Crashing Into Proof of a Reasonable Alternative Design: The Fallacy of the *Restatement (Third) of Torts: Products Liability*

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**INTRODUCTION**

On May 20, 1997, at its annual meeting in Washington, D.C., the council of the American Law Institute ("ALI") adopted the final draft of its long awaited and controversial *Restatement (Third) of Torts*, bearing on the topic of products liability.¹ This effort was labeled by the learned reporters as the ALI's "rational and responsible resolution" to the ongoing and fiercely debated controversy surrounding the law of strict products liability, a field known to many by its section number in the *Restatement (Second) of Torts.*²

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¹ See *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1-21 (1997).* "The subject [of torts] has become too broad and too intricate to be encompassed in a single project, even one as prolonged as [the] Restatement Second . . . ." *Id.* at xv. "Products Liability is the first product of the Institute's long-term undertaking to revise and update the Restatement Second of Torts." *Id.*

² *Id.* at xv; *RESTATEMENT (SECOND) OF TORTS § 402A (1968).* The influential Section 402A, titled *Special Liability of Seller of Products for Physical Harm to User or Consumer,* states in its entirety as follows:

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.

*Id.* Section 402A states a rule best categorized as strict products liability in tort, as opposed
The principal points of contention among participants in the debate over the future development of strict products liability jurisprudence center around the applicability of strict liability in design defect cases, and the proper evidentiary form sufficient to meet the burden of proof in a design defect case. There is no evidence of harsh disagreements over the efficacy of the substantive law of strict products liability, or its underlying social policy. No one on either side of the arguments associated with strict products liability law has espoused the alteration or abrogation of the social policy underlying strict products liability.

3. Strict products liability in tort, as with other theories of products liability, is grounded on a finding that the product involved was defective at the time it left the defendant's control. See generally 63 AM. JUR. 2d Products Liability §§ 6, 12 (1996). Defective products are generally divided into three categories: products that are defectively manufactured, products that are defectively designed, and products that are defective due to an inadequate warning regarding the proper use of the product. See generally id. at § 8. This comment focuses on strict products liability cases based on a design defect; unlike a manufacturing defect, a design defect cannot be detected by comparing the allegedly defective product against the manufacturer's standard product because if a product is defectively designed, the entire line of products is defective. See 63A AM. JUR. 2d Products Liability § 930 (1996). "Due to the absence of an objective measure of defectiveness, design defect cases present the most difficult problems in the field of products liability litigation." Id.

4. That policy is embedded in the law of strict products liability as defined in the Restatement (Second) of Torts Section 402A, which is the basis for the development of strict products liability law in most of the United States. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1968), which states as follows:

"The public has the right to and does expect . . . that reputable sellers will stand behind their products [and] public policy demands that the burden of accidental
Proof of Reasonable Alternative Design

That deeply rooted social policy recognizes that the manufacturer who places a product in the commercial stream is in a better position than the consumer (or other foreseeable user) to bear the costs of injury resulting from the use of the product, by including the costs of liability in the price of the product. This policy is often stated in some variation of the following phrase: "The doctrine of strict liability places the product supplier in the role of a guarantor of the product's safety, but it does not make the supplier an insurer against all injuries caused by the product."

The reporters of the Restatement (Third) of Torts, however, seek to avoid the manufacturer-as-guarantor policy underlying strict products liability law in cases alleging a design defect. The avoidance technique they propose is contained in Section 2(b), which imposes on plaintiffs advancing a design defect theory in a strict products liability suit the responsibility of proving a "reasonable alternative design." Because a reasonable alternative design requirement, by its nature, injects negligence principles into such cases, this proposed rule would effectively remove design defect cases from the realm of strict liability and place them in the arena of negligence, thereby providing manufacturers with a distinct advantage; in the negligence realm, the social policy of manufacturer-as-guarantor, which underlies strict products liability, is not recognized.

injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; . . . the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.


7. Restatement (Third) of Torts: Products Liability § 2b (1997). Section 2(b) reads, [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 by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe . . . .

Id. The reporters for the Restatement (Third) note in their Introduction that "Section 2(b) generated considerable controversy [because it] calls for proof of a reasonable alternative design in order to sustain an action for defective design." Id. at 4. The reporters believe that when the entire Restatement (Third) is read as a whole, the impact of this requirement is lessened; they warn that "[o]verzealous advocates may seek to focus the attention of courts on § 2(b) alone. Users of this Restatement are cautioned against such a fragmented reading." Id.
The purpose of this comment is twofold; first, to illuminate the subjective motives and the over-stretched legal analysis of the restatement reporters as they attempt to introduce a reasonable alternative design requirement to the law of strict products liability pertaining to design defect cases; second, to question whether the ALI was improperly influenced in agreeing to the utilization of the restatement process as the vehicle for accomplishing that goal.

Part One examines the history and rationale behind the ALI's efforts to construct restatements of the law, to determine whether any of the ALI's stated goals were advanced by the completion of the *Restatement (Third) of Torts: Products Liability*. Further, Part One will look at the possibility that special interests, specifically insurance industry groups, utilized improper financial influence over both the ALI's decision to go forward with the restatement project, and its final result.

Focusing on the concept of "reasonable alternative design," Part Two examines a representative sample of the very case law relied on by the reporters of the *Restatement (Third)* to expose their fallacy in drawing the conclusion that a majority of American jurisdictions already require proof (expressly or implicitly) of a reasonable alternative design in a strict products liability case alleging design defect.

Part Three then focuses upon the present state of strict products liability law in Pennsylvania, where the imposition of the reasonable alternative design requirement would uniquely undermine decades of developmental jurisprudence in this area of the law.

I. THE AMERICAN LAW INSTITUTE AND THE RESTATEMENTS OF THE LAW

The ALI was incorporated in 1923, with the express purpose of "promoting the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."

In an effort to instill credibility into the work of the ALI, one of the initial incorporators, William Lewis Draper, recruited highly respected members from a wide cross-section of the legal community. Once assembled, the group

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9. See id. at 921. An example of the caliber of persons originally associated with the
undertook to write a restatement of the entire law. This massive project was motivated by the belief that the proliferating size of the body of precedent case law had forced local lawyers and state court judges into local isolation due to their inability to access this larger body of information. Thus, relying on only a relatively few state court rulings on any particular legal issue, state courts could easily lose perspective and arrive at conclusions inconsistent with general common law.

Since the early days of the ALI, the practical and theoretical reasons supporting its restatement approach to the law have undergone significant change. Several factors combined to influence the change in direction undertaken by the ALI. First, several philosophical theories espousing the notion that the law should reflect the society it serves came into vogue and received significant approval among contemporary scholars. Further, encouraged by the widespread recognition and acceptance of previously completed restatement works, subsequent drafters hoped to utilize the restatement as a vehicle with which to influence the future direction of the law, and bring about social change. Finally, and most significantly, American legal publishers had undertaken to catalogue and cross reference the huge volume

Institute was the preeminent New York jurist and future Supreme Court Justice, Benjamin Cardozo. Concerning the purpose of the institute and the need for its establishment, Cardozo remarked:

The American Law Institute . . . is the first cooperative endeavor by all the groups engaged in the development of law to grapple with the monster of uncertainty and slay him. It proposes a scientific and accurate restatement of the law . . . [I]t will be something less than a code and something more than a treatise. It will be invested with unique authority, not to command, but to persuade. It will embody a composite thought and speak a composite voice. Universities and bench and bar will have had a part in its creation . . . [T]he plan reduces to a minimum the likelihood of failure. If these men cannot restate the law, then the law is incapable of being restated by anyone.

Id. at 921-22 (citing BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW, 6-9 (1924) (quoting a speech given by Cardozo expressing his support for the establishment of the ALI and approving of the restatement approach).

The "monster of uncertainty" that Cardozo spoke of was the ever growing and sometimes unmanageable body of precedent case law. See id. The well-known analogy often used to describe the development of common law rules is that of the runaway calf, twisting this way and that. See Max Radin, The Trail of the Calf, 32 CORNELL L. QUARTERLY 137 (1946).

10. See Zacharias, supra note 8, at 920.
11. See id.
12. See id.
13. See id. at 922. Roscoe Pound's notions of "Societal Jurisprudence" and Carl Llewellyn's views on "Legal Realism" completely rejected the doctrine of stare decisis as a sound basis upon which to develop the future of American jurisprudence. See id.
14. See id. at 923.
of case law, allowing judges, lawyers, and their clerks to access and assimilate the previous opinions into their decisions.\textsuperscript{15}

As an acknowledgement to these changes, a debate ensued within the ALI, which continues even today, as to whether the restatements should continue to strive to state what the law is, or attempt to identify what the law should be.\textsuperscript{16} In the midst of this debate, the ALI began the second series of restatements in the early to mid 1960s.\textsuperscript{17} These projects proceeded under the supposition that the new restatements, by identifying "true law" and highlighting disagreement among the states, could help bring order to chaos.\textsuperscript{18} These new restatements no longer purported to identify the single correct rule; rather they attempted to focus and narrow the debate over contentious issues, identify what were the best options, and explain the preferences of the ALI's wise leaders.\textsuperscript{19}

Recent developments surrounding the ALI effort at producing the third series of restatements indicate that there is a new force impacting the ALI regarding its purpose and role in helping to develop the law.\textsuperscript{20} That force is found in the lobbying power of special interest groups with whom many of the members of the ALI are aligned.\textsuperscript{21} These special interest forces have succeeded in shifting the purpose of the instant restatement project away from clarification of the law, identification of the arguments, and proposals for reasonable resolutions, and toward the purpose of advancing the partisan positions of the special interest groups.\textsuperscript{22} It

\textsuperscript{15} See Zacharias, supra note 8, at 923. The volume of cases had increased, but it was no longer indigestible. These developments made restatements in the original form less important; in other words, just another secondary source. See id.

\textsuperscript{16} See id.

\textsuperscript{17} See id. at 924.

\textsuperscript{18} See id. at 924. In 1960, the ALI altered its policy to allow for reporters to advocate the adoption of minority rules applicable to novel issues when the members agreed that courts were more likely to adopt such rules in the future. See id. The ALI relied on its prestigious reputation in the hope that the legal community would defer to its respected membership, drawn from bench, bar, and academia, and would be trusted to perceive the issues and explain why a "correct" minority position should be adopted. See id.

\textsuperscript{19} See id. at 925.

\textsuperscript{20} See Monroe H. Freedman, Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements, 26 Hofstra L. Rev. 641 (1998).

\textsuperscript{21} See id. at 643. ALI members have been lobbied with respect to their votes on both preliminary questions and final drafts of ALI projects by business clients, large corporate clients, and lobbyist representing industry clients such as the insurance industry. See id.

\textsuperscript{22} See id. The foreward to the Restatement (Third) of Torts: Products Liability admits that it "of course 'goes beyond the law' as the law otherwise would stand; a] Restatement that was simply a photograph would not be worth the effort that goes into an
is the hope of such groups that by influencing a restatement project, they will be able to utilize the substantial influence that the previous ALI restatements have had on the courts in developing the law to advance their single point of view regarding the subject of the restatement. To allow such biased interests to influence the restatement projects would only serve to undermine the long-standing credibility of the ALI.

The ALI has traditionally been insistent that "members should and do leave their clients at the door." However, it appears that the pressures asserted on ALI members by their high priced clients and their own interests have increased the likelihood that such pressures will have significant influence on the members' voting decisions. Recognition of this fact by Mr. Roswell Perkins in 1991 prompted the then president of the ALI to remark to members that "the precept of leaving one's client at the door must be honored if we are to preserve our integrity as an organization." Perkins went on to say that members were mobilizing "outside influences" with possible "economic implications" to influence ALI members. "What this means is that some members were getting lucrative clients to threaten to give or withhold their legal business depending on how members voted on particular issues."

More disturbing is the fact that the special interest element has recently succeeded in installing as a restatement reporter Professor James A. Henderson, Jr., a legal scholar noted for his strong

Institute product [and] a photograph of the law in this field would have been a blurred image of confusion." Restatement (Third) of Torts: Products Liability xvi (1997).

23. See Freedman, supra note 20, at 643.
24. See id. at 641. Professor Freedman concluded:
The American Law Institute's reputation for impartial judgment in formulating Restatements of the Law has been compromised by conflicts of interest on the part of ALI members who vote on Restatement provisions. That is, there is a significant risk that the independent professional judgment of ALI members has been materially and adversely affected by the interests of members' clients and by the members' own interests. As a result, no judge, scholar, or student can rely on a Restatement rule or comment as representing the objective judgment of ALI members, unaffected by the partisanship of advocates who are creating precedents to protect their clients' and their own interests in future litigation.

Id. Professor Freedman's status as a distinguished professor of legal ethics and an elected life member of the American Law Institute lends heightened credibility to his observations and conclusions. See id.

25. See id. at 643.
26. See id.
27. See id.
29. See id.
partisan views with respect to the restatement topic on which he writes. Professor Henderson and Professor Aaron D. Twerski are the official reporters responsible for the drafting of the Restatement (Third) of Torts: Products Liability.  

Evidence exists demonstrating that Professor Henderson desires to utilize his position to capitalize on the substantial deference courts have given to previous ALI restatements, and thereby interject his personal views into the law of products liability. Professor Henderson's long time advocation of tort reform is well documented. Beginning with his writings in the early 1980s, Henderson has exhibited his disdain for the concept of strict liability, especially as it relates to theories of products liability.

Henderson insists that "tort liability must be premised on fault, and that only foreseeable risks may be taken into account." In applying his view to cases of products liability, Henderson would agree that strict liability should apply to alleged manufacturing defects because liability in such cases is determined narrowly and objectively, by reference to the manufacturer's own standards. He would not, however, apply strict liability in design and warning defect cases, because without an objective standard, courts will inappropriately second guess strict products liability decisions.

31. See James A. Henderson, Revising Section 402A: The Limits of Tort as Social Insurance, 10 Touro L. Rev. 107, 119 (1993). In this article, Professor Henderson states that in his opinion, tort-run social insurance is pro-consumer, he would not want to see it implemented as a working protective device for consumers, and he promises that it will not be under the revised Restatement. Id.
32. See Theodore Isenberg & James A. Henderson, Jr., Inside the Quiet Revolution in Products Liability, 39 UCLA L. Rev. 731 (1992) (providing a statistical analysis designed to show the decline in pro-plaintiff judgments and corresponding monetary awards in strict products liability cases, and to lend support to the argument for the need for reform in that area of the law); see also James A. Henderson, Jr. & Aaron D. Twerski, A Proposed Revision of Section 402A of the Restatement (Second) of Torts, 77 Cornell L. Rev. 1512 (1992) (stating that doctrinal 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).
33. See James A. Henderson, Jr., Coping with the Time Dimension in Products Liability, 69 Cal. L. Rev. 919 (1981). See also Products Liability Reform: Hearings before the Subcomm. for Consumers of the Senate Comm. of Commerce, Science, and Transportation, 97th Cong., 2nd Sess. 22, (1982) (statement of Professor James A. Henderson, Jr.). In testimony on products liability reform, after referring to the high administrative costs of tort law, Professor Henderson said, "If I were a cynic, I would say that if this is a social insurance scheme, it is being run primarily to benefit the trial bar." Id.
35. See id.
36. See id.
Among other things, this negligence based system of liability, which Henderson sees as the only fair way of apportioning liability, allows manufacturers of potentially dangerous products to establish for themselves the extent of their duty to their customers, and would go against the weight of authority in most jurisdictions.  

Furthermore, in a 1993 presentation before the Symposium on the Revision of the Restatement (Second) of Torts Section 402A, Henderson dismissed the risk spreading rationale for strict products liability, and characterized the concept of “tort as social insurance” as a “miserable flop.” Henderson’s stated position is that the social insurance rationale should not be applied in cases so as to provide “working protective device” for consumers. He intends to use his position as a reporter to ensure that such a policy is not included in the revised restatement.

The ALI has set out in a perilous new direction by sanctioning this type of approach used by Henderson and Twerski as the reporters of the Restatement (Third) of Torts. The Restatement (Third) of Torts: Products Liability project should have resulted in an academic and scholarly product, reflective of the lofty standards to which the ALI previously subscribed, and to which courts and legislatures could turn with confidence in their efforts to reconcile inconsistencies and conflicts in the law. However, this project, infected as it was with reporter bias and improper influence, has produced nothing more than a position paper reflecting the views of special interests groups with whom the selected reporters are aligned. The adoption of the Restatement (Third) of Torts: Products Liability by the ALI will come to be seen as a conscious decision by that organization to alter its status in the legal community, from well respected objective analyst to subjective advocate. Once complete, that change will forever destroy the basis of credibility upon which the influential works of the ALI rests, and will relegate the ALI and its works to the level of amicus curiae in the eyes of the legal community.

37. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 33 (5th ed. 1984). Even an entire industry, by adopting careless methods to save time, effort, or money, cannot be permitted to set its own uncontrolled standard. See id.

38. See Henderson’s Redesign, supra note 34, at 2367 n.14; see also, Henderson, supra note 31, at 118-20.

39. See Henderson, supra note 31, at 120. The risk spreading rationale disfavored by Henderson is the social policy underlying the concept of strict liability, which states that a manufacturer is in a better position to account for the risk of injuries by spreading the cost of insurance across the entire line of his products. See id.
II. SURVEY OF THE LAW OF STRICT PRODUCTS LIABILITY IN SELECTED REGIONS OF THE COUNTRY

As previously stated, one of the ALI's principal reasons for undertaking the restatement projects was to help to bring order to the seemingly chaotic state of the law. The undertaking of a Restatement (Third) of Torts: Products Liability would cause one to assume that the state of strict products liability law in the United States had degenerated into a state of chaos and disarray, so as to prevent anyone from finding consistency among the different jurisdictions. To dispel the notion that such a chaotic situation exists, it is necessary to examine the present state of strict products liability law throughout the United States.

To simplify the task, one jurisdiction from each of the geographic regions of the country has been selected. This method should amply account for the societal and cultural differences that are hallmarks not only of the demographics of the United States, but also of the different yet understandable approaches to the law that exist within those regions. The jurisdictions chosen, and their representative regions, are as follows: Alabama (The South Region), New Mexico (The Southwest Region), Washington (The Northwest Region), Kansas (The Heartland Region), Indiana (The Midwest Region), and Connecticut (The Northeast Region). The conclusion of this comment in every jurisdiction analyzed is that the very cases cited and analyzed by the Restatement (Third) reporters do not support its broad conclusion, typically because the reporters rely on so-called crashworthiness cases to (improperly) draw a conclusion for all design defect cases. Regrettably, a more complete survey of American jurisprudence, one that would duplicate the analysis contained in the Restatement (Third), is well beyond the scope of this comment. However, another commentator undertook just such an effort in 1996, when the Restatement (Third) was still in a proposed form, and after an exhaustive

40. See Zacharias, supra note 8, at 925.
42. See infra notes 68-106 and accompanying text.
43. See infra notes 107-27 and accompanying text.
44. See infra notes 128-45 and accompanying text.
45. See infra notes 146-75 and accompanying text.
46. See infra notes 176-89 and accompanying text.
47. See infra notes 190-200 and accompanying text.
analysis, concluded that only eight jurisdictions in the United States supported the conclusion of the Restatement (Third), that proof of a reasonable alternative design is required in all design defect cases.  

A. The Impact of the Crashworthiness Doctrine on the Restatement (Third)

Section 2(b) of the Restatement (Third) of Torts: Products Liability defines a defectively designed product as follows:

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 by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe . . . .

In a lengthy Reporters' Note following the comments to Section 2, the reporters conducted a survey of the law of the several states regarding the necessity to prove a reasonable alternative design in a design defect case. This survey is divided into four categories:

FIRST are the jurisdictions that explicitly require a plaintiff . . . to prove that a reasonable alternative design would have reduced or avoided the plaintiff's harm. SECOND
are the jurisdictions that apply a general risk-utility test for defective design without explicitly requiring proof of a reasonable alternative design. Recognition of a risk-utility standard for judging the defectiveness of product designs implicitly commits the court to the requirement of a reasonable alternative design. THIRD are the jurisdictions that purport to rely on a consumer expectation test but in fact engage in a risk-utility analysis that, as with the SECOND approach, implicitly commits the court to a reasonable alternative design requirement. And FOURTH are the jurisdictions, relatively few in number, that apply a true consumer expectations test, independent of risk-utility, without requiring proof of a reasonable alternative design.50

In so categorizing the law of the several states regarding strict products liability based on design defect, the reporters of the Restatement (Third) of Torts relied on strict products liability cases utilizing a particular type of design defect: the crashworthiness doctrine.51 The crashworthiness doctrine grew out of products liability claims against the automobile industry and

50. Id. at § 2 cmt. d, Reporters’ Note at I, 46. The reporters list 23 jurisdictions in their first category (jurisdictions that explicitly require proof of a reasonable alternative design): Alabama, Delaware, District of Columbia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, New York, Pennsylvania, Texas, Utah, West Virginia, Oregon, Colorado, Georgia, Minnesota, Montana, North Carolina, and Ohio. Id. at II-A, 46-65. The reporters list 10 jurisdictions in their second category (jurisdictions that impliedly require proof of a reasonable alternative design in all design defect cases, without explicitly doing so): Arizona, Florida, Kansas, Kentucky, Maine, Missouri, New Hampshire, New Mexico, South Carolina, and Virginia. Id. at II-B, 65-71. The reporters list 3 jurisdictions in their third category (jurisdictions that impliedly require proof of a reasonable alternative design in most design defect cases): Connecticut, Iowa, and Washington. Id. at II-C, 71-73. Finally, the reporters list 8 jurisdictions in their fourth category (jurisdictions that do not require proof of a reasonable alternative design): California, Tennessee, Alaska, Arkansas, Hawaii, Nebraska, Oklahoma, and Wisconsin. Id. at II-D, 73-77.

51. See generally id. at § 2 cmt. d, Reporters’ Note at II-A through II-C (citing to crashworthiness cases for the position that a reasonable alternative design requirement is already recognized as an element of a design defect case within the particular state's law). Crashworthiness cases are sometimes referred to as second collision cases, or cases involving enhanced injury, and this doctrine, in one basic form or another, has been adopted in all fifty states. See R. Ben Hogan, The Crashworthiness Doctrine, 18 AM. J. OF TRIAL ADVOC. 37 (1994). “The crashworthiness doctrine is merely a subset of a products liability action pursuant to section 402A [of the Restatement (Second) of Torts], and usually arises in the context of a vehicular accident.” Kupetz v. Deere & Co., 644 A.2d 1213, 1218 (Pa. Super. Ct. 1994). “The crashworthiness doctrine provides that a manufacturer/seller is liable in situations in which the defect did not cause the accident or initial impact, but rather increased the severity of the injury over that which would have occurred absent the design defect.” Id. See also Mills v. Ford Motor Co., 142 F.R.D. 271 (M.D. Pa. 1990); Barris v. Bob's Drag Chutes & Safety Equip., 685 F.2d 94 (3d Cir. 1982).
requires any manufacturer to whom it applies to “take such steps as may be reasonable and practicable to forestall particular crash injuries and mitigate the seriousness of others.”

The basic concept underlying a crashworthiness (also known as a second collision) cause of action is that manufacturers of products designed to be occupied during movement must include collisions as a foreseeable intended use of their products. That is, a manufacturer has a legal duty to design and manufacture its product to be reasonably crashworthy. Simply put, a “defect in a product that does not cause the accident but does cause or enhance an injury is a crashworthiness defect.”

The need to establish a standard to determine the extent of such legal a duty follows from the imposition of this duty. Many manufacturers argue that they should not be held to a standard that exceeds that subscribed to by the industry. This appeal to use industry state-of-the-art as the applicable standard has been dismissed by the courts as an improper standard. In 1932, in the seminal case of The T.J. Hooper, Judge Learned Hand dismissed

52. Hogan, supra note 51, at 41 n.17.

53. See Larsen v. General Motors, Inc., 391 F.2d 495, 502 (8th Cir. 1968). In this case the plaintiff was injured when the steering column of his 1963 Corvair struck him in the chest following a front end collision. Larsen, 391 F.2d at 496-97. The district court granted the defendant's motion for summary judgment, concluding that General Motors had no duty to manufacture an accident proof vehicle and would not be liable in cases where the alleged defect did not cause the accident. Id. at 497. The circuit court reversed this ruling, stating that under the present state of the art, “an automobile manufacturer is under no duty to design an accident-proof or fool-proof vehicle or even one that floats on water, but such manufacturer is under a duty to use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision.” Id. at 502. “Collisions with or without fault of the user are clearly foreseeable by the manufacturer and are statistically inevitable.” Id.

54. See Huddell v. Levin, 537 F.2d 726, 735 (3d Cir. 1976). In analyzing the law of New Jersey with respect to strict liability and its application to a case involving enhanced injuries to a motorist caused by a second collision inside the vehicle with a defectively designed headrest, the circuit court ruled,

[I]t was beyond peradventure that an automobile manufacturer today has some legal obligation to design and produce a reasonably crashworthy vehicle. The court went on to say that a manufacturer is not required to design against bizarre accidents, but the manufacturer is required to take reasonable steps—within the limitations of cost, technology, and marketability—to design and produce a vehicle that will minimize the unavoidable danger. Rephrased in the terminology of strict liability, the manufacturer must consider accidents as among the “intended” uses of its product.

Id. at 735.

55. Hogan, supra note 51, at 41.

56. See Larsen, 391 F.2d at 503.

57. Id.

58. 60 F.2d 737 (8th Cir. 1932).
that argument when he stated, "[I]indeed, in most cases, reasonable prudence is common prudence, but strictly it is never its measure." Applying this rationale to a case decided over forty years after *T. J. Hooper*, the Nebraska Supreme Court clarified the issue by stating, "The question therefore is not whether anyone else was doing more, although that may be considered, but whether the evidence disclosed that anything more could be done."

To prevail in a design defect case brought under the crashworthiness doctrine, a plaintiff must show that an alternative design existed that would have been safer under the same circumstances. The plaintiff must also show that the defective design caused injuries that would not have occurred had the alternative design been incorporated.

Proving a reasonable alternative design in a crashworthiness case imposes upon the plaintiff the burden of proving negligence on the part of the vehicle manufacturer regarding its duty to design a crashworthy vehicle. Thus, for a plaintiff to prevail in a crashworthiness cause of action, all of the elements of a negligence cause of action must be proven.

The concept of strict liability is injected into a crashworthiness

59. *T.J. Hooper*, 60 F.2d at 740. In this case, the judge found the tug "Hooper," and its companion vessel, to be unseaworthy due to the lack of radio receiving equipment which could have warned them of the impending storm which ultimately brought about their demise at sea. *T. J. Hooper*, 60 F.2d at 740. Having been deemed unseaworthy, the owner of the vessels was liable for the loss of both the barges the tugs were towing and their cargoes. *Id.* The owner argued that the radio technology was new and that it had not been adopted as standard equipment in the business at hand. *Id.* The court rejected this argument, stating that it is the court that states what one's duty is, not the applicable industry itself. *Id.*

60. Hancock v. Pacar, 283 N.W.2d 25, 35 (Neb. 1979). In an action seeking damages for the death of her husband, the plaintiff asserted a claim against the manufacturer of the truck that the decedent was driving. *Hancock*, 283 N.W.2d at 31. When the truck hit a deer, the impact bent the front bumper of the truck in such a manner as to interfere with the steering mechanism of the truck, causing the truck to veer out of control. *Id.* at 31. The plaintiff alleged that the bumper was defectively designed by being made of inferior material, was functionally misplaced and had insufficient support. *Id.* The defendant countered with the argument that the bumper was the state-of-the-art in truck manufacturing. *Id.* at 34-35. The court rejected this argument, stating that proof that no one in the industry is doing something different does not establish state-of-the-art. *Id.*

61. *Huddell*, 537 F.2d at 737.

62. *Id.* at 737-38.


64. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* § 30 (5th ed. 1984). The elements to a cause of action for negligence, (and the corresponding crashworthiness elements), are duty, (the judicially imposed duty to manufacture a crashworthy vehicle), breach, (failure to eliminate design defects that could cause foreseeable injuries in a vehicle collision), causation, (design defect caused enhanced injuries to the plaintiff), and damages. *Id.*
case subsequent to the required proof of a reasonable alternative design.\textsuperscript{65} Once a manufacturer's design of the offending product has been proven defective, the manufacturer is held strictly liable for the damages caused by the product, regardless of the existence of fault on the part of the vehicle operator in bringing about the initial collision.\textsuperscript{66}

This concept of strict liability distinguishes a design defect case brought under the crashworthiness doctrine from a design defect case brought pursuant to Section 402A of the Restatement (Second) of Torts, where the defectively designed product was the initial and sole cause of plaintiff's injuries.\textsuperscript{67} Having thus distinguished this cause of action, it can be said that the reporters of the Restatement (Third) of Torts: Products Liability were not justified in relying upon crashworthiness cases to support a blanket conclusion that a particular state requires a plaintiff to prove the existence of a reasonable alternative design in all design defect cases brought under a theory of strict products liability.

B. The South Region: Alabama

In the state of Alabama, the courts have developed strict products liability law over the past twenty-three years. In 1976, the Alabama Supreme Court, in the seminal cases of Atkins v. American Motors Corp.\textsuperscript{68} and Casrell v. Altec Industries,\textsuperscript{69} adopted a modified version of Section 402A of the Restatement (Second) of Torts. Although the court was reluctant to dispense with fault notions, because it wanted to retain the causal nexus between the manufacturer of the product and the defect, it did develop what the

\textsuperscript{65} See Hogan, supra note 51, at 43-44.

\textsuperscript{66} Id.

\textsuperscript{67} See Restatement (Second) of Torts § 402A (1968).

\textsuperscript{68} 335 So. 2d 134 (Ala. 1976). In Atkins, the plaintiff's decedent was killed in an AMC Gremlin when the gas tank caught fire after the car was rear-ended by a Lincoln Continental. Atkins, 335 So. 2d at 137. The plaintiff brought a products liability case under Section 402A of the Restatement (Second) of Torts. Id. The Alabama Supreme Court adopted Section 402A as the law in Alabama with respect to products liability, but refused to adopt it in its strict liability form, preferring to modify the cause of action to effectively prevent a strict liability cause of action against an intermediate seller of a product who was not causally connected to the circumstances that brought about the defect in the product. Id. at 137.

\textsuperscript{69} 335 So. 2d 128 (Ala. 1976). This case was a companion case to Atkins. In this case, decided under the Alabama Extended Manufacturer's Liability Doctrine, the plaintiff's decedent was electrocuted when the boom arm of a "bucket truck" came in contact with overhead electric power lines. Casrell, 335 So. 2d at 130. In imposing liability upon the seller of the truck, the court attempted to distinguish negligence from strict liability by finding negligence as a matter of law. Id. at 132. In effect, the application of such law by Alabama is strict liability under assumed names normally associated with negligence. Id. at 131.
Alabama judicial system consistently refers to as the "Alabama Extended Manufacturer's Liability Doctrine," the application of which can only be described as strict liability.\textsuperscript{70} Thus, the only defense available to manufacturers in future cases would exist in their ability to show that the defect did not exist when the product left their control.\textsuperscript{71} However, Alabama does not allow a strict liability action against an intermediate seller with no causal connection to the circumstances of the injury.\textsuperscript{72} Under this version of strict products liability law, injured plaintiffs seeking to impose liability on intermediate wholesalers and retailers who were unable to establish the necessary causal nexus with the defect, might still be able to prosecute their cause of action based upon the implied warranty of merchantability.\textsuperscript{73}

The concept of "reasonable alternative design" was first recognized by the Alabama courts during this period in the 1985 crashworthiness case of \textit{General Motors Corp. v. Edwards}.\textsuperscript{74} In \textit{Edwards}, the alleged product defect was the design of the 1980 Chevrolet Chevette, which "placed [the gas tank] in the 'crush zone' (between the rear bumper and axle of the Chevette)." The \textit{Edwards} court required the plaintiffs to present evidence of "a safer, practical, alternative design [that] was available to the manufacturer at the time it manufactured the automobile," however, the court expressly limited the application of the reasonable alternative design requirement to cases of enhanced injury or crashworthiness.\textsuperscript{75} The concept of crashworthiness, as

\textsuperscript{70} \textit{Atkins}, 335 So. 2d at 142. The public policy behind Alabama’s law of strict products liability is included in the development of the law by the courts. This policy supports the conclusion that proving want of due care in products liability cases involving complicated manufacturing processes can be almost impossible. The plaintiff in such cases should not be forced to prove more than the mere placement on the market by the defendant of a product not reasonably safe when used for its intended purpose and that, as a proximate result, injury ensued. \textit{Id.}

\textsuperscript{71} \textit{Id.} at 143.

\textsuperscript{72} \textit{Id.} at 143.

\textsuperscript{73} See ALA. CODE § 7-2-314(1) (1975) (stating that "[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").

\textsuperscript{74} 482 So. 2d 1176 (Ala. 1985). Plaintiffs brought a products liability action based upon a crashworthiness theory for personal injuries and the death of their two sons. \textit{Edwards}, 482 So. 2d at 1180. General Motors was named as a defendant as the manufacturer of a Chevette automobile that burst into flames when struck from the rear by another vehicle. \textit{Id.} at 1180. A jury found GM liable for the deaths and the injuries under the Alabama Extended Manufacturer’s Liability Doctrine. \textit{Id.}

\textsuperscript{75} \textit{Edwards}, 482 So. 2d at 1180, 1191. The \textit{Edwards} court limited its holding to claims "against an automobile manufacturer where it is alleged that an automobile manufactured by
discussed previously, is particularly applicable to these types of cases because the product, or its relative safety, is not generally implicated as a cause of the initial accident; rather, the alleged defect is the product’s inability to protect its occupant in a collision. The question of product safety, and thus manufacturer liability, arises when the injuries sustained by the plaintiff in the accident would not have occurred, or would have been less serious, if the product had not been defective. Such theories logically impose on a plaintiff the burden of showing how the product could have been manufactured or designed to have eliminated the risk of enhanced injuries.

In 1990, a significant federal court ruling changed the direction of the law in Alabama. In the case of *Elliot v. Brunswick Corp.*, the United States Court of Appeals for the Eleventh Circuit overturned the district court’s judgment for the plaintiff in a strict products liability case. The case involved an accident where a fourteen-year-old boy jumped from a bridge and was seriously injured by the propeller of a speed boat, manufactured by the defendant. The plaintiff argued that the propeller was defective by offering an alternative design for the propeller that included a propeller guard.

On appeal, the circuit court ruled that the plaintiff had not satisfied the consumer expectation test so as to prove that the propeller was defective. As to the alternative design offered by the plaintiff, the court ruled that such a design was not feasible, thereby precluding the establishment by the plaintiff of a claim cognizable under the Alabama Extended Manufacturer’s Liability Doctrine. The federal court concluded, based upon its

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76. See supra notes 49-67 and accompanying text for a discussion of the theory and development of the crashworthiness cause of action, and its relevance to the Restatement (Third) of Torts: Products Liability.

77. Edwards, 482 So. 2d at 1189.
78. Id.
79. 903 F.2d 1505 (11th Cir. 1990).
80. *Elliot*, 903 F. 2d at 1506.
81. Id.
82. Id.
83. Id. at 1507. The consumer expectation test is designed to show that a product is dangerous “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.” See RESTATEMENT (SECOND) OF TORTS, § 402A cmt. i (1968).
84. *Elliot*, 903 F.2d at 1507-10.
interpretation of the Alabama Supreme Court's ruling in Edwards, that Alabama law required the showing of a reasonable alternative design in order to prevail in a design defect case.\textsuperscript{85} This was however, an erroneous conclusion by the federal court, as the Alabama Supreme Court's ruling in Edwards requiring proof of a reasonable alternative design was limited to crashworthiness cases.\textsuperscript{86}

The Alabama law with respect to strict products liability is an anomaly. Its development with respect to the existence of a reasonable alternative design requirement in all design defect cases stems from the continuation of the erroneous holding of the Eleventh Circuit in Elliot. It is possible that the Alabama case law would allow a plaintiff to prevail in a design defect case without proof of a reasonable alternative design. There is a consumer expectation component to the adopted risk/utility test recognized by the law of Alabama.\textsuperscript{87} This test has been developed over time, mainly in the context of crashworthiness case.\textsuperscript{88} The adopted risk/utility test is a balancing test, and a plaintiff need not satisfy all of the cited criteria in order to tip the balance in his favor.\textsuperscript{89} Indeed,

\textsuperscript{85} Id. at 1510.

\textsuperscript{86} See Edwards, 482 So. 2d at 1189.

\textsuperscript{87} Flemister v. General Motors Corp., 723 So. 2d 25 (Ala. 1998). This was a crashworthiness case in which the plaintiff's decedent was killed when the Chevrolet Beretta in which she was a passenger was struck in the passenger door by another vehicle. Flemister, 723 So. 2d at 25. On appeal from the jury verdict in favor of the defendant, the plaintiff attacked the risk/utility test contained in the Alabama Extended Manufacturers Liability Doctrine, specifically the consumer expectation component, stating that in cases such as these it is impossible for a reasonable consumer to form any expectations as to the safety of an automobile. Id. at 27. The Flemister court rejected this argument, recognizing the consumer expectation component of the risk/utility test adopted by the court in Edwards. Id. at 28. The court concluded that the risk/utility test is a balancing test, and proof of one component on balance may not always be sufficient. Id.

\textsuperscript{88} See Edwards, 482 So. 2d at 1188. The seven elements of the risk/utility test are: (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 a substitute product that 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; and (7) the feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product.

\textsuperscript{89} Id.
in all cases, the facts of the case will determine the results of the balancing test. It is easy to conceive that there exists an unreasonably dangerous product for which there is no safer alternative design, and neither defendants nor courts could reasonably dispute the argument that the lack of a safer alternative design does not necessarily speak positively for the safety of the chosen design.

The reporters of the Restatement (Third) rely upon several crashworthiness cases when identifying Alabama as a state that explicitly requires proof of alternative design for design defect cases. They also cite other cases that are easily distinguished from the traditional design defect case. In one of these, Vines v. Beloit Corp, the manufacturer of an allegedly defective product was granted summary judgment on both failure to warn and design defect theories. Regarding the failure to warn, the manufacturer prevailed after the court ruled that the plaintiff's employer was a sophisticated user and intermediary, and that the warnings provided by the manufacturer under those circumstances were adequate. As to the alternative design offered by the plaintiff, the court ruled that it amounted to a design that accomplished no more than to incorporate the manufacturers safety recommendations into the machine. The court viewed this merely

90. Restatement (Third) of Torts: Products Liability § 2b cmt. d, Reporters' Note at II-A (1997) (citing General Motors Corp. v. Edwards, 482 So. 2d 1176 (Ala. 1985), and Townsend v. General Motors Corp., 642 So. 2d 411 (Ala. 1994)). The Reporters' Note to comment d, which provides the background for the Restatement (Third) rules regarding design defect cases, "is by far the longest Reporters' Note to any comment in this Restatement, and therefore a special format is appropriate." Id. at cmt. d, Reporters' Note. The reporters divided their notes to comment d into four sections: an introduction, a summary of American case law on the test for defective design, a summary of commentators' views on that case law, and a summary of American case law on specific issues related to design defect cases. Id.


92. 631 So. 2d 1003 (Ala. 1994).

93. Vines, 631 So. 2d at 1003. An employee of Scott Paper Products was injured when he became entangled in broken paper that was spinning on a high speed paper reel. Id. at 1004. The manufacturer had delivered the paper reel machine to Scott paper as a component part to an unfinished system and had provided recommendations to the employer for the inclusion of safety precautions upon installation of the machine at the plant. Id. at 1005. The recommended precautions consisted of "safety color coding," "written safety warning," and "warning signs" designed to prevent workers from approaching the spinning reel while it was in operation. Id.

94. Id. at 1006.

95. Id.
as a novel approach to the failure to warn cause of action, which the court found unpersuasive. This case does not stand for the proposition that Alabama law requires proof of a reasonable alternative design. The court concluded only that the plaintiff’s design defect claim was merely a novel twist of the facts used to aggravate the allegations supporting his failure to warn claim.

The reporters found additional support for identifying Alabama as explicitly requiring proof of an alternative design in the case of *Beech v. Outboard Marine Corp.* *Beech* was a defective design case brought by an eight-year-old swimmer who was “run over and injured while swimming with his father near a boat powered by an . . . outboard motor manufactured by [the defendant.]” The case was brought in the United States District Court for the Northern District of Alabama; that court certified questions to the Alabama Supreme Court regarding whether the plaintiff had made out a case of defective product when the only alleged defect was a design that lacked a propeller guard. The reporters rely on this case for the broad proposition that lack of proof of a reasonable alternative design is a bar to a cause of action for defective design in Alabama. Both the federal district court where this case was first brought, and the Alabama Supreme Court, found this case to be factually equivalent to *Elliot v. Brunswick.* The five certified questions to the Alabama Supreme Court asked, in essence, that the supreme court determine as a matter of law whether the existence of an outboard motor without propeller guards was sufficient to state a cause of action for a defective product.

The state supreme court, again relying on its previous ruling in *GMC v. Edwards,* determined that a reasonable alternative design was required in design defect cases. In answering the questions certified by the district court, the Alabama Supreme Court engaged

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96. Id.
98. Beech, 584 So. 2d at 447-49.
99. Id.
100. Id.
101. Id.
102. Edwards, 482 So. 2d 1176; see supra notes 74-78 and accompanying text for a discussion of Edwards.
103. Beech, 584 So. 2d at 450. This case is a procedural enigma. Rather than decide the defendant’s motion for summary judgment, the district court certified questions to the Alabama Supreme Court. Id. at 449. The questions themselves indicated that the case presented an arguable question of fact over the existence of an alternative design, precluding a grant of summary judgment. Id.
in its own analysis of the risk/utility test and, citing Edwards as controlling, decided that as a matter of law "there is no cause of action [in Alabama] for failure to provide propeller guards on pleasure boat outboard motors."\textsuperscript{104} Accepting this approach in these types of cases appears to go against the Alabama Supreme Court's 1998 ruling in \textit{Flemister v. General Motors Corp.},\textsuperscript{105} which determined that the jury, not the court, should apply the risk/utility balancing test to determine the existence of a feasible alternative design.\textsuperscript{106}

From this discussion, the most that can be said about the ruling in \textit{Beech} is that the Alabama courts will not entertain an action for strict liability based upon injuries caused by an outboard motor without propeller guards. It is scant support for the broad proposition put forth by the reporters in the \textit{Restatement (Third)} that Alabama is a state that explicitly requires proof of a reasonable alternative design in design defect cases. The Alabama case law cited and discussed in the \textit{Restatement (Third)} simply does not support this broad proposition.

\textbf{C. The Southwest Region: New Mexico}

In 1972, New Mexico adopted the law of strict products liability as set forth in Section 402A of the \textit{Restatement (Second) of Torts}, with the New Mexico Supreme Court's ruling in the case of \textit{Stang v. Hertz Corp.}\textsuperscript{107} The New Mexico courts developed the law of strict products liability with strict adherence to the parameters of Section 402A.\textsuperscript{108} Some minor variations on liability, mostly in cases involving failure to warn of obvious dangers, were presented and adopted by the courts.\textsuperscript{109} However, the variations were eventually

\begin{footnotesize}
\begin{enumerate}
\item[104.] \textit{Id.} at 450.
\item[105.] 723 So. 2d 25 (Ala. 1998).
\item[106.] \textit{Flemister}, 723 So. 2d at 25-27; see \textit{supra} note 87 for a discussion of \textit{Flemister}.
\item[107.] 497 P.2d 732 (N.M. 1972). This case was a wrongful death action, brought against the Hertz Rental company, for damages caused to the passenger of a rented vehicle when a tire on the car blew out and caused an accident. \textit{Stang}, 497 P.2d at 733. In reversing a lower court finding that strict liability did not apply to this case, the New Mexico Supreme Court adopted the concept of strict liability as outlined in the \textit{Restatement (Second) of Torts}. The court then applied the concept of strict liability to the facts of this case and determined that there existed no basis to distinguish sellers of products from lessors of products regarding liability for injuries caused by defects in such products. \textit{Id.} at 735.
\item[108.] \textit{Id.} at 737.
\item[109.] \textit{See} Garrett v. Nissen, 498 P.2d 1359 (N.M. 1972) (holding that a trampoline was not defective for failing to provide warnings as to its dangers when it was not otherwise defectively manufactured, and user was an experienced gymnast who used trampoline frequently), \textit{overruled by} Klopp v. Wackenhut, 824 P.2d 293, 297 (N.M. 1992). \textit{See also} Skyhook v. Jasper, 560 P.2d 934 (N.M. 1977) (holding that a crane rig was not defective for
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overruled by subsequent decisions of the New Mexico Supreme Court.  

In 1995, in response to the growing debate over strict products liability, and specifically design defect cases, the New Mexico Supreme Court took the opportunity in *Brooks v. Beech Aircraft Corp.* to summarize and clarify the law of strict products liability in New Mexico, with particular attention paid to design defect cases. The *Brooks* case involved the death of the pilot in the crash of a private aircraft manufactured by the defendant. The plaintiff alleged that the plane was defective both in the design of the safety features for failing to install shoulder harness restraints, which enhanced the pilots injuries in the crash and caused his death. The action was brought in both negligence and strict liability. In *Brooks*, the court outlined four policy choices underlying the imposition of strict products liability. Analyzing the countervailing arguments of the defendant manufacturers and weighing them against those four policies, the court concluded that the benefits to society of maintaining strict products liability outweighed the concerns set forth by manufacturers.

Defendants argued that there was a distinct difference between manufacturing defects and design defects, and that fairness dictates that negligence principles should govern the requirements of proof in design defect cases. Additionally, the court stated that the want of available safety devices when the dangers involved in its use were obvious, known to the users, and the rig contained adequate visible warnings of said dangers, overruled by *Klopp v. Wackenhut*, 824 P.2d at 297.

110. See *Klopp v. Wackenhut Corp.*, 824 P.2d 293 (N.M. 1992) (overruling *Garrett* and *Skyhook Corp.*).

111. 902 P.2d 54 (N.M. 1995).


113. *Id.* at 55.

114. *Id.*

115. *Id.*

116. *Id.* at 57. The court cited four primary policies supporting imposition of strict products liability: (1) placing the cost of injuries caused by defective products on the manufacturer, who is in a better position to pass the true product cost onto all distributors, retailers, and consumers of the product; (2) relieving the injured plaintiff of onerous burden of establishing the manufacturer's negligence; (3) providing full chain of supply protection; and (4) in the interest of fairness, providing relief against the manufacturer who, while perhaps innocent of negligence, cast a defective product into the stream of commerce and profited thereby. *Id.* at 57-58.


118. *Id.* at 56. Beech argued that strict liability is an inappropriate standard to measure a supplier's liability for design defects. *Id.* Beech argued further that the concept of design defect may only be understood by reference to the manufacturer's conduct, and that negligence must be the sole standard of liability to ensure the public of the availability of
arguments surrounding the determination of the appropriate standard for proving that a product was defective were moot, considering the New Mexico strict products liability jury instructions defining defective products.\textsuperscript{119} The New Mexico jury instructions contained three instructions, the third of which includes a risk/utility component based upon the seven part analysis of defective products as enunciated by Dean John Wade in his article on the nature of strict products liability.\textsuperscript{120} In appropriate circumstances, these instructions, including the risk/utility component, are sufficient to allow the jury to focus attention on evidence reflecting meritorious choices made by the manufacturer on alternative design.\textsuperscript{121}

The court, however, distinguished this risk/utility analysis from the negligence based risk/utility analysis contained in the Restatement (Third) of Torts: Products Liability Proposed Draft by stating, "It is not the conduct of the manufacturer or the designer which is primarily in question, but rather the quality of the end result; the product is the focus of the inquiry."\textsuperscript{122} Thus, while maintaining the focus of liability on the product itself, the risk that the public will be needlessly deprived of beneficial products for the
sake of compensating injured victims will be minimized. The court went on to note, "[I]n most instances, the manufacturer will be aware of the risks posed by any given design and the availability of any alternative designs." The court concluded by stating, "Given the risk-benefit calculation on which the jury is instructed in New Mexico, and the policy considerations that favor strict liability, we believe that it is logical and consistent to take the same approach to design defects as to manufacturing flaws."

In the latest restatement, Professor Henderson relies on Brooks in making his assertion that the establishment of a risk/utility analysis for design defect cases implicitly requires a plaintiff to make a showing of a reasonable alternative design to prevail, by requiring the court to conduct a risk-utility test. Brooks does not support such a conclusion. In fact, the Brooks court concludes that only in those rare instances when the technology available at the time of trial has advanced beyond that which was known at the time of distribution will the risk utility component of the jury instruction be applicable. In most other cases, product design defects will be judged according to the standards applied in cases alleging manufacturing defects. Thus, citation to Brooks is insufficient to conclude that New Mexico implicitly requires proof of a reasonable alternative design in all design defect cases.

D. The Northwest Region: Washington

In the 1969 case of Ulmer v. Ford Motor Co., the Washington Supreme Court adopted Section 402A of the Restatement (Second) of Torts as the law in Washington regarding strict products liability. The court extended Section 402A to design defect cases.
in the 1975 crashworthiness case of Seattle-First National Bank v. Tabert. In Tabert, the court set out its consumer expectation test for determining the relative safety of a product in a design defect case.

Because this analysis contains elements of a risk/utility balancing test, it has been compared to a negligence standard. However, the Tabert court was clear in establishing its preference for the retention of strict liability by requiring the focus of the analysis to be on the product from the consumer's view, thereby eliminating any manufacturing perspective.

In 1981, the Washington legislature passed the Products Liability Act. Reading this statute literally, it appears that it adopted a negligence standard for strict products liability cases advanced on design defect theories, and appears to require proof of a reasonable alternative design; part of the statute states as follows:

A product is not reasonable safe as designed, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms and the adverse effect that an alternative design that was practical and feasible would have on the usefulness of the product . . .

decisions (although admittedly not expressed as such therein). The trial court erred in giving instructions which tended to create, in the minds of the jury, the impression that it was necessary that the plaintiff prove negligence.

Id. at 734-35.

130. 542 P.2d 774 (Wash. 1975) (en banc). Therein, the court stated:
A product may be just as dangerous and capable of producing injury whether its condition arises from a defect in design or from a defect in the manufacturing process. While a manufacturing defect may be more easily identified or proved, a design defect may produce an equally dangerous product. The end result is the same—a defective product for which strict liability should attach.

Id. at 776.

131. Id. at 779. Therein the court stated:
In determining the reasonable expectations of the ordinary consumer, a number of factors must be considered. The relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk may be relevant in a particular case. In other instances the nature of the product or the nature of the claimed defect may make other factors relevant to the issue.

Id.

132. Id.

133. WASH. REV. CODE ANN. §§ 7.72-010 to 7.72-060 (West 1992).

134. WASH. REV. CODE ANN. § 7.72-030(1)(a), Liability of Manufacturers (West 1992). The section also provides five methods by which a plaintiff could prove that a product was unreasonably dangerous. Id.
However, subsequent rulings by the state courts have not interpreted the act so literally.

Proving a product is defective by presenting proof of a reasonable alternative design had always been available to design defect plaintiffs in Washington. However, based upon the Washington Supreme Court decision in the case of *Connor v. Skagit Corp.*, the plaintiff may prove that a product was unreasonably dangerous by any number of acceptable methods, including proof of a reasonable alternative design. Plaintiffs could not prevail however, when the evidence of a reasonable alternative design was insufficient and it was the only proof offered to establish a defective product.

In deciding the 1985 case of *Couch v. Mine Safety Appliances, Co.*, its first case under the new statute, the Washington Supreme Court interpreted the language of the statute to comport with its original holding in *Tabert*. The *Tabert* court held that a product is not reasonably safe if it is unsafe beyond that which would reasonably be contemplated by the ordinary consumer. This statutory interpretation by the court gave renewed viability to the *Connor* decision following the adoption of the statute. The court stated that in light of the legislative intent to incorporate the language of *Tabert* into the statute, subsequent rulings such as *Connor*, that are in conformance with *Tabert*, would still govern the outcome of strict products liability cases. Therefore, although reasonable alternative design is listed as one of several statutory methods of proof in a design defect case, it is not the exclusive method by which such cases may be proved.

The reporters of the *Restatement (Third)* include the state of Washington in a group of states that they categorize as applying a "consumer expectation test" based upon a risk/utility analysis, thereby implicitly requiring proof of a reasonable alternative design. The reporters characterize such states as falling into a pattern of using consumer expectation rhetoric while applying risk/

135. 664 P.2d 1208 (Wash. 1983) (en banc).
137. 728 P.2d 585 (Wash. 1985) (en banc).
139. *Id.*
140. *Id.*
141. *Id.*
utility as the appropriate analysis.\textsuperscript{143}

Although it has been overlooked by the reporters, in order to understand the position of the Washington Supreme Court and its analysis of design defect cases, one must be aware of the fact that \textit{Tabert} is first and foremost a crashworthiness case. It appears that the Washington legislature included a reasonable alternative design requirement in their strict products liability statute, and that its inclusion was based on the ruling of the Washington Supreme Court in \textit{Tabert}.\textsuperscript{144} Nevertheless, subsequent cases have led the Washington Supreme Court to interpret the statute to include reasonable alternative design as just one way to prove such a case.\textsuperscript{145} Based upon these facts, it is reasonable to conclude that the Washington Supreme Court may disagree with the reporter's categorization of its law.

\textbf{E. The Heartland Region: Kansas}

In the state of Kansas, the law of strict products liability is based upon Section 402A of the \textit{Restatement (Second) of Torts}. The Kansas Supreme Court adopted Section 402A in the 1976 case of \textit{Brooks v. Deitz}.\textsuperscript{146} In determining the existence of a defective product based upon a design defect theory, the Kansas Supreme Court, in the case of \textit{Lester v. Magic Chef Inc.},\textsuperscript{147} adopted the consumer expectation test as outlined in Section 402A comment (i) as the proper standard.\textsuperscript{148} The court also determined that a risk utility balancing test was inapplicable.\textsuperscript{149} The court discussed and explicitly rejected the applicability of the \textit{Barker} test that had been

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\textsuperscript{143} \textit{Id.} at cmt. d, Reporters' Note, Part II-C. The reporters rely on the \textit{Tabert} case as support for their conclusion. \textit{Id.}

\textsuperscript{144} \textit{See Wash. Rev. Code Ann.} § 7.72-030 (West 1992); \textit{Tabert}, 542 P.2d at 779.

\textsuperscript{145} \textit{See Couch}, 728 P.2d at 589.

\textsuperscript{146} 545 P.2d 1104 (Kan. 1976). The plaintiff in this case, an experienced plumber, was injured while performing maintenance on a home furnace. \textit{Brooks}, 542 P.2d at 1106. A malfunctioning switch that controlled the gas supply had allowed an accumulation of gas near the floor around the heater. \textit{Id.} This gas exploded when the plaintiff attempted to work on the heater. \textit{Id.} The plaintiff's claims for injuries were submitted to the jury on both negligence and strict liability theories, and the jury awarded over $250,000 in damages. \textit{Id.} The defendant appealed, arguing that there was no cause of action in strict liability in Kansas. \textit{Id.} This act by the court of adopting Section 402A was simply a formal recognition of the legal basis upon which it had based its decisions in similar cases in the past. \textit{Id.} at 1108.

\textsuperscript{147} 641 P.2d 353 (Kan. 1982).

\textsuperscript{148} \textit{Lester}, 641 P.2d at 361. In order for a product to be unreasonably dangerous under the consumer expectation test, the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. \textit{Id.}

\textsuperscript{149} \textit{Id.}
\end{footnotesize}
developed in the California courts.\footnote{Id. See Barker v. Lull Eng’g Co. Inc., 573 P.2d 443 (Cal. 1978). The test developed in Barker states: [A] product may be found defective in design, so as to subject a manufacturer to strict liability for resulting injuries, under either of two alternative tests. First, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alternatively be found defective in design if the plaintiff demonstrates that the product’s design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.\textit{Id} at 455-56.}

Subsequent to its holding in \textit{Lester}, the Kansas Supreme Court seemed to expand its position as to what test to apply in the 1983 case of \textit{Siruta v. Hesston Corp.}\footnote{659 P.2d 799 (Kan. 1983).} There the court stated that, in strict liability actions, a plaintiff may sustain his burden of proof concerning design defects by showing the feasibility of a safer design.\footnote{Siruta, 659 P.2d at 808. The plaintiff brought his case in strict liability against the manufacturer of a hay baler. \textit{Id.} at 801. While operating the defendant’s machine, plaintiff’s arm was caught in the mechanism and severed after it entered the chute of the hay baler. \textit{Id.} The plaintiff sought to prove that the machine was unreasonably dangerous by offering evidence that the defendant, after the occurrence of the relevant incident, incorporated the plaintiff’s proffered alternative design into its product. \textit{Id.} at 807. The defendant sought to exclude the evidence as prohibited under the rules against admission of subsequent remedial measures. \textit{Id.} The court ruled that the evidence had not been presented to establish negligence on the part of the defendant, but only to show that the design offered by the plaintiff was feasible, and was therefore admissible for that purpose. \textit{Id.} at 809.\footnote{689 P.2d 795 (Kan. 1984).} The court resolved the apparent conflict between \textit{Siruta} and \textit{Lester} concerning which test or tests applied to design defects cases in \textit{Betts v. General Motors Corp.}\footnote{Id. at 801. The court concluded that jury instructions have nothing to do with the evidence that may be offered at trial, and in a products liability action the parties may present evidence on risk-utility, including feasibility of safer designs along with many other factors. \textit{Id.} Such evidence is allowed but not necessarily required in a design defect case, and regardless of the evidence produced, the jury will receive a consumer expectation instruction. \textit{Id.}} Therein the court held that in a design defect case, the proper jury instruction for whether a design is unreasonably dangerous is the consumer expectation test, and that evidence of a reasonable alternative design based upon a risk/utility analysis is allowed but not required.\footnote{Id. at 801.}

In 1981, Kansas adopted a comprehensive Products Liability Act that severely limited consumers’ rights by placing limitations on consumer actions, including a statute of repose, and implementing provisions regarding useful safe life.\footnote{KAN. STAT. ANN. §§ 60-3301 to 60-3307 (1994).}

It also provides for defenses
based upon compliance with government standards, and a state-of-the-art defense.\textsuperscript{156} There are also limitations for non-manufacturers and limitations on the manufacturer's duties, including the duty to warn, and limitations for a seller's lack of knowledge of a defect.\textsuperscript{157} None of the provisions of the Act, however, modify the rulings of the Kansas Supreme Court as to the viability or applicability of the consumer expectation test in design defect cases.

The reporters of the \textit{Restatement (Third)} list Kansas among those states that implicitly require proof of a reasonable alternative design without explicitly doing so.\textsuperscript{158} They base this statement on their conclusion that, under \textit{Betts}, Kansas requires the application of a risk/utility test in design defect cases.\textsuperscript{159} This appears to be a rationalization on the part of the reporters to conform the court's ruling to their preconceived notion of the proper proof in a design defect case. The \textit{Betts} court stated that in a design defect case, the jury will be instructed on the consumer expectation test, but that jury instructions have nothing to do with evidence offered at trial.\textsuperscript{160} Therefore, it would be ludicrous to assume that the court meant to require juries in design defect cases to be instructed on a consumer expectation test, but then require plaintiffs to meet an entirely different standard, the risk/utility test. Confusion would certainly prevail over such proceedings.

The only rational interpretation of the court's ruling in \textit{Betts} is that the plaintiff in a design defect case must present evidence sufficient to meet his burden under the consumer expectation test. Thus, if he chooses, the plaintiff may submit evidence normally presented to support elements of a risk/utility balancing test. However, the court will not conform the appropriate test to the evidence presented. Although a plaintiff can present any evidence he wishes, including evidence of a reasonable alternative design, he can prevail only if the evidence is sufficient to meet his burden under a consumer expectation test.

In a case decided after the \textit{Restatement (Third)} was published, the Kansas Supreme Court explicitly rejected the requirement of a reasonable alternative design as the standard of proof in a design

\begin{itemize}
  \item \textsuperscript{158} \textit{Restatement (Third) of Torts: Products Liability} § 2 cmt. d, Reporters' Note at II-B, 68 (1997).
  \item \textsuperscript{159} \textit{Id.}
  \item \textsuperscript{160} \textit{Betts}, 689 P.2d at 801.
\end{itemize}
defect case. In the case of Delaney v. Deere & Company, the court summarized the development of the law of strict products liability, and its conclusions were consistent with the foregoing analysis of Kansas law. The basic issue in the case was whether a defendant could escape liability under the Kansas Products Liability Act for injuries caused by a defective machine when the danger was patent and the manufacturer provided, and the plaintiff had read, adequate warnings and instructions. The United States District Court for the District of Kansas granted summary judgment for the defendant. The district court ruled that the Kansas statute precluded the manufacturer's duty to warn of or protect against patent hazards, and that comment (j) to Section 402A of the Restatement (Second) of Torts established "as a matter of law" that providing adequate warnings would insulate a product from a finding of defectiveness. On appeal, the United States Court of Appeals for the Tenth Circuit was unable to synthesize the Kansas rulings and certified two questions to the Kansas Supreme Court for their disposition. That court was asked to determine if Section 60-3305(c) of the Kansas statute applied to both the duty to warn and the duty to protect against hazards, and whether Kansas adhered to comment (j) of Section 402A, or whether comment (1) to Section 2 of the Restatement (Third) of Torts more accurately reflected the law of Kansas on the subject.

The Kansas Supreme Court ruled that Section 60-3305(c) only applied to the duty to warn. More importantly for the purposes of this comment, the Kansas Supreme Court rejected both comment (j) to Section 402A of the Restatement (Second) of Torts, and

162. Delaney, 999 P.2d at 934-35.
164. Id. at 933. The plaintiff was injured when a round hay bale he was moving with the defendant's tractor fell on him. Id. The plaintiff was using a home-made fork device without a safety clip to lift the bale in direct contravention of the warnings and instructions provided by the manufacturer and accompanying the tractor. Id.
165. Id.
166. Id.
167. Id.
168. Id. Comment j to 402A reads, "[W]here warning is given, the seller may reasonably assume that it will be read and heeded: and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." Restatement (Second) of Torts § 402A cmt. j (1968). Comment 1 to Section 2 of the Restatement (Third) states generally that adequate warnings and instructions will not save a product from being found defective. See Restatement (Third) of Torts: Products Liability § 2 cmt. 1 (1997).
169. Delaney, 999 P.2d at 940.
comment (1) to Section 2 of the *Restatement (Third) of Torts*. The court stated that it examined comment (1) and found it "wanting." In rejecting comment (1), the court noted that although comment (1) directly contradicted comment (j), adopting comment (1) would implicitly import the concept of a reasonable alternative design into the law of Kansas. The court concluded by stating unequivocally that, in the state of Kansas, the determination of the existence of a defectively designed product is judged exclusively by the consumer expectation test.

The reporters for the *Restatement (Third)* got Kansas dead wrong when it placed that state in the category of states that implicitly require proof of a reasonable alternative design without explicitly doing so. The reporters should not be put to task for the *Delaney* court's clarification of Kansas law, because *Delaney* was decided after the *Restatement (Third)* was published. However, the *Delaney* court relies on prior Kansas case law when stating that "Kansas has consistently held that evidence of a reasonable alternative design may [be] but is not required to be introduced in a design defect action." 

**F. The Midwest Region: Indiana**

The law of strict products liability in Indiana was slow to develop due to relative inaction by the Indiana Supreme Court. In 1970, the Indiana Supreme Court adopted Section 402A of the *Restatement (Second) of Torts* in the case of *Cornette v. Searjeant Metal Products, Inc.* Up until this point, the court had relied on the federal courts and lower state courts to develop its law. Prior to *Cornette*, the decision of the United States Court of Appeals for the Seventh Circuit in the 1966 crashworthiness case of *Evans v.*
General Motors Corp.\textsuperscript{177} had significant influence in directing the Indiana courts in the development of its law on strict products liability.\textsuperscript{178} Subsequent cases decided by the Indiana Supreme Court revolved around the issue of the "open and obvious danger," which the Evans court found to be significant to its ultimate ruling that an automobile manufacturer did not have a duty to foresee that its product would be used to collide with other vehicles.\textsuperscript{179} The court concluded that collisions were an open and obvious danger that should be avoided by the user of the product.\textsuperscript{180} This influence continued to be viable even after the 1978 enactment of Indiana's strict products liability statute, as evidenced by appellate court rulings relying on the open and obvious danger rule as developed by the federal courts sitting in diversity cases.\textsuperscript{181}

The law in Indiana took a dramatic turn in 1978 with the adoption of a products liability statute and the Indiana Supreme Court's ruling in the case of Koske v. Townsend Engineering Co.\textsuperscript{182} In Koske, the supreme court ruled that the Indiana products liability statute preempted the field of strict liability in tort, and thus overruled previously recognized common law doctrines that conflicted with the statute.\textsuperscript{183} In the case of Miller v. Todd, which followed closely on the heels of Koske, the Indiana Supreme Court effectively negated the Seventh Circuit's ruling in Evans by recognizing the viability of a cause of action based on enhanced injury, crashworthiness, and second collision.\textsuperscript{184}

Under the Indiana products liability statute, the proper test to determine the existence of an unreasonably dangerous product is the "consumer expectation test."\textsuperscript{185} The Indiana products liability

\textsuperscript{177} 359 F.2d 822 (7th Cir. 1966).
\textsuperscript{178} Cornette, 258 N.E.2d at 655-56. In Evans, the court determined that the defendants could not be held liable for injuries caused by a defectively designed automobile as a result of a second collision. Evans, 359 F.2d at 825.
\textsuperscript{179} Evans, 359 F. 2d at 824.
\textsuperscript{180} Id.
\textsuperscript{181} See Bemis Co. Inc. v. Rubush, 427 N.E.2d 1068, 1061-64 (Ind. 1981) (citing Burton v. Smith Foundry, 529 F.2d 108 (7th Cir. 1976); and Posey v. Clark Equip. Co., 409 F.2d 560 (7th Cir. 1969)). According to the court, the open and obvious danger rule precluded liability of the defendant under either negligence or strict liability unless the plaintiff could show that the defect was "hidden and not normally observable, constituting a latent danger." Id. at 1061.
\textsuperscript{182} See IND. CODE ANN. §§ 34-20-1-1 to 34-20-9-1 (Lexis 1998); 551 N.E.2d 437 (Ind. 1990).
\textsuperscript{183} Koske, 551 N.E.2d at 443.
\textsuperscript{184} 551 N.E.2d 1139 (Ind. 1990).
\textsuperscript{185} See IND. CODE ANN. § 34-20-4-1 (Lexis 1998), which states as follows:
A product is in a defective condition under this article if, at the time it is conveyed by
statute has a separate section governing design defect cases, and although that section modifies the rule of strict liability as it is expressed for manufacturing defects, it does not expressly require proof of a reasonable design alternative in all design defect cases. The requirement of proving a reasonable alternative design in a design defect case in Indiana is only present in the cases brought under the theories of crashworthiness and second collisions.

The restatement reporters take the position that the law in Indiana explicitly requires proof of a reasonable alternative design for design defect cases. This conclusion is based exclusively on Indiana case law developed in the area of crashworthiness, and not on the Indiana products liability statute, which preempts prior conflicting case law. As was seen in the previous discussion of this particular cause of action, proof of reasonable alternative
design has always been a requirement in crashworthiness cases. To infer from this, in the face of contrary statutes and interpretive case law, that the law of Indiana requires such proof in all strict products liability cases alleging design defect, is deceptively misleading.

G. The Northeast Region: Connecticut

The Connecticut Supreme Court adopted Section 402A of the Restatement (Second) of Torts as the basis for strict products liability in the 1965 case of Garthwait v. Burgio. In a subsequent case, Slepski v. Williams Ford Inc., the court determined that in a strict products liability case alleging a design defect, the proper test to apply to determine whether a product is unreasonably dangerous was the consumer expectation test.

Subsequent to the court's decisions in the previously cited cases, the Connecticut legislature adopted several statutes designed to impact the rights of consumers in cases involving strict products liability. However, none of the statutes passed in Connecticut have had the effect of undermining the common law cases of strict products liability, and as such, the standards for proving both defectiveness and unreasonably dangerous remain the same.

The Connecticut Superior Court most recently reaffirmed Connecticut's adherence to the consumer expectation test in strict
products liability cases in the case of Stevens v. Romer.\textsuperscript{195} Prior to Stevens, the Connecticut Supreme Court had expressly rejected the requirement of a reasonable alternative design in design defect cases in the case of Potter v. Chicago Pneumatic Tool Co.\textsuperscript{196}

The restatement reporters strain to include Connecticut in the group of states that explicitly state that the proper test to be applied in a design defect case is the consumer expectation test, but that, according to the reporters, actually utilize a risk/utility test, which, again according to the reporters, implies the necessity of a finding of a reasonable alternative design.\textsuperscript{197} The reporters infer from the mere mention of risk/utility within the leading Connecticut cases that proof of a reasonable alternative design is (implicitly) required in all design defect cases in that jurisdiction.\textsuperscript{198}

On the contrary, when commenting on the proper test to be applied in a design defect case, the Connecticut Supreme Court in Potter stated, "The ordinary consumer expectation test is appropriate when the everyday experience of the particular product's users permits the inference that the product did not meet minimum safety expectations."\textsuperscript{199} The court did, however, recognize a modified test in those cases where complex machinery was the product at issue and ordinary consumers may not have been in a position to form any expectations as to the performance of such a machine. The Potter court stated that in such cases, "The jury should engage in the risk-utility balancing required by our modified consumer expectation test when the particular facts do not reasonably permit the inference that the product did not meet the

\begin{itemize}
\item \textsuperscript{195} 1999 WL 195958, at *2 (Conn. Super. Mar. 24, 1999). The plaintiff herein had brought a claim under a theory of strict products liability, after the defendant pharmacy had provided him with the wrong prescription drug. Id. at *1. The defendant sought to strike the plaintiff's complaint as failing to state a claim upon which relief could be granted, asserting that although the plaintiff had been given the wrong drug, the drug he received was not defective. Id. at *2. Applying the consumer expectation test, the court stated that the plaintiff could have expected to receive the proper drug and thus the improper drug was defective to the extent that it undermined the plaintiff's reasonable expectations that it was the proper drug. Id. at *3.

\item \textsuperscript{196} 694 A.2d 1319 (Conn. 1997). Therein the court stated, "The defendants propose that it is time for this court to abandon the consumer expectation standard and adopt the requirement that the plaintiff must prove the existence of a reasonable alternative design in order to prevail on a design defect claim. We decline to accept the defendants' invitation." Id. at 1331 (emphasis added).

\item \textsuperscript{197} RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d, Reporters' Note at II-C, 71-72 (1997).

\item \textsuperscript{198} Id.

\item \textsuperscript{199} Potter, 694 A.2d at 1333.
\end{itemize}
safety expectations of the ordinary consumer." Regardless of having adopted such a modified test, the court emphasized that it was not abrogating the general consumer expectation test in design defect cases by stating, "There are certain kinds of accidents—even where fairly complex machinery is involved—[that] are so bizarre that the average juror, upon hearing the particulars, might reasonably think: ‘Whatever the user may have expected from that contraption, it certainly wasn’t that.’

The rationalizations of the restatement reporters with respect to the law of Connecticut seems to be an attempt to construct a hole designed to accept the legal peg fashioned by the Potter court. The Potter decision means what it says: a risk/utility balancing test is appropriate in some design defect cases, namely those involving products beyond the experience of an ordinary consumer. This does not in any way infer that Connecticut requires proof of a reasonable alternative design in all design defect cases.

III. THE LAW OF STRICT PRODUCTS LIABILITY IN PENNSYLVANIA

Strict products liability law in Pennsylvania stands virtually alone in its uncompromising adherence to the original concept of strict liability under Section 402A of the Restatement (Second) of Torts. In 1966, the Pennsylvania Supreme Court adopted the law of strict liability, as outlined in Section 402A, in the seminal case of Webb v. Zern. Since that time, there have been several significant rulings rejecting negligence principles and cementing the concept of strict products liability in Pennsylvania. In the 1975 case of Berkebile v. Brantly Helicopter Corp., the Pennsylvania Supreme Court stated that “the reasonable man standard, in any form, has no place in strict liability.” In the 1978 case of Azzarello v. Black Brothers

200. Id.
201. Id.
202. 220 A.2d 853 (Pa. 1966). This case arises from the explosion of a beer keg. Webb, 220 A.2d at 854. The keg had been tapped and placed in a room, and persons had extracted approximately one gallon of beer from the keg. Id. When the plaintiff entered the room, the keg inexplicably exploded, causing serious injuries to the plaintiff. Id. The plaintiff had proceeded on a res ipsa loquitur negligence theory because it was impossible to determine precisely what had caused the explosion. Id. The trial court granted the defendants demurrer and dismissed, citing the failure of the plaintiff to join both his brother and father who had an opportunity to control the keg, and the expiration of the statute of limitations. Id. The Pennsylvania Supreme Court reversed and acknowledged that the plaintiff had plead his case broadly enough to have stated a claim under the newly adopted strict products liability theory of defective products as stated in Section 402A of the Restatement (Second) of Torts. Id. at 854.
204. Berkebile, 337 A.2d at 899. The court explained, “[w]e recognize that the words
Co., Inc., the Pennsylvania Supreme Court announced the underlying social policy upon which it based its view of manufacturers as guarantors of the safety of their products. The court stated:

Today a manufacturer is effectively the guarantor of his product's safety. Our courts have determined that a manufacturer, by marketing and advertising his product, impliedly represents that it is safe for its intended use. We have decided that no current societal interest is served by permitting the manufacturer to place a defective article in the stream of commerce and then to avoid responsibility for damages caused by the defect.

This policy does not, however, make the manufacturer of a product an insurer of the product's safety.

With respect to the law of strict products liability in Pennsylvania, the Azzarello decision has created much confusion over the application of a risk/utility balancing test and the requirement of proof in the form of a reasonable alternative design. For one to understand the present state of the law of strict liability, ‘unreasonably dangerous’ may serve the beneficial purpose of preventing the seller from being treated as the insurer of its products. However, we think that such protective end is attained by the necessity of proving that there was a defect in the manufacture or design of the product, and that such defect was a proximate cause of the injuries. Id. at 900 (quoting Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1161 (Cal. 1972)).


Azzarello, 391 A.2d at 1026. Plaintiff was injured when she caught her hand in the rollers of a coating machine at work. Id. at 1022. She sued the manufacturer under a strict liability theory, citing Section 402A of the Restatement (Second) of Torts. Id. The manufacturer joined the plaintiff’s employer as an additional defendant, claiming that the employer's negligence caused the injury. Id. Following jury instructions, which focused on the “unreasonably dangerous” language in Section 402A, the jury found the manufacturer was not liable and the employer was liable, and awarded the plaintiff $125,000. Id. The plaintiff moved for a new trial, which was granted based on an intervening opinion of the Pennsylvania Supreme Court, which banned the use of negligence principles in a strict liability case. Id. at 1023. The manufacturer appealed and the superior court affirmed the grant of a new trial. Id. The supreme court ruled that the use of the words “unreasonably dangerous” in jury instructions in a strict liability context was misleading, and inappropriate to the proper determination of the jury regarding the defectiveness of a product. Id. at 1027.

Id. at 1026 (quoting Salvador v. Atlantic Boiler Co., 319 A.2d at 907).

Id. at 1024. The distinction between guarantor and insurer lies in the proof required of the plaintiff. It is insufficient for the plaintiff to simply show that he used the product and was injured. Id. at 1024, n.5. Such a standard would make the manufacturer an insurer of its product. Id. In order to prevail under Section 402A of the Restatement (Second) of Torts, the plaintiff must prove that the product was unsafe in some way. Id. See supra notes 4-6 and accompanying text for a discussion of the manufacturer-as-guarantor policy that underlies the theory of strict products liability.
products liability in Pennsylvania, one must understand the supreme court's holding in *Azzarello*.

In *Azzarello*, the court adopted a requirement that a trial court conduct a risk/utility balancing of the plaintiff's averments of fact in order to make a threshold determination of the viability of its strict products liability claim.\(^{209}\) By inference, this requirement would seem to require all plaintiffs to submit proof of a reasonable alternative design in all design defect cases. However, the *Azzarello* ruling did not propose to establish a standard of proof in design defect cases.\(^{210}\) The purpose of the risk/utility balancing test enunciated in *Azzarello* is to ensure that the social policy rejecting the position of manufacturer as insurer of its product is not violated.\(^{211}\) Subsequent court rulings have clarified the *Azzarello* ruling by limiting it to those cases in which the minds of reasonable people could not differ on whether the risks posed by a product outweigh its utility.\(^{212}\)

In the case of *Dambacher v. Mallis*, the Pennsylvania Superior Court ruled that the trial court need not proceed to a social policy determination under *Azzarello*, absent a specific request by the defendant, and the absence of such a determination on the record would amount to a presumption by a reviewing court that the resolution of that question was against the defendant.\(^{213}\) Thus, the purpose of the *Azzarello* balancing test is to prevent a plaintiff from seeking damages for injuries caused by a product, where the granting of relief would amount to placing the manufacturer in a position of insurer. The most obvious example of such a scenario would be a plaintiff suing the manufacturer for injuries caused by a knife while he was in the process of slicing a tomato. The ruling in

\(^{209}\) *Id.* at 1026.

\(^{210}\) *Id.*

\(^{211}\) *Id.* at 1024-25.

\(^{212}\) *Dambacher v. Mallis*, 485 A.2d 408, 423 (Pa. Super. Ct. 1984) (citing *O'Brien v. Muskin Corp.*, 463 A.2d 298 (N.J. 1983)). In *Dambacher*, the plaintiff was injured as a passenger in a vehicle that slid off the road in a rainstorm. *Dambacher*, 485 A.2d at 412. She sued the seller of the radial tires used on the vehicle in strict liability for failure to warn against the dangers inherent in mixing radial and non-radial tires. *Id.* at 411. On appeal from the jury verdict against it, the seller averred that the trial court, applying the rule established by the court in *Azzarello*, should have proceeded to determine whether the lack of warnings on the tires rendered the product "unreasonably dangerous." *Id.* at 420. In rejecting this argument, the court stated that, under *Azzarello*, the trial court should determine whether the proffered evidence would support a finding by the jury that the tire was defective, however, it did not follow that such a finding should lead to a conclusion by the court that the tire was or was not defective. *Id.*

\(^{213}\) *Dambacher*, 485 A.2d at 422.
Azzarello does not speak of the proof required of a plaintiff in establishing the defectiveness of a product once the social policy distinction mandated by Azzarello has been made.\textsuperscript{214}

Support for this view of the limited application of Azzarello can be found in the fact that even after Azzarello, the Pennsylvania courts have continually and consistently applied a consumer expectation test as the basis of liability in a design defect case.\textsuperscript{215} The only Pennsylvania cases recognizing a requirement for a showing of a reasonable alternative design are those that advance a claim under a crashworthiness or second collision theory of liability.\textsuperscript{216}

In the case of \textit{Surace v. Caterpillar, Inc.}, the United States Court of Appeals for the Third Circuit relied on Azzarello when it predicted that the Pennsylvania Supreme Court would adopt the seven point analysis of Dean John Wade and allow for recovery in a strict products liability case prosecuted on a design defect theory based upon a risk-utility analysis.\textsuperscript{217} In that case, the court extended

\begin{itemize}
\item \textsuperscript{214} Azzarello, 391 A.2d at 1024.
\item \textsuperscript{215} Ellis v. Chicago Bridge & Iron Co., 545 A.2d 906 (Pa. Super. Ct. 1988) (citing Sherk v. Daisy-Heddon, 427 A.2d 657, 661 (Pa. Super. Ct. 1981)). Ellis involved an action for damages arising out of the death of plaintiff's husband, which occurred when irregular shaped steel plates being loaded onto a barge fell on top of him. Ellis, 545 A.2d at 907. The plaintiff alleged that the plates were defectively designed in that they lacked sufficient warnings or instructions concerning the danger inherent in handling the objects. \textit{Id}. at 908. The court held that in a failure to warn situation, it is only necessary to warn of latent dangers, and that the application of the consumer expectation test as to open and obvious dangers would result in a finding that a product was not defective. \textit{Id}. at 912.
\item \textsuperscript{216} See Kupetz v. Deere & Co. Inc., 644 A.2d 1213 (Pa. Super. Ct. 1994). \textit{See also} Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976). In order to prevail on a crashworthiness theory in a products liability action under Section 402A, a plaintiff must demonstrate (1) that the design of the vehicle was defective and that when the design was made, an alternative, safer design practicable under the circumstances existed; (2) what injuries, if any, would have resulted to the plaintiff had the alternative, safer design, in fact, been used; and (3) some method of establishing the extent of plaintiff's enhanced injuries attributable to the defective design. \textit{Kupetz}, 644 A.2d at 1218.
\item \textsuperscript{217} 111 F.3d 1039 (3d Cir. 1997). The seven points of consideration proposed by Dean Wade are as follows:
\begin{enumerate}
\item the usefulness and desirability of the product — its utility to the user and to the public as a whole;
\item the safety aspects of the product — the likelihood that it will cause injury, and the probable seriousness of the injury;
\item the availability of a substitute product which would meet the same need and not be as unsafe;
\item 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;
\item the user's ability to avoid danger by the exercise of care in the use of the product;
\item 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 instruction; and
\item the feasibility, on the part of the manufacturer, of spreading the loss by adjusting the price of the
\end{enumerate}
the scope of Azzarello when it not only applied the risk/utility analysis to make a threshold determination as to the applicability of the recognized social policy regarding strict products liability, but also applied it to the proof of a reasonable alternative design offered by the plaintiff to support his theory of defect. However, such an application of the Azzarello rule may not prove acceptable to the Pennsylvania Supreme Court in a subsequent case. The court of appeals recognized this possibility when it took notice of the fact that the Pennsylvania Supreme Court has not yet spoken directly to this issue. As of now, it is not clear whether a plaintiff's strict products liability claim, advanced on a theory of design defect and supported by proof of a reasonable alternative design, would be subjected to a risk/utility analysis as predicted by the Third Circuit, or whether such proof would be judged on its sufficiency to pass muster under a consumer expectation test.

The Restatement (Third) reporters include Pennsylvania in the group of states that explicitly require proof of reasonable alternative design. The reporters find support for this conclusion exclusively in the Pennsylvania Supreme Courts ruling in Azzarello. They cite to three additional cases as evidence of the application of the Azzarello rule to require proof of a reasonable alternative design in a design defect case.

The first case the reporters cite is Fitzpatrick v. Madonna. However, reliance on this case to support their position is misguided, and is evidence of the reporters' misunderstanding of the purpose of the Azzarello ruling. In Fitzpatrick, the product or carrying liability insurance. Id. at 1046 (quoting Daumbacher v. Mallis, 485 A.2d 408, 423 n.5 (Pa. Super. Ct. 1984) (citing John Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L. J. 825, 837-38 (1973))).

218. Id. at 1053.
219. Id. at 1051.
220. Id. at 1042.
221. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d, Reporters' Note at II-A, 57 (1997).
222. Id.
224. 623 A.2d 322 (Pa. Super. Ct. 1993). In this case, plaintiff's decedent was killed when struck by the propeller of a motor boat while swimming. Fitzpatrick, 623 A.2d at 323. The court, conducting the test established in the Azzarello case, used a risk/utility analysis to determine that the propeller was not defective, and held that to allow the plaintiff to recover on the proffered evidence would make the manufacturer liable for any damages caused by the propeller. Id. at 326.
Pennsylvania Superior Court affirmed the trial court's decision to dismiss the plaintiff's design defect claim against the maker of an outboard motor as violative of the social policy underlying the law of strict products liability after it conducted the Azzarello risk/utility balancing test. The court did not determine whether the proof of product defectiveness offered by the plaintiff was sufficient to support such a finding if the case had been presented to a jury. This case illustrates the proper application of the rule of Azzarello.

The second case cited by the reporters is the case of Surace v. Caterpillar, Inc. This case was discussed above, and the ruling in Surace is dubious support for the conclusion reached by the reporters due to the Surace court's expanded application of the rule of Azzarello.

The third case cited by the reporters is Defrancesco v. Excam, Inc. In Defrancesco, the Pennsylvania Superior Court clearly rejected the argument that the Azzarello risk/utility analysis implied the requirement of proof of a reasonable alternative design. Based upon this ruling, the reporters attempt to make a hairline distinction between the standard identifying a design defect and the variety of proof the plaintiff must introduce to prove that defect. They infer from this distinction that Defrancesco "supports, rather than contradicts," the requirement that the plaintiff show a reasonable alternative design in a Pennsylvania design defect case. Contrary to this conclusion, the court in Defrancesco was

225. Id. at 327.
226. Id.
227. Surace, 111 F.3d at 1039.
228. 642 A.2d 529 (Pa. Super. Ct. 1994). In Defrancesco, the plaintiff was injured when the derringer pistol he was carrying in his sweater pocket accidentally discharged when the hammer struck a box as he bent over. Id. at 530. The plaintiff asserted, through his expert witnesses, that the weapon was defective because it was possible to discharge the weapon by striking the hammer when it was resting against the breach, and that it was possible to place the hammer in a pseudo half-cocked position such that sufficient pressure on the safety would cause the hammer to fall and the weapon to discharge. Id. Following a jury verdict, the defendants appealed stating that the plaintiff had failed to prove defectiveness by failing to present proper evidence of a reasonable alternative design which was feasible. Id.
The court rejected this argument stating that such proof was not required in Pennsylvania. Id. at 531.
229. Defrancesco, 642 A.2d at 531.
230. RESTATMENT THIRD OF TORTS: PRODUCTS LIABILITY, § 2 cmt. d, Reporters' Note at II-A, 57 (1997). "In evaluating Pennsylvania cases, one must be careful to distinguish the standard for identifying design defects from the variety of proof that the plaintiff must introduce, through expert testimony, to establish a breach of that standard." Id.
231. Id.
clear in its holding that such proof was not required.\textsuperscript{232}

The forgoing discussion of the Pennsylvania law seriously undermines the reporters' conclusion that this jurisdiction requires proof of a reasonable alternative design in all design defect cases. The reporters go to great lengths to isolate statements made by the Pennsylvania courts regarding the use of a risk/utility balancing test in their analysis of cases under \textit{Azzarello}. Using these isolated statements, they then proceed to construct a complex inferential analysis to create support for their position. In doing so, they overlook the clear and obvious pronouncements of the Pennsylvania courts, which are contrary to such a conclusion.

Pennsylvania has staunchly maintained the separation of negligence principles and strict products liability law; it is a disservice to the Pennsylvania appellate courts that the reporters of the \textit{Restatement (Third)} ignore this effort and categorize Pennsylvania as a jurisdiction that explicitly requires proof of a reasonable alternative design in all design defect cases.

\textbf{CONCLUSION}

The fallacy of the \textit{Restatement (Third) of Torts: Products Liability} is its conclusion, drawn from a survey found in the Reporters' Notes to comment (d) of Section 2, that the majority of jurisdictions in the United States already require (either expressly or impliedly) proof of a reasonable alternative design in all design defect cases. There is no doubt that some jurisdictions would allow the introduction of evidence of a reasonable alternative design to prove design defect in strict products liability cases. In fact, many, if not all, jurisdictions would actually require such proof in certain cases, such as in crashworthiness cases. However, it does not follow that such jurisdictions require such proof in all design defect cases. It is undeniable that the concept of a reasonable alternative design is based in the law of negligence, and as such its inclusion into the law of strict products liability undermines the social policy embodied in the theory of strict liability of manufacturer-as-guarantor.

\textsuperscript{232} \textit{Defrancesco}, 642 A.2d at 531. The court stated, "We have held that in a defective design case, the question is whether the product could have been designed more safely." \textit{Id}. The court continued, "Although appellants suggest that current Pennsylvania law requires a plaintiff to make a showing of a reasonable alternative design based upon a risk/utility analysis, such a suggestion was error as Pennsylvania has not imposed such rigorous restriction in strict liability cases." \textit{Id}. 
The law of strict products liability is undergoing a continuous assault as competing forces seek to bolster their positions on the issues. By seeking court decisions that favor their arguments, special interest advocates hope to amass a body of precedent law sufficient to overcome further resistance to their desired changes. In dealing with such cases, the courts have attempted to maintain a logical and fair method of resolving individual claims, while still maintaining adherence to the basis of the law in their jurisdictions. The basis of that law in most jurisdictions today is still Section 402A of the Restatement (Second) of Torts.

The reporters of the Restatement (Third) took the position that the law of strict products liability was in such a state as to require the aid of the ALI to restate the law and create cohesion among the jurisdictions. In undertaking this endeavor, they engaged in rhetorical license and analytical legerdemain to arrive at the conclusion that a majority of jurisdictions in this country now require plaintiffs to produce evidence of a reasonable alternative design before they can recover on claims of defectively designed products on a theory of strict products liability. As has been demonstrated by this discussion, one could find strong support in the very same case law reviewed by the reporters that such is not the case. The reporters of the Restatement (Third) have engaged in a lengthy research and writing project purporting to restate the law of products liability, but have succeeded in producing nothing more than an extensive brief in support of their personal views.

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