highlighted thus far, there are certain circumstances that apply prioritization of innocence to the seller. As referenced, non-profits supplying beneficial products to the public, or any entity providing a product that is deemed beneficial for the general welfare of the public. Again, a circumstantial and fact-dependent scenario. Note that these types of scenarios where consumers are less prioritized are rare. An exception, not the rule.

[95] *See id.*

[96] *See id.*

[97] *See id.* at 446-47. (citing Restatement (Second) of Torts § 402A cmt. k).

[98] *See Feldman, 97 N.J. 429.*

[99] *See id.* at 447.

[100] *See id.*

[101] *See id.*

Generally, the strict-liability doctrine represents the safety of the product and not the nature of the provider's conduct.[102] Ultimately, due to the potential dangers of the product(s) (here, drugs), under strict liability, the defendant is "*assumed to know* of the dangerous propensity of the product."[103]

With New Jersey law surrounding products liability actions over the sale of counterfeit drugs lacking uniformity, there is an analogous argument that a plaintiff may find useful by citing to cases like *Feldman*, which hold that providers of prescription drugs can be subject to strict liability. Plaintiffs will argue, "shouldn't wholesalers and distributors of counterfeit drugs be held to that same standard?" "Shouldn't consumers be protected over the likes of those dispensing products to consumers that are dangerous to the public, regardless of their knowledge of the defect or providing a warning that may not be entirely adequate?[104]

New Jersey law on this issue requires consistency. Greater consistency will resolve complexities in the litigation of products liability actions regarding this issue, which are rising.[105] Thus far, this note has discussed a variety of different standards that can be applied in products liability suits over drugs. But each is dependent on the circumstances. It appears that the circumstances can range greatly, and the New Jersey legislature or the New Jersey Supreme Court should pick one standard and establish consistency. Sellers of drugs could be immunized for simply lacking knowledge of the defect, or they could be held strictly liable because they

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[102] *See id.* at 450.

[103] *See Feldman*, 97 N.J. 429.

[104] *See Newton*, 50 N.J.L. at 535-37.

[105] *See* Fred Charatan, *Fake Prescription Drugs are Flooding the U.S.*, 322 BRIT. MED. J. 1446 (Jun. 16, 2001), https://pmc.ncbi.nlm.nih.gov/articles/PMC1173338/ (emphasizing the increase in counterfeit pharmaceutical drugs); *see also* AnneMoss Rogers, *Gas Station Heroin, and Other Not-Yet-Regul. Drugs*, MENTAL HEALTH AWARENESS EDUC. (Jan. 26, 2024), https://mentalhealthawarenesseducation.com/gas-station-heroin-and-other-not-yet-regulated-drugs/ (highlighting the rise of unregulated/counterfeit substances being sold at convenience stores and gas station markets).

know they are handling such a dangerous item that they *should have known* of any present defect and failed to provide an adequate warning to consumers.[106]

Choosing one (preferably one that protects consumers like the legislature originally intended, i.e. strict liability)[107] would make the law more consistent and easier to apply. Law makers that are content with where New Jersey law stands on this issue would argue that keeping an *ad-hoc* approach is more beneficial because it equivalently balances the interests of both product liability defendants and plaintiffs.

Applying a blanket innocent seller defense does have the danger of excessive protection to sellers leading to the consumption of more dangerous, defective substances by consumers. On the other hand, implementing strict liability in all cases could burden/harm product sellers that truly are innocent.[108] This would turn away from an original intention to reduce litigation costs for innocent product sellers.[109]

While either option could have their dangers, broader protection of consumers on this issue would likely outweigh the presented danger. Overall, it would organize the litigation system on this issue, which could ultimately benefit both plaintiffs and defendants.

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[106] *See* N.J. REV. STAT. § 24:6M-5 (2024) (immunizing seller from civil/criminal liability if selling item in good faith); *see also Feldman*, 97 N.J. at 450 (holding that providers in pharmaceutical drug sales of defective product are strictly liable).

[107] *See Newton*, 50 N.J.L. at 535-37.

[108] *See* Smith v. Alza Corp., 400 N.J. Super. at 540 (citing Claypotch v. Heller, Inc., 360 N.J. Super. at 485).

[109] *Id.*

IV. EXAMPLES OF APPLICABLE SITUATIONS

Thus far, this article has discussed how to solve the growing issue of counterfeit drug sales and subsequent product liability suits from harmed consumers. This section will elaborate on how greatly the issue has developed, how it is become a commonality, and why analyzing this is important.

COUNTERFEIT PHARMACEUTICAL DRUGS

In the United States, it is estimated that $431 billion in drugs are counterfeited annually, according to the World Health Organization (WHO).[110] Back in 2022, counterfeit drug incidents were up seventeen (17) percent, with 2,121 incidents occurring in said year.[111] Now, in 2025, one could presume that number/percentage has continued to increase. CNBC authors Contessa Brewer and Scott Zamost outline the trend of counterfeit drug incidents alluded to throughout this article.[112] Specifically, the story of a Las Vegas poker star, Lazaro Hernandez, is highlighted.[113]

Hernandez was responsible for orchestrating a nationwide $230 million scheme where HIV drugs sold to pharmacies were purposefully counterfeited before they were sold back to large pharmacies at a substantial discounted rate.[114] Biktarvy is/was the "number one" prescribed drug for treating HIV, with Descovy being another prominent drug to treat HIV.[115] These two drugs were those that were primarily altered in the counterfeiting operation held by

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[110] Contessa Brewer & Scott Zamost, *Fraud in a Bottle: How Big Pharma Takes on Criminals Who Make Millions Off Counterfeit Drugs*, CNBC (Dec. 11, 2023), https://www.cnbc.com/2023/12/11/fraud-in-a-bottle-big-pharma-takes-on-counterfeit-drugs.html.

[111] *Id*.

[112] *See generally id*.

[113] *See id*.

[114] *Id*.

[115] *Id*.

Hernandez.[116] The counterfeiters were obtaining empty, authentic bottles of the drugs, filling them with the counterfeit pills, and then packaging them with a counterfeit seal.[117]

COUNTERFEIT DRUGS SOLD AT CONVENIENCE STORES

Counterfeit drug operations are not only occurring in the sphere of pharmaceutical drugs (such as the incident with Hernandez), but also in drugs being sold at local gas stations and convenience stores.[118] For example, Tianeptine, also known as "gas station heroin," is one of the trending unregulated substances surfacing in gas stations and convenience stores.[119] Tianeptine is "an atypical tricyclic antidepressant" primarily sold in Europe, Asia, and South America to suppress anxiety.[120] The drug is regulated in certain countries within those continents, but only in *very limited dosages*.[121] Thus, safe use is possible, but it is prohibited in several United States jurisdictions because of the dangers posed without knowledge of safely administering dosages as they do in the referenced continents.[122]

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[116] Contessa Brewer & Scott Zamost, *Fraud in a Bottle: How Big Pharma Takes on Criminals Who Make Millions Off Counterfeit Drugs*, CNBC (Dec. 11, 2023), https://www.cnbc.com/2023/12/11/fraud-in-a-bottle-big-pharma-takes-on-counterfeit-drugs.html.

[117] *See id.*

[118] *See Elizabeth Tracy, Substances Bought at Gas Stations and Convenience Stores Present Unique Challenges in the ED,* JOHNS HOPKINS MEDICINE PODCASTS *(Jan. 22, 2024), https://podcasts.hopkinsmedicine.org/substances-bought-at-gas-stations-and-convenience-stores-p*. This brief excerpt highlights the dangers of purchasing drugs/other drug items within local gas stations and other mini marts. Presumably, locations such as 7-Eleven's, Shell, Exxon, or other smaller, privately owned gas stations are selling dangerous products. When entering a mini mart, there are a variety of options behind a counter that are not visible to the naked eye. There are several unhealthy products/substances available for purchase. New counterfeit drugs being sold contain dangerous and unregulated chemicals and do not bear a customer warning. Often times, the seller (a mini mart) is *unaware* of what they are selling.

[119] *See id.*

[120] Steve Sapp, *Philadelphia CBP Officers Bag 22 Pounds of 'Gas Station Heroin' Destined to Edgewater, NJ, U.S. Customs and Border Protection* (Dec. 13, 2024), https://www.cbp.gov/newsroom/local-media-release/philadelphia-cbp-officers-bag-22-pounds-gas-station

[121] *See* Mayo Clinci Staff, *Tianeptine: Is Safe Use Possible?*, MAYO CLINIC (Mar. 29, 2024), https://www.mayoclinic.org/healthy-lifestyle/consumer-health/in-depth/tianeptine-is-safe-use-possible/art-20562252.

[122] Laura Koppen, *What is tianeptine, and are there recommendations for managing tianeptine misuse/withdrawal in the medical setting?* UNIV. OF ILL. CHICAGO (Jun. 2024), https://dig.pharmacy.uic.edu/faqs/2024-2/june-2024-

Across the country, and prominently within New Jersey, the drug is being sold online, as well as in local smoke shops, gas stations, and convenience stores while being marketed as a "dietary supplement."[123] The drug is very addictive, and misuse can cause a dangerous degree of dependency on the product, posing severe health concerns.[124] Ultimately, the consequences of tianeptine use can be deadly.[125]

One of the abovementioned "dietary supplements" being sold throughout New Jersey convenience stores containing tianeptine is "Neptune's Fix Elixir." A 32 year-old man from Toms River, New Jersey consumed the "elixir" and suffered a seizure, heart failure, cerebral anoxia, and other reactions, ultimately resulting in his death.[126] The Food and Drug Administration ("FDA") has said, "Tianeptine can interact with other medicines in a life-threatening way."[127]

On December 4, 2024, U.S. Customs and Border Protection intercepted a shipment of tianeptine in Southern New Jersey, which was scheduled to arrive at its destination of Edgewater, New Jersey (northeast).[128] The parcels of tianeptine were originally sent from Hong Kong, China, and the officers discovered five bags of a white powdery substance.[129] The shipment of tianeptine weighted 22 pounds, and eight (8) ounces, illustrating just how much is being brought into the New Jersey area, and being sold despite its FDA ban.[130] Keep in mind, this was only one

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faqs/what-is-tianeptine-and-are-there-recommendations-for-managing-tianeptine-misuse-withdrawal-in-the-medical-setting/.

[123] *See* Sapp, *supra* note 120.

[124] *See id.*

[125] *See generally* Attrino, *supra* note 1.

[126] *Id.*

[127] *Id.*

[128] Sapp, *supra* note 120.

[129] *Id*.

[130] *See id.*

bust of the drug. Even more has likely been brought into the state that the U.S. Customs and Border Protection has yet to discover.

The FDA has advised consumers that consumption of tianeptine products, especially the abovementioned "Neptune's Fix Elixir," poses a "reasonable probability of life-threatening events including suicidal ideation or behavior for children, adolescents, and young adults twenty-five (25) and younger, with further risks including unintentional overdoses."[131] A portion of the Neptune's Fix bottles have shown to include other "mind-altering" substances along with the tianeptine, such as synthetic cannabinoids (manmade versions of marijuana's main ingredient).[132]

The "Elixir" has been marketed as "happiness in a bottle", deceptively leading consumers to believe it is a form of a health supplement to "take the edge off."[133] It has effects, superior to another type of drug, Kratom, but some believe it is a more elevated substance, although Kratom is already dangerous on its own.[134] Kratom is another substance marketed similarly to tianeptine-linked products, having chemicals that mimic opioid pain relievers.[135] Opioids are notorious for their addictive qualities.[136] Drugs like Kratom and Tianeptine have the same addictive qualities,

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[131] Kate Gibson, *Neptune's Fix Products Recalled Nationwide Due to Serious Health Risks*, CBS NEWS (Jan. 30, 2024), https://www.cbsnews.com/news/fda-neptunes-fix-tianeptine-product-recall-gas-station-heroin/.

[132] *Id.*

[133] *Id.* Overall, this tianeptine-laced drug has been marketed as several things that it is not. It is referenced as a dietary supplement, a stress-reliever, and the like. This is a predatory drug that aims for a demographic of teens/young adults and/or anyone recovering from a severe drug addiction looking for a simple fix.

[134] *See id.*

[135] Matthew Hastings, *What is Kratom? Is The Herbal Extract a Safe Alternative to Opioids?* UNIVERISTY OF COLORADO ANSCHUTZ (Sep. 25, 2023), https://news.cuanschutz.edu/news-stories/what-is-kratom-is-the-herbal-extract-a-safe-alternative-to-opioids.

[136] *Id.* Highlighting the abovementioned footnote (119), this emphasizes why this drug can be very dangerous for an individual recovering from a substance addiction. Marketing the product deceptively (which is what is being done) is a primary example of what products liability law was designed to mitigate.

which makes them such a danger to consumers when they are sold with other dangerous ingredients.[137]

The dangers of tianeptine are well-documented.[138] Throughout the country, but especially New Jersey, tianeptine is on the loose in local convenience stores being deceptively marketed as a dietary supplement, which it is not.[139] Dangerous counterfeit products are at the fingertips of innocent individuals who have suffered adverse reactions as a result of their consumption.[140] The injuries and risks outlined throughout exemplify why the overarching question of this note is being presented.[141]

Despite the FDA recalling the product of "Neptune's Fix,"[142] cases of consumers suffering adverse reactions have continued to accumulate.[143] In May 2024, Dr. Diane Calello (Executive Director of the New Jersey Poison Control Center at Rutgers New Jersey Medical School) voiced that the Poison Control Center had received 41 cases (regarding adverse reactions

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[137] *See id*. (providing that the drug Kratom has addictive qualities like opioids); *See also* Gibson, *supra* note 131 (stating that tianeptine is similar to Kratom and also has addictive qualities). Although Kratom is a legalized drug, it is known for its addictive qualities. Tianeptine is the same, but simply a *worse* – and more dangerous – drug. Either can be extremely dangerous to consumers when supplemented with other ingredients, but Tianeptine has more hazards than Kratom. Moreover, Tianeptine can be a very dangerous drug to those who struggle with addiction. It is often seen as a "come down" drug for those recovering from addictions to drugs like heroin. Thus, it can be very dangerous when sold to a recovering addict who think the product is safe because it is marketed as such.

[138] *See generally* Attrino, *supra* note 1 (showing man dying from use of substance containing tianeptine); *See also* Gibson, *supra* note 131 (providing multitude of side effects experienced from tianeptine usage).

[139] *See* Attrino, *supra* note 1.

[140] *Id.*

[141] *Id.*

[142] Gibson, *supra* note 131.

[143] *Health Alert: Tianeptine Update – Continued Cases Despite January 2024 Recall*, NEW JERSEY DEPARTMENT OF HEALTH (Sep. 24, 2024), https://www.nj.gov/health/populationhealth/documents/health-alert%20tianeptine-update.pdf.

from consumption of tianeptine) since June 2023, when normally the center only received one or two of those cases a year (if that).[144]

Moreover, in April 2024, a bill was introduced to prohibit the sale of *any* "gas station heroin."[145] Energy and Commerce Committee Ranking Member Frank Pallone, Jr. (D-NJ) introduced the bill.[146] Senator Dick Durbin (D-Il) stated that "he would introduce companion legislation to the Senate."[147] Furthermore, Durbin stated the following:

> "Americans put their trust and faith in a dietary supplement to improve their health and well-being…But some unscrupulous companies have abused that trust and marketed illegal – and dangerous – ingredients in some of these products, such as tianeptine. As a result, some consumers have been sickened and even died. Consumers deserve to know that these products are safe. In face of this mounting public health threat, we must pass legislation to provide the FDA with the authorities it needs to rid the market of tianeptine and other dangerous ingredients."[148]

The accumulation of these cases despite the manufacturer and the FDA both recalling the product illustrates the dangers consumption of the product poses.[149] Additionally, this portrays the knowledge of some sellers of the product, as it could be an argument that the seller "should have known" of the potential hazards that come with consumption of the product.[150]

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[144] Chad Pradelli & Cheryl Mettendorf, Experts Warn About Dangers of 'Gas Station Heroin' – Action News Investigation, ABC Action News (May 9, 2024), https://6abc.com/post/what-is-gas-station-heroin-poison-control-warning-about-dangers-of-otc-supplement--action-news-investigation/14790362/.

[145] *Pallone Introduces Bill to Prohibit Sale of "Gas Station Heroin"*, ENERGY AND COMMERCE COMMITTEE DEMOCRATS (Apr. 23, 2024), https://democrats-energycommerce.house.gov/media/press-releases/pallone-introduces-bill-prohibit-sale-gas-station-heroin.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *See* Model Jury Charge (Civil), § 5.40A, "Products Liability – Introduction" at 2. It can be challenging to prove whether a product seller "should have known" of a product's dangerous propensity. That is one of the ambiguities of New Jersey product liability law when this issue of counterfeit drugs sales is assessed. Sellers that have still been selling this product after the public recall would provide a plaintiff with a strong argument that they "should have known" of the product's dangers. This generates a significant obstacle for a plaintiff satisfying their burden of proof.

Various tort victims, like the man in Toms River, New Jersey, will be seeking justice against the negligent party/parties who are responsible for letting a dangerous, unregulated drug deceptively get into their hands.[151] Specifically, the Toms River man is seeking judgment in a wrongful death and negligence action against the manufacturer, distributor, and seller engaged in "fraudulent business practices engaged in by misleading consumers about the products safety."[152] As the attorneys of the case said, "No one should die because they drank [what was marketed as] a small energy drink that they purchased at a local convenience store."[153]

The action brought by the Toms River man encapsulates the importance of distinguishing between the applicability of the innocent seller defense or whether strict liability will be imposed on any party within the product's stream of commerce.[154] In a scenario regarding the sale of tianeptine, the expectation is that the seller of the product would seek to be indemnified due to their lack of knowledge that they were selling a dangerous and/or defective product.[155] However, the plaintiff of the action will argue either that the innocent seller defense should not apply because the defending party (seller) was aware of the product's dangerous condition and/or its defective nature, or the Plaintiff will argue that strict liability should be imposed, regardless of the seller's awareness/knowledge.[156]

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[151] *See generally* ENERGY AND COMMERCE COMMITTEE DEMOCRATS, *supra* note 145.

[152] *Id.*

[153] *Id.*

[154] *See* N.J. STAT. ANN. § 2A:58C-9.

[155] *See* Springfield Imported Motors, Ltd v. Jaguar Rover Triumph, Inc., Inc., 187 N.J. Super. at 126. This source provides that the intent of the innocent seller defense is to deflect blame from an innocent party that is not responsible for the harm done, shifting the blame along to the manufacturer and/or distributor, who carries more responsibility for the alleged defect of the product.

[156] *See* N.J. STAT. ANN. § 2A:58C-9 (providing that innocent seller defense hinges on whether the seller was aware of any defect or dangerous condition); *See also Feldman*, 97 N.J. at 429 (highlighting that under the strict liability analysis, the defendant is assumed to know the dangerous propensity of a product).

The difficulties that a lack of certainty over which law is applicable can develop are put on display in product liability actions like these. Will a Plaintiff have the ability to prove that the convenience store knew of the dangerous condition?[157] Should the convenience store be strictly liable due to the nature of the business they underwent?[158]

The law should say one way or the other. Leaving the question open-ended either hampers a Plaintiff seeking justice and reform from recouping a fair judgment because of a failure of proof under the applicable standard, or it forces an innocent defendant to incur the fees of litigation to defend an action that they are not actually liable for.[159]

Regarding counterfeit drug operations such as that performed by Lazaro Hernandez, the analysis is somewhat of the same.[160] If a similar situation occurred within New Jersey, a Plaintiff bringing a product liability action would need to prove the seller (a pharmacy) was aware of the product's dangerous condition and/or that the product was materially defective.[161] Unless the counterfeit packaging was *noticeably defective* to the naked eye of the pharmacy, it is hard to believe that a pharmacy would have the actual knowledge of the product's dangerous propensity.

Nevertheless, as seen in *Feldman*, the court implies that strict liability is applicable in those involved in the supply chain of prescription drugs.[162] New Jersey law creates a presumption that strict liability is to be imposed on each of the manufacturer, distributor and

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[157] *See* N.J. STAT. ANN. § 2A:58C-9.
[158] *See Feldman*, 97 N.J. at 429.
[159] *See* Smith v. Alza Corp., 400 N.J. Super. at 540 (citing Claypotch v. Heller, Inc., 360 N.J. Super. at 485).
[160] *See generally* Brewer & Zamost, *supra* note 110.
[161] *See* N.J. STAT. ANN. § 2A:58C-9.
[162] *See Feldman*, 97 N.J. at 441-42.

seller of pharmaceutical drugs, since potentially dangerous products are being handled by each party.[163]

Thus, based on the court's decision in *Feldman*,[164] a counterfeit drug operation regarding pharmaceutical drugs can have a clearer resolution than an operation at convenience stores or gas station markets involving tianeptine, or another similar, unregulated drug.

However, a Plaintiff seeking to reach a judgment against as many parties as possible (i.e. manufacturer, distributor and the seller)[165], can argue that the same standard applied to counterfeit pharmaceutical drugs should apply to the counterfeit drugs sold in convenience stores.

A factor in the reasoning of *Feldman* provides that strict liability should be imposed because "dangerous products are being handled."[166] Plaintiffs suffering adverse reactions from products containing tianeptine can state that convenience stores should be strictly liable because they are also handling an "unavoidably" dangerous product.

Presumably, strict liability is likely applied to pharmacies as a seller, because a pharmacy has or should have a greater knowledge of drugs and any dangers/defects amongst them, rather than a convenience store would. However, laws concerning product liability are designed to protect the consumer first.[167]

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[163] *See id.* (implying strict liability against a seller of a counterfeit pharmaceutical drug); *See also Newton*, 50 N.J.L. at 535-37 (providing that legislature intends for protection of consumers over a seller/manufacturer).
[164] *See generally Feldman*, 97 N.J. at 429.
[165] *See generally Mass Torts Explained*, LAMINACK, PIRTLE & MARTINES (last visited Feb. 15, 2025), https://www.lpm-triallaw.com/blog/mass-torts-explained.
[166] *Feldman,* 97 N.J. at 441-42.
[167] *See*, *e.g.*, *Newton*, 50 N.J.L. at 535-37.

Therefore, to protect an innocent consumer at a convenience store who has suffered life-changing injury at the hands of a counterfeit drug operation, a court should not be too reluctant to impose a strict liability standard. Convenience stores sell various dangerous drugs with limited warnings of the dangers they impose to consumer(s).[168]

Clearly, there are a variety of questions which surround how a product liability case regarding the sale of a counterfeit drug should be handled. Other jurisdictions explicitly state whether such situations call for the innocent seller defense, or if the sellers are strictly liable. The final section of this paper will highlight the complexities that this will create in counterfeit drug product liability actions, which are likely to become overwhelming in New Jersey because of the presence of drugs like tianeptine.[169] If New Jersey were to favor the innocent seller defense over strict liability, or vice versa, it will be a balancing question between prioritizing the protection of consumers or protecting the time and pockets of innocent retailers.

V. SOLUTIONS TO CREATING A UNIFORM ENFORCEMENT

Jurisdictions vary on whether they immunize sellers in product liability actions.[170] Approximately half of the jurisdictions have enacted "some form" of an innocent seller statute.[171]

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[168] *See generally Pallone Raises Concern Over "Gas Station Heroin,"* ENERGY & COMMERCE COMMITTEE DEMOCRATS (Mar. 14, 2024), https://democrats-energycommerce.house.gov/media/press-releases/pallone-raises-concern-over-gas-station-heroin.

[169] *See* Fred Charatan, *Fake Prescription Drugs are Flooding the United States*, NATIONAL LIBRARY OF MEDICINE (Jun. 16, 2001), https://pmc.ncbi.nlm.nih.gov/articles/PMC1173338/ (emphasizing the increase in counterfeit pharmaceutical drugs); *See also* AnneMoss Rogers, *Gas Station Heroin, and Other Not-Yet-Regulated Drugs*, MENTAL HEALTH AWARENESS EDUCATION (Jan. 26, 2024), https://mentalhealthawarenesseducation.com/gas-station-heroin-and-other-not-yet-regulated-drugs/ (highlighting the rise of unregulated/counterfeit substances being sold at convenience stores and gas station markets).

[170] A Primer on Statutory Protections for Intermediary Sellers in Toxic Tort Cases, WILLIAMS MULLEN (Oct. 7, 2021), https://www.williamsmullen.com/insights/news/legal-news/primer-statutory-protections-intermediary-sellers-toxic-tort-cases#:~:text=While%20over

[171] *Id.*

However, twelve states have adopted *complete protection* against all three (3) product liability claims,[172] those being the following: Alabama, Colorado, Delaware, Idaho, Illinois, Kansas, Maryland, Mississippi, Missouri, North Dakota, Tennessee and Utah.[173]

The remaining jurisdictions provide partial protection to product sellers under only one or two of the product liability causes of action. Another factor in the applicability of some jurisdiction's innocent seller defense(s) is that some are only initiated if the manufacturer can be named a defendant in the case.[174] Therefore, there are multiple states in which a seller and/or a distributor does not have statutory protection in scenarios where a manufacturer either cannot be served, has dissolved, or the like.[175]

Jurisdictions which adopt this manufacturer presence-dependent approach[176] provide an alternative to the abovementioned conflicting balancing test.[177] Manufacturers are often the most attractive target for a few reasons.[178] One is that they are usually the most *directly responsible* for ensuring the safety of their product which ended up being harmful.[179] Another reason is

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[172] Dan Ray, *Types of Product Liability Claims*, NOLO (Oct. 11, 2023), https://www.nolo.com/legal-encyclopedia/types-of-defective-product-liability-30070.html#:~:text=If%20you've%20been%20hurt,failure%20to%20warn%20or%20instruct. There are three (3) different product liability claims: (1) Defective Manufacture; (2) Defective Design; and (3) Failure to Warn or Instruct.

[173] WILLIAMS MULLEN, *supra* note 170. While the New Jersey statute can be interpreted as providing sellers with complete protection against all three product liability claims, the jurisdiction does not contain a. "blanket innocent seller defense" like those mentioned. These states explicitly cover sellers, while in New Jersey, they are typically covered, but can be liable if the plaintiff proves the knowledge standard.

[174] *Id.*

[175] *See id.*

[176] *Id.*

[177] *See* Charatan, *supra* note 169 (demonstrating balancing test); *See also* Rogers, *supra* note 169 (providing same).

[178] *See Understanding Product Liability Laws*, J.P. WARD AND ASSOCIATES (Oct. 31, 2024), https://jpward.com/understanding-product-liability-laws/#:~:text=It's%20important%20to%20note%20that,the%20safety%20of%20their%20products.

[179] *Id.*

because it is common that the manufacturer will have a policy limit for the plaintiff to recover from that is greater than that of the product seller and/or distributor.[180]

Therefore, these types of jurisdictions are able to protect potentially innocent product sellers from the burdensome time and fees of litigation,[181] but still provide plaintiffs the ability to recover for harm resulting from negligence within the stream of commerce by ensuring that there is at least one member can be held liable.[182]

However, there is no strict liability leaving no "reasonable and good-faith" sellers with blanket liability.[183] What could be called a "half of an innocent seller defense" equivalently weighs the interests of both consumers and manufacturers, distributors and sellers – illustrating an approach that would be beneficial for New Jersey to adopt.[184]

Additionally, this approach is beneficial due to the fact-dependent nature of product liability law.[185] Each case is unique.[186] Fact-dependent statutory protection allows the law to adapt to specific circumstances, creating flexibility for both plaintiffs and defendants.[187] Jurisdictions which provide partial statutory protection for sellers and/or distributors in the manner of immunizing them in specific product liability claims.[188]

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[180] *See id*.

[181] *See Newton, 50 N.J.L. at 535-37.*

[182] See J.P. WARD AND ASSOCIATES, *supra* note 179.

[183] *See id*.

[184] *See id*.

[185] *See generally Product Liability in All 50 States*, MATTHIESEN, WICKERT & LEHRER, S.C. ATTORNEYS AT LAW (last updated Jan. 13, 2022), https://www.mwl-law.com/wp-content/uploads/2018/02/PRODUCT-LIABILITY-LAW-CHART.pdf. This approach allows the product liability to adapt to the specific circumstances under each case. In product liability matters, each case is unique. This approach allows flexibility for both plaintiffs, as well as defendants, potentially.

[186] *Id.*

[187] *Id.*

[188] WILLIAMS MULLEN, *supra* note 170.

For example, a few jurisdictions will only allow a product seller defendant to defend themselves with an innocent seller defense if the action concerns defective manufacture or failure to warn, but not for defective design.[189] Moreover, there are jurisdictions that only allow innocent seller defenses for failure to warn product liability actions, but not defective manufacture or design defect.[190]

This type of approach to the issue would not be useful for New Jersey to adopt. This approach would not successfully resolve the issue at hand, as the sale of counterfeit drugs in pharmacies and in local convenience stores would include claims under all three of the product liability claims.[191] In addition to the fact that this latter approach would not be appropriate for solving the niche counterfeit drug issue in New Jersey, it does not make great sense. It is illogical to allow a product seller to exercise the innocent seller defense for only two (2) product liability claims but not a third.[192]

Presumably, these models of applying the innocent seller defense exist because it would seem likely that it would be more reasonable to expect that a product seller "knew or should have known" of the dangerous propensity of a product.[193] When that legislation was passed, it may have seemed more feasible that a product seller would detect a design defective rather than

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[189] *See id.* (describing the differences in innocent seller defenses amongst jurisdictions with one being an applicability to certain product liability claims); *See also* Ray, *supra* note 172 (providing the different product liability claims).

[190] *See* WILLIAMS MULLEN, *supra* note 170.

[191] *See* Ray*, supra* note 172.

[192] WILLIAMS MULLEN, *supra* note 170 (highlighting jurisdictions that allow sellers to exercise the product seller defense for claims of defective manufacture or failure to warn, but not defective design); *See also* Ray, *supra* note 172 (noting jurisdictions which allow innocent seller defenses for failure to warn actions, but not defective manufacture or defective design).

[193] *See* WILLIAMS MULLEN, *supra* note 170.

defective manufacture, or would have be more reasonably expected to know of or should know of a danger in the product requiring them to warn consumers (i.e. failure to warn claims).

Nevertheless, this is an unreasonable presumption because it could be equivalently likely that a product seller should be expected to meet the standard for product liability.[194] While this could be true under a certain set of facts, in the majority of cases it seems likely that a product seller could suffice or not meet the requisite standard in any of the three (3) product liability claims.

When evaluating alternative forms of legislation on this issue (outside of a blanket innocent seller defense or a strict liability standard), it is apparent that the two realistic options are the "manufacture dependent approach" or the approach of applying the innocent seller defense to only certain claims available under product liability.[195]

Pursuant to the above analysis, the former approach seems the most cerebral. When balancing the interests of harmed consumers and potentially innocent product sellers[196], requiring the applicability of the innocent seller defense to hinge on whether the manufacture cannot feasibly be named a party to the matter, is the most rational method.[197]

The "manufacture dependent approach" accomplishes a middle ground for the interests of the consumers and sellers.[198] This method protects innocent sellers by eliminating the

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[194] *See id.*

[195] *Id*.

[196] *See generally Newton*, 50 N.J.L. at 535-37 (1888).

[197] *See* WILLIAMS MULLEN, *supra* note 170.

[198] *See id*. (describing the "manufacture dependent approach"); *See also* J.P. WARD AND ASSOCIATES, *supra* note 179 (providing rationale as to why the manufacture dependent approach is reasonable). This approach would reach a "middle-ground" because it equivalently balances the interests of the products and sellers. Manufacturers are typically the entity named as a defendant in a product liability with the most financial resources to compensate the harmed consumer [plaintiff]. Additionally, in an overwhelming amount of product liability cases, if a seller would be liable, a manufacturer will be also found liable. In other words, [typically] for a product liability case to be successful, it is due to the liability of a manufacturer. Thus, the "manufacture dependent approach" is beneficial for both sides because it will protect potentially innocent sellers from liability, but also values priority of consumer

possibility for action against them (ordinarily) but provides a caveat which prioritizes consumer protection.[199] That caveat is that product sellers in a product liability suit will be unable to exercise the "innocent seller" defense[200] when a manufacturer is unable to be attached as a defendant in a plaintiff's lawsuit.[201] This way, a plaintiff would always have an avenue of recovery when bringing a claim under New Jersey product liability law.[202]

This approach to the law is arguably the most beneficial – with not favoring plaintiffs over defendants, or vice versa.[203] With the likely ascent of product liability claims being brought in New Jersey because of the recent presence of counterfeit drugs being sold at local gas stations and convenience stores, it is crucial that the law surrounding the issue be less ambiguous.[204]

Although New Jersey product liability law concerning "innocent sellers" is clear, its interpretation to this issue is vague.[205] It involves proving that the sellers "knew or should have known" of the product's dangers.[206] Deciding whether a defendant seller "should have

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protection, by not allowing the innocent seller defense to apply when a manufacturer may be dissolved, unable to be served, or the like (because this would virtually eliminate the possibility of a case for a plaintiff).

[199] WILLIAMS MULLEN, *supra* note 170.

[200] MODEL CIV. JURY CHARGES, *supra* note 14.

[201] WILLIAMS MULLEN, *supra* note 170.

[202] *Id.*

[203] *See id.*

[204] *See generally* Tracy, *supra* note 118. Drugs containing unregulated ingredients, such as tianeptine, have been spotted throughout the state, and the entirety of the northeast. Several articles published since 2023 highlight the dangers involved with consumption of unregulated drugs like tianeptine. Thus, the magnitude of product liability suits against manufacturers, sellers and distributors should increase greatly. While on the surface the law is clear regarding general product liability claims, it can be ambiguous as to the niche issue of counterfeit drugs. That is because the sellers will claim that they did not have knowledge of the dangers the drug posed, but plaintiffs will argue that due to the dangerous propensity of the drug, the sellers of these drugs should have acted more reasonably in selling the product.

[205] *See* MODEL CIV. JURY CHARGES, *supra* note 14.

[206] *See Feldman*, 97 N.J. 429 (citing Freund v. Cellofilm Properties, Inc. 87 N.J. 229 (1981)). It can be difficult to "see into the mind" of a product seller. Thus, the litigation would be dependent on how the quality of arguments over whether sellers "should have known." Therefore, it would be more beneficial to both plaintiffs and defendants in these types of actions to have legislation that leaves fewer unanswered questions for both parties. This is another

known" of a product's dangers is a difficult task. It involves seeing into the mind of the sellers at the time of the sale. There is a strong argument that sellers in settings like drug stores, gas station markets, and other convenience stores should know of potential dangers when selling drugs that may possibly be unregulated.

Accordingly, it would be beneficial for New Jersey to adopt a "manufacture dependent" approach.[207] Adoption is not unfeasible either.[208] Several other jurisdictions have adopted this approach to product liability.[209] Although those jurisdictions do not take said approach to troubleshoot ambiguity specifically for this issue of counterfeit drug sales, it is an avenue to accomplishing a form of law that balances the interests of both consumers and businesses/companies/entities within the chain of commerce of a product.[210]

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reason why the "manufacturer dependent approach" would likely be best for New Jersey and other states with similar issues.

[207] *See* WILLIAMS MULLEN, *supra* note 170.

[208] *See id*. Adoption of this approach is not a dream, or a far-fetched idea. Other states have adopted this approach, as shown in the source cited. This approach works for other states, and it is not unreasonable to expect it to work if adopted by New Jersey legislature.

[209] *Id.*

[210] *Id.*