IN THE SUPREME COURT OF PENNSYLVANIA

No. 17 MAP 2013

TERENCE D. TINCHER AND JUDITH R. TINCHER, Respondents,

v.

OMEGA FLEX, INC., Appellant.

Appeal of: OMEGA FLEX, INC.

BRIEF FOR AMICI CURIAE THE SHERWIN-WILLIAMS COMPANY, UNITED STATES STEEL CORPORATION, CALGON CARBON CORPORATION, AND THE PROCTER & GAMBLE COMPANY

Appeal from the September 25, 2012 Order of the Superior Court of Pennsylvania, Docket No. 142 EDA 2011, Affirming the June 1, 2011 Order of the Court of Common Pleas of Chester County, Pennsylvania, Docket No. 2008-00974-CA

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are current product manufacturers and sellers who are or may be, from time to time, parties to cases in this Commonwealth alleging strict products liability in tort.

Amici take no position on defendant's liability in this case.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Amici accept Appellant's statement of jurisdiction.

ORDER OR OTHER DETERMINATION IN QUESTION

Amici accept Appellant's statement of the Order in question.

STATEMENT OF THE SCOPE OF REVIEW AND THE STANDARD OF REVIEW

Amici accept Appellant's statement of the scope and standard of review.

STATEMENT OF THE QUESTION INVOLVED

(1) Whether this Court should replace the strict liability analysis of Section 402A of the Second Restatement with the analysis of the Third Restatement of Torts, Products Liability?

(2) In addition, the parties are directed to brief the question of whether, if the Court were to adopt the Third Restatement, that holding should be applied prospectively or retroactively. *See generally Bugosh v. I.U. North America, Inc.*, 601 Pa. 277, 971 A.2d 1228, 1242-43 (Pa. 2009) (Saylor, J., dissenting, joined by Castille, C.J.).

Suggested Answers: (1) Yes. This Court should adopt the liability rules found in Sections 1 through 4 of the Third Restatement in place of Section 402A of the Second Restatement. (2) This Court should apply its holding retroactively to all pending cases.

STATEMENT OF THE CASE

Amici accept Appellant's statement of the case.

SUMMARY OF ARGUMENT

This case presents an historic opportunity for the Court to bring long-needed clarity and consistency to products liability law, to accommodate the reality of modern-day product design and warning practices, and to provide for the introduction of the most probative evidence for plaintiffs and defendants in cases that involve product safety. Over half a century ago, Pennsylvania adopted Section 402A of the Restatement (Second) of Torts (1965) ("Second Restatement") in *Webb v. Zern*, 422 Pa. 424, 427, 220 A.2d 853, 854 (1966), a manufacturing defect case. While § 402A provided a sound rule for manufacturing defect cases, it was not created for and was ill-equipped to handle design and warning defect claims, which were still in their infancy in the 1960s when Section 402A was drafted.

Pennsylvania's application of § 402A to design and warning cases, the majority of claims in today's tort litigation environment, has created several difficulties for courts, litigants and juries: (1) while judges address risk-utility in deciding defectiveness as a matter of law, jurors are not permitted to consider risk-utility factors when deciding defectiveness at trial; (2) jury instructions fail to adequately define a "defect"; and (3) assessment of product safety is artificially divorced from assessment of the manufacturer's or seller's conduct. Another consequence of Pennsylvania's approach is that neither judge nor jury applies the core legal standard to the evidence presented at trial. These features place Pennsylvania outside the mainstream of jurisdictions and undermine the consistency and fairness of proceedings. It is time to correct these unintended problems by adopting Sections 1 through 4 of the Restatement of the Law (Third) of Torts, Products Liability (1998) ("Third Restatement").

The Third Restatement presents a modest and balanced reformulation of products liability law. It retains classical strict liability for manufacturing defects, but it expressly identifies modern concepts such as foreseeability and reasonableness already in use in design and warning

cases. Moreover, it levels the playing field: noncompliance with applicable product safety statutes and regulations may render a product defective, REST. (3D) § 4(a), while compliance with applicable product safety statutes and regulations may be considered to evaluate whether the product is defective, REST. (3D) § 4(b). By permitting judges and jurors to consider the manufacturer's decision to follow or to not to follow industry standards and regulations, the Third Restatement creates incentives for manufacturers and sellers to abide by industry standards and regulations in order to increase safety. The amici curiae are dedicated to providing safe, high-quality products to customers, and adoption of the Third Restatement would entail significant welfare gains for Pennsylvania consumers, as well as manufacturers and suppliers doing business here.

Adopting the Third Restatement's products liability rules would not cause any great upheaval in Pennsylvania law. Instead, it would clarify and harmonize it. The principal change that the Restatement Third rule would effect would be to properly allocate to juries the responsibility for weighing risk-utility factors with guidance regarding which factors to consider. Third Restatement concepts *already* play a role, expressly or impliedly, in Pennsylvania products liability jurisprudence. Embracing the Third Restatement formulation would bring this approach to the surface, resolve tensions, and promote coherence in Pennsylvania law.

ARGUMENT

I. PENNSYLVANIA SHOULD ADOPT THE THIRD RESTATEMENT OF TORTS PRODUCT LIABILITY RULES IN THE PLACE OF § 402A OF THE SECOND RESTATEMENT OF TORTS.

A. Section 402A of the Second Restatement of Torts has proven to be a poor tool for determining "defectiveness" in design and warning cases.

Pennsylvania adopted § 402A of the Second Restatement of Torts almost half a century ago in *Webb v. Zern*, 422 Pa. 424, 427, 220 A.2d 853, 854 (1966), just one year after the

American Law Institute (ALI) published that standard. Section 402A cemented two major developments in legal theory as of that time: (1) it eliminated privity as a requirement for a suit by product users against manufacturers and sellers; and (2) it confirmed the expansion of strict liability from the limited realms of foodstuffs and "products for intimate bodily use" to all products introduced into the stream of commerce. *See* John W. Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 5-13 (1965).

Even though § 402A was a modern formulation of tort concepts fifty years ago, it was a creature of its time. In the mid-1960s and before, "products liability" almost exclusively connoted claimed ***manufacturing*** defects, not design or warning defects.[1] Indeed, *Webb v. Zern* itself adopted § 402A without any consideration for design or warning defect questions. 422 Pa. at 427, 220 A.2d at 854; *see* 422 Pa. at 428-32, 220 A.2d at 855-57 (Bell, C.J., dissenting).

Although § 402A fit well with manufacturing defect claims, it was not so easily applied to design and warning claims.[2] Section 402A states: "One who sells any product in a defective

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[1] *See Phillips v. Cricket Lighters*, 576 Pa. 644, 664-66, 841 A.2d 1000, 1012-13 n.2 (2003) (Saylor, J., concurring) (quoting John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 825 (1973) ("The prototype case was that in which something went wrong in the manufacturing process, so that the product had a loose screw or a defective or missing part or a deleterious element, and was not the safe product it was intended to be.")); Richard L. Cupp, Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. 874, 890 (2002) ("Most of the early cases did not entail claims of defectiveness that could, even in retrospect, be classified as design claims."); James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 880 (1998) ("The simple truth is that liability for defective design was in its nascent stages in the early 1960s and section 402A did not address it meaningfully, if at all."); REST. (3D) § 1 cmt. a ("History") (questions of design defects and inadequate instructions or warnings were infrequent until after adoption of the Second Restatement).

[2] Indeed, the Third Restatement approach is not substantially different from that of the Second Restatement with regard to manufacturing defect claims, and would not materially change the way Pennsylvania courts approach manufacturing defect cases. *Compare* Pa. Sugg. Std. Civ. Jury Instr. 16.10 (4th ed. 2011) (instructing jury to find a supplier liable for a "defect in

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." REST. (2D) § 402A. This language, without more, is difficult to apply to design or warning claims. Proof of a manufacturing defect is conceptually straightforward—the jury need only compare the as-built product with the manufacturer's own standards. The unit of measure—a non-defective product—is readily available and comes directly from the manufacturer. Moreover, the requirements for a non-defective product (the specifications) are known before the claim arises.

In contrast, determining whether a product that meets its manufacturer's specifications is nonetheless defective because it is "unreasonably safe" in design, warning, or instructions is a more complex endeavor because there must be some external measure for defectiveness. *See* REST. (3D) § 2 cmt. a ("In contrast to manufacturing defects, design defects and defects based on inadequate instructions or warnings are predicated on a different concept of responsibility. In the first place, such defects cannot be determined by reference to the manufacturer's own design or marketing standards because those standards are the very ones that plaintiffs attack as unreasonable. Some sort of independent assessment of advantages and disadvantages . . . is necessary."). As a comment to the Third Restatement points out, answering the question of whether an entire product line is defective because it is "unreasonably

(continued...)

the product" "even if the [supplier] has taken all possible care in the preparation and sale of the product") *with* REST. (3D) § 2(a) ("[A product] contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product."). The main effect of adopting the Third Restatement would be to harmonize Pennsylvania's approach to warning and design defects with those of other states and to provide juries and judges with clear guidance regarding the factors to consider in design and warning defect claims.

dangerous," REST. (2D) § 402A, "requires reference to a standard outside the specifications." REST. (3D) § 2 cmt. d.

Courts, juries and litigants, therefore, have a greater need for guidance on the requirements to establish a defect in design and warning cases, but they cannot find help in the words of § 402A itself. Section 402A does not define "defective." *See* REST. (2D) § 402A. Nor does the section define "unreasonably dangerous." *See Lewis v. Coffing Hoist Div., Duff-Norton Co., Inc.*, 515 Pa. 334, 340, 528 A.2d 590, 592-93 (1987) ("It must be noted . . . that § 402A provides no definition of the term 'defect,' and thus, of itself, does not afford an effective working guide to what kinds of factual circumstances will result in the imposition of strict liability on a manufacturer for injuries which are caused by its product."). Even the commentary to § 402A does not venture beyond the nearly tautological observations that a product is "defective" when it is "unreasonably dangerous" and "not defective" when it is "safe for normal handling." *See* REST. (2D) § 402A cmts. g, h, i. This void left courts to attempt to fill the gap.

B. Recognizing That Section 402A Provides Insufficient Guidance, Most Courts Have Supplemented It With A Risk-Utility Balancing Test That Appropriately Balances A Product's Usefulness And Acceptable Safety.

In an effort to circumscribe what otherwise could be amorphous liability (whether extremely limited liability, on the one hand, or limitless liability, on the other), courts developed various tests for what makes a product's design or warnings "defective" or "unreasonably dangerous." Some courts developed a "consumer expectations" test, which asks the jury whether a product failed to perform as safely as an ordinary consumer would expect. *See infra* n. 4, 5. Most courts, including Pennsylvania, have adopted some form of risk-utility balancing, often allowing proof of a reasonable alternative design to influence the liability determination. *See Azzarello v. Black Bros. Co.*, 480 Pa. 547, 558, 391 A.2d 1020, 1026 (1978); *see also infra* n. 4, 5.

The risk-utility test largely tracks the so-called Wade factors, so named as a result of an influential article by John Wade, then Dean of Vanderbilt Law School, published around the time of the Second Restatement. Dean Wade identified seven factors as relevant to evaluating whether a product is acceptably safe:

> (1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. at 17.

These risk-utility factors are consistent with the Third Restatement concepts of reasonably foreseeable risks of harm, whether a product is not reasonably safe, and the availability of reasonable alternative designs. They also reflect safety standards *actually used* in real-world product safety design. Design standards promulgated by leading standards-setting organizations such as the American Society for Testing and Materials ("ASTM") refer to risk-utility factors such as the usefulness of a product, the availability of a safer design, and the effect of instructions or warnings on product safety. *See, e.g.*, ATSM International, Annual Book of ASTM Standards, Vol. 15.11, No. F 400-004 (2007) ("Standard Consumer Safety Specification for Lighters") ("Lighters, being flame-producing devices, can, as do all flame sources, present a potential hazard to the consumer. This specification cannot eliminate all hazards, but is intended to minimize potential hazards to users."); *id.*, No. F 2088-03 ("Standard Consumer Safety Specification for Infant Swings") ("This consumer safety specification establishes safety performance requirements, test methods, and labeling requirements to minimize hazards to

infants . . . resulting from normal use and reasonably foreseeable misuse or abuse of infant swings.").

There is strong support, bordering on national consensus, that the risk-utility method is the best standard by which to judge strict products liability. *See* John M. Thomas, *Defining "Design Defect" in Pennsylvania: Reconciling Azzarello and the Restatement (Third) of Torts*, 71 TEMP. L. REV. 217, 222 (1998) ("There is widespread agreement among courts and scholars today that the cost-benefit balancing test is the appropriate test for design defect."); Dominick Vetri, *Order Out Of Chaos: Products Liability Design-Defect Law*, 43 U. RICH. L. REV. 1373 (2009) ("[I]n virtually all courts across the United States, a risk-utility proof is accepted as a proper method for proving a design defect, regardless of the legal test or jury instruction."). Pennsylvania's law is in line with this consensus. *See Azzarello*, 480 Pa. at 558, 391 A.2d at 1026.

The risk-utility test also has a firm grounding in economic and legal theory. It is beyond doubt that "[p]roducts are not generically defective merely because they are dangerous." REST. (3D) § 2 cmt. a. For example, objects like knives, lawnmowers, and automobiles cannot be made perfectly safe for human use without sacrificing their useful characteristics—*e.g.*, sharpness for knives, ability to cut and mow quickly for lawnmowers, and available speed for automobiles. As Dean Wade observed, a car's speed creates the risk that "if an obstacle suddenly and unexpectedly looms in front of it, [a] driver [may] be unable to stop or swerve in time to avoid a collision." Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. at 16 (even under the Second Restatement formulation, "[s]trict products liability clearly does not require a perfectly safe product"). Even an item as simple as a hammer "will not infrequently smash a finger or thumb if used unskillfully." *Id.* Yet there is uniform consensus that the presence of inherently

risky features like a car's speed or a hammer's weight do not make them defective. *Id.* Even under the Second Restatement formulation, "[s]trict products liability clearly does not require a perfectly safe product." *Id.*

For most products, product-related accident costs can be eliminated entirely "only by excessively sacrificing product features that make products useful and desirable." REST. (3D) § 2 cmt. a. Nor would "super-safe" products promote social welfare and consumer choice. Consumers understand that some risks may accompany the products they seek in the marketplace; despite this risk, "most people probably want (or 'demand,' from the economic perspective of product makers) manufacturers to provide them with the benefits of science and technology if and when such benefits reasonably appear to exceed the risks." David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 466 (1993); *see also id.* at 459-61; Aaron Twerski & James Henderson, *Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 BROOK. L. REV. 1061, 1075-76 (2009).

C. Pennsylvania's idiosyncratic approach to § 402A created unintended consequences and places Pennsylvania outside the mainstream of products liability doctrine.

Despite embracing a risk-utility test, Pennsylvania courts have developed an idiosyncratic approach to risk-utility determinations and the ultimate determination of "defectiveness" that has created unintended problems for courts, juries and litigants. The reporters of the Third Restatement have called Pennsylvania's approach "difficult to decipher," REST. (3D) § 2 cmt. d. This Court itself has noted that the law in this Commonwealth is in a "state of disrepair." *Beard v. Johnson & Johnson, Inc.*, 41 A.3d 823, 836 (Pa. 2012). As one federal district judge has put it: "Pennsylvania products liability law can be described as, at best, unsettled, and, at worst, a

maze of uncertainty, providing little guidance to manufacturers." *Sansom v. Crown Equipment Corp.*, 880 F. Supp. 2d 648, 653 (W.D. Pa. 2012) (Hornak, J.).

1. Pennsylvania alone segments the defect inquiry between judge and jury.

Pennsylvania is the only jurisdiction that asks trial judges to apply risk-utility balancing to determine whether a case can proceed to the jury as a matter of law, yet forbids the jury from evaluating the product's risk-utility balance. *See Moyer v. United Dominion Industries, Inc.*, 473 F.3d 532, 538-41 (3d Cir. 2007) ("Our own review of products liability law reveals that most other jurisdictions give the jury a central role in making the strict liability determination and regard juries as capable of balancing risk-utility factors . . . . Indeed our research fails to disclose any other jurisdiction that has adopted [Pennsylvania's] two-step approach or denies the jury a chance to apply the risk-utility test."); Thomas, *Defining "Design Defect" in Pennsylvania*, 71 TEMP. L. REV. at 225 ("*Azzarello* endorsed, and has been almost uniformly interpreted as having endorsed, cost-benefit analysis for purposes of limiting strict liability and preventing manufacturers from being held automatically liable for harm resulting from their product's use. Unfortunately, the *Azzarello* court went on to suggest a jury instruction that, by leaving the most important terms undefined, failed to effectuate these purposes.").

In *Azzarello*, the Court rejected absolute liability for sellers and manufacturers, reasoning that the Second Restatement standard would impose liability only with respect to products with a "defect." 480 Pa. at 554-55, 391 A.2d at 1024. As the Court described, the critical factor for determining "defectiveness" under the Second Restatement is whether the product is "unreasonably dangerous." 480 Pa. at 555, 391 A.2d at 1024.

The Court then adopted an allocation of responsibility that would create unanticipated difficulties. Following a California decision, the Court stated that the phrase "unreasonably

dangerous" should not go to the jury when it considers whether a product is defective. 480 Pa. at 555, 391 A.2d at 1025 (citing *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153, 1161, 1162 (Cal. 1972)). Instead, the Court reasoned that the words "unreasonably dangerous" in § 402A "have no independent significance" and "merely represent a label to be used where it is determined that the risk of loss should be placed upon the supplier" as opposed to the user. 480 Pa. at 555-56, 391 A.2d at 1025. The Court explained the division of responsibility between judge and jury: "While a lay finder of fact is obviously competent in resolving a dispute as to the condition of a product, an entirely different question is presented where a decision as to whether that condition justifies placing liability upon the supplier must be made." 480 Pa. at 556-57, 391 A.2d at 1025-26 (footnotes omitted). As the Court stated, "we must not lose sight of the fact that regardless of the utility of the Restatement [(Second)] formulation in predicting responsibility, it is primarily designed to provide guidance for the bench and bar, and not to illuminate the issues for laymen." *Id.*

The Court further explained that the phrase "unreasonably dangerous" in § 402A represents a *legal* determination that policy considerations require placing the risk of loss on a manufacturer or supplier as opposed to a user. The Court accordingly held: "It is a judicial function to decide whether, under plaintiff's averment of the facts, recovery would be justified; and only after this judicial determination is made is the cause submitted to the jury to determine whether the facts of the case support the averments of the complaint." 480 Pa. at 558, 391 A.2d at 1026. Because these questions are legal, "[t]hey do not fall within the orbit of a factual dispute which is properly assigned to the jury for resolution. A standard suggesting the existence of a 'defect' if the article is unreasonably dangerous or not duly safe is inadequate to guide a lay jury in resolving these questions." *Id.*

Under *Azzarello*, a trial court judge, therefore, first must apply a risk-utility balancing test to determine whether social policy supports a finding that the product is unreasonably dangerous. 480 Pa. at 558; 391 A.2d at 1026; *see Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 1045 (3d Cir. 1997) (applying the risk-utility analysis as part of the threshold social policy inquiry). But the court, in this balancing process, cannot resolve disputed questions of fact. Thus, it must balance risk and utility while assuming all disputed facts in favor of the plaintiff, "to avoid entangling the trial judge in determining factual questions assigned to the jury." *Bugosh v. I. U. North America*, 601 Pa. 277, 971 A.2d 1228 (2009) (Saylor, J., dissenting). The judge's legal decision regarding unreasonable danger is based on a version of facts that is, by definition, one-sided and unverified.

If the trial judge does not find the product to be not defective as a matter of law, the court then submits the case to the jury only on the questions of whether the product has a "feature" or "element" that made it unsafe, and whether that feature caused the plaintiff's injury. *Azzarello*, 480 Pa. at 559 n.12, 391 at 1027 n.12; *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 97, 337 A.2d 893, 900 (1975). A product is defective if it "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." *Azzarello*, 480 Pa. at 559, 391 A.2d at 1027. This division of responsibility, especially insofar as it has been interpreted to divest the jury from considering reasonableness of conduct, has created many difficulties in application.

2. Pennsylvania's approach creates problems for jury instructions.

Pennsylvania's segmentation of risk-utility considerations leads to difficulties in meaningfully instructing juries. The bare instructions give little guidance (or boundaries) to the jury's determination:

> The (supplier) of a product is the ***guarantor*** of its safety. The product must, therefore, be provided with every element necessary to make it safe for (its intended) use, and without any condition that makes it unsafe for (its intended) use. If you find that the product, at the time it left the defendant's control, ***lacked any element*** necessary to make it safe for (its intended) use or ***contained any condition*** that made it unsafe for (its intended) use, then the product was defective, and the defendant is liable for all harm caused by such defect.

Azzarello, 480 Pa. at 560, 391 A.2d at 1027 (citing Pennsylvania Std. Civ. Jury Instr. 8.02, Subcomm. Draft (June 6, 1976)) (emphasis added).[3] Despite clear law to the contrary, the terms and tone of this instruction suggest absolute liability as a guarantor and likely prejudice defendants in design and warning cases. *See* REST. (3D) § 2 Reporters' Note (calling the Pennsylvania instruction "unduly harsh"). It lacks any notion of "reasonable safety" or "risk-benefit." "Guarantor" to a jury is likely to sound like an "insurer" responsible for any hindsight analysis suggesting a design that could have been safer to the plaintiff in the peculiar circumstances of that accident. As *Azzarello* explained, "[i]f the theory is strict liability in tort, the plaintiff must still prove that the article was unsafe in some way. Thus, the liability is not that of an insurer; it is not absolute in the literal sense of the word." *Azzarello*, 480 Pa. at 553 n.5, 391 A.2d at 1024 n.5 (quoting Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.T. J. 13 (1965)). Yet the jury instructions suggest absolute liability.

The jury also receives little guidance from the court for determining whether a defect exists. "To have to define the term [defective] to the jury, with a meaning completely different

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[3] The current version of this instruction is found at Pennsylvania Suggested Standard Civil Jury Instruction 16.20 (4th ed. 2011). The only material change from the 1976 draft, apart from some minor alterations to language, is the addition of the phrase "and there was an alternative, safer practicable design" before the phrase "then the product was defective." This instruction is used in crashworthiness cases, *see Kupetz v. Deere & Co.*, 435 Pa. Super. 16, 26-29, 644 A.2d 1213, 1218-19 (1994), but typically is not applied in standard design defect or warning defect cases.

from the one they would normally give to it, is to create the chance that they will be misled. To use it without defining it to the jury is almost to ensure that they will be misled." John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 832 (1973).

Ultimately, *neither* judge *nor* jury applies the core legal standard—"unreasonably dangerous"—to the facts. *See* Thomas, *Defining "Design Defect" in Pennsylvania*, 71 TEMP. L. REV. 217, 229-40; *id.* at 232 ("[I]f the court is required to view the evidence on the cost-benefit factors in the light most favorable to the plaintiff, and if (as most scholars and some courts have concluded) the *Azzarello* instruction does not permit the jury to consider cost-benefit factors at all, then neither the court nor the jury has the authority to actually decide whether the true benefits of the proposed alternative design outweigh the true costs. In other words, under this view of the division of decisional power, neither the court nor the jury determines whether the product is in fact unreasonably dangerous or defective."). This division of responsibility—where neither judge nor jury decides contested issues about the risk and utility of a product—strips the parties of the right to a jury trial on the key issues in a case. *See id.* at 234-36 (discussing constitutional concerns). Moreover, commentators have reasoned that juries should be permitted to decide the risk-utility question because it enables them to determine how safe a product should be in order to be reasonably "safe." *See, e.g.*, Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. at 497 ("One might well argue that the law should jealously guard the community's prerogative consciously to decide the significant moral question of how much product safety is enough.").

Pennsylvania's idiosyncratic divvying of the liability determination creates difficulties not only for jurors, but also for courts, which have asked for guidance. *See, e.g., Surace v. Caterpillar, Inc.*,, 111 F.3d at 1046 ("We regret that the Supreme Court has not yet spoken

definitively on the matter of risk-utility analysis or its component factors. Since it is almost twenty years since *Azzarello*, we hope that the Court will speak definitively soon."); *Gaudio v. Ford Motor Co.*, 2 Pa. D. & C. 5th 317, 322 n.2 ("This court shares the views as expressed in an order from the Delaware County Court of Common Pleas which stated, 'while the court feels that a risk-benefit analysis is relevant, it is perplexed as to how the evidence should be presented and who should make the decision with respect to this issue. In crashworthiness cases the procedure seems unclear as how to appropriately decide this issue whether to the jury during trial or by the judge alone.'") (quoting *Busa v. Ford Motor Co.*, Delaware County Court of Common Pleas, No. 04-3469 (2006)).

Conversely, there is no indication that other jurisdictions in which the jury *does* consider risk-utility have encountered problems due to jury confusion or misapplication. *See Moyer*, 473 F.3d at 539-41 (no other jurisdiction "denies the jury the chance to apply the risk-utility test"); *Barton v. Adams Rental, Inc.*, 938 P.2d 532, 537 (Colo. 1997) (identifying the factors in its "straightforward" risk-benefit analysis).

Indeed, no other jurisdiction follows Pennsylvania's division of labor between judge and jury; most states allow the jury to consider risk-utility factors. *Moyer*, 473 F.3d at 539-41 & n.4. Despite this Court's reliance on the *Cronin* decision from California, the California Supreme Court had already limited *Cronin* by the time *Azzarello* was decided. In *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978), the California Supreme Court held that the jury needed to hear *some* standard for finding a defect, even if the phrase "unreasonably dangerous" was not used. The California Supreme Court, therefore, held that lower courts should instruct juries to find a design defect if either the plaintiff proves "that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable

manner," or the defendant fails to prove "that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design." *Barker*, 573 P.2d at 457-58. Continued reliance on *Azzarello* puts Pennsylvania out of the mainstream with respect to modern products liability jury instructions.

D. Pennsylvania's approach artificially separates assessment of product safety from manufacturer or seller conduct.

Pennsylvania also permits jurors to assess the safety of products but not the conduct that led to the design or warning choices for those products. This separation grew out of an early concern in *manufacturing defect* cases that manufacturers would attempt to defend defectively manufactured products by referring to care taken in the manufacturing process. Pennsylvania's regime of strict liability would be defeated when plaintiffs, often lacking evidence of the process error, would be unable to prove lack of reasonable care. This concern does not apply in design and warning cases, when alternative designs or warnings can be considered.

Courts and commentators now recognize that "products" and "conduct" are inseparable in design and warning claims, and that this semantic distinction creates more mischief than it resolves. *See Phillips*, 576 Pa. at 669, 841 A.2d at 1015 (Saylor, J., concurring) (calling this distinction between product and conduct "a common aphorism in the developmental stages of strict liability doctrine," and observing that "most courts and commentators have come to realize that in design cases the character of the product and the conduct of the manufacturer are largely inseparable"). While "[i]n theory a product manufacturer could act reasonably in designing a product, but its product could nevertheless be unreasonably dangerous," in practice, "manufacturers consciously choose how to design their products." *Id.* (quoting Cupp & Polage, *The Rhetoric of Strict Products Liability Versus Negligence*, 77 N.Y.U. L. REV. at 893). Thus,

"[a]sking whether the product is reasonable tends to circle back to asking whether the manufacturer used due care in designing it." *Id.*

> *[T]o condemn a design for being unreasonably dangerous is inescapably to condemn the designer for having been negligent.* To insist otherwise would be akin to a professor telling a law student that, while the brief the student wrote is awful, the professor is not passing judgment on the student's skill in writing it. Similarly, . . . insistence that strict liability is somehow being imposed if the court assesses the reasonableness of the design and not the reasonableness of the designer's conduct is purest sophistry.

576 Pa. at 669-70; 841 A.2d at 1015 (Saylor, J., concurring) (quoting Henderson & Twerski, *Achieving Consensus on Defective Product Design,* 83 CORNELL L. REV. at 919) (emphasis added).

The artificial separation of product from conduct creates tension in Pennsylvania law, and it has led to anomalous and inconsistent rulings. For example, product alteration can defeat a plaintiff's claim; plaintiffs have the burden of showing that a product defect "existed when it left the hands of the defendant." *Schindler v. Sofamor, Inc.*, 2001 Pa. Super. 118, 774 A.2d 765, 771 (Pa. Super. Ct. 2001). Nonetheless, this court has ruled that product alteration is not a defense if "the manufacturer could have *reasonably expected or foreseen* such an alteration"—a distinctly conduct-based rule. *Davis v. Berwind Corp.*, 547 Pa. 260, 267, 690 A.2d 186, 190 (1997) (emphasis added).

Similarly, evidence of compliance with industry standards, custom, or practices is not admissible to prove the absence of a product defect, because such evidence would tend to make the jury focus on "the quality of the defendant's conduct" rather than on the "attributes of the product itself." *Lewis*, 515 Pa. at 342, 528 A.2d at 594. But the same type of evidence is admissible in rare circumstances in which it "pertains solely to the characteristics of the end product." *Cave v. Wampler Foods, Inc.*, 2008 Pa. Super. 267, 961 A.2d 864, 869 (2008). Thus,

in a given case, a court faced with evidence of compliance or noncompliance with governmental or industry standards must make the artificial choice of whether the evidence says something about the product, or whether it says something about the seller's conduct.

Pennsylvania courts have struggled with this tension long enough, creating uncertainty for litigants, jurors, and judges. *See Gaudio v. Ford Motor Co.*, 2 Pa. D. & C. 5th at 322 n.2 (Pa. Com. Pl. 2007). In practice and at trial, the question of whether a product's design or its warnings are defective and unreasonably dangerous cannot be evaluated without assessing—openly or not—the defendant's conduct. Because Pennsylvania's current formulation of the legal test ignores this reality, it should be reformed.

E. Pennsylvania should allow juries to consider the risk and utility of products when determining liability in design and warning cases.

Guidance is necessary to make sure that strict liability does not become absolute liability. The purpose and history of products liability as a tort supports the use of risk-utility balancing as a tool for determining whether conduct is liability-creating, and for preventing absolute liability. Courts, including this one, acknowledge that reasonableness plays some part in the risk-utility determination for design and warning cases. For example, as the New York Court of Appeals described, in the risk-utility analysis, the "reasonableness of an actor's conduct is considered in light of a number of situational and policy-driven factors." *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 735 (N.Y. 1995) (citations and quotations omitted). This approach necessarily "invites the parties to adduce proof about the manufacturer's choices and ultimately requires the fact finder to make 'a judgment about [the manufacturer's] judgment.'" *Id.* (citation omitted). Moreover, this Court has acknowledged a standard for crashworthiness cases that includes proof of an alternative safer, practicable design as a required element. *See Schroeder v. Commonwealth, Dep't of Transp.*, 551 Pa. 243, 252, 710 A.2d 23, 28 n.8 (Pa. 1998); *Kupetz v.*

Deere & Co., 435 Pa. Super. 16, 26-29, 644 A.2d 1213, 1218-19 (1994) ("In order to prevail on a crashworthiness theory in a products liability action under Section 402A, a plaintiff must demonstrate . . . an alternative, safer design practicable under the circumstances existed."). The reasons supporting that standard in crashworthiness cases apply across the board.

Courts and commentators alike recognize an explicit role for jury consideration of reasonable foreseeability and reasonable alternatives in design and warning cases as part of the risk-utility inquiry. *See* REST. (3D) § 2 commentary; *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 165 (Iowa 2002) ("Whether the doctrine of negligence or strict liability is being used to impose liability *the same process is going on in each instance*, i.e., weighing the utility of the article against the risk of its use.") (emphasis in original); Cupp & Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. at 877-78 ("Strict products liability evolved rapidly in the courts and law. Increasingly, however, scholars and commentators have questioned the distinction between strict liability and negligence in defective design and warning claims. Regardless of the label attached to the cause of action, courts increasingly are using more or less the same standard—a risk utility analysis essentially based on negligence principles."). The very genesis of the products liability tort from negligence antecedents shows that concepts of reasonableness are not alien to strict liability. For this Court to allow reasonableness to be openly considered—in the measured way permitted by the Third Restatement—does not mean that negligence and strict liability will collapse into a single claim.

F. The majority of states rely on risk-utility factors and proof of reasonable alternative designs or warnings to decide modern design and warning claims.

Because the Second Restatement failed to define what makes a product "defective" or "unreasonably dangerous," courts developed various formulations before the Third Restatement for determining defectiveness in design and warning claims. While a shrinking minority of

jurisdictions continues to adhere to a consumer expectations test in whole or in part, the shortcomings of that standard as an independent test for defectiveness have become clear. *See Glen Blue v. Envtl. Eng'g, Inc.*, 828 N.E.2d 1128, 1138 (Ill. 2005) ("It became apparent . . . that section 402A, created to address manufacturing defects, did not adequately cover design defects or defects based on inadequate warnings."). Consumers lack information to determine whether products of complex design, such as pharmaceuticals, have been reasonably designed to balance risks with benefits.

Most jurisdictions today apply a risk-utility or risk-benefit test and allow or require proof of a reasonable alternative design or warning. *See Moyer*, 473 F.3d at 539-41 n.4 (collecting authority); *Glen Blue,* 828 N.E.2d at 1138 (noting that the risk-utility test was created to address the restrictions of the consumer expectations approach); *see* REST. (3D) § 2 cmt. d Reporters' Note (jurisdictions following consumer expectations test represent a "distinct minority"). Moreover, states that purport to follow the consumer expectations test nonetheless typically allow the jury to consider some version of risk-utility balancing and proof of a reasonable alternative design. *See, e.g.*, *GMC v. Jernigan,* 883 So. 2d 646 (Ala. 2003) (endorsing a consumer expectations test but stating that plaintiff must prove a reasonable alternative design as a threshold issue); *Delaney v. Deere & Co.*, 999 P.2d 930, 945 (Kan. 2000) ("Kansas law has been clear in allowing evidence of the feasibility of an alternative design in the trial of a design defect."); *Dancy v. Hyster Co.*, 127 F.3d 649, 654 (8th Cir. 1997) (applying Arkansas law) (holding that plaintiff "has the burden of proving the existence of a defect by showing that a safer alternative design actually exists"). That is, regardless of the formulation of the test they use, jurisdictions throughout the country recognize the importance of weighing the risks of a product against its usefulness in order to determine whether it is not reasonably safe. *See also*

Twerski & Henderson, *Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 BROOK. L. REV. at 1072 ("Based on reported decisions, plaintiffs rarely, if *ever*, reach the jury in a classic design case without proof of a feasible alternative design.") (emphasis in original).

The modern, emerging consensus follows the Third Restatement principles. At least ***nineteen*** states (and the District of Columbia) have adopted Third Restatement principles outright or apply a risk-utility balancing test or a reasonable manufacturer test in design defect or failure to warn cases—and in all of those states, evidence of a reasonable alternative design either is required as an element of the plaintiff's burden of proof or as a factor in determining the existence of a defect.[4]

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[4] **Colorado:** *Armentrout v. FMC Corp.*, 842 P.2d 175 (Colo. 1992) (holding that the plaintiff bears the burden to show that the risks of the product outweigh the benefits, and the jury may consider reasonable alternative design); *see also Barton v. Adams Rental, Inc.*, 938 P.2d 532, 537 (Colo. 1997) (jury application of risk-utility test). **Delaware:** *Graham v. Pittsburgh Corning Corp.*, 593 A.2d 567 (Del. Super. Ct. 1990) (holding that Delaware uses a "reasonable manufacturer" test); *Nacci v. Volkswagen of Am., Inc.*, 325 A.2d 617 (Del. Super. Ct. 1974) (endorsing a reasonable manufacturer test that considers whether a reasonable manufacturer would pursue an alternative design). **District of Columbia:** *Warner Fruwhauf Trailer Co. v. Boston*, 654 A.2d 1272, 1278 (D.C. 1995) ("[T]he trier of fact ordinarily must consider whether any safer alternative designs were commercially feasible."). **Georgia:** *Jones v. NordicTrack, Inc.*, 550 S.E.2d 101, 103 (Ga. 2001) (applying risk-utility test and citing § 2 of the Third Restatement to support principle that liability for design defect includes consideration of whether the defendant failed to adopt a reasonable alternative design); *see also Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 673-75 (Ga. 1994) (jury application of risk-utility analysis with a consideration of whether there is a reasonable alternative design). **Indiana:** *TRW Vehicle Safety Systems, Inc. v. Moore*, 936 N.E.2d 201, 209 n.2 (Ind. 2010) (noting that the legislature did not adopt a reasonable alternative design requirement but instead enacted "a negligence standard for product liability claims based on defective design"); Ind. Code Ann. § 34-20-2-2 (2008) ("[T]he party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions."); *see also* Twerski & Henderson, *Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 BROOK. L. REV. at 1082 n.99 (concluding that, as a practical matter, Indiana courts require proof of a reasonable alternative design). **Iowa:** *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159 (Iowa 2002) (requiring proof of a reasonable alternative design through

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adoption of § 2 of the Third Restatement). **Kentucky:** *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35, 42 (Ky. 2004) (stating that "design defect liability requires proof of a feasible alternative design" but declining to expressly adopt the Third Restatement); *see also Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 535 (Ky. 2003) (jury application of risk-utility analysis). **Louisiana:** La. Rev. Stat. § 9:2800.56 (1998) ("A product is unreasonably dangerous in design if, at the time the product left its manufacturer's control: (1) There existed an alternative design for the product that was capable of preventing the claimant's damage; and (2) The likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on the utility of the product."). **Maine:** *Guiggey v. Bombardier*, 615 A.2d 1169 (Me. 1992) (acknowledging use of the risk-utility test); *Reali v. Mazda Motor of America, Inc.*, 106 F. Supp. 2d 75, 80 (D. Me. 2000) ("[I]n Maine, a plaintiff in a design defect case must prove that an alternative design is feasible and safer."); *see also Estate of Pinkham v. Cargill, Inc.*, 55 A.3d 1, 8 (Me. 2012) (applying Restatement (Third) Torts § 3); *Burns v. Architectural Doors & Windows*, 19 A.3d 823, 826 (Me. 2011) (citing tripartite division of claim types in § 2 of the Third Restatement). **Massachusetts:** *Vassallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909, 923 (Mass. 1998) (adopting § 2(c) of the Third Restatement in failure to warn cases in "recognition of the clear judicial trend" in products liability cases); *see also Haglund v. Philip Morris, Inc.*, 847 N.E.2d 315 (Mass. 2006) (finding that the manufacturer must design to avoid reasonably foreseeable risks of use and requiring proof of a reasonable alternative design). **Michigan:** *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176 (Mich. 1984) (adopting risk-utility balancing test and allowing proof of reasonable alternative design). **Minnesota:** *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 96 (Minn. 1987) (determining that the plaintiff may show a reasonable alternative design); *see also Harrison ex rel. Harrison v. Harrison*, 733 N.W.2d 451, 454-55 & n.1-2 (Minn. 2007) (citing standards and definitions from § 2 of the Third Restatement). **Mississippi:** *Williams v. Bennett d/b/a Krosstown Trade & Pawn Shop*, 921 So.2d 1269, 1275 (Miss. 2006) (acknowledging that the Mississippi Code Annotated agrees with § 2 of the Third Restatement and requires proof of a feasible alternative design); *see also Smith v. Mack Trucks, Inc.*, 819 So.2d 1258, 1266 (Miss. 2002) (jury application of risk-utility analysis). **New Jersey:** *Cavanaugh v. Skil Corp.*, 751 A.2d 518 (N.J. 2000) (finding that New Jersey's statute reflects § 2 of the Third Restatement, requires proof of a reasonable alternative design, and allows defendant to rebut by proving no practical or feasible alternative design); *Lewis v. Am. Cyanamid Co.*, 715 A.2d 967, 975 (N.J. 1998) (jury application of risk-utility analysis). **New Mexico:** *Brooks v. Beech Aircraft Corp.*, 902 P.2d 54, 62 (N.M. 1995) ("[O]ur existing uniform jury instructions allow proof and argument on all of the factors suggested by the Restatement (Third) of Torts as relevant in determining whether the omission of a reasonable alternative gave rise to an unreasonable risk of injury."). **New York:** *Miele v. Am. Tobacco Co.*, 2 A.D.3d 799 (N.Y. 2003) (adopting the risk-utility test, allowing proof of reasonable alternative design, and citing Third Restatement); *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 735-38 (N.Y. 1995) (jury application of risk-utility analysis); *see* Twerski & Henderson, *Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 BROOK. L. REV. at 1093 ("[T]he case law in New York is replete with decisions by courts that defendants are entitled to summary judgment because plaintiffs failed to introduce credible evidence of a reasonable alternative

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design.") (collecting cases). **South Carolina:** *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 14 (S.C. 2010) ("We hold today that the exclusive test in a products liability design case is the risk-utility test with its requirement of showing a feasible alternative design"). **Texas:** *Timpte Industries, Inc. v. Gish,* 286 S.W.3d 306, 313-14 (Tex. 2009) (citing standards from § 2 of the Third Restatement); *Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 256 & n. 8 (Tex. 1999) (jury applies risk-utility analysis; plaintiff must show evidence of safer alternative design); *but see Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 416 n.9 (Tex. 2011) ("We have cited but not adopted" the Third Restatement). **Virginia:** *Harris v. T.I., Inc.*, 413 S.E.2d 605, 610 (Va. 1992) ("[S]trict liability [is] a doctrine that is not recognized in Virginia."); *Lemons v. Ryder Truck Rental, Inc.*, 906 F. Supp. 328 (W.D. Va. 1995) (holding that without evidence of a feasible alternative design, plaintiff could not prove causation).**West Virginia:** *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 683 (W.Va. 1979) (holding that relevant test is what a "reasonably prudent manufacturer's standards should have been"); *see also Church v. Wesson*, 385 S.E.2d 393, 396 (W.Va. 1989) (holding that plaintiff failed to establish prima facie case when the undisputed evidence showed that alternative design was not feasible at the time of manufacture); Philip Combs & Andrews Cooke, *Modern Products Liability Law in West Virginia*, 113 W. VA. L. REV. 417, 424 (2011) ("*Morningstar* remains the leading case on products law in this state. Indeed, the decision foreshadowed the Restatement (Third) of Torts: Products Liability section 2 published two decades later.").

Sixteen other states apply hybrid approaches involving some consideration of consumer expectations as well as risk-utility balancing, and in all but two of those states, courts have explicitly endorsed or required the use of reasonable alternative design evidence when risk-utility balancing is used.[5] ***Five*** states follow Second Restatement principles in some fashion and have

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[5] **Alaska:** *Gen. Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1220-21 (Alaska 1998) (jury application of either consumer expectations test or risk-utility test, depending on the circumstances); *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979) (defendant may rebut plaintiff's prima facie case by showing benefits of product outweigh risks). **Arizona:** *Readenour v. Marion Power Shovel*, 719 P.2d 1058 (Ariz. 1986) (recognizing two-prong test, one considering the consumer's expectations and the other engaging in a risk-utility balancing test that includes reasonable alternative design); *see also Dart v. Wiebe Mfg., Inc.*, 709 P.2d 876, 880 (Ariz. 1985) (jury application of either consumer expectations or risk-utility test); *but see Powers v. Taser Int'l, Inc.*, 174 P.3d 777, 782 (Ariz. Ct. App. 2007) (noting that "*Dart* is inconsistent with the . . . Restatement Third" insofar as the Restatement (Third) focuses on "foreseeable" risks of harm). **California:** *Soule v. General Motors Corp.*, 882 P.2d 298 (Cal. 1994) (endorsing risk-utility requiring alternative design evidence unless the product is demonstrably defective, in which case consumer expectations is the appropriate test). **Connecticut:** *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319 (Conn. 1997) (adopting a modified formulation of the consumer expectations test that considers the product's risks and utilities; the jury may consider feasible alternative design, but the plaintiff is not required to prove that there was a reasonable alternative design); *see also Hartford Acc. & Indemn. Co. v. Ace Am. Reins. Co.*, 936 A.2d 224 (Conn. 2007) (citing Third Restatement with approval). **Florida:** *Radiation Tech., Inc. v. Ware Constr. Co.*, 445 So.2d 329, 331 (Fla. 1983) (including reasonable alternative design as a factor in the risk-utility balancing test); *see* Std. Jury Instr. Civ. Cases No. 02-2, 872 So. 2d 893, 895 (Fla. 2004) (providing for use of both consumer expectations and risk-utility test); *see also Agrofollajes, S.A. v. E.I. Du Pont De Nemours & Co., Inc.*, 48 So.3d 976, 997 (Fla. Dist. Ct. App. 2010) ("The Restatement (Third) of Torts: Products Liability rejects the 'consumer expectations' test as an independent basis for finding a design defect. . . . In addition, this Court has applied the Third Restatement . . . .") (citing *Kohler Co. v. Marcotte*, 907 So.2d 596, 598-600 (Fla. Dist. Ct. App. 2005)). **Hawaii:** *Ontai v. Straub Clinic & Hosp.*, 659 P.2d 734 (Haw. 1983) (finding that jury may use consumer expectations or the defendant may rebut defect and causation by showing that the benefits of the product outweigh the risks). **Illinois:** *Hansen v. Baxter Healthcare Corp.*, 764 N.E.2d 35, 43-46 (Ill. 2002) (jury application of both consumer expectations and risk-utility test, along with consideration of whether there is reasonable alternative design); *see also Mikolajczyk v. Ford Motor Co.*, 901 N.E.2d 329, 352 (Ill. 2008) (finding Third Restatement "instructive"); *Glen Blue v. Envtl. Eng'g, Inc.*, 828 N.E.2d 1128 (Ill. 2005) (finding that feasible alternative design is one means of showing liability). **Maryland:** *Phipps v. Gen. Motors Corp.*, 363 A.2d 955 (Md. 1976) (endorsing risk-utility test as appropriate, unless the product is demonstrably defective); *see also Murphy v. Playtex Family Prod. Corp.*, 176 F. Supp. 2d 473, 485, 489-90 (D. Md. 2001) (jury

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application of either consumer expectations or risk-utility test); *but see Halliday v. Sturm, Ruger & Company, Inc.*, 792 A.2d 1145 (Md. 2002) (declining to apply § 2 of the Third Restatement in the context of gun safety in deference to legislature). **New Hampshire:** *Vautour v. Body Masters Sports Indus., Inc.*, 784 A.2d 1178, 1182 (N.H. 2001) ("[W]hether a product is unreasonably dangerous to an extent beyond that which would be contemplated by the ordinary consumer is determined by the jury using a risk-utility balancing test."); *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843, 847-48 (N.H. 1978) (stating that "liability may attach if the manufacturer did not take available and reasonable steps to lessen or eliminate the danger of even a significantly useful and desirable product" and that "[r]easonableness, foreseeability, utility, and similar factors are questions of fact for jury determination"). **North Carolina:** N.C. Gen. Stat. § 99B–6 (1995) (requiring plaintiff to prove that "the manufacturer unreasonably failed to adopt a safer, practical, feasible, and otherwise reasonable alternative design . . . that would have prevented or substantially reduced the risk of harm without substantially impairing the usefulness . . . of the product" unless "the design . . . was so unreasonable that a reasonable person, aware of the relevant facts, would not use or consume a product of this design"). **Ohio:** *Perkins v. Wilkinson Sword, Inc.*, 700 N.E.2d 1247 (Ohio 1998) (applying a risk-utility test whose factors include consumer expectations and reasonable alternative design). **Oregon:** *McCathern v. Toyota Motor Corp.*, 23 P.3d 320 (Or. 2001) (acknowledging that the legislature adopted the consumer expectations test in Oregon's statute, but acknowledging that risk-utility balancing may be a means to proving liability). **Rhode Island:** *Buonanno v. Colmar Belting Co., Inc.*, 733 A.2d 712, 718 (R.I. 1999) (adopting § 5 of the Third Restatement, applicable to component parts manufacturers, which incorporates the standards for being "defective" from § 2, and noting a factual question "as to whether the foreseeable risks of harm posed to plaintiff could have been reduced or avoided had the alternative design been available"); *but see Castrignano v. E. R. Squibb & Sons, Inc.*, 546 A.2d 775, 779 (R.I. 1988) (noting Rhode Island's adoption of the consumer expectations test). **South Dakota:** *First Premier Bank v. Kolcraft Enters., Inc.*, 686 N.W.2d 430, 444-45 (S. Dak. 2004) (reviewing jury instructions that provided both consumer expectations and risk-utility/alternative design tests, and remanding because court did not clarify that jury only had to find liability under one of the two tests). **Tennessee:** *Ray by Holman v. BIC Corp.*, 925 S.W.2d 527 (Tenn. 1996) (providing two tests for determining whether a product is unreasonably dangerous: consumer expectations test or prudent manufacturer test requiring risk-utility balancing); *Potter v. Ford Motor Co.*, 213 S.W.3d 264, 269 (Tenn. Ct. App. 2006) (alternative design evidence not required, but "highly relevant," to prima facie case); *see also Jackson v. Gen. Motors Corp.*, 60 S.W.3d 800, 803-05 (Tenn. 2001) (jury application of either consumer expectations test or variation of the risk-utility test). **Washington:** *Ruiz-Guzman v. Amvac Chem. Corp.*, 7 P.3d 795 (Wash. 2000) (advocating consumer expectations or risk-utility where reasonable alternative design is a factor, and citing § 2 of the Third Restatement as persuasive authority to support the Washington Products Liability Act, which includes consideration of a reasonable alternative design); *but see Braaten v. Saberhagen Holdings*, 198 P.3d 493, 497 n.5 (Wash. 2008) (criticizing the Third Restatement as incompatible with Washington law because it imposes a "negligence-type standard").

not expressly adopted a risk-utility test or a consumer expectations test for design defects; all have endorsed the use of reasonable alternative design evidence at least in some circumstances.[6]

[6] **Missouri:** *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 65 (Mo. 1999) (rejecting use of consumer expectations or risk-utility tests in jury instructions, but stating that litigants may nonetheless "argue that the utility of a design outweighs its risks, or that consumer expectations were violated, or any other theory of unreasonable dangerousness supported by the evidence") (quoting *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 154 (Mo. 1998)). **Montana:** *Rix v. General Motors Corp.*, 723 P.2d 195, 202 (Mont. 1986) ("[A] design is defective if at the time of manufacture an alternative designed product would have been safer than the original designed product and was both technologically feasible and a marketable reality."); *see also Lutz v. Nat'l Crane Corp.*, 884 P.2d 455 (Mont. 1994) ("[O]ur [design defect] analyses have focused on the feasibility and practicality of the design, as well as marketability."). **Nevada:** *Fyssakis v. Knight Equip. Corp.*, 826 P.2d 570 (Nev. 1992) (citations omitted) ("Under Nevada law, evidence that . . . a safer alternative design was feasible at the time of manufacture will support a strict liabilities claim."); *McCourt v. J.C. Penney Co., Inc.*, 734 P.2d 696, 698 (Nev. 1987) ("Alternative design is one factor for the jury to consider when evaluating whether a product is unreasonably dangerous."). **Utah:** *Wankier v. Crown Equipment Corp.*, 353 F.3d 862, 867 (10th Cir. 2003) (requiring safer, feasible alternative design "[i]n the absence of . . . Utah authority indicating that a plaintiff is not required to prove a safer, feasible alternative design"). **Wyoming:** *Rohde v. Smiths Med.*, 165 P.3d 433 (Wyo. 2007) (plaintiff must prove product was unreasonably dangerous to user or consumer); *Campbell ex rel. Campbell v. Studer, Inc.*, 970 P.2d 389, 392 n.1 (Wyo. 1998) ("The requirement that plaintiff show the existence of a reasonable alternative design as an element of her claim has been the subject of extensive debate. Comments b and e to [§ 2 of the Third Restatement], however, suggest an alternative design may not be necessary in every design defect case. We need not enter the debate at this time."); *see also id.* at 394-95 (affirming summary judgment because "no evidence was presented which would establish . . . the existence of a feasible, safer design").

The ***nine*** remaining states use a strong form of the consumer expectations test that does not expressly incorporate risk-utility balancing, but at least four of the nine nonetheless require or allow proof of reasonable alternative designs to be a factor in determining liability.[7]

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[7] **Alabama:** *GMC v. Jernigan,* 883 So.2d 646 (Ala. 2003) (endorsing a consumer expectations test but stating that plaintiff must prove a reasonable alternative design as a threshold issue); *see also Graham v. Sprout-Waldron & Co.*, 657 So.2d 868, 870-71, 874 (Ala. 1995) (jury application of consumer expectations test). **Arkansas:** *Pilcher v. Suttle Equip. Co.*, 223 S.W.3d 789, 794 (Ark. 2006) (a product is unreasonably dangerous if the danger is "beyond that contemplated by the ordinary and reasonable buyer"); *Dancy v. Hyster Co.*, 127 F.3d 649, 654 (8th Cir. 1997) (applying Arkansas law) (holding that plaintiff "has the burden of proving the existence of a defect by showing that a safer alternative design actually exists," though it is not part of the affirmative burden that the alternative design be "feasible in terms of cost, practicality and technological possibility"). **Idaho:** *Adams v. United States*, 622 F. Supp. 2d 996, 1009 (D. Idaho 2009) ("Under § 402A, the Idaho courts have put the burden on the product seller to prove an alternative safe design as part of the seller's overall burden to prove the affirmative defense of 'unavoidably unsafe products.'") (citing *Toner v. Lederle Laboratories*, 732 P.2d 297, 307-08 (Idaho 1987)); *see also Rojas v. Lindsay Mfg. Co.*, 701 P.2d 210, 211-12 (Idaho 1985) (jury application of consumer expectations test). **Kansas:** *Delaney v. Deere & Co.*, 999 P.2d 930 (Kan. 2000) (adhering to consumer expectations test, but recognizing validity of risk-utility balancing in complex cases; stating the law is "clear" that evidence of the feasibility of an alternative design is allowed but not required at trial, and that this makes Kansas law inconsistent with the Third Restatement); *see also Gaumer v. Rossville Truck & Tractor Co., Inc.*, 257 P.3d 292, 302 (Kan. 2011) ("Although Kansas law permits [feasible alternative design] evidence, it is not required."). **Nebraska:** *Freeman v. Hoffman-La Roche, Inc.*, 618 N.W.2d 827 (Neb. 2000) (applying a consumer expectations test to design defect and a reasonably foreseeable use test for failure to warn); *but see id.* (declining to adopt the standard for design defect for prescription drugs and medical devices in § 6(c) of the Third Restatement, but adopting the learned intermediary doctrine set forth in § 6(d) of the Third Restatement applicable to prescription drugs and medical devices); *see also Shuck v. CNH America, LLC*, 498 F.3d 868, 977 (8th Cir. 2007) ("Nebraska has already cited with approval a general approach set forth in the Restatement Third of Torts [§] 2(b)."). **North Dakota:** N.D. Cent. Code 28-01.3-01 ("'Unreasonably dangerous' means that the product is dangerous to an extent beyond which would be contemplated by the ordinary and prudent buyer, consumer, or user . . . ."). **Oklahoma:** *Lee v. Volkswagen of Am., Inc.*, 688 P.2d 1283 (Okla. 1984) (endorsing a consumer expectations test for design defect); *Smith v. U.S. Gypsum Co.*, 612 P.2d 251 (Okla. 1980) (finding that a product is unreasonably dangerous when it does not contain or reflect warnings covering all foreseeable uses); *see also Basford v. Gray Mfg. Co.*, 11 P.3d 1281, 1284 (Okla. Civ. App. 2000) (jury question whether product was "unreasonably dangerous"). **Vermont:** *See Farnham v. Bombardier, Inc.*, 640 A.2d 47 (Vt. 1994) (stating that "unreasonably dangerous" means "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it") (quoting Second Restatement § 402A cmt. i). **Wisconsin:** *Green v. Smith &*

Thus, the grand majority of states, and emerging national consensus, follows the principles of the Third Restatement expressly or in some fashion. Since the ALI published the Third Restatement in 1998, some states have adopted Third Restatement principles outright.[8] Other states have acknowledged Third Restatement principles by citing it as a basis for common law decisions or statutory interpretations.[9] States that have rejected the Third Restatement are in a minority, and they have approaches that are unlike Pennsylvania's jurisprudence.[10] No state adopts Pennsylvania's approach of segmenting the role of the judge and the jury.

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Nephew AHP, Inc., 629 N.W.2d 727, 759 (Wis. 2001) (establishing consumer-contemplation test as the exclusive standard and rejecting § 2 of the Third Restatement); *see also Godoy v. E.I. Du Pont De Nemours & Co.*, 768 N.W.2d 674, 686 (Wis. 2009) ("[A]lthough the feasibility of an alternative design can be considered when evaluating a design defect claim, it is not a requirement.").

[8] *See, e.g., Wright v. Brooke Group Ltd.*, 652 N.W.2d 159 (Iowa 2002); *Vassallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909, 923 (Mass. 1998) (adopting § 2(c) in failure to warn cases in "recognition of the clear judicial trend" in products liability cases).

[9] *See, e.g., Jones v. NordicTrack, Inc.*, 550 S.E.2d 101, 103 (Ga. 2001) (applying risk-utility test and citing § 2 of the Third Restatement to support principle that liability for design defect includes consideration of whether the defendant failed to adopt a reasonable alternative design); *Williams v. Bennett*, 921 So.2d 1269, 1275 (Miss. 2006) (relying on § 2 of the Third Restatement for principle that plaintiff must prove reasonable alternative design); *Brooks v. Beech Aircraft Corp.*, 902 P.2d 54, 62 (N.M. 1995) ("[O]ur existing uniform jury instructions allow proof and argument on all of the factors suggested by the Restatement (Third) of Torts as relevant in determining whether the omission of a reasonable alternative gave rise to an unreasonable risk of injury."); *Cavanaugh v. Skil Corp,* 751 A.2d 518, 521 (N.J. 2000) (holding that the New Jersey statute reflects the Third Restatement in requiring that alternative designs be feasible); *Miele v. Am. Tobacco Co.*, 2 A.D.3d 799 (N.Y. 2003) (adopting the risk-utility test and allowing proof of reasonable alternative design, and citing the Third Restatement); *Timpte Industries, Inc. v. Gish,* 286 S.W.3d 306, 313-14 (Tex. 2009) (citing standards from Third Restatement § 2).

[10] *See, e.g., Delaney v. Deere & Co.*, 999 P.2d 930 (Kan. 2000) (adhering to § 402A of the Second Restatement and consumer expectations test, but recognizing validity of risk-utility balancing in complex cases); *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 759 (Wis. 2001) (establishing consumer-contemplation test as the exclusive standard and rejecting § 2 of the Third Restatement); *cf. Braaten v. Saberhagen Holdings*, 198 P.3d 493, 497 n.5 (Wash. 2008)

II. ADOPTING THE THIRD RESTATEMENT WILL IMPROVE AND CLARIFY PENNSYLVANIA JURISPRUDENCE WITHOUT UPENDING SETTLED PRINCIPLES.

A. Pennsylvania products liability jurisprudence is conceptually consistent with Third Restatement principles.

Adopting the Third Restatement would bring about a modest change in Pennsylvania products law while reaffirming much of that jurisprudence. Pennsylvania long has rejected absolute liability in products cases and has referred to risk-utility factors for a court to assess whether a jury may determine a product to be unreasonably unsafe. Indeed, the Reporters' Notes to the Third Restatement characterize Pennsylvania law as "consistent with" the rules set forth in § 2 of the Third Restatement. *See* REST. (3D) § 2 cmt. d (Reporters' Note) ("[S]imply because the court has reserved to itself risk-utility balancing does not mean elimination of the plaintiff's obligation to prove that the product that caused injury was not reasonably safe. To make a prima-facie case, the plaintiff must satisfy the court that risk-utility parameters have not been met."); *id.* ("Although Pennsylvania case law governing products liability is sometimes difficult to decipher, a careful analysis of Pennsylvania's appellate decisions suggests that its law may be read to be consistent with the rules set forth in § 2."). Pennsylvania additionally should recognize that jurors are competent to apply the Third Restatement test and to evaluate reasonable alternative designs. Jurors bring to the courtroom the community's sense of reasonable safety.

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(criticizing the Third Restatement as incompatible with Washington law insofar as it imposes a "negligence-type standard"); *Halliday v. Sturm, Ruger & Co., Inc.*, 792 A.2d 1145 (Md. 2002) (declining to apply § 2 of the Third Restatement in the context of gun safety and deferring to legislature in that context).

Under existing Pennsylvania law, a plaintiff must prove that a product is defective and the defect caused the plaintiff's injuries. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. at 93-94, 337 A.2d at 898. To avoid absolute liability, Pennsylvania decisions already limit liability in design and warning cases by making the "defect" and "safety" inquiries depend upon the product's "intended use" and "intended user"—concepts that are themselves embedded with reasonable use and foreseeability.[11] *Phillips*, 576 Pa. at 657, 841 A.2d at 1007 (adopting "intended use" and "intended user" rules for design defects). Yet, these constraints are not always useful or applicable.

The development in the law focusing on certain uses was predicted by Dean Wade in 1973—although he commented even then that it would be preferable to "bring the policy elements out into the open by giving consideration to the factors to be weighed in determining whether the product is duly safe." Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. at 847. By focusing more explicitly on concepts such as whether the manufacturer or seller could have prevented the reasonably foreseeable risks of harm posed by the product through adoption of a reasonable alternative design, the Third Restatement articulates a standard

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[11] Under current formulations, for a manufacturing defect, a product is defective when it leaves the seller's hands but fails to comport with its intended design and is unsafe for normal handling or use. *See Dambacher ex rel. Dambacher v. Mallis*, 336 Pa. Super. 22, 70, 485 A.2d 408, 433 (Pa. Super. 1984) (Wieand, J., dissenting) (reviewing theories of strict products liability). Under a design defect claim, a product is "defective only if it '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.'" *Phillips*, 576 Pa. at 652, 841 A.2d at 1005 (quoting *Azzarello*, 480 Pa. at 559, 391 A.2d at 1027). A product is not defective if it is safe for its intended user. *Id.* (applying "intended user" standard from failure to warn cases to design defect case). Under a failure to warn claim, a product is defective if it lacks sufficient warnings to apprise users of non-obvious dangers in the product. *See Davis v. Berwind Corp.*, 547 Pa. 260, 267, 690 A.2d 186, 190 (1997); *Berkebile*, 462 Pa. at 99, 337 A.2d at 902 (citing REST. (2D) TORTS § 402A cmt. h); *Mackowick v. Westinghouse Elec. Corp.*, 525 Pa. 52, 55, 575 A.2d 100, 102 (1990) (warnings must be directed to the understanding of the intended user).

of liability that reflects but clarifies (*i.e.*, restates) the common law concepts that have emerged under Pennsylvania law. *See Azzarello*, 480 Pa. at 558, 391 A.2d at 1026 (risk-utility balancing); *Burch v. Sears, Roebuck & Co.*, 320 Pa. Super. 444, 450, 467 A.2d 615, 618 (1983) (risk-utility balancing); *Moyer*, 473 F.3d at 538 (risk-utility balancing); Thomas, *Defining "Design Defect" in Pennsylvania*, 71 TEMP. L. REV. at 223 (risk-utility balancing); *Duchess v. Langston Corp.*, 564 Pa. 529, 559, 769 A.2d 1131, 1149 (2001) (reasonable alternative design)[12]; *Phatak v. United Chair Co.*, 2000 Pa. Super. 198, 756 A.2d 690, 693 & n.4 (Pa. Super. Ct. 2000), *appeal denied*, 566 Pa. 666, 782 A.2d 548 (2001) (citing *Gottfried v. Am. Can Co.*, 339 Pa. Super. 403, 489 A.2d 222 (1985), and *Connelly v. Roper Corp.*, 404 Pa. Super. 67, 590 A.2d 11 (1991)) (reasonable alternative design).

Scholars also have recognized that explicit adoption of the Third Restatement would not change how most states' courts operate in practice. *See* David G. Owen, *Design Defect Ghosts*, 74 BROOK. L. REV. 927, 931 (2009) ("[T]he Third Restatement's shift . . . , though conceptually monumental, merely did 'restate' what most courts themselves had long been doing if rarely saying."). Indeed, in most states, "the [Third] Restatement does not contract the scope of liability for design defects from that provided in section 402A." Michael D. Green, *The Unappreciated Congruity of the Second and Third Torts Restatements on Design Defects*, 74 BROOK. L. REV. 807, 836 (2009) ("Confronted with the inevitability of tradeoffs in determining

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[12] In *Duchess*, the Court stated: "Significantly, such evidence [of feasibility of design alternatives] is *an essential element* of the plaintiff's liability case predicated on a theory of design defect based upon the availability of an alternate, safer design." 564 Pa. at 559, 769 A.2d at 1149 (citing 63A AM. JUR. 2D PRODUCTS LIABILITY § 1095 (1997) (stating that "[t]he reasonableness of choosing from among various alternative product designs and adopting the safest one if it is feasible is not only relevant in a design defect action, but is at the very heart of the case") and REST. (3D) § 2(b) & cmt. d).

how safe a product should be designed, a movement towards a risk-utility standard began to take hold and was accelerated and confirmed by the Restatement (Third) of Torts.").

B. The Third Restatement standard fairly reflects the economic and moral underpinnings of strict products liability.

Under the Third Restatement, "[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for the harm to persons or property caused by the defect." *Id.* at § 1. A product is "defective" in design "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe." *Id.* § 2(b). In addition, a product is "defective" due to inadequate instructions or warnings "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings . . . and the omission of the instructions or warnings renders the product not reasonably safe." *Id.* § 2(c).

The commentary to § 2 makes clear that the Third Restatement retains classical strict liability for manufacturing defect cases. REST. (3D) § 2 cmt. a. However, because design and warning cases are "predicated on a different concept of responsibility" and "cannot be determined by reference to the manufacturer's own design or marketing standards because those standards are the very ones that plaintiffs attack as unreasonable," "[s]ome sort of independent assessment of advantages and disadvantages" is necessary. *Id.*

The Third Restatement illustrates that the definitions of defectiveness in § 2(b) and (c), which impose liability for products that are defectively designed or sold without adequate warnings or instructions and are thus *not reasonably safe*, "achieve the same *general objectives* as does liability predicated on negligence." It still shifts the risk of selling an unsafe product to a

manufacturer or seller when it could have made a product safer by using a reasonable alternative design or warning. *Id.*. Both liability regimes seek to create incentives for optimal levels of safety, but the Third Restatement gives jurors the standard to assess safety with concepts that speak directly to the issues of usefulness and safety that underlie a balanced products liability regime and in terms that are concrete and familiar enough for lay jurors to apply. As the Third Restatement drafters noted, "[s]ociety benefits most when the right, or optimal, amount of product safety is achieved." *Id.*

From a fairness perspective, the Third Restatement approach "prevents careless users and consumers from being subsidized by more careful users and consumers, when the former are paid damages out of funds to which the latter are forced to contribute through higher product prices." *Id.*; *see* M. Stuart Madden, *Selected Federal Tort Reform and Restatement Proposals Through the Lenses of Corrective Justice and Efficiency*, 32 GA. L. REV. 1017, 1057-58 (1998) ("'Optimal levels of safety,' it must be noted, does not mean total, or even maximum, safety.") (footnote omitted). The Third Restatement is well-crafted to deal with products that have inherent risks, because the jury, not the judge alone, can consider whether there are reasonable alternative designs that preserve a product's utility while avoiding an unacceptable level of risk. Jurors in modern times are familiar with applying such standards in their product purchasing and financial decisions.

In addition to focusing on safety, the Third Restatement imposes liability for design and warning only when the risks of harm are *reasonably* foreseeable—this approach squares with the economic and moral underpinnings of a fair tort law.

> Most courts agree that, for the liability system to be fair and efficient, the balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the

> time of distribution. To hold a manufacturer liable for a risk that was not foreseeable when the product was marketed might foster increased manufacturer investment in safety. But such investment by definition would be a matter of guesswork. Furthermore, manufacturers may persuasively ask to be judged by a normative behavior standard to which it is reasonably possible for manufacturers to conform. For these reasons, Subsections (b) and (c) speak of products being defective only when risks are reasonably foreseeable.

REST. (3D) § 2 cmt. a. Because most adverse events may appear foreseeable in hindsight, liability cannot turn on an unbridled concept of "foreseeability." For, without constraint, "foreseeability" can swallow other product liability rules. *See Sharfarz v. Goguen*, 691 F.3d 62, 70 (1st Cir. 2012) ("Hindsight is always 20/20. And when events have run their course, it is easy to label 'foreseeable' everything 'that has in fact occurred.'").

Moreover, while the Third Restatement requires proof of reasonable alternative designs or reasonable alternative warnings in most instances, they are not the exclusive means by which a plaintiff can prove liability. REST. (3D) § 2 cmt. b (recognizing the development in the common law under which some courts have held that reasonable alternatives are a factor, but not always a required element of proof, in a plaintiff's case). Indeed, in § 3 of the Third Restatement (when circumstantial evidence supports a defect), § 4 of the Third Restatement (dealing with violations of statutory or regulatory norms), and § 2, cmt. e (dealing with designs that could be considered manifestly unreasonable), the Restatement recognizes that proof of a reasonable alternative design or warning is the primary but not exclusive means to establish a "defect" for products liability. REST. (3D) § 2 cmt. b, d. In this way, the Third Restatement accurately reflects the current state of the law in the sizeable majority of jurisdictions—proof of a reasonable alternative design either is required or may be introduced as probative evidence of whether a product was reasonably safe. Allowing this evidence is not a radical departure from

the common law—but merely a recognition of what courts and jurors look to, as a practical matter, to assess a product's reasonable safety in light of its usefulness.

With respect to design defects, § 2(b) adopts reasonableness as part of the standard for judging defectiveness. "More specifically, the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design by the seller or a predecessor in the distributive chain rendered the product not reasonably safe." *Id.* cmt. d. A plaintiff can prove that a reasonable alternative was (or reasonably could have been) available at the time of sale or distribution, whereas defendants can offer evidence of industry standards to question whether alternatives were feasible. *Id.* There is nothing radical or unfair about using the concept of reasonableness—it reflects the same theoretical underpinnings as Pennsylvania's intended use and intended user theories.

In addition, the Third Restatement approach would correct an outlier decision in Pennsylvania law and recognize the potential relevance of industry standards in all Pennsylvania cases. In *Lewis v. Coffing Hoist Div., Duff-Norton Co., Inc.*, 515 Pa. 334, 340, 528 A.2d 590, 592-93 (1987), the Court held that industry standards were inadmissible in a design defect case for the academic reason that they improperly injected reasonableness into the case contrary to *Azzarello*. Yet, virtually every other jurisdiction allows this kind of proof to be presented to jurors.[13] The dissenting justices in *Lewis* eloquently explained that courts are poor substitutes for

[13] *See, e.g.*, Ga. Council of Superior Court Judges, Suggested Pattern Jury Instructions: Civil Cases 62.670 (2007) ("In determining whether a product was defective, you may consider proof of a manufacturer's compliance with federal or state safety standards or regulations and industrywide customs, practices, or design standards."); 3 Ohio Jury Instructions 451.05 (2008) (including as a risk-utility factor "any applicable public or private standard that was in effect . . ."); Anderson, S.C. Requests to Charge – Civil, § 32-43 (2002) ("Industry standards and

design offices. 515 Pa. at 346-47, 528 A.2d at 596 (Hutchinson, J., joined by Flaherty, J., dissenting) ("I am compelled, in the words of a popular song, to 'speak out against the madness.' The instant madness is a creeping consensus among us judges and lawyers that we are more capable of designing products than engineers.").

In providing a fair and impartial forum when designs cause injuries, courts "need all the help [they] can get," and industry standards, which "contain [the] collective ... wisdom" of "individuals considered by their peers in industry, academia and research to be especially knowledgeable in a particular technical specialty," provide a natural yardstick for evaluating, along with other evidence, the acceptable safety of a product. *Id.* Indeed, the relevance and competence of industry experts' collective opinions is "as least as valuable as any individual expert witness's." *Id.* As the dissenters noted, our jurisprudence is fundamentally inconsistent if it excludes industry standards, yet "permit[s] the opinions of individual experts hired by the parties." *Id.*[14]

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state of the art at the time of manufacture are relevant to show both the reasonableness of the product's design and that the product is dangerous beyond the expectations of the ordinary consumer."); 8 Tenn. Prac. Pattern Jury Instr. T.P.I. – Civil 10.01 (2007) ("Consider also the customary designs, methods, standards and techniques of manufacturing, inspecting and testing by other manufacturers [sellers] of similar products.") (brackets in original); 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 110.02 (5th ed. 2005) ("[E]vidence of custom in the product seller's industry or of technological feasibility, whether relating to design, construction, or performance of the product, may be considered by the trier of fact.").

[14] Moreover, the dissenting justices in *Lewis* noted that "there is respectable legal opinion that liability for defective design cannot avoid the question of relative care, at least on the question of legal cause." *Id.* (citing *Foley v. Clark Equip. Co.*, 361 Pa. Super. 599, 523 A.2d 379 (1987) (Wieand, J.)).

C. Instructing jurors based on the Third Restatement is not difficult and would provide jurors with much-needed guidance and clarity.

A broad range of factors—including the feasibility of other design alternatives—goes into determining whether a reasonable alternative design renders a product "not reasonably safe" under the Third Restatement. These factors include:

- "the magnitude and probability of the foreseeable risks of harm,"
- "the instructions and warnings accompanying the product,"
- "the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing,"
- the relative advantages and disadvantages of the product as designed, and
- the relative advantages and disadvantages of potential alternative designs, which could include "production costs; the effects of the alternative design on product longevity, maintenance, repair, and esthetics; and the range of consumer choice among products."

REST. (3D) § 2 cmt. f. A plaintiff is not, however, "required to introduce proof on all of these factors; their relevance, and the relevance of other factors, will vary from case to case." *Id.*

Proof in failure to warn cases largely follows design defect cases. "In evaluating the adequacy of product warnings and instructions, courts must be sensitive to many factors," including "content and comprehensibility, intensity of expression, and the characteristics of expected user groups." *Id.; see also id.* cmt. i ("Subsection (c) adopts a reasonableness test for judging the adequacy of product instructions and warnings. It thus parallels Subsection (b), which adopts a similar standard for judging the safety of product designs").[15] For precisely these

[15] The Restatement (Third) does not permit warnings to validate otherwise unsafe designs. *See id.* cmt. l ("In general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks . . . . However, when an alternative design to avoid risks cannot reasonably be implemented, adequate instructions and warnings will normally

reasons, reasonableness is a necessary consideration—whether expressly identified or not—in order to determine the sufficiency of a warning.

It is a straightforward task to generate jury instructions based on Third Restatement standards for defect. *See* Cupp & Polage, *The Rhetoric of Strict Products Liability Versus Negligence,* 77 N.Y.U. L. REV. at 879-80; Thomas, *Defining "Design Defect" in Pennsylvania,* 71 TEMP. L. REV. at 240-41 (proposing alternative Pennsylvania instructions that harmonize with the Third Restatement and *Azzarello*). For example, the Georgia pattern instruction for design defect includes thirteen common-sense factors that a jury should weigh:

> To determine whether a product suffers from a design defect, you must balance the inherent risk of harm in a product design against the utility or benefits of that product design. You must decide whether the manufacturer acted reasonably in choosing a particular product design by considering all relevant evidence, including the following factors:
>
> a. the usefulness of the product;
>
> b. the severity of the danger posed by the design;
>
> c. the likelihood of that danger;
>
> d. the avoidability of the danger, considering the user's knowledge of the product, publicity surrounding the danger, the effectiveness of warnings, and common knowledge or the expectation of danger;
>
> e. the user's ability to avoid the danger;
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> f. the technology available when the product was manufactured;
>
> g. the ability to eliminate the danger without impairing the product's usefulness or making it too expensive;

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be sufficient to render the product reasonably safe. *Compare* Comment e. Warnings are not, however, a substitute for the provision of a reasonably safe design. . . .").

h. the feasibility of spreading any increased cost through the product's price or by purchasing insurance;

i. the appearance and aesthetic attractiveness of the product;

j. the product's utility for multiple uses;

k. the convenience and durability of the product;

l. alternative designs for the product available to the manufacturer; and

m. the manufacturer's compliance with industry standards or government regulations.

If you decide that the risk of harm in the product's design outweighs the utility of that particular design, then the manufacturer exposed the consumer to greater risk of danger than the manufacturer should have in using that product design, and the product is defective. If after balancing the risks and utility of the product, you find by a preponderance of the evidence that the product suffered from a design defect, then the plaintiff is entitled to recover.

Ga. Council of Superior Court Judges, Suggested Pattern Jury Instructions: Civil Cases 62.640 (2007).[16]

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[16] *See also, e.g.,* Mass. Super. Ct. Civil Prac. Jury Instr. § 11.3.2 (2001) (including "the gravity of the danger posed by the challenged design, . . . the mechanical feasibility of a safer alternative design, . . . [and any] adverse consequences to the product and to the consumer that would result from an alternative design"); 4A Minn. Prac., Jury Instr. Guides – Civil (JIG) 75.20 (5th ed. 2007) (including "2. The likelihood that harm will result from use of the product . . . 4. The cost and ease of taking effective precautions to avoid that harm 5. Whether the manufacturer considered the scientific knowledge and advances in the field. . . ."); N.J. Model Jury Charges (Civil), § 5.40D-3 (1999) (including "(1) The usefulness and benefit of the [product] . . . (2) The safety aspects of the [product] . . . (3) Was a substitute design for this [product] feasible and practical?") (brackets in original); N.Y. Pattern Jury Instr. – Civil 2:120 (2007) (including "(1) the product's usefulness and its costs, and (2) the risks, usefulness and costs of the alternative design[s] as compared to the product the defendant did market") (brackets in original); 3 Ohio Jury Instructions 451.05 (2008) (including "(1) The nature and magnitude of the risks of harm associated with the product's design or formulation in light of its intended and reasonably foreseeable uses, modifications, or alterations; (2) The product users' likely awareness of the risks of harm, whether based on warnings, general knowledge, or otherwise; . . . (4) The extent to which the product's design or formulation conformed to any applicable public or private

The Georgia instruction also sets forth multiple factors that a jury can consider for determining the reasonableness of a manufacturer's choice of one design versus other alternatives:

> In determining whether a product was defective, you may consider evidence of alternative designs that would have made the product safer and could have prevented or minimized the plaintiff's injury. In determining the reasonableness of the manufacturer's choice of product design, you should consider
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> a. the availability of an alternative design at the time the manufacturer designed the product;
>
> b. the level of safety from an alternative design compared to the actual design;
>
> c. the feasibility of an alternative design, considering the market and technology at the time the product was designed;
>
> d. the economic feasibility of an alternative design;
>
> e. the effect an alternative design would have on the product's appearance and utility for multiple purposes, and
>
> f. any adverse effects on the manufacturer or the product from using an alternative design.

Id. 62.660. Other jurisdictions instruct the jury to conduct a risk-utility or risk-benefit test and mention specific risk-utility factors in the notes or comments following the pattern instructions.[17]

(continued...)

standard that was in effect when it left the manufacturer's control"); 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 110.02 (6th ed.) (including "the relative cost of the product; seriousness of the potential harm from the claimed defect; [and] the cost and feasibility of eliminating or minimizing the risk").

[17] *See, e.g.*, Revised Arizona Jury Instructions (Civil) PLI 3 (4th ed. 2005) (commenting that the risk-utility factors should be argued by counsel for inclusion in jury instructions); Colo. Jury Instr., Civil 14:3 (4th ed. 2007) (noting that the Supreme Court in *Armentrout v. FMC Corp.*, 842 P.2d 175, 197 (Colo. 1992) identified risk-utility factors, including feasible alternative design); 18 La. Civ. L. Treatise, Civil Jury Instructions §11.02 (2d ed. 2007) (commenting on risk-utility factors and requiring proof of a reasonable alternative design); 8 Tenn. Prac. Pattern

Attached as Appendix A to this brief is a set of draft products liability jury instructions that would reflect Pennsylvania law under the Third Restatement standard for this Court's consideration. Other formulations could be considered and proposed by parties and courts over time, but this draft sample instruction illustrates how adoption of Third Restatement principles would clarify the jury's analysis.

Regardless of the precise formulation, directing the jury to consider specific factors regarding safety and reasonable alternative designs, and to weigh the risks and benefits of a product, guides the jury to focus on the actual legal standard for liability. *See* Henderson & Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. at 878-79 ("Compared with the consumer expectations standard, the reasonableness standard based on risk-utility analysis relies less on intuition and more on a balancing of articulated considerations regarding the relative advantages and disadvantages of the product as designed and as it alternatively could have been designed."). Jurors are capable of this task.

III. ADOPTION OF THE THIRD RESTATEMENT IS A BALANCED APPROACH THAT BENEFITS PENNSYLVANIA COURTS, JURORS, AND LITIGANTS.

Amici are committed to manufacturing safe, high-quality products for their customers. Adoption of the Third Restatement Approach will entail significant welfare gains for Pennsylvania consumers, as well as manufacturers and suppliers doing business here. It represents a balanced approach to liability that uses real-world factors that go into designing and manufacturing safe products. It also reflects the factors that consumers actually consider when they make decisions in the marketplace. Indeed, risk-utility balancing is not a foreign concept to

(continued...)

Jury Instr. T.P.I. – Civil 10.01 (2007) (commenting on traditional risk-utility factors that may be considered in the prudent manufacturer test).

jurors because they *do it all the time* with respect to the products that they purchase or use every day.

Moreover, the Third Restatement has the added benefit of harmonizing Pennsylvania law with the emerging national consensus regarding product safety. This leads to more predictable obligations for manufacturers and suppliers, and more consistent expectations for consumers, with respect to product safety. In the global economy, having clear standards and uniform treatment of products claims spares local, national, and global companies from trying to decipher confusing, idiosyncratic standards.

The Third Restatement's risk-utility test and its recognition of the probative force of evidence such as reasonable alternative designs and industry standards would align Pennsylvania's legal standard for design defect with the standards already used in government and industry. *Compare, e.g.*, REST. (3D) § 2 cmt. a ("Products are not generically defective merely because they are dangerous. Many product-related accident costs can be eliminated only by excessively sacrificing product features that make products useful and desirable.") *with* 16 C.F.R. § 1009.8 (2004) (In setting product safety standards, the Consumer Product Safety Commission should consider "the prospective cost of Commission action to consumers and producers, and [] the benefits expected to accrue to society from the resulting reduction of injuries. Consideration of product cost increases [should] be supplemented to the extent feasible and necessary by assessments of effects on utility or convenience of the product."). By acknowledging the need for product designers and producers to balance the risks of a product with its usefulness to consumers, the Third Restatement affirms the design standards appropriately used by product designers and endorsed by sound economic principles: design

decisions should optimize the welfare of the consumer by balancing the utility of and access to products with consumer safety.

Manufacturers want to maximize the utility of their products while also maintaining appropriate safety standards. In the face of safety concerns, (1) manufacturers first try to design out the risks of a product without sacrificing its utility; (2) if that is not possible, manufacturers try to guard against the risk; and (3) if that is not possible, manufacturers try to warn against the risk. *See* Mark R. Lehto, *Designing Warning Signs and Warning Labels: Part I – Guidelines for the Practitioner,* ERGONOMICS GUIDELINES AND PROBLEM SOLVING 249, 250 (Anil Mital et. al. eds., 2000) ("In general, the accepted hierarchy of control from most to least effective is: (1) elimination of hazards, (2) containment of hazards, (3) containment of people, (4) training of people, (5) warning of people.").

For example, consider a piece of heavy equipment like a metal-stamping machine press. To protect the hands of workers operating the press, designers may incorporate hand guards or other physical boundaries or devices to keep hands away from the press during operation. However, there are risks inherent in the use of a press that cannot be designed around without sacrificing its purpose. To account for these risks, manufacturers include instructions and warnings that apprise users of the risks associated with the product. These design and warning procedures are used in a variety of products presenting end-user risk. *See, e.g.,* American Society for Testing and Materials (ASTM) International, Annual Book of ASTM Standards, Vol. 15.11, No. F 400-004 (2007) ("Standard Consumer Safety Specification for Lighters") (detailing specific safety standards for cigarette lighter design and suggesting warning statements to affix to product); *id.*, No. F 1004-07 ("Standard Consumer Safety Specification for Expansion Gates

and Expandable Enclosures") (detailing design safety standards and minimum required warning information for expandable gates).

The Third Restatement—with its incorporation of reasonable alternative designs and warnings, and its principle that a manufacturer cannot use a warning to insulate itself from liability for an unreasonably unsafe design—tracks this process. Moreover, it creates incentives for manufacturers and suppliers to adopt safe designs and warnings whenever feasible. In this sense the Third Restatement is "technology forcing" —*i.e.*, it encourages manufacturers to pay attention to safety developments and to adopt safe, feasible standards. Indeed, by basing liability on reasonably foreseeable risks, the moral foundation of products liability law supports the Third Restatement approach. *See* Peter M. Gerhart, *The Death of Strict Liability*, 56 BUFF. L. REV. 245, 271-73 (2008) (arguing that the economic approach and the corrective justice approach to tort law both lead to the conclusion that "[i]t is morally unwise to impose liability when a person has made a reasonable choice and [it is] impossible practically to alter the standard of care by imposing liability"); Owen, *The Moral Foundations of Products Liability Law*, 68 NOTRE DAME L. REV. at 494 ("If such losses are unforeseeable, or if they result necessarily from the use of products which are on balance good, it simply is morally inappropriate to place legal responsibility on the maker, and the burden of the loss on the maker's owners and customers."); *see Vassallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909, 922-23 (Mass. 1998).

The commentary makes clear that the Third Restatement also attempts to maximize consumer choice. *See* REST. (3D) § 2 cmt. a. This supports existing policy goals: Consumers do not always want the safest products possible; they want products that are as safe as possible without unduly sacrificing other features such as durability, affordability, speed, performance,

appearance, size, and ease of use. The law should be designed, wherever possible, to maintain consumer choice and honor these other important values.

IV. THIS COURT SHOULD ADOPT THE THIRD RESTATEMENT RATHER THAN ATTEMPTING INCREMENTALLY TO FIX PENNSYLVANIA'S JURISPRUDENCE.

This case presents an important opportunity for this Court to acknowledge the central role of risk-utility balancing and the concept of reasonableness in products liability design and warning cases. As Justice Saylor wrote for himself and now-Chief Justice Castille and Justice Eakin in *Phillips*, "adoption of the Restatement's closely reasoned and balanced approach . . . synthesizes the body of products liability law into a readily accessible formulation based on the accumulated wisdom from thirty years of experience" and "represents the clearest path to reconciling the difficulties persisting in Pennsylvania law, while enhancing fairness and efficacy in the liability scheme." 576 Pa. at 679, 841 A.2d at 1021 (Saylor, J., concurring); *see also id.*, 576 Pa. at 665, 841 A.2d at 1012 (Saylor, J., concurring) ("The Restatement [(Third)]'s considered approach illuminates the most viable route to providing essential clarification and remediation."). Just as this Court was at the forefront in adopting the Second Restatement of Torts for this Commonwealth's products liability jurisprudence, this case presents an opportunity to once again move the law forward with the experience that time has brought, by adopting § 1-4 of the Third Restatement of Torts as the law of the Commonwealth.

Moreover, while Justice Saylor's dissent in *Bugosh* recognized that this Court could, instead of adopting the Third Restatement, incrementally change its approach to the Second Restatement, *Bugosh*, 601 Pa. at 300 ("For example, the Court could at least depart from *Azzarello* prospectively, thus clearing a path for our common pleas and intermediate appellate courts to consider the reasoned recommendations of the Third Restatement, as well as other reasoned alternatives and/or refinements."), such a decision would be problematic. Piecemeal

correction to the existing Second Restatement jurisprudence coupled with a limited adoption of the core Third Restatement principles would risk further confusion for trial courts, litigants, and jurors. In 2009, the Third Circuit decided *Berrier v. Simplicity Manufacturing, Inc.*, 563 F.3d 38 (3d Cir. 2009), a products liability case that applied Pennsylvania law. In *Berrier*, the Third Circuit predicted that this Court would adopt the Third Restatement approach, which "represents a synthesis of law derived from reasoned, mainstream, modern consensus" and "illuminates the most viable route to providing essential clarification and remediation [of Pennsylvania products liability law], at least on a prospective basis." *Berrier*, 563 F.3d at 60 (quoting *Phillips*, 576 Pa. at 675-78, 841 A.2d at 1012 (Saylor, J., concurring)).

The *Berrier* opinion—however well-reasoned—has had the effect of creating a series of inconsistent rulings in Pennsylvania's state and federal courts, thus undermining the bedrock principle that the law be consistent and predictable. *Konold v. Superior Int'l Indus. Inc.*, __ F. Supp. 2d __, 2012 WL 5381700 (W.D. Pa. Oct. 31, 2012) (Second Restatement) (Schwab, J.); *Lynn v. Yamaha Golf-Car Co.*, 894 F. Supp. 2d 606 (W.D. Pa. 2012) (Third Restatement) (Hornak, J.); *Sikkelee v. Precision Airmotive Corp.*, 876 F. Supp. 2d 479 (M.D. Pa. 2012) (Second Restatement) (Jones, J.); *Giehl v. Terex Utilities, Inc.*, No. 3:12-0083, 2012 WL 1183719 (M.D. Pa. Apr. 09, 2012) (Third Restatement) (Caputo, J.); *Thompson v. Med-Mizer, Inc.*, No. 10-2058, 2012 WL 5987551 (E.D. Pa. Nov. 30, 2012) (Third Restatement) (Perkin, M.J.); *Carpenter v. Shu-Bee's Inc.*, No. 10-0734, 2012 WL 2740896 (E.D. Pa. July 09, 2012) (Second Restatement) (Perkin, M.J.). Overruling *Azzarello* without adopting a definite new standard would do little to prevent judges in next-door courtrooms from applying different rules. Additionally, if the Court were to reject *Azzarello* but not adopt the Third Restatement as a

whole, that could affect the perceived validity of this Court's and the lower courts' prior holdings, based on the degree to which they may, or arguably may, rely on *Azzarello*.

It is time for this Court to acknowledge its role of defining Pennsylvania's products liability law. The adoption of the Third Restatement's core liability analysis would benefit courts, jurors and all litigants by clarifying the law and providing the most useful and coherent tools to decide products liability claims.

V. THE COURT'S HOLDING SHOULD BE APPLIED TO ALL PENDING CASES

The circumstances surrounding this particular issue, together with this Court's prior precedents, recommend application of whatever rule the Court adopts to all pending cases. In general, "at common law, a decision announcing a new principle of law is normally retroactive." *Blackwell v. Commonwealth*, 527 Pa. 172, 182, 589 A.2d 1094, 1099 (1991) (citing *August v. Stasak*, 492 Pa. 550, 424 A.2d 1328 (1981)). This Court uses a three-factor standard when deciding whether a new decision applies retroactively, analyzing "(1) the purpose to be served by the new rule, (2) the extent of the reliance on the old rule, and (3) the effect on the administration of justice by the retroactive application of the new rule." *Blackwell*, 527 Pa. at 183, 589 A.2d at 1099 (citing *Desist v. United States*, 394 U.S. 244 (1969) and *Commonwealth v. Miller*, 490 Pa. 457, 417 A.2d 128 (1980)). In applying this standard, the Court must (1) "look[] to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation," (2) consider whether the decision "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed," and (3) "weigh[] the inequity imposed by retroactive application" so as to prevent "injustice or hardship." *Blackwell*, 527 Pa. at 184, 589 A.2d at 1100 (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)).

In this case, all three factors support application of the new rule to pending cases. Regarding the first factor, the Court accepted this appeal to clarify Pennsylvania law and to resolve the inconsistent tests applied by state and federal courts. Announcing a clarified standard and then not applying it to pending cases would not only fail to achieve these goals, but it would exacerbate the problem in the near-term.

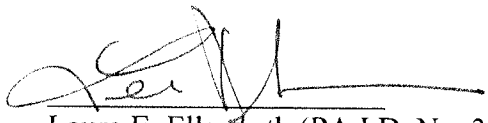
Likewise, Pennsylvania law has not been clear. The ad hoc and oftentimes inconsistent development of products liability jurisprudence in the past three decades has prevented litigants from relying on past precedent. Furthermore, in the wake of the confusion sewn by the Third Circuit's *Berrier* decision, litigants in Pennsylvania today cannot expect any consistency from court to court or even from judge to judge. Interested parties have long been expecting this Court to clarify the issue, and in this environment, no reasonable litigant should have relied on *Azzarello*'s continuing vitality.

Finally, with respect to the third factor, there would be no inequity, injustice, or hardship imposed by application to pending cases. The Third Restatement rule would not change the standard of conduct that would apply to manufacturers and sellers after the fact. Clarifying the rule that is to be applied in all pending cases would also likely serve to expedite the resolution of many pending cases, given the cloud of uncertainty that would be lifted from those cases.

VI. CONCLUSION

For all the reasons stated above, amici respectfully urge this Court to adopt the Third Restatement analysis as the law of this Commonwealth for products liability claims.

Respectfully submitted,



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APPENDIX A: MODEL JURY INSTRUCTIONS

STRICT PRODUCT LIABILITY

1.1: Strict Product Liability – General Rule of Strict Liability

This is a product liability case. Under certain circumstances, the manufacturer of a product may be subject to liability for the harm caused to the plaintiff by a defect in the product which existed when the product left the manufacturer's possession.

The law does not make a manufacturer the insurer of its product, and the fact that the product may cause an injury does not automatically make the manufacturer liable. Nearly every product is capable of causing injury. Therefore, a product is not defective simply because a person has been hurt while using the product. Instead, to recover damages for strict liability, a person injured by an allegedly defective product must prove each of the following elements of his claim by a preponderance of the evidence:

(1) the product was defective;

(2) the defect existed at the time the product left the defendant's control; and

(3) the defect was the factual and proximate cause of the plaintiff's injury.

Authorities: Adapted from Pennsylvania Suggested Standard Civil Jury Instructions, 8.01 and 8.02; *Kemp v. Oldham Saw Co., Inc.*, 2004 WL 5135428 (Pa. Com. Pl. 2004) (Tereshko, J.); *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1013-14 (Pa. 2003) (Saylor, J., concurring); *Azzarello v. Black Bros. Co.*, 391 A.2d 1020, 1027 (1978); *Pegg v. General Motors Corp.*, 391 A.2d 1074, 1085 (1978) (en banc); *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893 (Pa. 1975); *Powell v. J.T. Posey Co.*, 766 F.2d 131, 134 (3d Cir. 1985); *Conti v. Ford Motor Co.*, 743 F.2d 195, 197 (3d Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985); *Whitner v. Von Hintz*, 263 A.2d 889, 892-94 (1970); *Takach v. B.M. Root Co.*, 420 A.2d 1084, 1086-87 (Pa. Super. Ct. 1980); Restatement (Third) of Torts: Product Liability § 1 (1998).

1.2: Strict Product Liability – Definition of "Design Defect"

A product may be defective because of its particular design. A product is defective in design when the manufacturer could have reduced or avoided the reasonably foreseeable risks of harm posed by the product by the adoption of a reasonable alternative design, and the omission of the alternative design renders the product not reasonably safe. The plaintiff must prove that such a reasonable alternative design was, or reasonably could have been, available at time of sale or distribution and that it would have made the product reasonably safe.

When evaluating the reasonableness of a design alternative, the use of the product and the overall safety of the product must be considered. It is not sufficient that the alternative design would have reduced or prevented the plaintiff's harm if it would also have introduced into the product other dangers of equal or greater magnitude or if the alternative design would not have been reasonable or practical under the circumstances. In assessing the reasonableness of the manufacturer's design, you may consider industry standards, customs and practices in existence at the time of the product's design.

Authorities: Restatement (Third) of Torts: Product Liability § 2 and cmts. d, e (1998).

1.3: Strict Product Liability – Defect Due to Inadequate Warning

A product may be defective because of inadequate warnings or instructions. A product is defective because of inadequate warnings or instructions when the manufacturer could have reduced or avoided the reasonably foreseeable risks of harm posed by the product by providing reasonable instructions or warnings, and the omission of the instructions or warnings renders the product not reasonably safe.

Authorities: Restatement (Third) of Torts: Product Liability § 2 (1998).

1.4: Strict Product Liability –"Not Reasonably Safe"

Products are not defective merely because they are dangerous. Many product-related accidents can be eliminated only by sacrificing product features that make products useful and desirable. Society does not benefit from products that are excessively safe any more than it benefits from products that are excessively risky. For example, society does not benefit from automobiles designed with maximum speeds of 40 miles per hour or kitchen knives that are not sharp enough to cut food. Thus, you must consider the various trade-offs between safety and usefulness in determining whether a product is defective because it is not reasonably safe.

A reasonably designed product still carries with it elements of risk that the user or consumer must be protected against since some risks cannot be designed out of the product at reasonable cost or without impairing the product's utility.

The ultimate issue you must evaluate in judging whether a product contains a defect in design is whether the manufacturer could have reduced or avoided the product's reasonably foreseeable risks of harm by the adoption of a reasonable alternative design and whether the omission of the alternative design renders the product not reasonably safe.

Similarly, the ultimate issue you must evaluate in judging whether a product contains a defect because of inadequate instructions or warnings is whether the manufacturer could have reduced or avoided the product's reasonably foreseeable risks of harm by providing reasonable instructions or warnings and whether the omission of the instructions or warnings renders the product not reasonably safe.

Authorities: Restatement (Third) of Torts: Product Liability § 2 cmt. a (1998).

1.5: Strict Product Liability – Factors to Consider in Deciding Whether Design is Reasonably Safe

To determine whether a product has a design defect, you must balance the inherent risk of harm in a product design against the utility or benefits of that product design. You must decide whether the manufacturer acted reasonably in choosing a particular product design by considering all relevant evidence, which could include the following factors:

(a) the usefulness and desirability of the product;

(b) the severity of the danger posed by the product's design;

(c) the likelihood of that danger actually occurring;

(d) the avoidability of the danger, considering the intended user's knowledge of the product, publicity surrounding the danger, the effectiveness of warnings, and common knowledge or the expectation of danger;

(e) the product's intended uses and user, and the characteristics of intended user groups, including age, education, skill, and experience;

(f) the intended user's ability to avoid the danger by the exercise of reasonable care;

(g) the technology available when the product was manufactured;

(h) the instructions and warnings accompanying the product;

(i) the ability to eliminate the danger without impairing the product's usefulness or making it too expensive;

(j) the appearance and aesthetic attractiveness of the product;

(k) the product's utility for multiple uses;

(l) the convenience and durability of the product;

(m) feasible alternative designs for the product reasonably available to the manufacturer at the time the product was made and the relative advantages and disadvantages of the product as designed and as it alternatively could have been designed, including the effects on production costs, the product's usefulness, product longevity, maintenance, repair, and aesthetics; and

(n) the manufacturer's compliance or non-compliance with industry standards, customs, or practices, or government regulations.

If you decide that the reasonably foreseeable risk of harm in the product's design outweighs the utility of that particular design, then the manufacturer exposed the consumer to greater risk of danger than the manufacturer should have in using that product design, and the product is defective. However, if after balancing the risks and utility of the product, you find that the plaintiff did not show by a preponderance of the evidence that the product had a design defect, then the plaintiff is not entitled to recover.

Authorities: Restatement (Third) of Torts: Product Liability § 2 cmt. f (1998); Ga. Council of Superior Court Judges, Suggested Pattern Jury Instructions: Civil Cases 62.640 and 62.660 (2007); *Riley v. Warren Mfg., Inc.*, 688 A.2d 221, 224 (Pa. Super. Ct. 1997) (discussing risk-utility factors to be considered by the court in design defect cases); *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1007 (Pa. 2003) (adopting "intended use" and "intended user" standard).

1.6: Strict Product Liability – Factors to Consider in Deciding Whether Warning Is Adequate

To determine whether a product has a defect because of inadequate instructions or warnings, you must evaluate whether the manufacturer could have reduced or avoided the product's reasonably foreseeable risks of harm by providing reasonable instructions or warnings and whether the omission of the instructions or warnings renders the product not reasonably safe. You must decide whether the instructions or warnings were adequate by considering all relevant evidence, which could include the following factors:

(a) the warnings' or instructions' content;

(b) the warnings' or instructions' clarity and comprehensibility;

(c) the intensity of expression in the warnings or instructions;

(d) characteristics of intended user groups, including age, education, skill, and experience;

(e) the obviousness of the risk;

(f) the severity of the danger posed by the underlying risk;

(g) the likelihood of that danger actually occurring;

(h) the avoidability of the danger with proper warnings or instructions; and

(i) the manufacturer's compliance or non-compliance with industry standards, customs, or practices, or government regulations.

Authorities: Restatement (Third) of Torts: Product Liability § 2 cmt. f, i (1998); Ga. Council of Superior Court Judges, Suggested Pattern Jury Instructions: Civil Cases 62.640 and 62.660 (2007); *Riley v. Warren Mfg., Inc.*, 688 A.2d 221, 224 (Pa. Super. Ct. 1997) (discussing risk-utility factors to be considered by the court in design defect cases); *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1007 (Pa. 2003) (adopting "intended use" and "intended user" standard).

1.7: Strict Product Liability – Manufacturer Not Expected to Make Foolproof Design or Warnings

Proof that a newer, safer product has been designed, or that the manufacturer has improved or altered its product design, does not mean that an earlier version of product is defective. Moreover, a manufacturer is not required to impair the usefulness of its product or price itself out of the market by using only those design features representing the ultimate in safety design. Instead, a manufacturer is only required to make a product that is reasonably safe for intended users and for its intended use.

Authorities: *Azzarello v. Black Bros. Co.*, 391 A.2d 1020, 1024 n.5 (Pa. 1978); *Serpiello v. Yoder Co.*, 418 F. Supp. 70, 72 (E.D. Pa. 1976), *aff'd*, 556 F.2d 568 (3d Cir. 1977); *Craigie v. General Motors Corp.*, 740 F. Supp. 353, 358 (E.D. Pa. 1990); *Bartkewicz v. Billinger*, 247 A.2d 603 (Pa. 1968); *Rooney v. Federal Press Co.*, 751 F.2d 140 (3d Cir. 1984); *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1007 (Pa. 2003) (adopting "intended use" and "intended user" standard).

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2013, I have caused to be served a copy of the foregoing Brief for Amici Curiae The Sherwin-Williams Company, United States Steel Corporation, Calgon Carbon Corporation, and The Procter & Gamble Company by **First Class U.S. Mail,** which service satisfies the requirements of Pa. R.A.P. 121, on the parties listed below:

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