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## Changes in the Landscape of Products Liability Law: An Analysis of the Restatement (Third) of Torts

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# CHANGES IN THE LANDSCAPE OF PRODUCTS LIABILITY LAW: AN ANALYSIS OF THE RESTATEMENT (THIRD) OF TORTS

REBECCA TUSTIN RUTHERFORD

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## I. INTRODUCTION

FOR MORE THAN thirty years, section 402A of the *Restatement (Second) of Torts* has dominated the landscape of products liability law.<sup>1</sup> A majority of courts in jurisdictions across the United States have considered and adopted, in some form, the rule of section 402A, which makes product manufacturers and retailers liable to consumers who are injured by defective products even though the seller exercised all possible care in preparing and selling the product.<sup>2</sup> Such widespread acceptance of section 402A has meant that the *Restatement* provision has played a major role in shaping the understanding of products liability law.<sup>3</sup>

In recent years, however, there have been rumblings that section 402A is at odds with the current practice of products liability law.<sup>4</sup> Scholars and jurists alike have criticized the *Restatement (Second)* provision because it establishes a confusing standard of liability—a standard that purports to be one of strict liability but

<sup>1</sup> See, e.g., James A. Henderson, Jr., & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1512 n.1 (1992) ("conservatively estimat[ing] that no fewer than 3,000 published court opinions" cite section 402A).

<sup>2</sup> See *id.* at 1512. See generally Roland F. Banks & Margaret O'Connor, Commentary, *Restating the Restatement (Second), Section 402A—Design Defect*, 72 OR. L. REV. 411, 421-23 (1993) (surveying the law of those states that have adopted section 402A in some form).

<sup>3</sup> See Henderson & Twerski, *supra* note 1, at 1512. For example, many manufacturers believe that strict liability in tort unfairly imposes liability in the absence of negligence or malice and compels defendants to pay damages in excess of their proportional responsibility. See, e.g., Mark Kuhlmann, *Tort Reform in the Aviation Industry*, 10 AIR & SPACE LAW. 15 (1995). Consumers, and those who align themselves with plaintiffs' interests, however, tend to view the products liability system as one of the most important means by which innocent victims can recover for injuries caused by defective products. See, e.g., Joseph T. Cook, *The Product Liability Crisis: Is It the Demise of Aviation Manufacturers? Two Myths from Hell*, 6 AIR & SPACE LAW. 1, 11 (1992).

<sup>4</sup> See Henderson & Twerski, *supra* note 1, at 1512-13.

that relies on traditional negligence principles, such as reasonableness, to explain its application.<sup>5</sup> Scholars have also found fault with section 402A because it fails to distinguish different types of product defects.<sup>6</sup> In 1994, the American Law Institute (ALI) acknowledged that section 402A was out of date and undertook to find a better way to describe the law of products liability.<sup>7</sup> After several years of intense debate and lobbying,<sup>8</sup> the ALI approved a Final Draft of the *Restatement (Third) of Torts: Products Liability*.<sup>9</sup>

Today, significant changes in products liability law loom on the horizon. This Comment will trace the history of section 402A and examine the current state of products liability law under the *Restatement (Second) of Torts*. Then, it will review the Proposed Final Draft of the *Restatement (Third) of Torts: Products Liability*, and consider how adoption of the revised Restatement might affect products liability law as it applies to manufacturing and design defect cases and failure to give adequate warning or instruction cases.<sup>10</sup>

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<sup>5</sup> See, e.g., Robert L. Rabin, *Restating the Law: The Dilemmas of Products Liability*, 30 U. MICH. J.L. REF. 197, 204 (1997). Section 402A has also been criticized because it adopts an "all-or-nothing" approach to contributory fault and because it fails to address whether liability under its provisions extends to bystanders. See *id.* See also William A. Dreier, *Design Defects Under the Proposed Section 2(b) of the Restatement (Third) of Torts: Products Liability—A Judge's View*, 30 U. MICH. J.L. REF. 221, 222-23 (1997).

<sup>6</sup> See Dreier, *supra* note 5, at 222.

<sup>7</sup> See *id.* (explaining that the job of the ALI is "to find a better way to describe an existing area of the law so that attorneys can advise clients, judges can charge juries, and professors can instruct students, all with more precision").

<sup>8</sup> See *ALI Wraps Up Product Liability Project, New UCC Article on Licenses Makes Debut*, 65 U.S.L.W. 2777, June 3, 1997. U.S. Law Week quotes one of the Reporters as saying "[the Reporters] listened to everyone, defense attorneys, plaintiffs' attorneys, academics. Their fingerprints are all over [the Restatement (Third)]." See *id.*

<sup>9</sup> *Id.* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Proposed Final Draft, 1997) [hereinafter RESTATEMENT (THIRD)]. The ALI expects that the revised Restatement will be published and available to courts and practitioners in 1998. See *ALI Wraps Up Product Liability Project, supra* note 8, at 2777.

<sup>10</sup> This Comment will not consider the Restatement (Third) rules of liability that apply to special products or product markets (prescription drugs and medical devices, food products, and used products) or the new rules for liability of commercial product sellers not based on product defects at the time of sale. RESTATEMENT (THIRD) § 5-11.

## II. THE RESTATEMENT (SECOND) OF TORTS SECTION 402A

### A. TOWARDS SECTION 402A: THE HISTORY OF LIABILITY OF SELLERS OF DEFECTIVE PRODUCTS

#### 1. *From Non-Liability to Strict Liability Under Warranty*

Early common law substantially insulated manufacturers and suppliers of defective products from liability.<sup>11</sup> Driven by a desire to cut off a potential flood of litigation, courts required privity of contract between the manufacturer or supplier and the plaintiff as a prerequisite to recovery.<sup>12</sup> As many persons who had been injured by defective products had not entered into any contract with the manufacturer or supplier, most early products suits ended in a judgment for the defendant.<sup>13</sup>

Because lack of privity often barred recovery in products cases where the manufacturer was clearly negligent, American courts began to develop exceptions to the privity requirement.<sup>14</sup> In *MacPherson v. Buick Motor Co.*,<sup>15</sup> Judge Cardozo effectively abol-

<sup>11</sup> See, e.g., *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Exch. 1842). *Winterbottom* is frequently cited as standing for the general rule that a manufacturer or supplier was not liable for negligence to persons injured by a product absent a contractual relationship. *Winterbottom* was a mail coach driver; his employer had contracted with the Postmaster General to supply horses and drivers to deliver the mail. See *id.* at 109. The defendant also had a contract with the Postmaster General to supply the coaches and keep them in good repair. See *id.* *Winterbottom* was injured when one of the coaches broke down. See *id.* He sued the defendant for negligently failing to carry out his duties of maintenance and repair. See *id.* The court denied liability as a matter of law. See *id.* at 114.

<sup>12</sup> See *id.*

[I]f the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.

*Id.*

<sup>13</sup> See Philip H. Corboy, *The Not-So-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed Restatement (Third) of Torts: Products Liability*, 61 TENN. L. REV. 1043, 1048 (1994) ("No-duty rules, epitomized by the privity requirement, permitted judges to dismiss cases as a matter of law regardless of the defectiveness of the product.").

<sup>14</sup> See *id.* at 1049; see also Cornelius W. Gillam, *Products Liability in a Nutshell*, 37 OR. L. REV. 119, 153-55 (1958) (listing 29 historical exceptions to the privity requirement).

<sup>15</sup> 111 N.E. 1050 (N.Y. 1916). *MacPherson* was injured when the automobile he was driving suddenly collapsed; one of the wheels the defendant manufacturer

ished the privity requirement by announcing that a manufacturer or a supplier of a potentially dangerous product was under a duty to *all* foreseeable users to exercise reasonable care in the manufacture and supply of the product, regardless of the existence or nonexistence of a contract.<sup>16</sup> The duty would arise when the defendant had knowledge of a danger and knowledge that, in the usual course of events, the danger would be shared by persons other than the buyer.<sup>17</sup> A product was considered dangerous if it was "reasonably certain to place life and limb in peril when negligently made."<sup>18</sup> As other courts began to recognize similar duties to avoid injury where danger could be foreseen, injured plaintiffs' chances of success against product sellers increased; however, other barriers to recovery under a negligence theory remained.<sup>19</sup> For example, plaintiffs still faced the burden of producing evidence of the manufacturer's negligence.<sup>20</sup> To further aid plaintiffs, courts liberalized their application of the *res ipsa loquitur* doctrine<sup>21</sup> and developed the rule

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had used was made of defective wood, which crumbled into fragments. *See id.* at 1051. Though no contract existed between MacPherson and the manufacturer, the court found that the defect could have been discovered upon reasonable inspection and that failure to conduct such an inspection in the context of a potentially dangerous product, such as an automobile, was negligence. *See id.*

<sup>16</sup> *See id.* at 1056-57.

<sup>17</sup> *See id.* at 1056.

<sup>18</sup> *Id.*

<sup>19</sup> *See id.* MacPherson did not relieve plaintiffs from the burden of proving that the product defect resulted from the manufacturer's failure to use reasonable care, nor from the requirement of proving that the defect proximately caused the product failure and the resulting injury.

<sup>20</sup> *See Corboy, supra* note 13, at 1048-49 (arguing that manufacturers were able to evade liability because "the evidence of negligence was generally within [their] own control").

<sup>21</sup> The doctrine of *res ipsa loquitur* provides an inference of negligence where the plaintiff proves that the instrumentality that caused the injury was in the defendant's exclusive control, and the accident was one which ordinarily does not happen in the absence of negligence. *See generally* *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 438 (Cal. 1944). The plaintiff in *Escola* was a waitress who was injured when a pop bottle exploded in her hand. *See id.* at 437. She alleged that the explosion was due either to the bottler's negligence in manufacturing the glass bottle or its negligence in creating excessive pressure inside the bottle, but she was unable to prove any specific acts of negligence. *See id.* The court allowed the plaintiff to rely on the doctrine of *res ipsa loquitur* even though the defendant did not have exclusive control over the bottle when it exploded. *See id.* at 438. The court reasoned that the doctrine should apply when "defendant had control [of the instrumentality causing the injury] at the time of the alleged negligent act, although not at the time of the accident, *provided* plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession." *Id.* (emphasis in the original).

of strict liability.<sup>22</sup>

Strict liability for defective products was first achieved under warranty in *Henningsen v. Bloomfield Motors, Inc.*<sup>23</sup> The *Henningsen* decision established that a plaintiff may recover for injuries caused by a defendant's product despite the plaintiff's inability to prove that the defendant failed to exercise reasonable care in manufacturing and selling the product.<sup>24</sup> The court ruled that where a manufacturer or a dealer puts a new product into the stream of commerce and promotes its purchase by the public, an implied warranty that the product is reasonably suitable for use accompanies the product into the hands of the ultimate purchaser.<sup>25</sup> By eliminating the necessity of proving negligence, the court subjected sellers to strict liability.<sup>26</sup>

*Henningsen* thus signaled the genesis of strict products liability. This rule, however, did not receive immediate acceptance; courts and commentators were not satisfied that the doctrine, as expressed in warranty terms, afforded enough protection to injured plaintiffs.<sup>27</sup> While strict liability in warranty relieved a plaintiff from the burden of proving negligence, they argued, it did not exempt her from the requirement of establishing priv-

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<sup>22</sup> See *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 455 (Cal. 1978) ("[O]ne of the principal purposes behind the strict product liability doctrine is to relieve an injured plaintiff of many of the onerous evidentiary burdens inherent in a negligence cause of action.").

<sup>23</sup> 161 A.2d 69 (N.J. 1960). See also Corboy, *supra* note 13, at 1049.

<sup>24</sup> The *Henningsen* court held an automobile manufacturer and a dealer liable to a plaintiff who was injured in one of their cars. The plaintiff, whose husband had purchased a new Plymouth from the defendant dealer twelve days earlier, was driving the car when she heard a loud noise come from under the hood and felt the steering wheel spin in her hands; the car veered sharply and crashed into a highway sign and a brick wall. See *Henningsen*, 161 A.2d at 75.

<sup>25</sup> See *id.* at 83. While the court held that the privity requirement would not be strictly applied so as to defeat a plaintiff's recovery under such an implied warranty, it did not completely eliminate the privity requirement from the warranty cause of action. Rather, the court ruled that the implied warranty of merchantability extends to the purchaser of the product, members of his or her family, and to other persons who might be expected by the parties to the warranty to become users of the product. See *id.* at 100. In *Henningsen*, the privity requirement threatened to bar recovery because the plaintiff's husband was the only "purchaser" of the new car; the plaintiff herself did not join in executing the contract for sale. See *id.* at 73.

<sup>26</sup> See William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 793 (1966) [hereinafter Prosser, *The Fall*].

<sup>27</sup> Strict liability in warranty was attacked as cumbersome and expensive to litigate. See William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1123 (1960) [hereinafter Prosser, *The Assault*].

ity.<sup>28</sup> Rather than adopting the *Henningsen* rule, many courts continued to search for a rule that would provide the benefits of strict liability, but not at the expense of the advances that had been made under the negligence cause of action.<sup>29</sup>

## 2. Arguments for Strict Liability in Tort

In the early 1960s, when William Prosser began drafting the *Restatement (Second) of Torts*, products liability had barely emerged as a distinct legal concept.<sup>30</sup> Prosser, however, had already determined that his goal for the fledgling concept would be to establish strict liability for defective products under the heading of torts.<sup>31</sup> Prosser preferred strict liability in tort because of the efficient manner in which the doctrine could be administered and because it presented fewer obstacles to plaintiff recovery than a warranty cause of action.<sup>32</sup> In his well-known law review article, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, Prosser identified seven courts that held product sellers liable for injuries resulting from the use of their products despite proof that the sellers had exercised all possible care and the fact that the users had not entered into any contract with the sellers.<sup>33</sup> Looking at these decisions, Prosser discerned a trend toward strict liability in tort for injuries caused by defective products<sup>34</sup> and argued that such a "trend" justified the incorporation of the strict liability standard in the *Restatement (Second)*.<sup>35</sup>

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<sup>28</sup> A combined reading of several U.C.C. provisions suggests that implied warranties run only between sellers and purchasers: "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." U.C.C. § 2-314 (1990) (emphasis added). A "sale" is defined in the U.C.C. as "the passing of title from the seller to the buyer for a price." *Id.* § 2-106.

<sup>29</sup> See Prosser, *The Fall*, *supra* note 26, at 800 (arguing for recognition of strict liability in tort).

<sup>30</sup> See Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 637 (1995); see also Prosser, *The Assault*, *supra* note 27, at 1112-13 (identifying a handful of jurisdictions that had established something similar to strict liability in tort in products cases by 1960).

<sup>31</sup> See Shapo, *supra* note 30, at 637.

<sup>32</sup> See *id.*; see also RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (1965) [hereinafter RESTATEMENT (SECOND)].

<sup>33</sup> See Prosser, *The Assault*, *supra* note 27, at 1112-13.

<sup>34</sup> See *id.*; see also RESTATEMENT (SECOND) § 402A cmt. b ("Beginning in 1958 . . . , a number of recent decisions have . . . extended the rule of strict liability to cover the sale of any product which, if it should prove to be defective, may be expected to cause physical harm to the consumer or his property.").

<sup>35</sup> See Prosser, *The Assault*, *supra* note 27, at 1099. Several present day scholars argue that the problems of section 402A stem from the fact that Prosser used the

Prosser maintained that "the public interest in human life, health, and safety" demanded that product users receive the maximum possible protection that the law could provide.<sup>36</sup> In a products case, strict liability in tort presents the fewest barriers to plaintiff recovery and, thus, provides more protection to consumers than other theories of liability.<sup>37</sup> The complexities of the manufacturing process make negligence on the part of a defendant manufacturer extremely difficult to prove. Under a traditional negligence approach, many deserving plaintiffs fail to recover because they lack access to the same information, expertise, and resources that the defendants control.<sup>38</sup> In cases where the product is defective, but the suppliers, wholesalers, and retailers exercise reasonable care in selling it, a pure negligence theory bars recovery; because the supplier is under no duty to inspect or test the product, it could not be liable for negligently failing to notice a manufacturing defect.<sup>39</sup> Strict liability relieves consumers from the burden of proving negligence. Even where the plaintiff could establish that the product was defective, the actual manufacturer was often unknown or judgment proof.<sup>40</sup> Thus, Prosser favored strict liability in tort because it increased an injured plaintiff's chances of recovery.<sup>41</sup>

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Restatement (Second) to state what he thought the law *should* be rather than to restate what the law actually said. See, e.g., Rabin, *supra* note 5, at 204 (characterizing section 402A as an anomaly, "a 'restatement' before there was any law to restate").

<sup>36</sup> See Prosser, *The Assault*, *supra* note 27, at 1122.

<sup>37</sup> With a strict liability theory, a plaintiff does not have to prove the defendant's negligence, nor does she have to prove privity.

<sup>38</sup> See John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493, 508 (1996) [hereinafter Vargo, *New Clothes*].

<sup>39</sup> See Prosser, *The Assault*, *supra* note 27, at 1117. Moreover, a product's packaging prevents suppliers from inspecting the product; a retailer could not look for a product defect without opening the packaging and destroying the accompanying advertisements. See *id.*

<sup>40</sup> See *id.*

<sup>41</sup> See *id.*; Shapo, *supra* note 30, at 689 ("Another idea supporting the development of section 402A inheres in the supposition that the traditional negligence rules of proof create hurdles that are too high for many plaintiffs with meritorious cases."). Prosser further determined that strict liability was justified on fairness principles where the manufacturer or supplier sought to avoid responsibility to injured persons who had been induced to believe that the product was suitable and safe for use by the manufacturer's marketing and advertising. See Prosser, *The Assault*, *supra* note 27, at 1123; see also Escola, 150 P.2d at 443 (Traynor, J., concurring) (Because consumer "vigilance has been lulled by the steady efforts of manufacturers to build up confidence [in the product's safety] by advertising

Prosser also adopted policy arguments from the *Henningsen* decision to support the *Restatement (Second)* proposal for strict liability in tort.<sup>42</sup> Prosser believed that *Henningsen* stood for the policy that “the burden of losses . . . [should be] borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur.”<sup>43</sup> Indeed, the *Henningsen* court stated that manufacturer liability should rest upon the “demands of social justice”<sup>44</sup> and reasoned that the greater burden must be placed upon manufacturers and suppliers because they occupy dominant positions in relation to the consumer: “[u]nder modern conditions, the ordinary layman, . . . has neither the opportunity nor the capacity to inspect or to determine the fitness of [a product] for use; he must rely on the manufacturer who has control of [the product’s] construction . . . .”<sup>45</sup> Moreover, as between the manufacturer and the ultimate user, the manufacturer is in a better position to absorb the risk as it can pass any losses onto the community through price increases.<sup>46</sup> This burden-shifting, or “risk-spreading,” rationale would become the foundation principle of section 402A.<sup>47</sup>

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and marketing devices . . . ,” consumers “no longer approach products warily but accept them on faith . . . .” Therefore, manufacturers must assume a greater responsibility for their products.).

<sup>42</sup> See Prosser, *The Fall*, *supra* note 26, at 791. (proclaiming that the Citadel barrier to plaintiff recovery fell with *Henningsen*).

<sup>43</sup> *Id.* at 793 (quoting *Henningsen*, 161 A.2d at 81). Justice Traynor made a similar argument in his concurring opinion in *Escola*; he argued that “public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.” *Escola*, 150 P.2d at 440 (Traynor, J., concurring).

<sup>44</sup> *Henningsen*, 161 A.2d at 83 (quoting *Mazetti v. Armour & Co.*, 135 P. 633, 635 (Wash. 1913)).

<sup>45</sup> *Id.* The *Henningsen* court also invalidated the defendant’s attempted disclaimer of the implied warranty for similar policy reasons:

the automobile manufacturer [may not] use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer, who in effect has no real freedom of choice, the grave danger of injury to himself and others that attends the sale of such a dangerous instrumentality as a defectively made automobile.

*Id.* at 95.

<sup>46</sup> See Prosser, *The Assault*, *supra* note 27, at 1120; see also *Escola*, 150 P.2d at 440-41 (Traynor, J., concurring). Justice Traynor argued that the cost of a product-related injury to an unsuspecting consumer could be anticipated by a manufacturer and, thus, insured by the manufacturer and distributed among the public as a cost of doing business. See *id.*

<sup>47</sup> See RESTATEMENT (SECOND) § 402A cmt. c.

## B. STRICT LIABILITY IN TORT ACHIEVED

## 1. A Statement of the Rule

The first major decision to recognize strict liability in tort, *Greenman v. Yuba Power Products, Inc.*,<sup>48</sup> relied on many of the same policy considerations that Prosser outlined in *The Assault Upon the Citadel* and in his drafts of section 402A.<sup>49</sup> The *Greenman* court expressly adopted the risk-spreading rationale as the justification for imposing strict liability in tort: "[t]he purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."<sup>50</sup> Ultimately, *Greenman* held that public policy required manufacturer liability for defective products to be governed by the law of strict liability in tort, rather than by the law of contract warranties.<sup>51</sup>

Almost three years after *Greenman*, the ALI formally adopted section 402A of the *Restatement (Second) of Torts*.<sup>52</sup> Section 402A clearly establishes strict liability in tort without using warranty language:<sup>53</sup>

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<sup>48</sup> 377 P.2d 897 (Cal. 1963). In *Greenman*, the plaintiff was severely injured by a combination power tool, when a piece of wood he was working on flew out of the machine and hit him on the forehead. See *id.* at 898. Substantial evidence supported the finding that the tool was defectively designed and that a reasonable alternative design existed: normal use caused vibrations that resulted in the lathe moving away from the piece of wood being worked on, permitting the wood to fly out; experts testified that there were other more positive ways of fastening the parts together which would have prevented the accident. See *id.* at 899. The court held that the jury could have concluded that statements in the manufacturer's brochure claiming that the tool "provid[ed] rigid support" and that "every component has positive locks that hold adjustments through rough or precision work" probably created an expectation in the plaintiff's mind and that the injury resulted from the product's failure to meet those expectations. *Id.* at 899, 899 n.1.

<sup>49</sup> See generally Corboy, *supra* note 13, at 1050 (noting the "remarkable cross-fertilization of ideas" between Justice Traynor, author of the *Greenman* decision, and Prosser); John W. Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551, 554-57 (1980).

<sup>50</sup> *Greenman*, 377 P.2d at 901.

<sup>51</sup> See *id.* at 900. The *Greenman* court rejected the manufacturer's defense based on failure to give notice of breach of warranty and imposed strict liability in tort. See *id.*

<sup>52</sup> See RESTATEMENT (SECOND) § 402A.

<sup>53</sup> See *id.* cmt. a. ("The rule is one of strict liability . . ."); Prosser recognized that "[a] number of courts [in their search for a theoretical basis for imposing strict liability in products cases] . . . have resorted to a 'warranty'." *Id.* cmt. m. Thus, Prosser carefully drafted section 402A so as not to prevent any court from

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  - (a) the seller is engaged in the business of selling such a product, and
  - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
  - (a) the seller has exercised all possible care in the preparation and sale of his product, and
  - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.<sup>54</sup>

The protection afforded by the rule of section 402A extends to all users and consumers of the product.<sup>55</sup> Comment *l* reiterates that this rule of strict liability does not require any contractual relationship between the plaintiff and the defendant; the rule does not require the plaintiff to have purchased the product from the defendant or to have purchased the product at all.<sup>56</sup> "Consumers" include those who consume the product as well as those who prepare the product for consumption, and "users" encompasses those who actually use the product as well as those who passively enjoy the benefit of the product.<sup>57</sup>

Section 402A imposes strict liability only upon those persons "engaged in the business of selling products for use or consumption."<sup>58</sup> Comment *f* clarifies the rule's intention to target manufacturers, wholesalers, retail dealers, and distributors.<sup>59</sup> A person who occasionally sells a product, but is not engaged in

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treating the stated rule as a matter of warranty. In comment *m*, however, Prosser warns that if a court decides to treat this rule of liability as a matter of warranty, "it should be recognized and understood that the 'warranty' is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales." *Id.* Such rules may include provisions of the Uniform Sales Act or the Uniform Commercial Code, common law limitations on the scope and content of warranties, notice requirements, disclaimers, and the validity of the contract. *See id.*

<sup>54</sup> RESTATEMENT (SECOND) § 402A.

<sup>55</sup> *See id.* cmt. *l*.

<sup>56</sup> *See id.*

<sup>57</sup> *Id.* (including passengers in an automobile or airplane).

<sup>58</sup> *Id.* cmt. *f*.

<sup>59</sup> *See id.*

that activity as a part of his or her business is not subject to the rule of strict liability.<sup>60</sup> The *Restatement (Second)* justifies this distinction by pointing out that occasional sellers do not share the "special responsibility" of those engaged in the business of supplying people with products which may endanger their personal safety; consumers are not forced to rely on the occasional seller for product safety the same way they must trust that manufacturers and retailers will provide safe products.<sup>61</sup>

While section 402A aimed to increase consumer protection, it did not propose to make manufacturers insurers of their products. Therefore, section 402A recognizes a few "defenses" to claims that may arise under the rule.<sup>62</sup> First, a seller will not be liable where the product leaves the seller in a safe condition, but becomes harmful through subsequent mishandling.<sup>63</sup> Furthermore, a defendant may be relieved of liability where the plaintiff makes substantial modifications to the original product.<sup>64</sup> Contributory negligence, in the form of assumption of risk, is also a

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<sup>60</sup> See *id.* (giving as examples of "occasional sellers" a housewife who sells a jar of jam and a car owner who sells his car to a used car dealer).

<sup>61</sup> See *id.*

<sup>62</sup> See Frank J. Vandall, "Design Defect" in *Products Liability: Rethinking Negligence and Strict Liability*, 43 OHIO ST. L.J. 61, 74 (1982) ("strict liability is not insurance").

<sup>63</sup> See RESTATEMENT (SECOND) § 402A cmt. g. For example, a manufacturer of beverages who packages his product in reasonably safe glass bottles would not be liable to a person who is injured while trying to open the bottle by banging it against a table. See *id.* cmt. h. For a product to be in a safe condition at the time it leaves the seller, the seller must properly package the product and take other precautions "to permit the product to remain safe for a normal length of time when handled in a normal manner." *Id.* cmt. g; see also David G. Owen, *The Graying of Products Liability Law: Paths Taken and Untaken in the New Restatement*, 61 TENN. L. REV. 1241, 1259 n. 67 (1994) [hereinafter Owen, *The Graying*] (citing Mary Fisk, *An Interview with John Byington*, TRIAL, Feb. 1978, at 25, for the proposition that consumer misconduct likely accounts for more product accidents than does defectiveness).

<sup>64</sup> See RESTATEMENT (SECOND) § 402A cmt. p. Because of a lack of decisions addressing the possible liability of a seller in situations where the product underwent substantial changes after it left the hands of the seller, the ALI refused to take a position on whether strict liability would apply in such cases. See *id.* Comment p states that a seller probably would be responsible where the changes made to the product were minor, such as modifications made when tuning or servicing a product like a car. See *id.* There is a suggestion, however, that a seller would not be liable where significant modifications have been made to the original product. See *id.* The analysis requires a case-by-case determination of "whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes." *Id.*

defense.<sup>65</sup> Where a plaintiff is contributorily negligent in failing to discover the defect in a product, however, she will not be barred from recovery.<sup>66</sup> Finally, the rule set out in the *Restatement (Second)* is one of strict liability, not absolute liability; section 402A recognizes that many products cannot be made entirely safe for all purposes.<sup>67</sup> A plaintiff may recover under section 402A only where the defendant's product is defective and *unreasonably* dangerous.<sup>68</sup>

Comment j imposes a further requirement on sellers to warn consumers about those products that contain an element or ingredient whose danger is not generally known or is one that a consumer would not reasonably expect to find in the product.<sup>69</sup> A seller's failure to give an adequate warning about the nature of a product or to provide directions as to its use will make a product unreasonably dangerous.<sup>70</sup> Where a seller adequately warns consumers of the potential dangers of a product, and the product is otherwise safe for use when the warnings are heeded, the product is not defective.<sup>71</sup>

The rule of strict liability in tort affords ordinary people maximum protection from defective products. It relieves injured plaintiffs from the burdens of proving negligence and increases the likelihood that the plaintiff will recover. Liability under the rule extends to a wide class of potential defendants and an even larger group of possible plaintiffs. Overall, section 402A represents the high water mark of the pro-consumer movement in products liability.<sup>72</sup>

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<sup>65</sup> See RESTATEMENT (SECOND) § 402A cmt. n. A plaintiff should share the responsibility for her injury when she has been negligent in "voluntarily and unreasonably proceeding to encounter a known danger." *Id.* This defense is the same as in other cases of strict liability. *Id.*

<sup>66</sup> See *id.*

<sup>67</sup> See *id.* cmt. i. (listing ordinary sugar, and uncontaminated whiskey, tobacco, and butter as examples).

<sup>68</sup> See RESTATEMENT (SECOND) § 402A(1).

<sup>69</sup> See *id.* cmt. j.

<sup>70</sup> See *id.*

<sup>71</sup> See *id.* (Where an adequate warning is given, the seller may assume it was read and heeded.).

<sup>72</sup> See Vargo, *New Clothes*, *supra* note 38, at 507.

## 2. Section 402A in Practice

A majority of jurisdictions adopted verbatim the strict liability standard of section 402A<sup>73</sup> holding product sellers responsible for injuries caused by products sold "in a defective condition unreasonably dangerous to the user."<sup>74</sup> Despite this apparent consensus on manufacturer and retailer liability, courts have differed greatly in their application of the standard.<sup>75</sup> The various jurisdictions have developed three distinct tests for determining whether a product is "defective" and "unreasonably dangerous": the consumer expectations test, the risk-benefit test, and the combination test.<sup>76</sup>

### a. The Consumer Expectations Test

In developing the consumer expectations test, courts focused on the Reporter's comments to section 402A.<sup>77</sup> Comment g, for example, explains that "in a defective condition" means "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."<sup>78</sup> Comment i further defines "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."<sup>79</sup> Thus, in jurisdictions that follow the consumer expectations approach, a defec-

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<sup>73</sup> See 2 AMERICAN LAW OF PRODUCTS LIABILITY 3D § 16:9 (Timothy E. Travers et al. eds., 1987) (identifying 33 jurisdictions that have adopted § 402A).

<sup>74</sup> RESTATEMENT (SECOND) § 402A(1).

<sup>75</sup> See generally Vargo, *New Clothes*, *supra* note 38, at 559-949 (surveying the common law, statutes, and pattern jury instructions of all fifty states with respect to the question of the standard for design defects).

<sup>76</sup> See Banks & O'Connor, *supra* note 2, at 420-23 (listing the various jurisdictions that apply the consumer expectations test and those that apply the risk-utility test). *But see* Vargo, *New Clothes*, *supra* note 38, at 538-47 (identifying slightly more discrete categories: the ordinary consumer expectation test; the modified consumer expectation test; the pure risk-utility test; the Wade test; the pure *Barker* test; and the modified *Barker* test).

<sup>77</sup> Many decisions simply incorporate, wholesale, the definitions of "defective" and "unreasonably dangerous" from the comments to section 402A. See, e.g., *Morris v. Adolph Coors Co.*, 735 S.W.2d 578, 583 (Tex. App.—Fort Worth 1987, writ ref'd) (specifically adopting the language of comments h, i, and j as the standard for determining defectiveness and unreasonable danger).

<sup>78</sup> RESTATEMENT (SECOND) § 402A cmt. g.

<sup>79</sup> *Id.* cmt. i.

tive product is one that fails to meet an ordinary consumer's reasonable expectations of safety.<sup>80</sup>

In applying the consumer expectations test, the question of whether a product is unreasonably dangerous is a question of fact for the jury to determine in light of the standard of safety they, as ordinary consumers, would expect from the product.<sup>81</sup> To illustrate this concept, consider *Giglio v. Connecticut Light and Power Co.*,<sup>82</sup> a case involving the question of whether a gas-operated home furnace was defective because the manufacturer failed to warn consumers of the possibility that the furnace could shoot flames.<sup>83</sup> The *Giglio* court left to the jury the question of whether the furnace was defective, stating that "the jury can draw their own reasonable conclusions as to the expectations of the ordinary consumer and the knowledge common in the community at large."<sup>84</sup> The jury concluded that the furnace was more dangerous than an ordinary consumer would have contemplated and, therefore, the failure of the manufacturer to warn of the risk of shooting flames made the product defective.<sup>85</sup>

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<sup>80</sup> See, e.g., *Harley-Davidson, Inc. v. Toomey*, 521 So. 2d 971 (Ala. 1988) (affirming a one million dollar judgment against Harley-Davidson for injuries sustained in an accident where the plaintiff collided with an oncoming car because he could not see out of his motorcycle helmet; the helmet was found to be defective in design because an ordinary consumer would reasonably expect the helmet to be designed so as not to fog over and to be easy to remove). Professor Vargo distinguishes between an "ordinary consumer expectations" test and a "modified consumer expectations" test. See Vargo, *New Clothes*, *supra* note 38, at 538-41. Under the ordinary consumer expectations test, liability would attach when an ordinary consumer found the product to be too dangerous. See *id.* at 539. This approach proved problematic when the product danger was obvious, because there could be no expectation of safety; an absence of expectations as to safety meant that strict liability would not apply. See *id.* The "modified consumer expectation" test incorporates risk-utility factors and focuses on *reasonable* expectations rather than ordinary expectations. See *id.* at 540. Liability attaches when a reasonable consumer, supplied with information about the product's dangers and benefits, determines that the risks outweigh the benefits. See *id.*

<sup>81</sup> See, e.g., *Giglio v. Connecticut Light & Power Co.*, 429 A.2d 486, 489 (Conn. 1980).

<sup>82</sup> 429 A.2d 486 (Conn. 1980).

<sup>83</sup> See *id.* at 488. The plaintiff was severely burned when she opened the furnace door to see if the pilot light was lit; the indicator designed to tell whether the pilot light was on (silver display) or off (red display) showed partially red and partially silver. See *id.* at 487.

<sup>84</sup> *Id.* at 489 (citing *Slepski v. Williams Ford, Inc.*, 364 A.2d 175, 178 (Conn. 1975)).

<sup>85</sup> See *id.* at 488.

Though the consumer expectations test seems reliable and easy to administer, some courts have rejected this approach because it does not go far enough to protect consumer interests.<sup>86</sup> The same court that decided *Greenman* criticized the test for treating consumer expectations "as a 'ceiling' on a manufacturer's responsibility . . . rather than as a 'floor'."<sup>87</sup> While admitting that "ordinary consumer expectations are frequently of direct significance to the defectiveness issue," the court warns that such expectations establish only a minimum safety standard that a product must meet to avoid being found defective.<sup>88</sup> Furthermore, the consumer expectations test has drawn criticism from commentators who have observed that the "unreasonably dangerous" language may mislead jurors into believing that a product must be "abnormally dangerous" or extremely dangerous in order for liability to attach.<sup>89</sup>

#### b. The Risk-Benefit Test

Other jurisdictions have found that the proper application of section 402A in determining whether a product is unreasonably dangerous involves balancing the danger a particular product creates against the gains it produces for society.<sup>90</sup> Courts often justify this risk-benefit test by explaining that the strict liability standard does not transform the seller into an insurer of his product, therefore, there must be some balancing of danger against usefulness.<sup>91</sup> Moreover, some courts prefer the risk-benefit test because they believe it provides flexibility and achieves an appropriate balance among the competing interests of manufacturers, consumers, and the public.<sup>92</sup>

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<sup>86</sup> See, e.g., *Barker*, 573 P.2d at 451-55.

<sup>87</sup> *Id.* at 451 n.7.

<sup>88</sup> See *id.*

<sup>89</sup> See John Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 832 (1973).

<sup>90</sup> See, e.g., *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239 (N.J. 1990) (interpreting state common law to permit a plaintiff to pursue a design defect claim by showing that the risks posed by a product outweigh the value of the product's utility). But see John Vargo, *Caveat Emptor: Will the A.L.I. Erode Strict Liability in the Restatement (Third) for Products Liability*, 10 *TOURO L. REV.* 21, 49 (1993) [hereinafter Vargo, *Caveat Emptor*] ("The ability of economists to place an economic value on anything is doubtful.") (citing John Vargo, *The American Rule in Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 *AM. U. L. REV.* 1567, 1627-28 (1993)).

<sup>91</sup> See Vandall, *supra* note 62, at 74.

<sup>92</sup> See *Dewey*, 577 A.2d at 1252 (citing *O'Brien v. Muskin Corp.*, 463 A.2d 298 (N.J. 1983)).

Most courts that adhere to the risk-benefit approach agree that proper application of the test requires more than the single question of whether a product's benefits outweigh the dangers it creates.<sup>93</sup> For example, in *Armentrout v. FMC Corp.*,<sup>94</sup> the court considered the risk-benefit issue in light of several factors representing different policy concerns.<sup>95</sup> Such factors included

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole; (2) The safety aspects of the product—the likelihood that it will cause injury and the probable seriousness of the injury; (3) The availability of the substitute product which would meet the same need and not be as unsafe; (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; (5) The user's ability to avoid danger by the exercise of care in the use of the product; (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.<sup>96</sup>

The court noted that the list was not exclusive and that the specific factors to be considered would vary depending on the facts of the case; some situations might require consideration of more or fewer factors.<sup>97</sup>

The *Armentrout* court, and other courts that have adopted the risk-utility approach to determine whether a product is unrea-

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<sup>93</sup> See, e.g., *Armentrout v. FMC Corp.*, 842 P.2d 175, 183-84 (Colo. 1992) ("In order to determine whether the risks outweigh the benefits of the product design, the jury must consider different interests, represented by certain factors.").

<sup>94</sup> 842 P.2d 175, 183-84 (Colo. 1992).

<sup>95</sup> See *id.* In *Armentrout*, the plaintiff's husband, a construction worker, suffered serious injuries when he was struck by the rotating upper portion of a crane. See *id.* at 178. The plaintiff alleged that the crane, which was not equipped with a bell to alert people that it was moving, was unreasonably dangerous. See *id.* The court analyzed whether the risk of injury created by the crane's design exceeded the benefits of the design and, thus, made the crane unreasonably unsafe. See *id.* at 181-85.

<sup>96</sup> *Id.* at 184. But see *Turner v. General Motors Corp.*, 584 S.W.2d 844, 849 (Tex. 1979) (rejecting a balancing test that enumerates factors to be considered because of the difficulty of formulating an appropriate series of factors).

<sup>97</sup> See *Armentrout*, 842 P.2d at 184. Cf. Aaron D. Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521, 527 (1982) (proposing an alternative list of factors to consider in weighing the risks and benefits of a product design).

sonably dangerous, relied heavily on John Wade's *On the Nature of Strict Tort Liability for Products*.<sup>98</sup> Wade first suggested the seven factors to be considered in determining whether a product is unreasonably dangerous.<sup>99</sup> The basis of Wade's risk-utility approach was that courts needed to use a "tort way of thinking" and "tort terminology" in strict liability cases.<sup>100</sup> This required framing jury issues in terms of what a reasonably prudent person would do under the same or similar circumstances.<sup>101</sup> Wade did not recommend giving the list of factors to the jury as instructions; rather, he proposed that the jury be given a single instruction explaining that "a product is [unreasonably dangerous and defective] if it is so likely to be harmful to persons . . . that a reasonable prudent manufacturer . . ., who had actual knowledge of its harmful character would not place it on the market."<sup>102</sup>

Under the risk-benefit approach, if after weighing all of the factors, a fact-finder decides that the risks of the product's design are greater than its benefits, the product is unreasonably dangerous and the manufacturer should be held strictly liable for injuries caused by the product.<sup>103</sup> This analysis seems strikingly similar to the long-recognized negligence analysis described by Learned Hand in *United States v. Carroll Towing Co.*<sup>104</sup>

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<sup>98</sup> 44 Miss. L.J. 825 (1973); see *Armentrout*, 842 P.2d at 183-84. Professor Vargo distinguishes a "pure risk-utility test" from the "Wade test." Vargo, *New Clothes*, *supra* note 38, at 541-46. "The pure test considers only risk-utility factors." *Id.* at 545. The Wade test "first imputes knowledge of the product's danger to the manufacturer" and then balances product risks against product utilities. *Id.*

<sup>99</sup> Wade, *supra* note 98, at 837-38.

<sup>100</sup> *Id.* at 834. Wade analogized strict liability in tort to the doctrine of negligence per se and suggested that courts assume the defendant knew of the dangerous condition of the product and ask "whether the magnitude of the risk created by the dangerous condition of the product was outweighed by the social utility attained by putting it out in this fashion." *Id.* at 835. In the design context, whatever showing would be sufficient to establish that the product is so dangerous that strict liability should apply would be enough to establish negligence on the part of the manufacturer in putting the product on the market. *See id.* at 836.

<sup>101</sup> *See id.* at 840. Wade rejected the consumer expectation approach as being derivative of the language of warranty cases. *Id.* at 829. Under a warranty approach, the reasonable expectations of the buyer served as guidelines for whether the manufacturer had breached the covenant that the goods were suitable for the purpose for which they were sold; however, in design matters, a consumer would not know what to expect because he would have no idea how safe a product could be made. *See id.*

<sup>102</sup> *Id.* at 839-40.

<sup>103</sup> *See Armentrout*, 842 P.2d at 184.

<sup>104</sup> 159 F.2d 169 (2d Cir. 1947) (announcing the famous B<PL formula, where liability depends on whether the probability and severity of the injury are greater

Some jurisdictions admit that the balancing tests in the negligence and strict liability contexts look similar, but clarify the distinction by insisting that in the products liability context the focus is on the *product* alone, while in the negligence context, the focus is on the *conduct* of the manufacturer and its decision to make and market the product.<sup>105</sup>

### c. The Combination Test

In struggling with the different approaches to section 402A, some jurisdictions have found that neither the consumer expectations test, nor the risk-benefit analysis adequately addresses all of the problems encountered in products liability cases.<sup>106</sup> Many jurisdictions reaching such conclusions have combined the two tests.<sup>107</sup> For example, in *Barker v. Lull Engineering Co.*,<sup>108</sup> the court held that the consumer expectations test could not be relied upon as the exclusive test for determining whether a product was defective and unreasonably dangerous.<sup>109</sup> Instead, the court established that a product may be found to be defective in design under either of the two alternative tests: a product contains a design defect if (1) it fails to perform as safely as an ordinary consumer would expect, or (2) the risks of danger inherent in the product design outweigh the benefits and usefulness of the product.<sup>110</sup> The *Barker* court reasoned that because an ordi-

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than the burden to take adequate precautions); see Gary T. Schwartz, *The Beginning and Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 625 (1992) (arguing that current design defect law, in which the risk-benefit test plays a primary role, contains a basic core of negligence reasoning). But see Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 865 (1996) (arguing that the Learned Hand test is significantly different from the risk-utility test applied in products liability cases because the Restatement test imposes liability on the basis of what is now known, rather than on the basis of what the producer knew or should have known at the time the product was designed).

<sup>105</sup> See, e.g., *Barker*, 573 P.2d at 457.

<sup>106</sup> See, e.g., *id.* at 454-56.

<sup>107</sup> See, e.g., *id.*

<sup>108</sup> 573 P.2d 443 (Cal. 1978).

<sup>109</sup> The plaintiff in *Barker* was injured by falling lumber when the high lift loader he was operating began to tip and forced him to jump from the loader. See *id.* at 447. *Barker* alleged that the loader was defective because it was unstable and had a tendency to roll. See *id.* The court refused to rely solely on the consumer expectations test because it concluded that such a test established only a minimum standard of product safety. See *id.* at 454-56.

<sup>110</sup> See *id.* at 456. Professor Vargo distinguishes between a "pure *Barker* test," which shifts the burden of proving the product's risk and utility to the defendant, and a "modified *Barker* test," which does not shift the burden of proof in balanc-

nary consumer often would have no expectations of product safety, the consumer expectations test would be impracticable in many cases.<sup>111</sup> *Barker* also rejected singular reliance on the consumer expectations test because it could limit the application of strict liability to those products that turned out to be more dangerous than the average consumer had contemplated.<sup>112</sup> Such a limitation would preclude recovery when a person was injured by a product that an ordinary consumer may have thought involved some risk of danger or injury.<sup>113</sup> In other words, the *Barker* court concluded that a product could still be unreasonably dangerous, and its manufacturer should be strictly liable for injuries the product caused, even though the average consumer might expect the product to involve some inherent risk; a manufacturer should not be protected from liability when it markets an unsafe product that meets everyone's expectation of danger.<sup>114</sup>

#### d. Types of Product Defects

Though the language of section 402A does not distinguish types of product defects, courts in their application of the rule have tended to differentiate among manufacturing defects, design defects, and products that are defective because of inadequate warnings or instructions.<sup>115</sup> The *Barker* court expressly recognized that the defectiveness concept "defies a simple, uniform definition applicable to all sectors of the diverse product liability domain."<sup>116</sup> *Barker* went on to distinguish manufacturing defects from design defects by explaining that a product that contains a manufacturing defect deviates from the manufacturer's intended result or from other identical units in the same product line,<sup>117</sup> whereas a product that contains a design defect

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ing the risks and utilities to the defendant. See Vargo, *New Clothes*, *supra* note 38, at 544-45.

<sup>111</sup> See *Barker*, 573 P.2d at 451.

<sup>112</sup> See *id.*

<sup>113</sup> See *id.*

<sup>114</sup> See *id.*

<sup>115</sup> See, e.g., *Morris*, 735 S.W.2d at 582. But see *Colt Indus. Operating Corp. v. Frank W. Murphy Mfg.*, 822 P.2d 925, 930 (Alaska 1991) ("The delineation between design and manufacturing defects is undoubtedly blurry. However, we have long recognized that overlap between the two categories is unavoidable. We have clearly stated that rigid delineation of the two categories is neither necessary nor desirable.").

<sup>116</sup> *Barker*, 573 P.2d at 446.

<sup>117</sup> See *id.* at 454; see, e.g., *Escola*, 150 P.2d at 439-40.

may conform perfectly to all of the other similar products in the line, but all of the products are unsafe because the absence of a safety device or something inherent in their design creates a danger.<sup>118</sup>

The language of section 402A recognizes only one basis of liability.<sup>119</sup> In practice, however, courts tend to apply different rules of liability depending on the type of defect alleged.<sup>120</sup> In the case of a manufacturing defect, liability is often established by proving the product in question deviated from the design of other similar products.<sup>121</sup> When the question is one of a design defect, courts tend to apply either the consumer expectations test, the risk-utility test, or a combination of the two.<sup>122</sup>

e. Summary

Application of the rule of section 402A has been anything but uniform. Though a majority of jurisdictions across the United States have adopted verbatim the language of the *Restatement (Second)* provision, each court has manipulated the rule to accommodate the facts of a particular case or to conform to the prevailing policy of the state. Different jurisdictions approach the strict liability standard from a variety of understandings. Some adhere to the explanation found in the comments to section 402A and impose liability based on consumer expectations. Others interpret the language of the rule to call for a balancing test and find liability only where the risks of a product outweigh its usefulness. Moreover, many jurisdictions do not follow section 402A's singular approach to defining a product defect, but rather distinguish manufacturing defects from design and warning or instruction defects. The disparity between the rule of products liability as stated in section 402A and the reality of products liability as practiced in the nation's courts has led to a call to revise the *Restatement (Second)* provision.

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<sup>118</sup> See *Barker*, 573 P.2d at 453.

<sup>119</sup> See RESTATEMENT (SECOND) § 402A (liability attaches when a product is "in a defective condition unreasonably dangerous to the user").

<sup>120</sup> See Richard N. Pearson, *Thoughts for a Restatement of the Law of Products Liability*, 4 PROD. LIAB. L.J. 61, 68 (1993).

<sup>121</sup> See *Barker*, 573 P.2d at 450; Pearson, *supra* note 120, at 68.

<sup>122</sup> See Vandall, *supra* note 62, at 74-75.

### III. THE RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY

In 1992, James Henderson and Aaron Twerski, two prominent products liability scholars, suggested that section 402A was in need of reformulation because it no longer reflected current doctrinal understanding.<sup>123</sup> In a law review article entitled *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, these scholars characterized section 402A as moot: the "burning questions" that section 402A was written to address have been well settled for years, and the current formulation of products liability law under the *Restatement (Second)* provides little to no help in solving the newest legal controversies.<sup>124</sup> The ALI agreed that section 402A was out of date<sup>125</sup> and appointed Henderson and Twerski to be Reporters for the *Restatement (Third) of Torts: Products Liability*.<sup>126</sup> In May 1997, after several years of research and debate, the ALI approved a final draft of the revised *Restatement*.<sup>127</sup>

#### A. A RESTATEMENT OF THE RULE

Under the *Restatement (Third)*, "[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."<sup>128</sup> A commercial seller's lia-

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<sup>123</sup> See Henderson & Twerski, *supra* note 1, at 1513 ("[D]octrinal developments in products liability have placed such a heavy gloss on the original text of and comments to section 402A as to render them anachronistic and at odds with their currently discerned objectives.").

<sup>124</sup> See *id.*

<sup>125</sup> RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY Forward (Tentative Draft No. 1, 1994).

<sup>126</sup> See Henderson and Twerski, *supra* note 1, at 1513. See generally Shapo, *supra* note 30, at 655 (The Reporters act as the "wheel-horses" for the Restatement project; they are responsible for the conducting the majority of the research and for generating drafts of the Restatement.).

<sup>127</sup> Actually, the ALI tentatively approved the Reporters' "Second Tentative" draft in May 1995, but delayed taking a final vote in order to give scholars more opportunity to research the current state of products liability law and to comment on the proposed changes. But see David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 784 n.199 (1996) [hereinafter Owen, *Defectiveness*] (The adoption of the second draft was "[t]entative" in theory, but largely cast in stone.).

<sup>128</sup> RESTATEMENT (THIRD) § 1. The revised Restatement defines a product as "tangible personal property distributed commercially for use or consumption." *Id.* § 19. Under the RESTATEMENT (THIRD) component parts and raw materials are considered products and are subject to the rule of liability. See *id.* cmt. b. Prior to the promulgation of the revised Restatement, the ALI had expressed no

bility for harm caused by a defective product will no longer be determined according to a single standard of strict liability.<sup>129</sup> Instead, a seller's liability will depend upon the type of product defect involved in each case: a manufacturing defect, a design defect, or a defect based on inadequate warnings or instructions.<sup>130</sup> Liability for selling or distributing a product that contains a manufacturing defect is strict,<sup>131</sup> whereas liability for products that are defective because of design or because of inadequate instructions or warnings rests upon a reasonableness test.<sup>132</sup>

Despite these significant substantive changes, the *Restatement (Third)* retains many of the fundamental provisions of section 402A. For example, the revised Restatement protects a similar group of potential plaintiffs; where the *Restatement (Second)* protected "users and consumers," the *Restatement (Third)* subjects sellers to liability where "persons" are harmed by their defective products.<sup>133</sup> The new rule similarly applies only to commercial sellers, that is, those "engaged in the business of selling or otherwise distributing the type of product that harmed the plaintiff;"<sup>134</sup> like section 402A, the rule does not affect the liability of the occasional seller.<sup>135</sup> Finally, the *Restatement (Third)* recog-

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opinion as to whether the rule of section 402A applied to the seller of a component part of the product. See generally RESTATEMENT (SECOND) § 402A. However, a straightforward application of section 402A against a component seller would result in liability where the component was manufactured improperly or the component supplier was actually the designer of the finished product and the finished product was flawed. The effect of this new characterization of component parts may be that component manufacturers will have a duty to warn end product users about each component in the finished product. See Edward M. Mansfield, *Reflections on Current Limits on Component and Raw Material Supplier Liability and the Proposed Third Restatement*, 84 KY. L.J. 221, 230 (1996).

<sup>129</sup> See RESTATEMENT (THIRD) § 2.

<sup>130</sup> See *id.*

<sup>131</sup> See *id.* § 2(a).

<sup>132</sup> See *id.* § 2(b), (c). One commentator argues that separating defects into "convenient, legal cubbyholes and, . . . [applying] different standards of liability to each category" will result in confusion, and in the confusion "the negligence exception [will] . . . swallow up the strict liability rule." Vargo, *Caveat Emptor*, *supra* note 90, at 38-40.

<sup>133</sup> RESTATEMENT (THIRD) § 1. Cf. RESTATEMENT (SECOND) § 402A cmt. 1.

<sup>134</sup> RESTATEMENT (THIRD) § 1 cmt. c ("The rule does not apply to an occasional seller or distributor of such products."). Cf. RESTATEMENT (SECOND) § 402A cmt. f.

<sup>135</sup> Examples of the occasional seller include those who occasionally sell baked goods to their neighbors or sell crafts at an occasional church bazaar. See RESTATEMENT (THIRD) § 1 cmt. c. Whether a defendant is a commercial seller is usually a question of law to be determined by the court. *Id.*

nizes that misuse of the product by a consumer or post-sale modification or alteration of the product may still provide a defense to the seller.<sup>136</sup>

## B. THE FUNCTIONAL APPROACH: CATEGORIES OF PRODUCT DEFECTS

### 1. *Manufacturing Defects*

The *Restatement (Third)* retains the traditional concept of strict liability as applied to manufacturing defects.<sup>137</sup> A product contains a manufacturing defect when "the product departs from its intended design."<sup>138</sup> In such a case, a seller or distributor will be liable for harm caused by such a defect despite the fact that he exercised all possible care in preparing and marketing the product.<sup>139</sup> The rule imposes liability regardless of whether the defendant's quality control efforts satisfy standards of reasonableness.<sup>140</sup> Because the defendant's conduct is not at issue in manufacturing defect cases, the rule does not require a risk-utility assessment.<sup>141</sup>

### 2. *Design Defects*

The revised *Restatement* discards the traditional strict liability standard with respect to design defects and adopts a reasonableness standard instead:<sup>142</sup> a product is defective in design when "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe."<sup>143</sup> Comment a explains that the strict liability standard created for manufacturing defects is inappropriate for design defects.<sup>144</sup> In the context of manufacturing defects, a defective product is fairly easy to iden-

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<sup>136</sup> See *id.* § 2 cmt. p. Under the revised rule, such post-sale conduct is relevant to the issues of defect and causation if the misuse or modification was so unreasonable and costly to avoid that the seller had no duty to design or warn against such conduct. See *id.*

<sup>137</sup> See RESTATEMENT (THIRD) § 2(a).

<sup>138</sup> *Id.* Common examples are products that are physically flawed, damaged, or incorrectly assembled. *Id.* cmt. c.

<sup>139</sup> See RESTATEMENT (THIRD) § 2(a). This standard is almost identical to the standard stated in section 402A. See *supra* note 41 and accompanying text.

<sup>140</sup> See RESTATEMENT (THIRD) § 2 cmt. a.

<sup>141</sup> See *id.* § 1 cmt. a.

<sup>142</sup> See *id.* § 2(b).

<sup>143</sup> *Id.*

<sup>144</sup> See *id.* cmt. a.

tify; by definition, a defective product is one that fails to meet the manufacturer's quality standards or fails to perform its intended function.<sup>145</sup> Only a small number of individual products in a product line will contain manufacturing defects. In the case of a design defect, however, every product in the line will be defective. A product with a design defect will meet the manufacturer's specifications and quality standards, but still will be unreasonably dangerous.<sup>146</sup> Because the manufacturer's standards are being challenged in a design defect case, they cannot be used to determine whether a product is defective; rather, courts must resort to independent standards.<sup>147</sup> The *Restatement (Third)*, therefore, establishes a reasonableness, or risk-utility, test as the independent standard.<sup>148</sup>

The reasonableness test requires a comparison between the product design that caused the injury and an alternative design.<sup>149</sup> Liability will attach only where the alternative design would have reduced the foreseeable risks of harm, such that the failure to incorporate the alternative design was unreasonable.<sup>150</sup> The new test for design defects balances the likelihood and magnitude of injury against the burden of precaution; the burden of precaution can be either the adoption of a reasonable alternative design or a conclusion that the product should never have been marketed.<sup>151</sup> Whether the inclusion of the alternative design would have been reasonable is to be determined from the point of view of an ordinary person, one who would weigh the cost of the alternative design, the desirability and usefulness of the product features, and the potential harms that the alternative design would avoid.<sup>152</sup> This test, which is nearly identical to the traditional negligence standard, assures

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<sup>145</sup> See Henderson & Twerski, *supra* note 1, at 1516; see also RESTATEMENT (THIRD) § 2 cmt. c.

<sup>146</sup> See RESTATEMENT (THIRD) § 2 cmt. d.

<sup>147</sup> See *id.*

<sup>148</sup> See *id.* § 2(b).

<sup>149</sup> See *id.* cmt. d.

<sup>150</sup> The new Restatement would only impose liability when the injury results from a reasonably foreseeable use of the product. See *id.* cmt. m. Sellers are not required to design and market their products so as to avoid the consequences of unreasonable modes of use. See *id.* This rule is justified in that careful users should not be forced to subsidize careless or reckless users. See *id.*

<sup>151</sup> See *id.* cmt. e; *id.* Reporters' Note cmt. d.

<sup>152</sup> See *id.* cmts. d, f. But see Shapo, *supra* note 30, at 664 (arguing that because courts rarely "muster dollar figures concerning the cost of safety features," the seeming mathematical precision of the term "risk-utility" is illusory).

that liability will arise only when the harm was reasonably preventable.<sup>153</sup>

The reasonableness test would be the only means of establishing liability for injuries caused by defectively designed products.<sup>154</sup> The *Restatement (Third)* expressly rejects the consumer-expectations test as an independent standard for judging the defectiveness of a product design on the basis that consumer expectations do not give adequate consideration to the possibility of a reasonable alternative design.<sup>155</sup> Because consumer expectations relate to the foreseeability and frequency of the risks of harm, such expectations are relevant under the reasonableness standard as a factor in the risk-utility calculation; however, they are not determinative of design defect.<sup>156</sup>

The *Restatement (Third)* further requires a plaintiff to prove that a reasonable alternative design could have been practically adopted at the time the product was sold.<sup>157</sup> In order to find a product design defective, a reasonable person must compare

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<sup>153</sup> See RESTATEMENT (THIRD) § 2 *id.* cmt. d; Owen, *Defectiveness*, *supra* note 127, at 760 (by limiting consideration of risks to those that are foreseeable, section 2(b) establishes a negligence principle).

<sup>154</sup> See RESTATEMENT (THIRD) § 2 cmt. d. Henderson and Twerski had previously determined that the consumer-expectations test suffered from "one major, even fatal flaw: its extreme subjectivity leaves the manufacturer open to the real possibility of liability without defect." James A. Henderson & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1295 (1991).

<sup>155</sup> See *id.* cmt. g.; Henderson & Twerski, *supra* note 154, at 1295. (After surveying the current state of the law, Henderson and Twerski further conclude that the consumer expectations test is not widely accepted because many jurisdictions that purport to adopt the consumer expectations test state the test in risk-utility terms.).

<sup>156</sup> See RESTATEMENT (THIRD) § 2 cmt. g.

<sup>157</sup> See *id.* cmt. d. The proposed Restatement establishes a two-pronged analysis to determine whether an alternative design (or warning) is reasonable: first, one must determine whether the alternative was technologically feasible at the time the product at issue was sold; second, one must determine whether the alternative was a reasonable market alternative to the product at issue. See Theodore S. Jankowski, *Focusing on Quality and Risk: The Central Role of Reasonable Alternatives in Evaluating Design and Warning Decisions*, 36 S. TEX. L. REV. 283, 339-43 (1995). The Reporters contend that "very substantial authority" supports their proposition that a plaintiff must establish a reasonable alternative design in order for a product to be found defective. See RESTATEMENT (THIRD) § 2, Reporters' Note, cmt. d. (identifying case law and statutes from Alabama, Delaware, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Mississippi, New Jersey, New York, Pennsylvania, and Texas that directly mandate proof of a reasonable alternative design). They also conclude that cases that adopt the risk-utility analysis require the plaintiff to establish a reasonable alternative design. See *id.*

the product that caused the injury to an alternatively designed product that meets the same needs and conclude that the alternative design was reasonable and its adoption would have reduced the risks of foreseeable harm.<sup>158</sup> Comment f suggests a broad range of factors to consider in determining whether an alternative design is technologically feasible and practical, and, thus, reasonable.<sup>159</sup> Because the alternative design must be "sufficiently safer" than the actual design, the plaintiff must do more than merely show that the defendant's design could have been made "just a little safer."<sup>160</sup> The plaintiff, however, is not required to produce a prototype of the alternatively designed product; qualified expert testimony will suffice.<sup>161</sup>

The *Restatement (Third)* briefly addresses the common manufacturer defenses of "state of the art" and open and obvious danger, but largely dismisses them as not dispositive.<sup>162</sup> The comparison of the defendant's product with other competing designs is relevant to the issue of defectiveness; therefore, manufacturers often defend their products on the ground that its design was the safest in use at the time the product was sold.<sup>163</sup> The *Restatement (Third)* would allow a defendant to introduce evidence of that fact; however, where the plaintiff introduces expert testimony that shows that a reasonable alternative design could have been practicably adopted, the product may be found defective notwithstanding the product's "state of the art" qualities.<sup>164</sup> The new rule also refuses to permit the fact that a product's defect created an obvious danger to preclude a finding of

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<sup>158</sup> See RESTATEMENT (THIRD) § 2 cmt. f. *But see* Vargo, *Caveat Emptor*, *supra* note 90, at 38 (arguing that requiring proof of a reasonable alternative design is "in reality, . . . requiring the plaintiff to redesign the product with the knowledge of the industry that existed at the time of the manufacture. This knowledge includes knowledge of the danger at the time of manufacture; thus liability is based upon negligence, not strict liability.").

<sup>159</sup> See RESTATEMENT (THIRD) § 2 cmt. f. These factors include the magnitude of the foreseeable risks, the advantages of the product as designed, and the effect of the alternative design on production costs. *Id.*; see also *supra* notes 52-53 and accompanying text.

<sup>160</sup> Henderson & Twerski, *supra* note 1, at 1520.

<sup>161</sup> See RESTATEMENT (THIRD) § 2 cmt. f.

<sup>162</sup> See *id.* cmt. d.

<sup>163</sup> Comment d notes that the term "state of the art" has created some unfortunate confusion because it has been alternatively defined to mean that the product design (1) "conforms to industry custom;" (2) "reflects the safest and most advanced technology developed and in commercial use;" or (3) "reflects technology at the cutting edge of scientific knowledge." *Id.*

<sup>164</sup> See *id.*; Vargo, *Caveat Emptor*, *supra* note 90, at 36-37 (suggesting that "state-of-the-art" means that "[if] the manufacturer is only held to what it knew at the

defectiveness.<sup>165</sup> An open and obvious danger does not prevent a plaintiff from proving that a reasonable alternative design should have been adopted.<sup>166</sup>

### 3. *Defects Resulting From Inadequate Warnings or Instructions*

The *Restatement (Third)* also establishes a reasonableness standard in warning and instruction cases.<sup>167</sup> A product will be deemed defective because of inadequate warnings or instructions when "the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller . . . and the omission of the instructions or warnings renders the product not reasonably safe."<sup>168</sup> To avoid a finding that a product is defective because of inadequate warnings or instructions, the warning or instruction must alert product users to the existence and nature of product risks and inform them of how to use the product safely.<sup>169</sup> To prevail on a claim of inadequate instructions or warnings, a plaintiff must prove that *adequate* warnings were not provided; this requires a reasonableness approach to testing the adequacy of the instructions.<sup>170</sup> Like design defect cases, inadequate warning and instruction cases require an independent assessment of the relevant advantages and disadvantages of the warning given and other reasonable alternative warnings and instructions not given.<sup>171</sup> The balancing can be complicated; a product must not contain warnings about trivial or far-fetched

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time of manufacture, then you are applying negligence . . . [and] state-of-the-art swallows the rule of strict liability . . .").

<sup>165</sup> Early in the history of products liability law, a finding that the danger created by the product was open and obvious precluded recovery. See RESTATEMENT (THIRD) § 2 cmt. c.

<sup>166</sup> See *id.*

<sup>167</sup> See RESTATEMENT (THIRD) § 2(c). Comment *l* explains the relationship between product designs and instructions and warnings: both reasonable designs and adequate instructions and warnings help achieve higher levels of product safety. *Id.* cmt. *l*. In some cases, a proper warning or instruction will suffice to render a product reasonably safe. *Id.* But, because users may not receive a warning or may fail to follow an instruction, when a safer design can be implemented, such is preferable to marketing the less safe design with warnings and instructions. *Id.*

<sup>168</sup> *Id.* § 2(c).

<sup>169</sup> See *id.* cmt. i. When a user has been alerted to a product risk, he or she can prevent harm by using the product in an appropriate manner or avoiding the product altogether. See *id.*

<sup>170</sup> See *id.* § 2(c) cmt. i (providing a careful analysis of the adequacy of instructions and warnings in light of the specific circumstances of each particular case).

<sup>171</sup> See *id.* cmt. a.

risks because including these types of warnings may obscure other warnings about very real risks, and too many warnings may cause a user to ignore them altogether.<sup>172</sup>

Under the *Restatement (Third)*, there is no duty to warn or instruct regarding risks that should be obvious to, or generally known by, product users.<sup>173</sup> Warnings of obvious risks will not provide effective additional measures of safety and may diminish the significance of warnings about non-obvious risks.<sup>174</sup> However, a product manufacturer or seller must provide warnings for non-obvious risks and for risks that consumers would deem material or significant in deciding whether to use or consume the product.<sup>175</sup> Finally, such warnings should be given to users, consumers, and "anyone who a reasonable distributor should know is in a position to respond to the instruction or warning by reducing or eliminating the risk of injury."<sup>176</sup>

#### 4. Summary

In order to bring the *Restatement of Torts* in line with current doctrinal understanding of products liability law, the ALI commissioned a complete re-drafting of section 402A. The new rule of products liability presented in the *Restatement (Third)* rejects section 402A's unitary approach to product defects and establishes different tests for liability depending on the type of defect in question.<sup>177</sup> The *Restatement (Third)* provision imposes strict liability only for manufacturing defects and adopts a reasonableness test for design and warning and instruction cases.<sup>178</sup> In design defect cases, the revised *Restatement* requires that a plaintiff prove a reasonable alternative design as a prerequisite to recovery.<sup>179</sup> The ALI anticipates that the new rules of the *Restatement*

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<sup>172</sup> See *id.* cmt. i.; cf. Jankowski, *supra* note 157, at 329 (noting that a "commonly held judicial assumption is that all additional warnings effectively reduce the risk of harm to the user while not causing a material decrease in the product's utility." This assumption has the effect of refocusing the liability question on whether the manufacturer withheld any information regarding product risk.).

<sup>173</sup> See RESTATEMENT (THIRD) § 2 cmt. j. The illustration that accompanies comment i explains that the danger of using a step ladder in front of an unlocked door is so obvious that a ladder manufacturer would have no duty to warn ladder users about it.

<sup>174</sup> See *id.*

<sup>175</sup> See *id.* cmt. i.

<sup>176</sup> Henderson & Twerski, *supra* note 1, at 1522.

<sup>177</sup> See RESTATEMENT (THIRD) § 2.

<sup>178</sup> See *id.*

<sup>179</sup> See *id.* cmt. d.

(*Third*) will guide the development of products liability law well into the twenty-first century.<sup>180</sup>

#### IV. THE REVISED RESTATEMENT: AN ANALYSIS

As illustrated by the discussion in the previous section, the *Restatement (Third)* proposes some very significant changes to the currently accepted expression of products liability law. If the revised *Restatement* gained wide acceptance, what would be the effect of the new rule on manufacturers? On consumers? On the legal system? On society? This section will consider these questions as well as others related to the workability of the revised rule and its policy implications.

##### A. THE WISDOM OF THE RESTATEMENT (THIRD)

###### 1. *Defining Product Defects*

The *Restatement (Third)* presents a workable test for defining product defects, one with which courts are familiar and have experience applying. Recall that many of the courts that have adopted the language of section 402A tend to differentiate between manufacturing defects, design defects, and products that are defective because of inadequate warnings or instructions.<sup>181</sup> Those courts also apply different rules of liability depending on the type of defect involved in the case.<sup>182</sup> The tripartite division of product defects presented in the *Restatement (Third)* reflects the reality of modern products liability law. The *Restatement* definitions of manufacturing defect and design defect are consistent with the common understanding of those terms as they are used in contemporary case law. That many jurisdictions independently developed, and presently apply, a similar three-part definition of a product defect further illustrates the workability of the *Restatement* approach.<sup>183</sup>

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<sup>180</sup> ALI wraps Up Product Liability Project, *supra* note 8, at 2777 (citing Henderson as saying he believes "the restatement will be 'well received' by judges").

<sup>181</sup> See *supra* notes 107-115 and accompanying text. A product that contains a manufacturing defect deviates from the manufacturer's intended result or from other identical units in the same product line; a product that contains a design defect may conform perfectly to all the other similar products in the line, but all the products are unsafe because of the absence of a safety device or something inherent in their design creates a danger.

<sup>182</sup> See *supra* notes 107-115 and accompanying text (liability for manufacturing defects is strict, whereas liability for design defects resembles negligence).

<sup>183</sup> Some commentators have criticized Henderson & Twerski's version for highlighting the differences between defect types, suggesting that the lines be-

## 2. Strict Liability for Manufacturing Defects

Strict liability for manufacturing defects is not an unusual, nor an unpopular, standard.<sup>184</sup> Many familiar policy arguments justify using the harsh standard in the limited context of manufacturing defects. For example, Prosser's risk-spreading rationale supports strict liability for manufacturing defects. That is, between product sellers, as business entities, and innocent victims, business entities are in a better position to insure against losses caused by defective products.<sup>185</sup> Moreover, manufacturing defect cases are "few and far between," thus, strict liability is unlikely to result in financial ruin for the manufacturer.<sup>186</sup> Second, manufacturing defects are often the result of manufacturer negligence,<sup>187</sup> but deserving plaintiffs have difficulty proving such negligence. Therefore, fairness justifies permitting recovery despite the plaintiff's proof problems.<sup>188</sup> Third, strict liability for manufacturing defects encourages investment in product safety because it reduces the chances that defendants will escape their share of responsibility for product accidents.<sup>189</sup> Finally, strict liability can be justified in terms of manufacturer expectations: manufacturers consciously set levels of quality control and accept that a predictable number of flawed products will enter the marketplace; manufacturers should not escape liability

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tween the types of defect may be fuzzy rather than bright. See, e.g., Jerry J. Phillips, *Achilles' Heel*, 61 TENN. L. REV. 1265, 1269 (1994). To some degree, all manufacturing defects may be viewed as a form of design defect; as part of every product's design, manufacturers plan for a predictable rate of failure. See *id.* That is, the few individual products that vary from the intended design were a part of the plan from the beginning. Moreover, the proposed Restatement may confuse the distinction between defect types by defining a manufacturing defect in terms of a design defect: a manufacturing defect is one that departs from its intended design. See Douglas E. Schmidt et al., *A Critical Analysis of the Proposed Restatement (Third) of Torts: Products Liability*, 21 WM. MITCHELL L. REV. 411, 414 (1995).

<sup>184</sup> See Phillips, *supra* note 183, at 1270-71.

<sup>185</sup> See RESTATEMENT (THIRD) § 2 cmt. a; see also *supra* note 26 and accompanying text.

<sup>186</sup> See Owen, *Defectiveness*, *supra* note 127, at 752.

<sup>187</sup> See *id.*

<sup>188</sup> See RESTATEMENT (THIRD) § 2 cmt. a. "Strict liability therefore performs a function similar to the concept of *res ipsa loquitur*, allowing deserving plaintiffs to succeed notwithstanding what would otherwise be difficult or insuperable problems of proof." *Id.*

<sup>189</sup> See *id.* Other reasons include (1) strict liability causes product purchase prices to reflect the high cost of defects and thus discourages consumption of defective products and (2) strict liability reduces the transaction costs involved in litigating the issue of manufacturer negligence. See *id.*

where they expect it.<sup>190</sup> Taken together, these justifications illustrate that the *Restatement (Third)* correctly retains the strict liability standard for manufacturing defects.<sup>191</sup>

### 3. *The Reasonableness Test*

A product is not defective merely because it is dangerous;<sup>192</sup> rather a product is defective if it creates an unreasonable risk of harm when used by a consumer in a foreseeable manner. In choosing a product design, a manufacturer considers the risk of injury a particular design creates and balances that risk against the cost, efficiency, and aesthetic value of the design. The reasonableness test of the *Restatement (Third)* checks the manufacturer's balancing. Under the *Restatement (Third)*, the fact finder must consider the advantages and disadvantages of the design in question and of reasonable alternative designs to determine whether the risk created by the design makes the product defective.<sup>193</sup> This test provides the fairest means of weighing the competing interest involved in a products liability case.<sup>194</sup> It is superior to the consumer expectations test that fails to provide for any objective balancing.<sup>195</sup> Moreover, using the reasonableness test as the sole test for determining liability for design de-

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<sup>190</sup> See *id.*

<sup>191</sup> Critics of the RESTATEMENT (THIRD) argue that the policy behind section 402A—that of placing the burden of accidental injuries on product sellers—justifies using the strict liability standard in every case, no matter what classification of defect is present. See, e.g., Vargo, *Caveat Emptor*, *supra* note 90, at 47. These critics maintain that design defects pose a substantial threat of harm to consumers because the entire line of products is marred by some dangerous condition; in comparison, manufacturing defects occur less frequently and pose less of a threat to consumers. See *id.* They conclude that by not requiring the strict liability standard in design and warning cases, a great number of vulnerable consumers will be denied protection. See *id.*; see also Angela C. Rushton, Comment, *Design Defects Under the Restatement (Third) of Torts: A Reassessment of Strict Liability and the Goals of a Functional Approach*, 45 EMORY L.J. 389, 405-06 (1996) (criticizing the revised Restatement because it limits the application of strict liability to manufacturing defects and arguing that by failing to apply strict liability to design and warnings defects the new rule undermines the policy of consumer protection).

<sup>192</sup> Consider a power tool or a kitchen appliance which may be dangerous because it has sharp edges or generates heat, but is not defective.

<sup>193</sup> See RESTATEMENT (THIRD) § 2 cmt. a.

<sup>194</sup> See Shapo, *supra* note 30, at 653. (For example, “computing the costs of injuries [and] considering the need to maintain incentives for the production of useful goods . . .”).

<sup>195</sup> See Owen, *Defectiveness*, *supra* note 127, at 761 (The consumer expectations test operates poorly in the design defect context where “reasonableness, optimality, and balance are the proper benchmarks of responsibility.”).

fects and defects as a result of inadequate instructions or warnings will further plaintiff interests; manufacturers will not be able to use consumer expectations to defeat a cause of action in a case involving a product with obvious dangers or a case where the consumer's expectations were particularly undeveloped or unfortunately realistic.<sup>196</sup>

Recent commentary has challenged the *Restatement (Third)*, contending that the reasonableness test mandated for design and warning and instruction cases would be too expensive to administer.<sup>197</sup> As written, the reasonableness test requires a case-by-case analysis of whether a particular product is worth the risk it creates. While this formulation does involve a time-consuming, fact-specific inquiry, it has not been overly burdensome in those jurisdictions that already apply the risk-utility test or a combination risk-utility/consumer expectations test.<sup>198</sup> Furthermore, even those jurisdictions that apply only a consumer expectations test must engage in a case-by-case consideration of whether a product meets the safety expectations of an ordinary consumer.<sup>199</sup> In most cases, the question of product defect de-

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<sup>196</sup> See Owen, *The Graying*, *supra* note 63, at 1247. ("[T]he new Restatement provides necessary shelter to victims of accidents resulting from obvious product risks that, cheaply and feasibly, could and should have been designed away.")

<sup>197</sup> See Calabresi & Cooper, *supra* note 104, at 865; see generally Henderson & Twerski, *supra* note 154, at 1263. Prior to publishing their proposed revisions to section 402A, Henderson & Twerski rejected the idea of strict liability for all types of product defects. See *id.* at 1277. They concluded that imposing liability without requiring proof of defect would complicate the determination of causation and confuse issues of contributory fault. See *id.* at 1279-86. The Reporters further reasoned that imposing liability without defect in design and warning cases would be socially wasteful:

Since actors react to liability signals on an individual basis rather than on the group basis upon which the [risk-utility] calculations were made, they will respond inappropriately [underinvesting in safety, overengaging in hazardous activity or overinvesting in safety, underengaging in the activity, and, perhaps, leaving the market altogether], thereby wasting scarce resources.

*Id.* at 1288. The Reporters also objected to the "daunting load" that a defendant would bear if it was saddled with the burden of proving that its product was not defective. See *id.* at 1293.

<sup>198</sup> Professor Shapo argues that the fact specific nature of products liability demands this kind of case-by-case consideration. See Shapo, *supra* note 30, at 653. "Products liability is highly fact oriented, . . . in issues of liability as they pertain to the position of parties in the distributional chain, in problems involving alleged failures to warn, and in questions of proof . . . [thus,] products law requires incremental development." *Id.*

<sup>199</sup> See Pearson, *supra* note 120, at 70.

serves careful consideration, and, therefore, the reasonableness test is not only feasible, but also appropriate.

## B. THE EFFECTS OF THE RESTATEMENT (THIRD) ON PRODUCTS LIABILITY LITIGATION

### 1. General Considerations

Though the tripartite definition of product defect under the *Restatement (Third)* is familiar and workable, in some cases it will increase the cost of products liability litigation. The consequences of such increased costs, however, are not entirely negative. For example, in design defect cases under the revised Restatement, parties will have to retain expert witnesses to testify to the existence and feasibility of an alternative design.<sup>200</sup> This additional cost, if perceived by the parties as burdensome, may encourage settlement.<sup>201</sup>

In almost every case, parties will face additional litigation related to how the alleged defect should be characterized.<sup>202</sup> One can expect lawyers to have intense arguments over "defect typing" as the issue may very well determine the outcome of the lawsuit.<sup>203</sup> There will likely also be litigation over what constitutes an alternative to a defective product.<sup>204</sup> Some commenta-

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<sup>200</sup> Cf. Richard L. Cupp, *Defining the Boundaries of "Alternative Design" Under the Restatement (Third) of Torts: The Nature and Role of Substitute Products in Design Defect Analysis*, 63 TENN. L. REV. 329, 336 (1996) (arguing that such additional litigation costs may have the effect of immunizing defendants from all but a few substantial claims).

<sup>201</sup> Trial expenses are a factor that weigh heavily on both sides in a decision to settle a case. Though it is generally believed that the burden of an expensive trial weighs more heavily on a plaintiff than a defendant, in class action suits litigation expenses arguably weigh evenly on both parties and serve to deter both plaintiffs and defendants from pushing for trial.

<sup>202</sup> Cf. Vargo, *Caveat Emptor*, *supra* note 90, at 46-47. ("[S]uch categories of defects are taken from the manufacturer's view . . . . The consumer could care less about such categories.").

<sup>203</sup> See Corboy, *supra* note 13, at 1090 (different standards of liability attach to different types of defects).

<sup>204</sup> See Schmidt et al., *supra* note 183, at 418. See also Shapo, *supra* note 30, at 675-76 (illustrating that skilled attorneys may be able to re-characterize a "reasonable alternative design" as a more expensive substitute in a separate product category); Cupp, *supra* note 200, at 330 ("Plaintiffs may . . . win or lose design cases based on how freely the courts allow them to roam in searching for reasonable alternatives."). Cupp maintains that the search for comparable alternatives is the preliminary step in determining defectiveness. See Cupp, *supra* note 200, at 330. Under Cupp's analysis, whether an alternative is suitable for comparison to the product in question can be determined by considering the following factors: (1) closeness of function; (2) closeness of risk; (3) closeness of appearance; (4) cross-

tors argue, for example, that defense attorneys will attempt to define "alternatives" narrowly, arguing that any change in the design of the product sufficiently changes the nature of the product such that it must be considered an entirely different product and that the different design cannot be used for purposes of determining design defect.<sup>205</sup> Plaintiffs' attorneys, on the other hand, will seek to define the alternatives broadly.<sup>206</sup> These new issues, however, will not necessarily increase the system-wide costs of products liability litigation. The cost of litigating the existence of an alternative design could only be considered an additional expense in jurisdictions that do not already require such proof. Moreover, the new approach may result in more cases being disposed of at the summary judgment stage; if so, the great expenditure of community resources, which occurs at the trial stage, would be avoided. Finally, though additional litigation is generally undesirable, the expense would be justified if consideration of these arguments resulted in fairer and more reliable outcomes.

## 2. Barriers to Plaintiff Recovery

One of the great triumphs of the *Restatement (Second)* section 402A was that it imposed "strict liability" on manufacturers for injuries caused by their defective products and, thus, increased a plaintiff's chances of recovery.<sup>207</sup> Indeed, section 402A eliminated almost all of the traditional barriers to plaintiff recovery and represents a high water mark in the pro-plaintiff movement.<sup>208</sup> The *Restatement (Third)*, however, reflects the opinion that consumers are better able to take care of themselves than was believed when the ALI adopted the *Restatement (Second)* and, therefore, that section 402A is too generous in its commitment to consumer protection.<sup>209</sup>

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elasticity of demand, an economic concept that includes all of the factors that consumers take into account when deciding whether another safer product will meet the same need; and (5) consumer autonomy to choose cost and utility benefits over increased safety. See *id.* at 363-67.

<sup>205</sup> See Cupp, *supra* note 200, at 330.

<sup>206</sup> See *id.*

<sup>207</sup> See Shapo, *supra* note 30, at 689 ("Another idea supporting the development of section 402A inheres in the supposition that the traditional negligence rules of proof create hurdles that are too high for many plaintiffs with meritorious cases.").

<sup>208</sup> See *supra* note 72 and accompanying text.

<sup>209</sup> See Shapo, *supra* note 30, at 689-90.

To correct the perceived favoritism shown to plaintiffs, the *Restatement (Third)* admittedly places a few "obstacles" in the path of plaintiff recovery. For example, the existence of a reasonable alternative design was only one factor in the risk-utility analysis under section 402A, but it is an element of the plaintiff's prima facie case under the revised *Restatement*.<sup>210</sup> In design defect cases under the *Restatement (Third)*, the plaintiff must conquer the additional hurdle of proving a reasonable alternative design or suffer a directed verdict.<sup>211</sup> Commentators have expressed concern that, in requiring a reasonable alternative design as an additional element of the plaintiff's case, the new *Restatement* does not consider that there may be some products for which there is no safe alternative.<sup>212</sup> They argue that by eliminating the "unreasonably dangerous" language and substituting the requirement of a reasonable alternative design, a person injured by an unsafe product may not recover if there is no way to make the product at issue safe.<sup>213</sup> These criticisms ignore that the reasonableness test would allow the jury to find that the alternative would have been to not manufacture the product at all. Furthermore, this requirement would only be a new hurdle in those jurisdictions that apply the consumer expectations test to determine defectiveness. Currently, most jurisdictions that follow a risk-utility approach require the plaintiff to prove that an alternative design would have reduced the risk of harm without mak-

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<sup>210</sup> See Corboy, *supra* note 13, at 1092-93. Cf. Schmidt et al., *supra* note 183, at 419 ("The existence of a [reasonable alternative design] is not a necessary element of the risk-utility test . . . [The test] is essentially a comparative approach which can allow the jury to evaluate many different factors, including . . . the availability of alternative designs without being a rigid condition precedent to recovery.").

<sup>211</sup> See Corboy, *supra* note 13, at 1088 (criticizing the revised Restatement because it may have the effect of limiting the access of injured plaintiffs to a jury verdict). The Reporters may have intended that juries decide fewer products liability cases; both have expressed doubt that juries are competent to handle complicated products liability cases. See, e.g., James A. Henderson, Jr., *Judicial Review of Manufacturer's Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973); Aaron D. Twerski, *From Risk-Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Product Liability Litigation*, 11 HOFSTRA L. REV. 861 (1983).

<sup>212</sup> Professor Shapo points to products that have recently been the subject of "mass tort" litigation such as asbestos, the Dalkon Shield, and silicon gel breast implants as examples of defective products for which no reasonable alternative exists. See Shapo, *supra* note 30, at 671-73; see also Schmidt et al., *supra* note 183, at 417.

<sup>213</sup> See Shapo, *supra* note 30, at 671-73.

ing the product impracticable.<sup>214</sup> Thus, the “obstacles” to plaintiff recovery erected by the revised *Restatement*, while greater than those explicitly stated in section 402A, do not, by any means, make plaintiff recovery impossible.

### 3. *Effects on Manufacturer Liability*

At first glance, the *Restatement (Third)* and its accompanying reasonableness standards for design and warning and instruction cases may seem to increase the possibility that a manufacturer of a finished product will escape liability. This would be true only if the courts currently applied strict liability in the majority of products cases. If the Reporters are correct in concluding that most jurisdictions presently apply a balancing standard<sup>215</sup> and that the strict liability language is merely “rhetorical preference,”<sup>216</sup> then there should be no appreciable decrease in plaintiff recovery in those cases that are submitted to a jury.

## C. THE TIMING OF THE NEW RESTATEMENT

Section 402A no longer reflects the current practice of products liability law;<sup>217</sup> thus, the *Restatement (Second)* provision is in need of revision. Critics of the ALI project argue that products

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<sup>214</sup> See also Michael J. Toke, Note, *Restatement (Third) of Torts and Design Defectiveness in American Products Liability Law*, 5 CORNELL J.L. & PUB. POL’Y 239, 283-85 (1996) (noting that legislation in six states and judicial decision in sixteen other states mandate proof of a reasonable alternative design).

<sup>215</sup> See RESTATEMENT (THIRD) § 1 cmt. a. According to the Reporters, many courts that apply a reasonableness test to determine liability insist on speaking of such liability as being “strict.” See *id.* Courts use the strict liability label in design defect cases if the product causes injury while being put to a reasonably foreseeable use because the seller is held to have known of the risks of such use and imputed knowledge is more often associated with strict liability than with negligence. See *id.* Courts also use “strict liability” to avoid characterizing the test as being based in negligence and, thus, to limit the defense of comparative fault. See *id.* Moreover, some courts call it strict liability because non-manufacturing sellers in the distributive chain are subject to strict liability. See *id.*

<sup>216</sup> Other commentators have concluded that a substantial number of jurisdictions still rely heavily on the consumer expectations test. See Shapo, *supra* note 30, at 665 (reviewing several of the cases relied on by the Reporters to advance their proposition that the reasonableness test should be the sole test for determining defect and concluding that the cases do not confirm Henderson & Twerski’s proposition); Howard Klemme, *Comments to the Reporters and Selected Members of the Consultative Group, Restatement of Torts (Third): Products Liability*, 61 TENN. L. REV. 1173, 1174-76 (1994).

<sup>217</sup> See *supra* notes 123-124 and accompanying text.

liability law is too unsettled for a *Restatement* to be possible.<sup>218</sup> They advocate delaying the promulgation of any *Restatement* until state legislatures and courts have had an opportunity to resolve the "burning questions" of products liability for themselves.<sup>219</sup> Such criticism ignores the fact that the ALI adopted section 402A at a time when strict liability in tort was only beginning to emerge as a distinct legal concept.<sup>220</sup> Section 402A became the foundation for much of modern products liability law because it offered courts a framework for liability built upon strong policy considerations and solid research. The *Restatement (Third)* is similarly well-researched and thoroughly reasoned. Those courts and legislatures currently considering important questions related to products liability need such a *Restatement*, one which also reflects a coherent set of rules, to provide guidance for the development of products liability law in their jurisdictions. Once again, the ALI has a unique opportunity to shape the future of products liability with its timely release of a *Restatement* of the law.<sup>221</sup>

#### D. CONCLUSION

The frustration of courts and commentators in struggling to sort out the conflicts and inconsistencies associated with section 402A spurred the ALI to undertake to write a *Restatement (Third) of Torts: Products Liability*. With no absolute majority of jurisdictions behind any one approach, the revised *Restatement* represents what the Reporters determined is the best rule for products liability law. The new *Restatement* differs substantively from the *Restatement (Second)* in that the new rule includes an explicit recognition of three distinct categories of product defects, a rejection of a strict liability standard for design defects, and a requirement that a plaintiff in a design defect case prove a

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<sup>218</sup> See Schmidt et al., *supra* note 183, at 419 (suggesting that the *Restatement (Third)* is an attempt by the Reporters to remake, reshape, or revise the law rather than an effort to summarize and capsulize the law).

<sup>219</sup> See, e.g., Shapo, *supra* note 30, at 685-86 ("[O]n matters where the law is truly in the process of development, a Restatement should maximize opportunities for courts to identify and resolve unsettled issues for themselves.").

<sup>220</sup> See Pearson, *supra* note 120, at 66.

<sup>221</sup> See Corboy, *supra* note 13, at 1074; see also Prosser, *The Fall*, *supra* note 26, at 803. But see Pearson, *supra* note 120, at 62 (suggesting that the effect of the revised Restatement may be minimal because those jurisdictions that have products liability statutes will not be able to judicially adopt the new rule and other jurisdictions which have a developed body of products liability case law may be reluctant to abandon precedent).

reasonable alternative design. Despite these significant changes, the *Restatement (Third)* presents a workable rule—a rule that closely resembles the risk-utility approach currently followed in several jurisdictions. Furthermore, the *Restatement (Third)* is supported by carefully reasoned policy considerations: policies that recognize the need for consumer protection and that attempt to balance such needs against a manufacturer's ability to design reasonably safe products. While no single rule of liability is likely to satisfy all of the competing interests in our society, the *Restatement (Third)* does a very good job of summarizing those facets of products liability for which there is substantial agreement; and, where there is no agreement, the *Restatement (Third)* adequately develops rules that reflect sound public policy.

