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Notes

A Reasonable Alternative to the Reasonable Alternative Design Requirement in Products Liability Law: A Look at Pennsylvania

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The manner in which design defects should be defined has caused more controversy than any other area of products liability law. The Restatement (Third) defines a product design as defective when the foreseeable risks of harm from using a product could have been avoided if the manufacturer had used a reasonable alternative design. This definition departs from the Restatement (Second), which defines defective products as unreasonably dangerous if the product fails to meet the expectations of consumers. Without so stating, the Restatement (Third) essentially changes products liability law from a regime of strict liability to one of negligence.

The debate is most unsettled in Pennsylvania. The Pennsylvania Supreme Court currently follows the approach of the Restatement (Second), holding that negligence has no place in determining whether a product is defective and, instead, modeling liability based on consumer expectations. In 2007, however, the Third Circuit predicted that the Pennsylvania Supreme Court would adopt the Restatement (Third) and apply a fault-based standard to determine liability in products liability cases. The Pennsylvania Supreme Court granted certiorari in a case to decide whether it should apply the Restatement (Third); however, in 2009, it dismissed the appeal as improvidently granted. As a result, the products liability law in Pennsylvania is in flux.

I argue that instead of following either of the Restatements, courts should apply strict liability, in which manufacturers are liable for foreseeable harm caused by their products, regardless of whether the product was deemed "defective." Although defect will not serve as a limitation on liability, manufacturers will be protected under my proposal by the affirmative defenses of negligent use or assumption of risk. By eliminating the elusive concept of defect from products liability, liability will be more predictable and will better reflect the costs of product use.

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INTRODUCTION

The manner in which design defects should be defined has generated more discussion and caused more controversy than any other area of products liability law.[1] Defining design defects was the most

1. David G. Owen, *Design Defect Ghosts*, 74 BROOK. L. REV. 927, 927 (2009).

explosive issue surrounding the drafting and adoption of the Restatement (Third) of Torts: Products Liability ("Restatement (Third)").[2] Now, more than ten years after its publication in 1998, neither courts nor scholars agree on the proper definition for design defects.[3] Rather, the controversy seems to have increased, as disagreement exists over the extent to which the Restatement (Third) has been adopted by the states, whether it should be adopted, and the scope of liability imposed once it has been adopted.[4]

The controversy surrounding the Restatement (Third) centers on section 2, which defines defective product design.[5] The Restatement (Third) defines a product design as defective when the foreseeable risks of harm from using a product could have been minimized or "avoided" if the manufacturer had used "a reasonable alternative design."[6] This definition departs from the Restatement (Second) of Torts: Products Liability ("Restatement (Second)"), which defines defective products as unreasonably dangerous if the product fails to meet the expectations of consumers, and this failure is in turn unreasonably dangerous to the consumer.[7] The Restatement (Second) imposes liability even if the seller exercises all possible care in the preparation and sale of the product.[8] In contrast, under the reasonable alternative design requirement of the Restatement (Third), liability hinges on the conduct of the manufacturer.[9] Although the Restatement (Third) does not use either term, it essentially alters the products liability regime from a standard of strict liability to one of negligence.[10]

The debate has taken on a partisan tone. Opponents to the Restatement (Third) argue that the shift is anti-consumer and the product of a "distinctive pro-defense bias."[11] Proponents, on the other hand, argue that the Restatement (Second) bases liability "on the jury's

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2. *Id.*

3. *Id.*

4. *Compare* Aaron D. Twerski & James A. Henderson, Jr., *Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 BROOK. L. REV. 1061, 1106–08 & n.203 (2009) (cataloguing states' acceptance of the Restatement (Third) and opining that it has struck a balance between "sound litigation theory and actual litigation practice" and "will stand the test of time"), *with* Larry S. Stewart, *Strict Liability for Defective Product Design: The Quest For a Well-Ordered Regime*, 74 BROOK. L. REV. 1039, 1059 (2009) ("Restatement (Third) missed the mark for normative rules in a well-ordered design defect regime. Intended or not, it has been seen as rolling back decades of progress and returning to an era of defendant protectionism.").

5. *See* Owen, *supra* note 1, at 930.

6. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998).

7. RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965).

8. *Id.* § 402A.

9. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998).

10. *See* Twerski & Henderson, *supra* note 4, at 1067; *see also* Jerry J. Phillips, *The Unreasonably Unsafe Product and Strict Liability*, 72 TENN. L. REV. 833, 833–34 (2005).

11. Phillips, *supra* note 10, at 834.

whim."[12] At present, the debate is most unsettled in Pennsylvania. The Pennsylvania Supreme Court currently follows the approach of the Restatement (Second), holding that negligence has no place in determining whether a product is defective and, instead, modeling liability based on consumer expectations.[13] After the publication of the Restatement (Third), several justices on the court questioned the utility of strict liability for design defects, but did not adopt the Restatement (Third).[14] In 2007, however, in *Berrier v. Simplicity Manufacturing, Inc.,* the Third Circuit predicted that the Pennsylvania Supreme Court, if confronted with the issue, would adopt the Restatement (Third) and apply a fault-based standard to determine liability in products liability cases.[15]

The Pennsylvania Supreme Court granted certiorari in *Bugosh v. I.U. North America, Inc.*, to decide "[w]hether [it] should apply section 2 of the Restatement (Third) of Torts in place of section 402A of the Restatement (Second) of Torts."[16] However, in the summer of 2009, over a two-justice dissent, the court dismissed the appeal as having been improvidently granted.[17]

As a result, the products liability law in Pennsylvania is in flux. State courts are bound by the decision in *Azzarello v. Black Bros. Co.*, and must adhere to the Restatement (Second). Federal courts, on the other hand, when applying Pennsylvania law, follow the Third Circuit decision set forth in *Berrier*, which applies the Restatement (Third). Thus, Pennsylvania provides a stark example of the controversy in defining design defects that is raging across the country.[18] Moreover, the Pennsylvania Supreme Court is likely to settle this difference soon. This situation provides an opportunity to clarify the law by taking a clear side on the heated debate surrounding design defects.

I will argue that the *Berrier* decision and the adoption of the Restatement (Third)'s fault-based liability was misguided. Rather than advocating an affirmation of the Restatement (Second) as set forth in *Azzarello*, however, I will argue instead that the Pennsylvania Supreme Court, when confronted with the opportunity, should apply a form of strict liability, in which manufacturers are liable for foreseeable harm caused by their products regardless of whether the product was deemed

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12. Twerski & Henderson, *supra* note 4, at 1067.

13. Azzarello v. Black Bros. Co., 391 A.2d 1020, 1026–27 (Pa. 1978).

14. Phillips v. Cricket Lighters, 841 A.2d 1000, 1005 (Pa. 2003). In the concurrence, Justice Saylor emphasizes that the Restatement (Third) has not yet been adopted in Pennsylvania. *Id.* at 1012 (Saylor, J., concurring).

15. 563 F.3d 38, 60 (3d Cir. 2009).

16. 942 A.2d 897, 897 (Pa. 2008) (per curiam).

17. Bugosh v. I.U. N. Am., Inc., 971 A.2d 1228, 1229 (Pa. 2009) (per curiam).

18. *See* Twerski & Henderson, *supra* note 4, at 1067 (describing conflicting definitions of design defect).

"defective." Although defect will not serve as a limitation on liability, manufacturers will be adequately protected under my proposal by affirmative defenses such as the plaintiff's negligent use or assumption of risk.

Following this introduction, Part I of this Note outlines the origins and history of products liability law, as well as the rationales behind the Restatement (Second) and Restatement (Third). Part II analyzes and critiques the relevant Pennsylvania case law, specifically the *Azzarello* decision, the Third Circuit's decision in *Berrier*, and ultimately, the Pennsylvania Supreme Court's decision to dismiss in *Bugosh*. Part III advocates for a strict products liability regime, in which product defectiveness is irrelevant. Finally, this Note concludes with a recommendation to the Pennsylvania Supreme Court, which is also relevant to other state supreme courts and legislatures across the country.

I. Origins of Products Liability Law

A. The Restatement (Second)

The modern concept of strict products liability was first formally introduced in *Greenman v. Yuba Power Products, Inc.*,[19] in 1963 by Justice Traynor of the California Supreme Court.[20] In *Greenman,* the court held that a "manufacturer is strictly liable . . . when an article he places on the market . . . proves to have a defect that causes injury to a human being."[21] Strict liability was justified in order to "insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[22]

Following the rationale in *Greenman*, section 402A of the Restatement (Second), published in 1965, imposes liability on anyone "who sells any product in a defective condition unreasonably dangerous to the user or consumer" even if "the seller has exercised all possible care in the preparation and sale of his product."[23] The comments to section 402A define defective products as those that leave the seller's hands in an unreasonably dangerous condition not contemplated by the ordinary consumer.[24]

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19. 377 P.2d 897 (Cal. 1963).

20. Dominick Vetri, *Order Out of Chaos: Products Liability Design-Defect Law*, 43 U. Rich. L. Rev. 1373, 1381 (2009).

21. *Greenman*, 377 P.2d at 900.

22. *Id.* at 901.

23. Restatement (Second) of Torts § 402A (1965).

24. *Id.* § 402A cmt. g.

Section 402A was adopted throughout the United States.[25] Indeed, "[n]o single doctrinal common law principle was ever adopted so widely and quickly in the United States as strict products liability."[26] However, although purportedly embracing strict liability, courts struggled to define what exactly made a product defective, thereby triggering strict liability.[27] The difficulty was especially apparent in defining defective product *designs*, and courts used different tests to determine whether a product was defective.[28]

1. Consumer Expectations Test

Initially, after states adopted the Restatement (Second), the consumer expectations test became the dominant test utilized by the courts.[29] Relying on the comments to section 402A, courts generally held that a product was defective if it "perform[ed] less safely than an ordinary consumer would expect."[30] Generally, courts imposed liability based on objective consumer expectations rather than using a subjective standard;[31] however, some courts examined the subjective expectations of the actual consumer.[32] Whether employing an objective or subjective standard of the consumer expectations test, products were deemed defective regardless of the conduct of manufacturers.[33]

The consumer expectations test proved to be ineffective in many situations. Specifically, the test failed to protect consumers from products with open and obvious dangers, because consumers could not have any reasonable expectation of safety.[34] Therefore, sellers of unreasonably dangerous products would escape liability even though the danger of the product could be reduced or eliminated through an alternative design.[35]

In addition to open and obvious dangers, the courts encountered problems identifying whose expectations should apply in cases where the

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25. John L. Diamond, *Eliminating the "Defect" in Design Strict Products Liability Theory*, 34 HASTINGS L.J. 529, 533–34 (1983).

26. *See* Vetri, *supra* note 20, at 1374.

27. Diamond, *supra* note 25, at 529.

28. *See* Vetri, *supra* note 20, at 1387–408.

29. *Id.* at 1386.

30. *Id.* at 1387.

31. *Id.*

32. *See, e.g.*, Pridgett v. Jackson Iron & Metal Co., 253 So. 2d 837, 843 (Miss. 1971); Garrett v. Nissen Corp., 498 P.2d 1359, 1363 (N.M. 1972); Young v. Tide Craft, Inc., 242 S.E.2d 671, 680 (S.C. 1978).

33. *See* Diamond, *supra* note 25, at 535.

34. *See* Vetri, *supra* note 20, at 1387.

35. For example, an industrial punch press that omitted a safety guard would likely be considered an open and obvious danger. *Id.* at 1388. Therefore under the consumer expectations test, the omission would not amount to a defective design even though a safety guard would substantially reduce or eliminate the danger at a slight cost. *Id.* Vetri notes that some states employed the consumer expectations test normatively—rather than factually—and inquired into what level of safety ordinary consumers *should* expect from a product design. *Id.* A normative approach necessarily considers reasonableness of the design. *Id.*

consumer controls the safety of other persons such as children, patients, employees, or bystanders.[36] In certain cases, users and bystanders have a conflict of interest pertaining to the safety of a product. For example, some individuals buy sport-utility vehicles, because they believe them to be safer due to their weight, size, and height.[37] However, the higher bumpers on sport-utility vehicles present a vehicle-penetration risk to occupants of other cars in collisions.[38] To address bystander injuries, some courts expanded the notion of consumer to include bystanders, or changed the perspective from what an ordinary consumer expects to what an ordinary consumer *should* expect in terms of safety.[39]

Finally, both courts and commentators complained that consumer expectations were too vague, especially in cases involving complex products.[40] In cases involving allegedly defective product designs, "consumers do not [always] have clear expectations as to how a product will perform when subjected to a broad range of uses."[41] Additionally, because consumer expectations may vary, a manufacturer could potentially be subjected to liability no matter how the product is designed.[42]

2. The Risk-Utility Test

Frustrated in part by the potential shortcomings of the consumer expectations test, some courts undertook a risk-utility analysis to determine product defectiveness.[43] Under a risk-utility test, courts balanced the danger of the product, measured by the gravity and likelihood of harm caused by the product, with the utility of the product.[44]

Using a risk-utility balancing test to determine product defectiveness can take on different forms. An influential article by Dean John Wade identified a list of factors that could be considered by courts in determining design defectiveness:

> (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 which would meet the same need and not be as unsafe.
>
> (4) The manufacturer's ability to eliminate the unsafe character of

36. Owen, *supra* note 1, at 942.
37. Vetri, *supra* note 20, at 1389.
38. *Id.*
39. *See id.* at 1390–92.
40. Owen, s*upra* note 1, at 943.
41. Twerski & Henderson, *supra* note 4, at 1100.
42. *Id.* at 1100–01.
43. *See* Owen, *supra* note 1, at 945.
44. *See* Vetri, *supra* note 20, at 1394.

> the product without impairing its usefulness or making it too expensive to maintain its utility.
>
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
>
> (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
>
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.[45]

The Wade factors have been criticized as overbroad.[46] Specifically, the first factor was politically unpopular because it "allow[ed] courts to second-guess the market as to the desirability of different kinds of products."[47] Additionally, the seventh factor—the ability to spread loss—has been criticized because it "always points to liability."[48] Moreover, commentators have argued the third factor—the availability of a substitute product—is a necessary element, rather than a factor, in order to establish a design defect.[49] Without a feasible alternative design, finding a product defect would necessarily impose liability on the entire product category, something many argue is better left to the legislature.[50]

Concerned about establishing liability over an entire category of products, some courts required the plaintiff to prove a reasonable alternative design was available in order to establish liability.[51] However, even these courts differed significantly over what constituted sufficient proof of a reasonable alternative design.[52] Therefore, despite the criticism, appellate courts often recited the Wade factors in assessing whether a product was defectively designed,[53] and as a result, no uniform test emerged to assess design defectiveness.[54]

In addition to criticisms over what factors should be balanced, courts differed in framing the scope of the balancing test. Under a method characterized as "macro-balancing" a court compares a product's overall total risk with its overall total utility.[55] In contrast, a "micro-balancing" approach considers the costs and benefits of adopting a

45. John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837–38 (1973).

46. Owen, *supra* note 1, at 955.

47. *Id.* at 956.

48. *Id.* at 958.

49. *See* Twerski & Henderson, *supra* note 4, at 1096.

50. *Id.* at 1069.

51. *See* Kenneth R. Meyer et al., *The Uncertainty Surrounding "Design" in Design Defect Cases*, 76 DEF. COUNS. J. 428, 428 (2009).

52. *See id.* at 432.

53. Owen, *supra* note 1, at 928–29.

54. *Id.* at 955.

55. *Id.* at 959.

particular alternative design feature proposed by a plaintiff.[56] For example, if a plaintiff is injured by a motorized boat propeller and proposes an alternative design in which the propeller was equipped with a propeller guard, the inquiry would only consider the balance of costs and benefits resulting from adding a propeller guard—not the broader risks of motorized boat propellers, or generally, the risks of motor-powered boats.[57]

Despite the widespread adoption of section 402A of the Restatement (Second), courts struggled to apply the standard in design defect cases, and little uniformity existed between the states.[58] Some courts applied the consumer expectations test; some applied versions of the risk-utility test, and others applied a combination of the two.[59] The varying interpretations of the Restatement (Second) paved the way for the Restatement (Third)'s attempt to codify and update thirty years of products liability law.[60]

B. THE RESTATEMENT (THIRD)

The Restatement (Third), published in 1998, sought to describe a set of "well-ordered" rules to guide courts and practitioners in products liability cases.[61] Specifically, the Restatement (Third) divides the concept of product defect into three separate subcategories: manufacturing defects, failures to warn, and design defects.[62]

1. Manufacturing Defects

Manufacturing defects are defined as a physical departure from a product's intended design.[63] Manufacturing defects involve a mistake in the production process and therefore, tend to occur in only a small percentage of units in a product line.[64] Like the Restatement (Second), the Restatement (Third) imposes liability on sellers of products with manufacturing defects, even though all possible care is exercised in the preparation and marketing of the product.[65]

The retention of strict liability for manufacturing defects was, for the most part, uncontroversial.[66] Manufacturing defects are generally

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56. *Id.* at 960–61.

57. *Id.*

58. *See* Vetri, *supra* note 20, at 1408.

59. *See* Twerski & Henderson, *supra* note 4, at 1072.

60. Larry S. Stewart, *Strict Liability for Defective Product Design: The Quest for a Well-Ordered Regime*, 74 BROOK. L. REV. 1039, 1039 (2009).

61. *Id.*

62. Vetri, *supra* note 20, at 1406.

63. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998).

64. John G. Culhane, *Real and Imagined Effects of Statutes Restricting the Liability of Nonmanufacturing Sellers of Defective Products*, 95 DICK. L. REV. 287, 309 n.84 (1991).

65. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998).

66. *See* Twerski & Henderson, *supra* note 4, at 1062–64; *see also* Alex J. Grant, *New Theories of*

easy to identify, because they differ from the rest of the product line.[67] Liability is justified either by applying the consumer expectations test, where consumers expect a product to function like other products, or by applying the risk-utility test, where there is a clearly feasible alternative product that functions properly.[68]

2. Failure to Warn

Under the Restatement (Third), a product could also be "defective because of inadequate instructions or warnings."[69] "Failure to warn" defects are reserved for "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions, or warnings by the seller or other distributor."[70]

Unlike manufacturing defects, the Restatement (Third) implements a negligence, fault-based standard for defect due to failure to warn. A plaintiff must show both that a warning was necessary and that such a warning was either absent or inadequate.[71] While warnings may be taken into account in determining liability, the Restatement (Third) expressly states that warnings are not substitutes for a safer design.[72]

3. Design Defects

Design defects, as defined by the Restatement (Third), exist "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 . . . and the omission of the alternative design renders the product not reasonably safe."[73]

The Restatement (Third) expressly states, "consumer expectations do not constitute an independent standard for judging the defectiveness of product designs."[74] The foreseeable risks and reasonable alternative design requirements essentially reset the standard of liability for defective product designs from strict liability to negligence.[75] Although consumer expectations remain relevant when evaluating a potential design defect using the risk-utility test, the Restatement (Third) is clear that a plaintiff cannot establish a defective design without showing a reasonable alternative design.[76]

By expressly disregarding the consumer expectations test as a

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Cigarette Liability: The Restatement (Third) of Torts and the Viability of a Design Defect Cause of Action, 3 CORNELL J.L. & PUB. POL'Y 343, 352 (1994).

67. Culhane, *supra* note 64.

68. Twerski & Henderson, *supra* note 4, at 1063–64.

69. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998).

70. *Id.* § 2 cmt. i.

71. Stewart, *supra* note 60, at 1055.

72. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. l (1998).

73. *Id.* § 2(b).

74. *Id.* § 2 cmt. g.

75. *Id.*

76. *Id.*

sufficient basis for liability, the Restatement (Third) instead advocates using the fault-based risk-utility approach.[77] Manufacturers would not be liable for products unless the plaintiff proved they were designed unreasonably—namely they could have been designed with a feasible and safer alternative design.[78] Like Judge Learned Hand's algebraic concept stating that negligence exists if the burden of undertaking precautions is less than the probability of expected harm,[79] under a risk-utility analysis, a product would be considered defective if the burden of designing a safer product was less than the magnitude and probability of harm caused by the existing product.[80]

In addition to hinging liability on the manufacturer's conduct, the reasonable alternative design requirement also serves to guard against dangerous products being deemed categorically defective.[81] For example, alcoholic beverages pose significant health risks when consumed in excess; employing a risk-utility analysis, a court could potentially determine the risks of alcohol outweigh its utility.[82] However, removing the alcohol, which would undoubtedly make the product safer, is not a reasonable alternative design, because it would also deprive consumers of the utility derived from alcohol.[83] Therefore, the reasonable alternative design requirement guards against categorical products liability, which the Restatement (Third) deems to be better left to the legislature, rather than the courts.[84]

In the comments, the Restatement (Third) preserved the possibility that in the future, certain categories of products might be sufficiently dangerous and of such minimal social utility that they would be deemed defective, even if no alternative design was available.[85] Despite preserving the possibility of categorical liability, the Restatement (Third) limited the possibility to products that were not "generally available and widely used and consumed"[86] and attempted to make the possibility of categorical products liability as narrow as possible.[87]

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77. Twerski & Henderson, *supra* note 4, at 1065.

78. *Id.* at 1069.

79. Negligence = $B < P \times L$, where B = burden; P = costs of adopting precautions against foreseeable, accidental loss; L = probable magnitude or expected cost of such a loss if it does occur. United States v. Caroll Towing Co., 159 F.2d 160, 173 (2d Cir. 1947).

80. Twerski & Henderson, *supra* note 4, at 1065.

81. *Id.* at 1070.

82. *Id.* at 1069.

83. *Id.*

84. *Id.*

85. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2, cmt. e (1998).

86. *Id.* § 2, cmt. d.

87. Twerski & Henderson, *supra* note 4, at 1071.

C. Response to the Restatement (Third): Current Law in the States

The Restatement (Third)'s position on manufacturing defects is generally uncontroversial.[88] While the provisions regarding defects for a failure to warn garnered significant commentary and criticism,[89] no issue within the Restatement (Third) pertaining to products liability has generated as much controversy as the proposed standard to define design defectiveness.[90]

The defense bar generally praised the change.[91] Manufacturers generally criticized the consumer expectations test, arguing that while consumers could expect products to be built according to their design, they were uninformed regarding all the considerations involved in designing a particular product.[92] Additionally, proponents of the Restatement (Third) argued that the majority of courts were already employing fault-based standards in products liability cases.[93] In contrast, the plaintiff's bar raised concerns that the change failed to protect consumers and was enacted to serve the interests of defendants.[94] Furthermore, critics contend the Restatement (Third) departs from the standards employed by a majority of states and amounts to a "regression in the law."[95]

After the enactment of the Restatement (Third), the debate played out in courtrooms across the country. In *Potter v. Chicago Pneumatic Tool Co.*, the Connecticut Supreme Court expressly rejected the Restatement (Third), stating "that the majority of jurisdictions *do not* impose upon plaintiffs an absolute requirement to prove a feasible alternative design."[96] The Connecticut Supreme Court criticized the Restatement (Third) and concluded that a feasible alternative design requirement placed an "undue burden on plaintiffs that might preclude otherwise valid claims from jury consideration."[97]

However, the *Potter* decision also recognized criticisms of the consumer expectations test and chose instead to adopt a "modified formulation of the consumer expectation test," in which design defectiveness involving "complex" products would hinge on a risk-utility

88. William M. Brown, *Déjà Vu All Over Again: The Exodus From Contraceptive Research and How to Reverse It*, 40 Brandeis L.J. 1, 18 (2001).

89. Stewart, *supra* note 60, at 1055–57.

90. Twerski & Henderson, *supra* note 4, at 1062.

91. *See* Stewart, *supra* note 60, at 1040.

92. *Id.* at 1042.

93. Michael D. Green, *The Unappreciated Congruity of the Second and Third Torts Restatements on Design Defects*, 74 Brook. L. Rev. 807, 807 (2009).

94. *See* Stewart, *supra* note 60, at 1059.

95. *Id.* at 1040.

96. 694 A.2d 1319, 1331 (Conn. 1997).

97. *Id.* at 1332.

analysis.[98] Connecticut essentially adopted a two-pronged test for determining design defects, in which liability could be established by demonstrating that the product failed to meet consumer expectations, or that the product failed to meet risk-utility standards.[99] Arizona,[100] Alaska,[101] California,[102] Florida,[103] Hawaii,[104] Ohio,[105] Oregon,[106] Puerto Rico,[107] Tennessee,[108] and Washington[109] all employ a similar two-pronged approach to determine design defect.[110]

Other states rejected the Restatement (Third) and risk-utility analysis in its entirety and insisted on applying the consumer expectations test.[111] Kansas,[112] Maryland,[113] Nebraska,[114] Oklahoma,[115] and Wisconsin[116] all employ the consumer expectations test as the sole standard to determine design defect.

Other courts purported to reject the Restatement (Third), while nevertheless requiring the plaintiff to prove a reasonable alternative design.[117] In *Mikolajczyk v. Ford Motor Co.,* the Illinois Supreme Court rejected the Restatement (Third), but held that risk-utility evidence may be introduced by either party to show whether a product was defectively designed.[118] Although the Illinois court ostensibly rejected the Restatement (Third) requirement of a feasible alternative design, where a defendant introduced risk-utility evidence, the plaintiff would be required to prove the existence of a reasonable alternative design, or that the entire product category was defective.[119] Although not technically requiring proof of a reasonable alternative design, Colorado,[120]

98. *Id.* at 1333–34.
99. Twerski & Henderson, *supra* note 4, at 1098.
100. *See* Dart v. Wiebe Mfg., Inc., 709 P.2d 876, 881–82 (Ariz. 1985) (en banc).
101. Smith v. Ingersoll-Rand Co., 14 P.3d 990, 994 (Alaska 2000).
102. Barker v. Lull Eng'g Co., 573 P.2d 443, 457–58 (Cal. 1978).
103. Force v. Ford Motor Co., 879 So. 2d 103, 105 (Fla. Dist. Ct. App. 2004).
104. Acoba v. Gen. Tire Co., 986 P.2d 288, 304 (Haw. 1999).
105. Knitz v. Minster Mach., Co., 432 N.E.2d 814, 818 (Ohio 1982).
106. McCathern v. Toyota Motor Corp., 23 P.3d 320, 329–30 (Or. 2001).
107. Collazo-Santiago v. Toyota Motor Corp., 149 F.3d 23, 25–26 (1st Cir. 1998).
108. Jackson v. Gen. Motors Corp., 60 S.W.3d 800, 803 (Tenn. 2001).
109. Bruns v. PACCAR, Inc., 890 P.2d 469, 474 (Wash. Ct. App. 1995).
110. *See* Smith v. Ingersoll-Rand Co. 14 P.3d 990, 994 (Alaska 2000); Dart v. Wiebe Mfg., Inc., 709 P.2d 876, 881–82 (Ariz. 1985) (en banc); *see also* Twerski & Henderson, *supra* note 4, at 1098–1100 & nn. 156–66.
111. Twerski & Henderson, *supra* note 4, at 1104.
112. Delaney v. Deere & Co., 999 P.2d 930, 934 (Kan. 2000).
113. Halliday v. Sturm, Ruger & Co., 792 A.2d 1145, 1154 (Md. 2002).
114. Haag v. Bongers, 589 N.W.2d 318, 329 (Neb. 1999).
115. Kirkland v. Gen. Motors Corp., 521 P.2d 1353, 1360 (Okla. 1974).
116. Vincer v. Ether Williams All-Aluminum Swimming Pool Co., 230 N.W.2d 794, 798 (Wis. 1975).
117. Twerski & Henderson, *supra* note 4, at 1073–74.
118. 901 N.E.2d 329, 347 (Ill. 2008).
119. *Id.*; *see also* Twerski & Henderson, *supra* note 4, at 1094–96.
120. Union Supply Co. v. Pust, 583 P.2d 276, 286 (Colo. 1978).

Minnesota,[121] New Hampshire,[122] New Mexico,[123] and Nevada[124] also allow risk-utility evidence to be introduced as a factor to consider in the design defect analysis, thereby essentially replacing the consumer expectations test.

Lastly, some courts embraced the Restatement (Third).[125] Alabama,[126] Delaware,[127] District of Columbia,[128] Georgia,[129] Indiana,[130] Iowa,[131] Kentucky,[132] Maine,[133] Massachusetts,[134] Michigan,[135] Montana,[136] Rhode Island,[137] South Carolina,[138] Virginia,[139] and West Virginia[140] all require proof of a reasonable alternative design in order to establish product defect.

Despite the ambitious effort of the Restatement (Third), consensus has not emerged on the appropriate legal test for design defects. The lack of uniformity is especially glaring in comparison to the remarkable (initial) success of the Restatement (Second). In an age of interstate and international product shipments, greater uniformity in products liability law is necessary.

II. The Pennsylvania Story

The debate over the appropriate standard to define design defects is most unsettled in Pennsylvania, because products liability law in Pennsylvania is in flux. Pennsylvania state courts are bound by the *Azzarello* decision, which explicitly adopted the Restatement (Second).[141] However, in *Bugosh,* the Third Circuit predicted the Pennsylvania Supreme Court would adopt the Restatement (Third), and federal district courts have followed its holding when applying Pennsylvania

121. Holm v. Sponco Mfg., Inc., 324 N.W.2d 207, 212–13 (Minn. 1982).
122. Vautour v. Body Masters Sports Indus., Inc., 784 A.2d 1178, 1184 (N.H. 2001).
123. Brooks v. Beech Aircraft Corp., 902 P.2d 54, 61–62 (N.M. 1995).
124. McCourt v. J.C. Penney Co., 734 P.2d 696, 698 (Nev. 1987).
125. Twerski & Henderson, *supra* note 4, at 1080–81.
126. Gen. Motors Corp. v. Edwards, 482 So. 2d 1176, 1191 (Ala. 1985).
127. Nacci v. Volkswagen of Am., Inc., 325 A.2d 617, 620 (Del. Super. Ct. 1974).
128. Warner Fruehauf Trailer Co. v. Boston, 654 A.2d 1272, 1276 (D.C. 1995).
129. Banks v. ICI Ams., Inc., 450 S.E.2d 671, 674 (Ga. 1994).
130. Jackson v. Warrum, 535 N.E.2d 1207, 1220 (Ind. Ct. App. 1989).
131. Wright v. Brooke Group Ltd., 652 N.W.2d 159, 169, 181–82 (Iowa 2002).
132. Burke v. U-Haul Int'l, Inc., 501 F. Supp. 2d 930, 933 (W.D. Ky. 2007); Toyota Motor Corp., v. Gregory, 136 S.W.3d 35, 42 (Ky. 2004).
133. St. Germain v. Husqvarna Corp., 544 A.2d 1283, 1285 (Me. 1988).
134. Johnson v. Brown & Williamson Tobacco Corp., 122 F. Supp. 2d 194, 207 (D. Mass. 2000).
135. Prentis v. Yale Mfg. Co., 365 N.W.2d 176, 184 (Mich. 1984).
136. Rix v. Gen. Motors Corp., 723 P.2d 195, 202–03 (Mont. 1986).
137. Buonanno III v. Colmar Belting Co., 733 A.2d 712, 717 (R.I. 1999).
138. Bragg v. Hi-Ranger Inc., 462 S.E.2d 321, 330 (S.C. Ct. App. 1995).
139. Allen v. Minnstar, Inc., 8 F.3d 1470, 1479 (10th Cir. 1993).
140. Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666 (W. Va. 1979).
141. Azzarello v. Black Bros. Co., 391 A.2d 1020, 1022 (Pa. 1978).

law.[142] In a separate case, the Pennsylvania Supreme Court certified the question "whether this Court should apply section 2 of the Restatement (Third) of Torts in place of section 402A of the Restatement (Second) of Torts," but the case was dismissed as improvidently granted.[143]

A. THE *AZZARELLO* DECISION

Modern Pennsylvania products liability law is based on the *Azzarrello* decision. In *Azzarello*, the plaintiff's right hand was pinched in a coating machine made and sold by Black Brothers, Inc.[144] Azzarello sued Black Brothers, "relying solely on the theory of strict liability under Section 402A of the Restatement (Second)."[145] Black Brothers alleged Azzarello's employer's negligence was the sole or contributing cause of Azzarello's injuries.[146]

The trial court instructed the jury that liability depended on finding the product "unreasonably dangerous."[147] The jury returned a verdict for the manufacturer, though not for the employer of the other defendant who appealed.[148] The Pennsylvania Supreme Court held that whether a product was unreasonably dangerous was a question of law to be decided by the judge—not the jury.[149] Instead, once a product was deemed unreasonably dangerous, the jury would then decide whether the evidence supported the allegations in the complaint—specifically, whether the product failed to meet consumer expectations.[150]

The Pennsylvania Supreme Court adhered to the Restatement (Second), but determined it was meant "to provide guidance for the bench and bar, and not to illuminate the issues for laymen."[151] The court compared the concept of strict liability with that of negligence, in which the court may employ the Hand Formula in determining negligence, but simply instruct jurors to consider actions of the reasonably prudent man.[152] Concluding that "unreasonably dangerous" was an inadequate standard to guide a jury on the question of defect, the court held, "It is clear that the term 'unreasonably dangerous' has no place in the instructions to a jury as to the question of 'defect.'"[153] The court stressed that a manufacturer is the guarantor of product safety and must provide,

142. *E.g.*, Hoffman v. Paper Converting Mach. Co., 694 F. Supp. 2d 359, 365 (E.D. Pa. 2010).
143. Bugosh v. I.U. N. Am., Inc., 942 A.2d 897 (Pa. 2008) (per curiam).
144. *Azzarello*, 391 A.2d at 1022.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 1026.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 1027.

along with the product, every element necessary to make it safe for its intended use.[154] If a jury determined that the product did not meet consumer expectations and caused the injury, liability would automatically follow.[155] Therefore, the Pennsylvania Supreme Court granted a new trial to Azzarello's employer.[156]

The *Azzarello* decision paralleled other states in adopting the Restatement (Second); however, unlike most other states that submit the question of whether a product was unreasonably dangerous to the jury, the Pennsylvania Supreme Court held that the question whether a product was unreasonably dangerous was one of law.[157] The court indicated that a judge should employ a risk utility analysis and consider "social policy" to determine whether a product was "unreasonably dangerous."[158] However the court did not require the plaintiff to show a reasonable alternative design before considering a product unreasonably dangerous.[159] Once a product was determined unreasonably dangerous by a judge, the jury would determine whether the product was defective based on consumer expectations, or whether the product "left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use."[160]

B. THE *BERRIER* DECISION

Thirty years after the *Azzarello* decision, in *Berrier v. Simplicity Manufacturing, Inc.*, the Third Circuit predicted Pennsylvania would abandon the Restatement (Second) and adopt the Restatement (Third) in its stead.[161] In *Berrier*, parents of a child who had to have her foot amputated after being backed over by a lawn mower sued Simplicity, the manufacturer of the lawn mower.[162] The Berriers alleged that the manufacturer was liable on a theory of negligent design, as well as strictly liable on the basis of defective design.[163] Specifically, the Berriers claimed the product was defectively and negligently designed because it did not have any "back-over protection, such as a 'no mow in reverse' device or roller barriers."[164]

After the Berriers filed their claim in state court, Simplicity

154. *Id.* at 1026–27.
155. *Id.*
156. *Id.* at 1027.
157. *Id.* at 1026.
158. *Id.*
159. *See id.*
160. *Id.* at 1027.
161. 563 F.3d 38, 40 (3d Cir. 2009).
162. *Id.* at 41.
163. *Id.*
164. *Id.*

removed the action to federal court based on diversity jurisdiction.[165] Applying Pennsylvania law, the district court granted summary judgment to Simplicity on both of the claims, reasoning that the Berriers could not recover because, as a bystander, the injured child was not an intended user of the lawn mower.[166] The Berriers appealed.[167]

The Third Circuit, hearing the appeal, noted Pennsylvania had yet to expressly recognize or reject a bystander's right to recover under products liability law.[168] In the absence of a controlling decision by the state supreme court, a federal court must predict how the highest court would decide.[169] The Third Circuit proceeded to reverse the district court and expressly adopted the Restatement (Third), which permits any person harmed by a defective product to recover, regardless of whether they were the purchaser or the user of the product.[170]

Although its rationale stemmed from predicting the Pennsylvania Supreme Court would protect bystanders, the Third Circuit expanded its holding to alter all of products liability law. The court concluded that "central conceptions borrowed from negligence theory are embedded in strict products liability doctrine," and that the "character of the product and the conduct of the manufacturer are largely inseparable."[171]

Curiously, the Third Circuit's expansive adoption of the Restatement (Third) was unnecessary to protect bystanders. Indeed, the court based its rationale in part on *Miller v. Preitz*,[172] a Pennsylvania case that implied a cause of action for bystanders under section 402A of the Restatement (Second).[173] The Third Circuit relied on a non-majority opinion in *Miller* that recommended adopting the Restatement (Second) in order to eliminate any privity requirement for products liability actions.[174]

Despite having an independent basis within the Restatement (Second) to extend liability to manufacturers for bystander injuries, the court predicted the Pennsylvania Supreme Court would abandon the Restatement (Second) in its entirety.[175] The Third Circuit cited a three-justice concurrence in *Phillips v. Cricket Lighters*, which recommended abandoning the Restatement (Second) in favor of the Third.[176]

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165. *Id.* at 44.
166. *Id.* at 45.
167. *Id.*
168. *Id.* at 46.
169. *Id.* at 45–46.
170. *Id.* at 54.
171. *Id.* at 56.
172. 221 A.2d 320 (Pa. 1966).
173. *Berrier*, 563 F.3d at 47.
174. *Id.* (citing *Miller*, 221 A.2d at 333).
175. *Id.* at 53.
176. *Id.* (citing Phillips v. Cricket Lighters, 841 A.2d 1000, 1018–22 (Pa. 2003) (Saylor, J.,

Additionally, the court relied on a dissent in *Pennsylvania Department of General Services v. U.S. Mineral Products*,[177] in which two justices questioned whether foreseeability could be completely separated in strict liability cases.[178] Thus, between opinions issued in *Phillips* and *Mineral Products*, the Third Circuit concluded that four of the current Pennsylvania justices—enough to overturn *Azzarello*—voiced support for adopting the Restatement (Third).[179]

The court justified the departure from existing Pennsylvania law as sound policy, stating "the Third Restatement takes a 'more progressive view,' and far more realistic approach to strict liability when 'bystanders' are involved," and recognized "the essential role of risk-utility balancing, a concept derived from negligence doctrine, in design defect litigation."[180]

Applying the Restatement (Third), which plainly does not distinguish between users and bystanders, the Third Circuit concluded the district court erred in granting Simplicity's motion for summary judgment, because it "should not have relied on the 'intended users' doctrine," which precluded bystander recovery.[181] The court held the Berriers were entitled to a trial, because they had proposed several reasonable alternative designs.[182] Specifically, the Berriers offered evidence that lawn mowers employing "no mow in reverse" technology or roller guards were examples of safer alternative designs.[183] The court also reversed the district court on the *Berrier* negligence claim, concluding that Simplicity owed a duty to the Berriers despite the child being a bystander.[184] Thus, although the court could have utilized the Restatement (Second) to protect bystanders, it issued a sweeping decision significantly altering Pennsylvania products liability law.

C. THE *BUGOSH* CERTIFICATION

In a separate case, the Pennsylvania Supreme Court certified the question "whether this Court should apply Section 2 of the Restatement (Third) of Torts in place of Section 402A of the Restatement (Second) of Torts."[185] However, in the summer of 2009, the Pennsylvania Supreme Court dismissed the appeal as having been improvidently granted.[186]

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concurring)).

177. 898 A.2d 590 (Pa. 2006).

178. *Berrier*, 563 F.3d at 53.

179. *Id.* at 57 n.28.

180. *Id.* at 60 (quoting *Phillips*, 841 A.2d at 1015–16 (Saylor, J., concurring)) (internal quotation marks omitted).

181. *Id.* at 60–61.

182. *Id.* at 63–66.

183. *Id.* at 44.

184. *Id.* at 68.

185. Bugosh v. I.U. N. Am., Inc., 942 A.2d 897, 897 (Pa. 2008) (per curiam).

186. Bugosh v. I.U. N. Am., Inc., 971 A.2d 1228, 1229 (Pa. 2009) (per curiam).

In *Bugosh,* the plaintiff sought to recover on a strict liability claim under 402A of the Restatement (Second) based on asbestos exposure.[187] After a jury verdict in favor of the plaintiff, the asbestos manufacturer appealed, arguing that the Restatement (Third) replaced the Restatement (Second), and that the plaintiffs failed to offer a reasonable alternative design.[188]

In a dissenting opinion to the dismissal, Justice Saylor of the Pennsylvania Supreme Court, argued the *Azzarello* decision left Pennsylvania products liability law "beset by 'pervasive ambiguities and inconsistencies'" and did not provide lower courts with guidance on how to treat cases employing reasonableness and foreseeability standards.[189] The dissent noted the national controversy over defining design defects.[190] Indeed, the appellee's brief reiterated criticisms that the Restatement (Third) was an "inappropriate attempt at tort reform orchestrated by members of the business and insurance communities."[191] Nevertheless, the dissent argued that a strict, categorical divide between strict-liability and negligence concepts was impossible "in light of the tort system's largely open-ended damages scheme, and the impossibility of designing products incapable of contributing to human injury."[192]

The dissent criticized *Azzarello* as "unduly disrupting product investment and innovation" and justified the sweeping policy shift in the absence of legislative action because *Azzarello* "has taken our jurisprudence too far from the legitimate home of tort law in the concept of corrective justice."[193] Therefore, risk-utility balancing, "an approach derived from negligence theory," was a rational and necessary limiting principle.[194] Accordingly, "the Court should disavow *Azzarello*" and "adopt Sections 1 and 2 of the Third Restatement in its stead."[195] In the view of the dissent, availability of a reasonable alternative design was a necessary component of establishing liability.

Despite the forcefulness of the dissent, it only garnered two votes, and the majority did not provide a reason for dismissing *Bugosh.* Therefore, *Azzarello* and the Restatement (Second) remains good law in Pennsylvania courts. However, federal courts, when applying Pennsylvania law, have followed the *Berrier* decision. The split likely will

187. *Id.* (Saylor, J., dissenting).

188. *Id.*

189. *Id.* at 1231–32 (quoting Brief for Products Liability Counsel, Inc. as Amicus Curiae in Support of Appellants at 28, *Bugosh*, 971 A.2d 1228 (No. 7 WAP 2008), 2008 WL 6011304).

190. *Id.* at 1231.

191. *Id.* at 1232 (citing Brief of Appellee Judith R. Bugosh at 24, *Bugosh*, 971 A.2d 1228 (No. 7 WAP 2008), 2008 WL 6011308).

192. *Id.* at 1234.

193. *Id.* at 1239–40.

194. *See id.* at 1230.

195. *Id.* at 1244.

not last long. The fundamental principle of *Erie Railroad Co. v. Tompkins* was to avoid forum shopping between state and federal courts based on substantive law.[196] The confusion that remains as a result of the *Bugosh* dismissal provides an opportunity to clarify the law by taking a clear side on the heated debate surrounding design defects.

III. Finding the Appropriate Standard: A Proposal for Change

The battle over the appropriate products liability regime is not isolated to Pennsylvania.[197] Products liability law across the entire country is in need of greater uniformity. The division is telling: Neither the Restatement (Second) nor Restatement (Third) has successfully defined defective product designs. A different approach is overdue. This Part argues that liability for injuries caused by products should not hinge on the elusive concept of defect. Rather, liability should be established if any product fails to perform as intended—or the foreseeable use of a product causes an injury. Although defect would no longer serve as a limit on liability for injuries caused by products, foreseeable use and proximate cause will limit unwarranted liability for manufacturers. Additionally, defendant-manufacturers will be able to rely on a robust defense of negligent use or assumption of risk to curb liability. Once a defendant has proven negligent use of a product or assumption of risk by the plaintiff, the plaintiff may only recover by showing a safer, reasonable alternative design was available and could have prevented the injury.

The proposed products liability regime incorporates aspects of the consumer expectations test, derived from the Restatement (Second), in determining foreseeable use of a product; but it relies on the Restatement (Third) and the reasonable alternative design requirement to establish liability once a defense has been established.

A. The Proposal

My proposed products liability regime can be separated into three parts:

(1) A plaintiff, injured by a product in the course of its foreseeable use, establishes a prima facie case for strict products liability.

(2) The defendant can rebut the prima facie case through an affirmative defense, either by showing that the product was used negligently, or that the plaintiff assumed the risk for the injuries.

(3) If the defendant meets its burden of showing negligence or assumption of risk on the part of the plaintiff, liability is precluded unless the plaintiff can prove that a feasible alternative design could have

196. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

197. *See supra* notes 112–36 and accompanying text.

prevented the injury.

This proposed regime of products liability avoids the confusion and difficulty of defining defective product designs that plagued both of the Restatements. Instead, it incorporates components of each Restatement into separate stages of the plaintiff's burden of production. The plaintiff's initial burden relies on the consumer expectations test of the Restatement (Second). If the manufacturer shifts the burden back through an applicable defense, the plaintiff must prove a reasonable alternative design as prescribed by the Restatement (Third).

B. Foreseeability Rather than Defect

Both Restatements impose liability for defectively designed products.[198] However, liability is limited to *defective* products.[199] Manufacturers of non-defective products—even if they cause harm—are not liable.[200] This limitation contrasts with traditional strict liability. Traditional strict liability "is liability in tort, imposed on an actor" (including a manufacturer of a product) "for the harms the actor causes, regardless of whether or not the actor was negligent."[201] Therefore, traditional strict products liability would not hinge on whether the product was defective, but rather, whether the product caused the injury. Although product defect is not an essential attribute to a products liability regime, without any limitations, traditional strict liability would hamper designs and be unduly burdensome on manufacturers.[202] However, a strict liability regime with specific limitations, like those outlined in my proposal, presents a more predictable and fairer standard than a remedial scheme that pivots on the elusive task of defining a product defect.

Even under a traditional strict products liability regime, liability is not unlimited.[203] Rather, liability only follows from foreseeable injuries.[204] Under my proposal, like traditional strict liability, liability will only follow from foreseeable use of a product. For example, a lawn mower manufacturer would be liable for any injuries caused by the product used while mowing one's lawn. However, the manufacturer would not be liable for injuries caused from the unforeseeable use of the lawn mower—such as where the mower was used in an attempt to break down

198. Restatement (Third) of Torts: Prods. Liab. § 2 (1998); Restatement (Second) of Torts § 402A (1965).

199. *See* Restatement (Third) of Torts: Prods. Liab. § 2 (1998); Restatement (Second) of Torts § 402A (1965); *see also* Twerski & Henderson, *supra* note 4, at 1066.

200. Twerski & Henderson, *supra* note 4, at 1066.

201. James A. Henderson, Jr., *Why Negligence Dominates Tort*, 50 UCLA L. Rev. 377, 380 (2002).

202. *See id.* at 397.

203. *See* Diamond, *supra* note 25, at 529 n.2.

204. *Id.*

fire wood into kindling. Moreover, even if a fact-finder concluded that using a lawn mower in such a manner was a foreseeable use—or misuse—of the product, the manufacturer would be shielded from liability based on negligent use of the product, as discussed below.[205]

A plaintiff could show a product was used foreseeably in a variety of ways. Sometimes foreseeable use will be apparent based on the obvious nature of the product.[206] Like the Restatement (Second), this inquiry considers objective consumer expectations about how the product is used. However, the inquiry into whether a product was used foreseeably does not ignore manufacturer conduct. For example, industry experience and the way the product is portrayed also shape consumer expectations.[207] In contrast to the Restatement (Second), which analyzed consumer expectations to determine product defect, under my proposal, consumer expectations are used to determine whether or not the use of the product was foreseeable. While consumers may be ill informed about the intricacies of how a product is designed, they have clear expectations about how a product is used.[208]

It is worth noting, foreseeable uses of a product are distinguishable from foreseeable risks of a product.[209] Negligence liability restrains liability based on foreseeable risks; however, strict products liability holds sellers and manufacturers liable regardless of whether they exercised all possible care in the preparation and sale of the product.[210] For example, cancer may not have been a foreseeable risk of exposure to asbestos at the time it was manufactured; however, because cancer may develop from a foreseeable use of asbestos products, under my proposal, liability follows.

C. Available Affirmative Defenses: Negligent Use and Assumption of Risk

My proposed regime would hold manufacturers liable for unforeseeable injuries caused by their products, so long as the product was used in a foreseeable way. Therefore, even if a manufacturer exercises reasonable care in the design of the product, they still may be exposed to liability. However, this expansion of liability, is limited through two affirmative defenses: negligent use and assumption of risk.

Under my proposal, extreme misuse of a product would likely be unforeseeable and therefore would shield the manufacturer from

205. *See infra* Part III.C.

206. Stewart, *supra* note 60, at 1053.

207. *Id.*

208. *See* Mark A. Geistfeld, *The Value of Consumer Choice in Products Liability*, 74 Brook. L. Rev. 781, 783 (2009).

209. Stewart, *supra* note 60, at 1053.

210. *Id.*

liability. However, even if the misuse of a product is foreseeable, a manufacturer could preclude liability by showing that the plaintiff unreasonably or negligently used the product. Similar to the doctrine of contributory negligence, recovery for injuries caused by the negligent use of a product—even if foreseeable—would preclude recovery.

Similarly, the defense of assumption of risk would be available to defendants. Under the doctrine of assumption of risk, when dangers are apparent, the defendant does not owe a duty to protect the plaintiff.[211] Therefore, under my proposal, when consumers are injured by products with open and obvious dangers, a defendant will avoid liability if it can be shown that the plaintiff assumed the risk.[212]

While the defenses of negligent use and assumption of risk in the products liability context help avoid unwarranted manufacturer liability, the defenses also introduce the shortcomings of the consumer expectations test. Specifically, products with open and obvious dangers invite defenses of negligent use and assumption of risk that would bar a plaintiff from recovering when safer products were available.

D. Evidence of a Reasonable Alternative Design as an Alternate Route to Recovery

To avoid these pitfalls, under my proposal, once the affirmative defenses of negligent use or assumption of risk are proven by the defendant, the plaintiff can still introduce risk-utility evidence, showing a feasible alternative design was available, and therefore, that it was unreasonable to place the product on the market. This concept borrows directly from the Restatement (Third), in that if plaintiffs can show a reasonable alternative design was available, they can recover despite their own negligence or misuse of the product, assuming the reasonable alternative design would have adequately protected them against their own negligent use.

Unlike the Restatement (Third), which places the initial burden of proving a reasonable alternative design on the plaintiff,[213] my proposal only enables the introduction of risk-utility evidence and evidence of a reasonable alternative design after the defendant has successfully raised an affirmative defense of negligent use or assumption of risk. In the

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211. Knight v. Jewett, 834 P.2d 696, 707 (Cal. 1992).

212. States have differing standards over the scope of assumption of risk as an affirmative defense. *See* Harvey S. Perlman, *Products Liability Reform in Congress: An Issue of Federalism*, 48 Ohio St. L.J. 503, 506 (1987). Clearly, a lack of uniformity regarding the affirmative defense hinders forming a uniform products liability regime. For the purposes of this proposal, assumption of risk is considered a question of fact for the jury and is available as an affirmative defense when "a plaintiff has voluntarily and intelligently undertaken an activity which he knows to be hazardous in ways which subsequently cause him injury." Howell v. Clyde, 620 A.2d 1107, 1112 (Pa. 1993).

213. Twerski & Henderson, *supra* note 4, at 1069.

context of a strict liability regime, the initial burden is properly placed on the defendant once the plaintiff shows the product caused the injury.

E. A Note Regarding Bystanders

Like the Restatement (Second) and the Restatement (Third), under my proposal, injuries to bystanders will not preclude liability to the product manufacturer. Like a direct injury to the product user, a bystander can make out a prima facie case for strict products liability by showing the foreseeable use of the product caused the injury to the bystander. The affirmative defenses available to defendants will still be available if the bystander's own negligence caused her injury, or she assumed the risk of being a bystander. For example, a fan at a baseball game, hit by a foul ball, likely assumed the risk associated with attending the game.

Hypothetically, if a product user's negligent use of a product injured a bystander, and the bystander did not assume the risk, the defense would not be available to preclude the manufacturer's liability for the bystander's injuries. However, the manufacturer would be able to limit liability through indemnification of the negligent product user.

Under my proposal, in the case of *Berrier,* the bystander child injured by the lawn mower could set forth a prima facie case of strict liability. It is certainly possible the defendant manufacturer could raise an affirmative defense of assumption of risk pertaining to the child bystander,[214] but assuming they are unsuccessful, the defendant manufacturer could also indemnify the user of the lawn mower based on negligent use of the lawn mower. This would not preclude recovery on behalf of the bystander, but would serve as a limitation on the manufacturer's liability. Of course, if the manufacturer successfully showed negligent use on the part of the product user, the product user could still introduce evidence that a reasonable alternative design would have avoided the injury. In the case of *Berrier*, even if the manufacturer showed the lawn mower user was negligent in backing over the child, the user could still show that back-over protection, or a "no mow in reverse" device would have avoided the injury all together.

F. Justifications for the Proposal

Imposing strict liability based on foreseeable use of a product, while allowing a manufacturer a defense of negligent use or assumption of risk, avoids the shortcomings of defining product defect that plagued the Restatement (Second) and the Restatement (Third). My proposal avoids the deficiencies of the consumer expectations test, because consumer

214. An assumption of risk defense is available even when a child is injured, so long as they were aware of the dangers and accepted the risk. Long v. Manzo, 682 A.2d 370, 374 (Pa. Super. 1996).

expectations about product use are more easily discernable than consumer expectations about a product's design. Additionally, products with open and obvious dangers will not escape liability, because injuries caused by the foreseeable use of the products—whether the danger is open and obvious or not—will still trigger liability. Defendants, especially manufacturers of products with open and obvious dangers, will rightfully raise a defense, such as negligent use or assumption of risk; however, plaintiffs injured by unreasonably dangerous products will still be able to recover by showing that a reasonable alternative design would have prevented the injury.

My proposal avoids the shortcomings of the Restatement (Third), because it retains a standard of strict liability, without collapsing the standard into negligence. Once a prima facie case of liability is established through an injury caused by the foreseeable use of the product, the burden is on the defendant to show the plaintiff acted unreasonably. This conforms to the purpose of strict products liability, namely that manufacturers "insure that the costs of injuries resulting from . . . products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[215] Despite extending liability without regard for fault, my proposal protects manufacturers because they are not required to compensate plaintiffs for injuries resulting from the unforeseeable use of a product. Moreover the defenses of negligent use and assumption of risk provide defendants with additional protection from liability.

Expanding liability to all products, regardless of defect, would shift the true costs of products onto manufacturers rather than onto victims of a product that causes injury.[216] Undoubtedly, manufacturers would shift the increased costs to the consumer in the form of higher prices.[217] Nevertheless, the higher prices would reflect the total costs of a product that causes injury to the consumer.[218] Consumers would respond to higher prices by foregoing purchasing products that regularly cause injuries. For example, any lawn mower that caused injuries would be more expensive due to the added liability costs. Safer lawn mowers, however—perhaps with "no mow in reverse" technology—would be relatively cheaper. Consumers would be driven to the lower priced, safer products. My proposal's regime of strict liability for *all* products reflects the true costs of the product and thereby encourages the socially appropriate level of consumption.

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215. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1963).
216. *See* Diamond, *supra* note 25, at 531.
217. *Id.*
218. *Id.*

G. Criticisms of the Proposal

Some have argued strict products liability has expanded to its peak, and further expansion of no-fault liability is institutionally impossible for the courts to implement.[219] It is worth noting that strict liability already applies in a number of significant areas. The worker's compensation system is based on strict liability.[220] Additionally, traditional strict liability applies to commercial enterprises engaged in abnormally dangerous activities.[221] Employer vicarious liability is also based on strict liability.[222] Lastly, products with manufacturing defects are essentially subject to traditional strict liability. Although a product must be deemed defective before liability without fault is imposed, determining defect is not difficult, because the product differs from other prototypes on the market. Liability for manufacturing defects therefore hinges on causation.

Expanding strict liability to all products has been attacked on three specific grounds: (1) expanding strict liability creates categorical liability and will eliminate certain products from the market; (2) expanding strict liability raises problems in determining causation; and (3) expanding liability creates a moral hazard, as consumers will not avoid injury.[223]

1. Categorical Liability

Expanding liability to products without defect imposes categorical liability on all products.[224] The Restatement (Third) requires proof of a reasonable alternative design specifically to avoid category liability.[225] The drafters were concerned that under a standard risk-utility test, a fact-finder could conclude the risks associated with a product would outweigh the benefits—even if no alternative were available.[226] Critics note this form of liability has not been embraced by American courts and was explicitly prohibited by the Restatement (Third).[227]

Admittedly, under my proposed strict liability regime, products that cause injuries result in liability for the manufacturer. All products would be subject to liability—not just products deemed defective. Because no product can be made completely safe, nor would it be cost effective to do so even if possible, manufacturers will undoubtedly face higher liability costs. The consequences of categorical liability, however, are neither as

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219. James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1263, 1268 (1991).

220. Henderson, *supra* note 201, at 383.

221. *Id.* at 385.

222. *Id.* at 401.

223. *Id.* at 391–97.

224. Henderson & Twerski, *supra* note 219, at 1268.

225. Henderson & Twerski, *supra* note 4, at 1070.

226. *Id.*

227. *Id.*

drastic nor as disastrous as commentary has argued. It is worth noting that categorical liability does not prohibit the sale or use of a product. Rather, it would establish liability for the injuries caused by the product. While the price of dangerous products might increase based on the injuries they cause, the increase in liability would reflect the true costs of the product.

2. Causation

The expansion of products liability has been criticized as posing difficult problems of determining causation.[228] In a regime in which liability does not hinge on defect, whether the product caused the harm is central to whether a product manufacturer will be liable for injuries associated with the product.

Professor James Henderson, a reporter for the Restatement (Third), argued expanding strict liability beyond defective products was unworkable, because determining whether a product caused an injury would place too heavy a burden on the courts.[229] As an example, Henderson posed a hypothetical accident in which a plaintiff, after eating a heavy lunch of pasta and drinking two bottles of beer, climbed upstairs to retrieve a book from his bedroom.[230] On the way downstairs to answer the door, while glancing at his book, the plaintiff tripped on a roller skate left by his daughter, fell down the stairs, and crashed through the glass screen of the television.[231] Henderson argued that the hypothetical implicated too many defendants, and if liability were imposed without defects, each product mentioned could be liable for the plaintiff's resulting injury.[232]

Certainly a products liability regime that imposed limitless liability on the hypothetical defendants would be undesirable. However, under my proposed strict liability regime, liability is limited to injuries caused by a product's foreseeable use. This would eliminate any liability of the television manufacturer and the roller skate manufacturer, because neither of those products caused the injury during the course of foreseeable use. Similarly, the plaintiff would have a difficult time showing the beer, pasta, and book were proximate causes of the injury. Proximate cause is undoubtedly an elusive concept,[233] but if foreseeability can limit the duty of care in negligence actions, there is no reason why it cannot be determined in products liability cases. Finally, any of the hypothetical defendants could raise an affirmative defense that the plaintiff acted negligently in using the product, or assumed the risk of

228. Henderson & Twerski, *supra* note 219, at 1268.
229. *Id.*
230. *Id.* at 1280.
231. *Id.* at 1280–81.
232. *Id.* at 1281.
233. *See generally* Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

using the product. If a fact-finder concluded leaving the roller skate on the staircase was unreasonable, the manufacturers of the staircase and of the roller skate would be precluded from liability. In the posed hypothetical, when analyzed under my proposal, a plaintiff would be required to show safer, reasonable alternative designs were available—which is exactly the standard Professor Henderson and the Restatement (Third) advocate.[234]

Complex products liability cases, whether the regime requires a defect or not, will undoubtedly arise. Like in negligence actions, in a strict liability regime, proving causation rests with the plaintiff.[235] That said, if multiple products, used in a foreseeable way, cause injury, liability should ensue for all of the products. The task of determining causation can be difficult, but this does not justify imposing a defect requirement in order to establish liability.

3. Moral Hazard

Expanding strict liability has also been attacked as inviting moral hazard—"the natural tendency for insureds to increase their risks of incurring covered losses by risky conduct after the insurance takes effect."[236] The argument contends that expanding strict products liability invites riskier behavior, because losses are spread to everyone through a higher priced product.[237] This encourages careless use of a product by those who would use expanded liability as insurance, while risk-averse consumers will choose not to consume the product, because they are forced to pay an increased price and would not benefit from the increase in insurance.[238]

As applied to my proposal, this argument suffers from two flaws. First, limiting liability to foreseeable use of a product greatly diminishes the ability to use products in injury-prone ways while still imposing liability on the manufacturer. Additionally, the affirmative defenses of negligent use and assumption of risk serve as a check on risky behavior because certain uses of a product will preclude recovery for the plaintiff.

Second, the argument fails to acknowledge the effect that expanded liability would have on manufacturers. Even assuming expanded liability invites riskier behavior on the part of consumers, it also encourages safer behavior on the part of manufacturers. Strict liability is liability without fault, but expanding liability will still change behavior, because manufacturers will include liability as a cost of doing business.[239] This encourages manufacturers to market their products responsibly and to

234. Henderson & Twerski, *supra* note 219, at 1268.
235. 63 AM. JUR. 2D *Products Liability* § 519 (2010).
236. Henderson, *supra* note 201, at 393.
237. *Id.*
238. *Id.*
239. *See* Diamond, *supra* note 25, at 531.

sell their products to safe users.[240] Whether savings due to the decline in injuries because of manufacturer safety precautions would offset any increase in consumer risk based on a moral hazard is an empirical question. However the possibility of consumer moral hazard alone should not dissuade experimentation in strict products liability regimes.

Expanding liability to products without defects does not pose a significant moral hazard, because liability is limited to foreseeable use of a product and an affirmative defense of consumer negligence discourages misuse of a product. Additionally, any increase in injuries resulting from risky behavior on the part of consumers must be balanced against risk-averse behavior on the part of manufacturers.

CONCLUSION

More than ten years after the publication of the Restatement (Third), controversy persists over the appropriate standard of design defects. Nowhere is the controversy more unsettled than in Pennsylvania, where a recent decision by the Third Circuit produced a split between state and federal courts applying Pennsylvania law. Currently, in products liability cases, federal courts apply the Restatement (Third), while Pennsylvania state courts continue to apply the Restatement (Second). The division in Pennsylvania is characteristic of the rest of the country, in which different states apply drastically different standards to define product defect.

This division presents an opportunity to clarify the law, not only in Pennsylvania, but also throughout the country. Rather than follow either the Restatement (Second) or the Restatement (Third), which have led to the current division, courts and legislatures should apply a form of strict liability that holds manufacturers of products liable when the foreseeable use of the product causes an injury. Plaintiffs should only have to produce evidence of a reasonable alternative design after the defendant has proven negligent use or assumption of risk. By eliminating the elusive concept of defect from a products liability regime, liability will be more predictable and will better reflect the true costs of product use.

Courts have struggled to develop a standard that realizes the purpose of strict products liability, without overburdening manufacturers or underprotecting consumers. Neither the Restatement (Second), nor the Restatement (Third) was successful in defining design defects. If the term "defect" lacks a coherent definition, it should not trigger liability. This Note proposes removing defect as a requirement for liability. Ultimately, this Note seeks to further the discussion towards developing a just and unified standard of products liability law.

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240. *Id.*

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