THE INCREASING ACCEPTANCE OF THE RESTATEMENT (THIRD) RISK UTILITY ANALYSIS IN DESIGN DEFECT CLAIMS

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I. INTRODUCTION

The American Law Institute completed its reformation of products liability law in 1998 by publishing the Restatement (Third) of Torts: Products Liability ("Restatement (Third)").[1] The Restatement (Third) was a response to the lack of necessary detail and ambiguity regarding products liability law in the Restatement (Second) of Torts, and its authors sought to clarify and constrict competing interpretations developing among various jurisdictions.[2] Overall, the Restatement (Third) attempted to recognize the emerging trends and decisions adopted by various states.[3] Despite its attempt to synthesize a consensus view, the new Restatement did more than restate the law followed by most jurisdictions; rather, it set forth new, unsettled concepts and restrictions.

One of the most controversial of these restrictions is the abandonment of the consumer expectation test and adoption of a risk-utility analysis in determining whether a product's design is defective.[4] Of particular importance in the controversy, the Restatement requires that the plaintiff prove a "reasonable alternative design," otherwise known as a RAD.[5] Because some courts purport to follow a risk-utility analysis but do not require proof of a reasonable alternative design, this Note will refer to the risk-utility test requiring plaintiff's proof of a RAD as the "Restatement's risk-utility analysis."

Part II of this Note will explain the differences between the consumer expectations test, a risk-utility analysis, and the Restatement's risk-utility analysis. These differences help explain why the consumer expectations test and general risk-utility analysis were abandoned in favor of the Restatement's risk-utility analysis. This Note will articulate the major arguments that have

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[1] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. (1998).

[2] George W. Conk, *Is There a Design Defect in the Restatement (Third) of Torts: Products Liability?*, 109 YALE L.J. 1087 (2000) (explaining that the objective of the Restatement (Third) was to resolve the problem of the meaning of the word "defect").

[3] Thomas V. Van Flein, *Prospective Application of the Restatement (Third) of Torts: Products Liability in Alaska*, 17 ALASKA L. REV. 1, 2 (2000).

[4] *See* Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability: A Guide to Its Highlights*, 34 TORT & INS. L.J. 85, 88 (1998) (stating that no issue brought about more debate in the Restatements than this particular component of Section 2).

[5] *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. INTRODUCTION ("Section 2(b) generated considerable controversy [because it] calls for proof of a reasonable alternative design in order to sustain an action for defective design.").

advanced against adopting the Restatement's risk-utility analysis. Part III illustrates why adopting the Restatement's risk-utility analysis in defective-design product liability cases is favorable, and urges state courts that have not yet adopted the Restatement (Third) approach to do so. Based on state court opinions from the past three years, Part IV of this Note will delineate (1) those jurisdictions that have accepted, or are moving toward acceptance, of the Restatement's risk-utility analysis, including proof of a reasonable alternative design, and (2) those jurisdictions that have rejected or negatively criticized the Restatement (Third), including an analysis of each court's decision.

II. CONSUMER EXPECTATION TEST VS. RISK-UTILITY ANALYSIS

A. Differences Between the Consumer Expectation Test, Risk-Utility Analysis, and the Restatement's Risk-Utility Analysis

1. Consumer Expectation Test

In developing the consumer expectations test, courts have focused on the comments to Section 402A of the Restatement (Second).[6] This test applies strict liability – avoiding a negligence standard – by measuring what an "ordinary consumer" would believe about the product in question.[7] The Restatement (Second) suggests that a product is defective when it is "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[8] The Restatement further defines a design defect as "unreasonably dangerous" if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[9] Whether a product is unreasonably dangerous is determined by fact-finders based on whether they, as ordinary consumers, would expect something safer than the product in question. Therefore, in jurisdictions that follow the consumer expectations test, a product is defective in design if it fails to meet an ordinary consumer's reasonable expectations of safety.[10]

Despite its seemingly simplistic application, the consumer expectations test has long been criticized as highly subjective, confusing, unpredictable, and unfair to both plaintiffs and defendants depending on its application.[11] In fact, the test was rejected by the Model Uniform Product Liability Act, which states that the consumer expectations test "takes subjectivity to its most extreme end."

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[6] RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 99, at 698 (5th ed. 1984).

[7] RESTATEMENT (SECOND) OF TORTS § 402A cmt. i.

[8] *Id.* at cmt. g.

[9] *Id.* at cmt. i.

[10] *Id.*; *see also* Rebecca Tustin Rutherford, *Changes in the Landscape of Products Liability Law: An Analysis of the Restatement (Third) of Torts*, 63 J. AIR L. & COM. 209, 222-23 (1997).

[11] *See* Donald T. Ramsey, *Consumer Expectation Test for Design Defect in California*, 24 TORT & INS. L.J. 650, 668 (1984); *see also* John H. Chun, *The New Citadel: A Reasonably Designed Products Liability Restatement*, 79 CORNELL L. REV. 1654, 1673-74 (1994).

Each trier of fact is likely to have a different understanding of abstract consumer expectations."[12]

Furthermore, one can argue that the consumer expectations test is functionally equivalent to a negligence test.[13] By arguing that an ordinary consumer is not likely to expect more than the exercise of reasonable care by the manufacturer, the consumer expectations test is transformed into a risk-utility test.[14] Indeed, some courts have taken this approach.[15]

2. *Risk-Utility Analysis*

Other jurisdictions utilize a risk-utility analysis. These jurisdictions have applied Section 402A of the Restatement (Second) by balancing the danger of a particular product against its benefits to society.[16] The rationale behind this test is that its flexibility achieves an appropriate balance among the competing interests of manufacturers, consumers, and the public.[17]

Under a risk-utility approach, courts have considered some of the following factors: (1) the usefulness and desirability of the product: its utility to the user and to the public as a whole; (2) the safety aspects of the product: the likelihood that it will cause injury and the probable seriousness of the injury; (3) the availability of a substitute product that would meet the same need and not be as unsafe; (4) the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; (5) the user's ability to avoid danger by the exercise of care in the use of the product; (6) the user's anticipated awareness of the dangers inherent in the product and their ability to be avoided based on general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; and (7) the feasibility of the manufacturer spreading loss by setting the price of the product or by carrying liability insurance.[18]

If, after weighing all of the factors, a factfinder determines that the risks of the product's design are greater than its benefits, the product is considered unreasonably dangerous under Section 402A of the Restatement (Second), leaving the manufacturer liable. Courts employing this analysis recognize that this balancing test is similar to a negligence analysis.[19] The distinctive differ-

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[12] UNIF. PROD. LIAB. ACT § 104(B) (1979).

[13] Chun, *supra* note 11, at 1674.

[14] *Id.*

[15] *Id.*; *see also* James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1520, 1533 (1992).

[16] Rutherford, *supra* note 10, at 224-25; *see also, e.g.*, Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239 (N.J. 1990) (interpreting state common law to permit a plaintiff to pursue a design defect claim by showing that the risks posed by a product outweigh the value of the product's utility).

[17] Rutherford, *supra* note 10, at 222-23; *see also Dewey*, 577 A.2d at 1252 (citing O'Brien v. Muskin Corp., 463 A.2d 298 (N.J. 1983)).

[18] Rutherford, *supra* note 10, at 222-25 (citing Armentrout v. FMC Corp., 842 P.2d 175, 184 (Colo. 1992)).

[19] *Id.* at 227.

ence, however, is that the focus remains on the product rather than the manufacturer's conduct.[20]

3. *Restatement's Risk-Utility Analysis*

The distinguishing characteristic under the Restatement (Third)'s risk-utility analysis is its focus on the manufacturer's reasonableness. This reasonableness standard requires a comparison between the design of the injury-causing product and an alternative design.[21] The risk-utility analysis in design defect cases, under Section 2(b) of the Restatement (Third), provides that 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."[22] Under this standard, a product is defectively designed if its inherent danger outweighs its utility.[23] The burden of proof lies with the plaintiff, requiring the plaintiff to prove "the availability of a technologically feasible and practical alternative design that would have reduced or prevented the plaintiff's harm."[24] Because this standard amounts to proving that the defendant could have acted in a more responsible manner but failed to do so, it strongly resembles a negligence analysis.[25] In addition, while the Restatement's risk-utility test considers consumer expectations relevant to determine reasonableness, it rejects the consumer expectations test as an independent standard for judging a product's defective design because that test does not give adequate consideration to the possibility of a reasonable alternative design.[26]

Based on this cursory explanation of product liability defective design tests, it is not difficult to ascertain why the consumer expectations test was abandoned and the general risk-utility analysis was modified. These arguments will be articulated more specifically in Part IV.

B. *Major Arguments Against Adoption of Restatement's Risk-Utility Analysis*

Considerable controversy has surrounded the adoption of Section 2(b) of the Restatement (Third). The Reporters of the Restatement asserted that the rule stated in Section 2(b) represented the overwhelming majority of American

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[20] *See* Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 865 (1996) (stating that the Learned Hand test is significantly different from the risk-utility test applied in products liability cases because the Restatement (Second) test imposes liability on the basis of what is now known, rather than on the basis of what the producer knew or should have known at the time the product was designed); *see also* Rutherford, *supra* note 10, at 227.

[21] RESTATEMENT (THIRD) OF TORTS § 2(b) cmt. d.

[22] RESTATEMENT (THIRD) OF TORTS § 2(b) (noting that the language of § 2 defining design defect employs traditional negligence concepts such as foreseeability and reasonableness).

[23] KEETON, *supra* note 6, at 699.

[24] RESTATEMENT (THIRD) OF TORTS § 2 cmt. f ("To establish a prima facie case of defect, the plaintiff must prove the availability of a technologically feasible and practical alternative design that would have reduced or prevented the plaintiff's harm.").

[25] *See* Andrew F. Popper, *Restatement Third Goes to Court*, 35 APR TRIAL 54, 55 (1999).

[26] RESTATEMENT (THIRD) OF TORTS § 2 cmt. g; *see also* Rutherford, *supra* note 10, at 234.

jurisdictions. However, according to some academic commentators, the Reporters were not restating existing law but instead proposing law reform.[27]

The largest concern of parties opposed to the Restatement is the RAD requirement. Opponents argue that the requirement imposes an undue burden on plaintiffs because it places a "potentially insurmountable stumbling block in the way of those injured by badly designed products."[28] Commentators have argued that, in suits against manufacturers who produce highly complex products, the RAD requirement will deter the complainant from filing suit because of the enormous costs involved in obtaining expert testimony.[29] This also may deter injury victims from pursuing their claims against manufacturers or encourage parties to settle prematurely.[30] This criticism can be rebutted by the argument that, although additional expenses in litigation are never desirable, the additional expense is justified because it results in more reliable and fair outcomes.[31]

Scholars also criticize the Restatement for practical reasons.[32] Practically, the alternative design requirement may be difficult for courts and juries to apply because the Restatement (Third) contains far-reaching exceptions.[33] These exceptions are: (1) that the reasonable alternative design requirement does not apply when the product design is manifestly unreasonable;[34] and (2) plaintiffs are not required to produce expert testimony in cases where the feasibility of a reasonable alternative design is obvious and understandable to lay persons.[35] This criticism completely contradicts the first criticism. Commentators cannot logically criticize the alleged high burden of the reasonable alternative design requirement, and then turn around and criticize the elements of the

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[27] Popper, *supra* note 25, at 55; *see also, e.g.*, Frank J. Vandall, *Constructing a Roof Before the Foundation Is Prepared: The Restatement (Third) of Torts: Product Liability Section 2(b) Design Defect*, 30 U. MICH. J.L. REFORM 261, 279 (1997); Frank J. Vandall, *The Restatement (Third) of Torts: Product Liability: Section 2(b): The Reasonable Alternative Design Requirement*, 61 TENN. L. REV. 1407 (1994); John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects – A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493 (1996); Marshall S. Shapo, *Products Liability: The Next Act*, 26 HOFSTRA L. REV. 761 (1998); David Owen, *Products Liability Law Restated*, 49 S.C. L. REV. 273, 286 (1998); Robert E. Keeton, *Warning Defect: Origins, Policies, and Directions*, 30 U. MICH. J.L. REFORM 367, 397-98 (1997).

[28] Note, *Just What You'd Expect: Professor Henderson's Redesign of Product's Liability*, 111 HARV. L. REV. 2366, 2373 (1998) [hereinafter *Just What You'd Expect*]; *see also* Vautour v. Body Masters Indus., Inc., 784 A.2d 1178, 1183 (N.H. 2001).

[29] *See Just What You'd Expect*, *supra* note 28, at 2373; *see also Vautour*, 784 A.2d at 1183.

[30] *See* Popper, *supra* note 25, at 56; Richard L. Cupp, Jr., *Defining the Boundaries of "Alternative Design" Under the Restatement (Third) of Torts: The Nature and Role of Substitute Products in Design Defect Analysis*, 63 TENN. L. REV. 329, 336 (1995) (stating that additional litigation costs may have the effect of immunizing defendants from all but a few substantial claims).

[31] *See* Rutherford, *supra* note 10, at 243.

[32] *Vautour*, 784 A.2d at 1183.

[33] *Id.*

[34] RESTATEMENT (THIRD) OF TORTS § 2 cmt. e; *see also Vautour*, 784 A.2d at 1183.

[35] RESTATEMENT (THIRD) OF TORTS § 2 cmt. f; *see also Vautour*, 784 A.2d at 1183.

Restatement (Third) that minimize the burden because the exceptions "introduce even more complex issues for judges and juries to unravel."[36]

A final criticism is that the Restatement (Third) is a retrogression in products liability because it returns to negligence concepts by placing the burden on the plaintiff.[37] Pro-consumer advocates present this argument because the Restatement (Second) relieved plaintiffs from proving negligence on the part of the manufacturer. By focusing on the product itself, however, the consumer expectations test unfairly made it easier to obtain a recovery for the plaintiff, regardless of whether the manufacturer exercised the utmost care.

Part III will demonstrate that states are beginning to see through these illogical attacks and accept the wisdom and functionality of the Restatement (Third)'s risk-utility analysis.

III. BENEFITS OF THE RESTATEMENT (THIRD)'S RISK-UTILITY ANALYSIS AND THE ARGUMENT THAT STATES SHOULD ADOPT

The Restatement's risk-utility analysis provides the fairest means of weighing the competing interests inherent in design defect product liability cases. The ultimate goal of any litigation is to ensure that those individuals who have truly suffered harm or injury are compensated. The Restatement's risk-utility analysis effectuates this goal while still protecting a manufacturer who has acted reasonably to protect the consumer's safety. By considering the advantages and disadvantages of the design in question and the availability of a reasonable alternative design, the Restatement's risk-utility analysis strikes the appropriate balance.

The reasonable alternative design requirement is not the stumbling block that courts and commentators rejecting the Restatement's risk-utility analysis allege. In fact, as the Reporters demonstrated in the empirical evidence used to support the Restatement's new standard, there are a myriad of examples where RAD tests have resulted in a plaintiff's verdict.[38] From a practical, trial, and evidentiary perspective, proof of a safer alternative design would present a more persuasive and compelling case than one without such proof.[39] Indeed, personal injury lawyers (including many who severely criticize the Restatement (Third) test) admit that when trying a design defect case, they usually show the jury an alternative, safer design. Without this showing, personal injury lawyers know that the jury is left without any guidance.[40]

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[36] *Vautour*, 784 A.2d at 1184.

[37] *See* Vargo, *supra* note 27; Patrick Lavelle, *Crashing into Proof of a Reasonable Alternative Design: The Fallacy of the Restatement (Third) of Torts: Products Liability*, 38 DUQ. L. REV. 1059 (2000); Frank J. Vandall, *The Restatement (Third) of Torts: Product Liability: Section 2(b): The Reasonable Alternative Design Requirement*, 61 TENN. L. REV. 1407 (1994); Angela C. Rushton, *Design Defects Under the Restatement (Third) of Torts: A Reassessment of Strict Liability and the Goals of a Functional Approach*, 45 EMORY L.J. 389 (1996).

[38] *See* James A. Henderson & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 914-17 (1998); *see also* Victor E. Schwartz, *The Role of the Restatement in the Tort Reform Movement: The Restatement, Third, Torts: Products Liability: A Model of Fairness and Balance*, 10 KAN. J.L. & PUB. POL'Y 41, 44 (2000).

[39] Van Flein, *supra* note 3, at 29.

[40] *See* Schwartz, *supra* note 38, at 44.

Besides actually aiding consumers, the RAD requirement is not nearly as burdensome as pro-consumer commentators suggest. The plaintiff is not required to produce a prototype of the alternatively designed product. As the cases discussed in this Note demonstrate, plaintiffs can use expert testimony to show a reasonable alternative design. The plaintiff can also establish a safer alternative design through "other products already available on the market [that] may serve the same or very similar function at lower risk and at comparable cost."[41] Rather than developing an entirely new alternative design, a plaintiff may utilize these products to serve as reasonable alternatives to the product in question.[42]

In addition, the impact of the RAD requirement is substantially less when read as a whole. Sections 3 and 4 of the Restatement (Third) overlay somewhat, possibly excusing the plaintiff from having to establish a reasonable alternative design when a defect may be inferred through a *res ipsa loquitur* analysis (§ 3)[43] or where the product fails to comply with a product-safety statute or regulation (§ 4).[44] In fact, the Reporters warned that overzealous advocates might seek to focus the attention of the court on Section 2(b) alone rather than reading the Restatement (Third) as a whole.[45] As illustrated in Part IV, courts that decline to accept the Restatement (Third) engage in precisely this kind of fragmented reading.

Jurisdictions that decline to adopt the Restatement's risk-utility analysis express concern about abandoning the longstanding application of a consumer expectations test.[46] However, under the Restatement's risk-utility analysis, consumer expectations are still relevant. The Restatement (Third) allows a consumer's expectations to establish the foreseeability and risk of harm under the risk portion of the risk-benefit test.[47] While not an independent standard, consumer expectations "may still substantially influence or even be ultimately determinative on risk-utility balancing."[48]

Moreover, abandoning the consumer expectations test as an independent standard is logical because, as an independent standard, consumer expectations do not take into account whether the manufacturer could implement the proposed alternative design at a reasonable cost or provide overall safety.[49] While

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[41] *See* Ruiz-Guzman v. Amvac Chem. Corp., 7 P.3d 795, 800 (Wash. 2000); *see also* RESTATEMENT (THIRD) OF TORTS § 2 cmts. d & f; ("How the defendant's design compares with other, competing designs in actual use is [also] relevant to the issue of whether the defendant's design is defective.").

[42] *See Ruiz-Guzman*, 7 P.3d at 800; *see also* RESTATEMENT (THIRD) OF TORTS § 2 cmts. d & f.

[43] *See* RESTATEMENT (THIRD) OF TORTS § 3; *see also* Halliday v. Strum, 792 A.2d 1145, 1155 (Md. 2002).

[44] *See* RESTATEMENT (THIRD) OF TORTS § 4; *see also Halliday*, 792 A.2d at 1155.

[45] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. INTRODUCTION ("Overzealous advocates may seek to focus the attention of the courts on § 2(b) alone. Users of this Restatement are cautioned against such a fragmented reading.").

[46] *See, e.g.*, Wortel v. Somerset Indus., Inc., 770 N.E.2d 1211 (Ill. App. Ct. 2002); Delaney v. Deer & Co., 999 P.2d 930 (Kan. 2000); *Halliday*, 792 A.2d at 1145; Green v. Smith & Nephew AHP, Inc., 629 N.W.2d 727 (Wis. 2001).

[47] RESTATEMENT (THIRD) OF TORTS § 2 cmt. g.

[48] *Id.*

[49] *Id.*

a small core of scholars support the consumer expectations test, a far greater number of scholars sharply criticize the test due to its unworkable and unpredictable nature.[50] Scholars also suggest that, in reality, the consumer expectation test does little to distinguish strict liability from ordinary negligence.[51] Even though courts resistant to the Restatement (Third) advocate strict liability principles – because a consumer would likely expect the manufacturer to exercise reasonable care in designing the product – the consumer expectations test functions as a negligence test.[52]

Finally, the Restatement's risk-utility analysis facilitates predictability. Based on variance among states, and vast interpretations of the previous Restatement (Second) regarding design defects, a consistent approach to guide manufacturers, consumers, and courts alike was impossible prior the Restatement (Third) risk-utility analysis.[53]

IV. The Increasing Acceptance of the Restatement's Risk-Utility Analysis: A Jurisdictional Analysis

Despite the assertion that the Restatement (Third) goes against the weight of authority in most jurisdictions,[54] in the six years following its controversial release, a number of jurisdictions have agreed with the logic set forth in Section 2(b). Many courts have either expressly adopted the section, including requiring proof of a reasonable alternative design, or have at least expressly recognized the Restatement (Third), hence validating it. Of the jurisdictions that continue to explicitly or implicitly reject the risk-utility analysis set forth by the Restatement (Third), the courts provide little justification for their holdings and bind themselves by nothing other than outdated precedent.

A. Jurisdictions that Accept or Positively Recognize the Restatement's Risk-Utility Analysis

The following states have either expressly accepted the Restatement's risk-utility analysis or relied on the Restatement (Third) as support for conclusions in design defect cases.

1. California

Recently, a California Court of Appeals expressly recognized the usefulness of the Restatement (Third) relating to consumer expectations.[55] Depending on the circumstances, California courts have traditionally allowed two

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[50] James A. Henderson & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 Cornell L. Rev. 867, 904 (1998).

[51] *See* Keith Miller, *Design Defect Litigation in Iowa: The Myths of Strict Liability*, 40 Drake L. Rev. 465, 473-74 (1991); *see also* Wright v. Brooke Group Ltd., 652 N.W.2d 159, 167 (Iowa 2002).

[52] Miller, *supra* note 51, at 473-74.

[53] *See* Chun, *supra* note 11, at 1674 (stating that a consistent approach to defective design can hardly be hoped for under the consumer expectations approach because different jurisdictions can and do apply it differently); *see also* Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 Cal. L. Rev. 435, 479 (1979).

[54] *Lavelle*, *supra* note 37, at 1067.

[55] Morson v. Super. Ct., 109 Cal. Rptr. 2d 343, 352 (Cal. App Dep't Super. Ct. 2001).

alternative ways to prove a design defect.[56] When the everyday use of a product leads to a conclusion that the product's design violated minimum safety standards and is therefore defective, an expert opinion pertaining to the design merits may not be necessary.[57] Under these particular circumstances, California permits the consumer expectations test. In all other circumstances, if "the benefits of the . . . design outweigh the risk of danger inherent in such design," the product is not defective.[58]

In *Morson v. Superior Court*,[59] the issue involved alleged defectively designed latex gloves, which caused the plaintiffs to develop allergies.[60] Though plaintiffs argued that the consumer expectations test was the appropriate standard, the court cited the Restatement (Third) Section 2(b) to support its rationale that a product is defective in design when the foreseeable risks could have been reduced or avoided by adopting a reasonable alternative design.[61] The court then discussed comment (g) to Section 2(b) to explain why consumer expectations do not constitute an independent standard for judging the defectiveness of product designs.[62] In concluding that the plaintiffs' expectations as consumers ordinarily do not play a determinative role in establishing defectiveness, the court acknowledged support for its conclusion by citing the relevancy of consumer expectations as set forth in the Restatement (Third).[63]

In another 2001 case, the Los Angeles County Superior Court refused to grant the defendant cigarette manufacturer a new trial, largely because the plaintiff's experts presented reasonable alternative cigarette designs that would have been safer and would have reduced risks.[64] The court reasoned that the jury instructions referred to the risks and benefits inherent in the design, not the product itself. Therefore, the plaintiff's proof of the existence of a safer cigarette design that could have reduced the risk of harm was sufficient.[65] In validating this reasoning, the court again cited to Section 2 of the Restatement (Third).[66]

These opinions are particularly significant because California previously formally rejected the RAD requirement, either by placing no value in it or by giving it limited relevance.[67] Although neither of these California court opinions expressly require proof of a reasonable alternative design or reject the consumer expectations test in *all* circumstances, the courts' reliance on the Restatement (Third) principles, and specific recognition of proof of a RAD,

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[56] *See* Soule v. Gen. Motors Corp., 882 P.2d 298, 311 (Cal. 1994); *see also* Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 432 (Cal. 1978).

[57] *See Soule*, 882 P.2d at 308; *see also Morson*, 109 Cal. Rptr. 2d at 350.

[58] *Barker*, 20 Cal. 3d at 432.

[59] 109 Cal. Rptr. 2d 343 (Cal. App. Dep't Super. Ct. 2001).

[60] *Id.* at 345.

[61] *Id.* at 351-52 (citing RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(b)).

[62] *Id.* (the court's citation of the Restatement (Third) comprises nearly an entire page of the opinion).

[63] *Id.* at 358 ("We are also supported in this conclusion by the narrow view of the use of the consumer expectations test set forth in the Restatement Third of Torts . . .").

[64] Boeken v. Philip Morris, Inc., 2001 WL 1894403, *9 (Cal. App. Dep't Super.Ct. 2001).

[65] *Id.*

[66] *Id.*

[67] *See* Popper, *supra* note 25, at 60.

lead to the conclusion that the California courts are well on the way to accepting the Restatement's risk-utility analysis.

2. Florida

While not discussing proof of the Restatement's RAD requirement at length, a Florida district court opinion cited the Restatement (Third) Section 2 verbatim in defining categories of product defects, including design defects.[68] The court concluded that the case at issue was similar to cases suggested by the Restatement, "where fairness requires the consumer to bear appropriate responsibility for proper product use, in order to prevent careless users and consumers from being subsidized by more careful users."[69] The recognition of the Restatement (Third) categories of product defects, including product designs where the risks could have been reduced by the adoption of a reasonable alternative design, supports the conclusion that when a plaintiff claims a product is defectively designed, the plaintiff must offer proof of a RAD.

3. Georgia

The Georgia Supreme Court cited Section 2 of the Restatement (Third) to support its conclusion that the appropriate analysis in defective design cases is whether the defendant failed to adopt a reasonable alternative design that would have reduced the foreseeable risks of harm presented by the product.[70] The court acknowledged that there is not a significant distinction between negligence and strict liability for purposes of the risk-utility analysis, but maintained that the "heart" of a design defect case is the reasonableness of selecting from among alternative product designs and adopting the safest, most feasible design.[71] One concurring justice specifically noted that, even after a plaintiff has presented a reasonable, safer, alternative design, he or she is not automatically entitled to a jury trial because Georgia law does not require manufacturers to ensure that their product designs are incapable of producing injury.[72]

This express positive recognition of the Restatement (Third) and reasonable alternative design requirement will likely affect Georgia's neighboring states' acceptance of the Restatement's risk-utility analysis.

4. Iowa

In 2002, the Supreme Court of Iowa dropped its use of the consumer expectation test and expressly adopted the Restatement's risk-utility analysis.[73] The court endorsed the Restatement's wisdom, recognizing that, while strict liability is appropriate in manufacturing defect cases, negligence principles are more suitable for other defective product claims.[74] The court also validated the Restatement (Third)'s comments relating to consumer expectations, concluding that consumer expectations are influential on risk-utility analysis in deciding

[68] Brassell v. K-Mart Corp., 765 So. 2d 235, 237-38 (Fla. Dist. Ct. App. 2000).
[69] *Id.* at 238.
[70] Jones v. Nordictrack, Inc., 550 S.E.2d 101, 103-04 (Ga. 2001).
[71] *Id.* at 104.
[72] *Id.*
[73] Wright v. Brooke Group Ltd., 652 N.W.2d 159, 169 (Iowa 2002).
[74] *Id.* at 168.

whether the omission of a proposed alternative design renders the product not reasonably safe.[75]

Because Iowa *expressly* adopted this portion of the Restatement (Third), a plaintiff's proof of a reasonable alternative design is now required in Iowa.

5. Michigan

The Michigan Court of Appeals' most recent opinion on point[76] specifically cites to the Restatement (Third), Section 2, to support its view that the risk of the product design at issue could have been reduced or avoided by a reasonable alternative design.[77] Because the plaintiffs presented an expert witness who testified about various alternative designs, which were superior to the defendant's design and reasonably available to the defendant, the court affirmed the trial court's verdict and damage award on the plaintiffs' negligent design claim.[78]

Once again, the court's citation to the Restatement (Third) in this design defect action shows specific recognition of the validity of the Restatement's risk-utility analysis.

6. New Jersey

While affirming that the plaintiff has the ultimate burden to prove that the defendant's product is defective, the Supreme Court of New Jersey specifically cited to the Restatement (Third), including the comment requiring plaintiff's proof of a RAD.[79] The court used the case to explain the overlap between New Jersey's statute and the Restatement (Third) Section 2(b) and how the two standards appropriately function together.[80] New Jersey's statute provides that if a *defendant* can prove there was no reasonable alternative design, the defendant cannot be held liable.[81] The court explained that this defense is absolute, not just a risk-utility factor.[82] Furthermore, consistent with the Restatement (Third), the plaintiff is required to show the existence of a reasonable alternative design.[83] However, if the defendant shows that there is not a practical and technically feasible design alternative, the jury does not have to weigh the plaintiff's proposed design against the defendant's.[84] Therefore, the court concluded that the Restatement (Third) analysis and the New Jersey state-of-the-art test are similar.[85]

The court's effort to reconcile its statute, which at first glance may have seemed irreconcilable, is evidence of its strong support of the Restatement (Third) and its risk-utility analysis.

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[75] *Id.* at 170-71.
[76] *See* Smrekar v. Jeep Corp., 2001 WL 792476 (Mich. Ct. App. 2001); *see also* Popper, *supra* note 25, at 60.
[77] Grostic v. Agco Corp., 2003 WL 124309, *5 (Mich. Ct. App. 2003).
[78] *Id.* at *10.
[79] Cavanaugh v. Skil Corp., 751 A.2d 518, 520 (N.J. 2000).
[80] *Id.* at 521.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*

7. Texas

A Texas statute specifically requires that the plaintiff have proof of a reasonable alternative design.[86] Therefore, it is also included in the next section, which delineates jurisdictions that recognize the RAD requirement but do not refer to the Restatement (Third). Despite the specific statute on point, the Texas Supreme Court recognized that the Restatement (Third) also makes a reasonable alternative design a prerequisite to design-defect liability.[87] The court also asserted that the law in most jurisdictions is consistent with this approach.[88] As discussed previously, this assertion has been hotly contested.[89] Regardless of whether the statement was true or false at the time, specific recognition of the Restatement (Third) and its approach to design defect liability only strengthens its authority.

8. Washington

In a 2000 *en banc* opinion, the Supreme Court of Washington cited the Restatement (Third) Section 2 as persuasive authority regarding reasonable alternative designs.[90] The court stated: "if another product can more safely serve the same purpose as the challenged product at a comparable cost and in a similar manner, a jury should be able to conclude that the risks of the challenged product outweigh its utility."[91] The court concluded that, consistent with comment (f) to Restatement (Third) Section 2, the plaintiff could "satisfy the requirement of showing an adequate alternative design by showing that other products can more safely serve the same function as the challenged product."[92]

Although the court did not require plaintiff's proof of a reasonable alternative design in all cases, this increasing recognition of the Restatement (Third) may indicate of the course of action Washington will pursue in the future.

B. Jurisdictions that Require or Recognize the Reasonable Alternative Design Requirement but Do Not Specifically Refer to the Restatement (Third)

Although some of the following states do not explicitly *require* proof of a reasonable alternative design, these states recently have recognized that proof of a RAD is admissible, relevant, and in some cases, necessary, in assessing the defectiveness of a product's design. Some of these jurisdictions even acknowledge that most cases turn on proof of a reasonable alternative design. This recognition implicitly commits the court to the requirement of a reasonable alternative design.[93] The requirement is implicit because if the court determines that proof of a RAD is relevant, and the plaintiff does not provide such

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[86] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 82.001-.006 (Vernon 2003).
[87] Hernandez v Tokai Corp., 2 S.W.3d 251, 256-57 (Tex. 1999).
[88] *Id.* at 257.
[89] *See supra* note 27.
[90] Ruiz-Guzman v. Amvac Chem. Corp., 7 P.3d 795, 800 (Wash. 2000).
[91] *Id.*
[92] *Id.* at 801.
[93] *See supra* note 37.

proof, the case is substantially weakened.[94] If proof of a RAD is implicitly required, the Restatement's risk-utility analysis is essentially approved.

In addition, this Note groups the last states in this section because they each have a statute that requires a showing of reasonable alternative design, which is consistent with the Restatement's risk-utility analysis. Because the state statute is mandatory authority, these states need not specifically cite to the Restatement (Third) for support.

1. Massachusetts

A Massachusetts appellate court determined that, in order for a plaintiff's testimony to be relevant, the testimony needed to be coupled with evidence of reasonable design alternatives.[95] The plaintiff deliveryman testified that the supermarket's transfer-loading dock was not at an appropriate level, contained unsafe steps, and created a uniquely dangerous situation.[96] Because the matter was technically beyond the scope of ordinary experience, the court required the plaintiff to present expert testimony of a reasonable alternative design.[97] Otherwise, a fact finder could not conclude that the mere presence of the steps or the lack of a raised loading dock constituted a negligent design.[98]

Therefore, even though the Massachusetts court did not specifically refer to the Restatement's risk-utility analysis, its requirement of a reasonable alternative design directly supports the Restatement (Third).

2. New Jersey

While observing that the jury employs a risk-utility analysis utilizing factors that are relevant to a particular case, the Superior Court of New Jersey confirmed that "the issue upon which most claims will turn is proof by the plaintiff of a reasonable alternative design, the commission of which renders the product not reasonably safe."[99] As discussed previously, this recognition implicitly employs the Restatement's risk-utility analysis.

3. Oregon

The most recent opinion on point by the Supreme Court of Oregon reiterated that the plaintiff's theory under Oregon statute is based on a consumer expectations test: that the product is unreasonably dangerous because it failed to perform as the ordinary consumer expects.[100] However, the Oregon Supreme Court decided to "leave for another day" the question of under what circumstances a plaintiff *must* have evidence related to a risk utility analysis, including proof that a practicable and feasible design alternative design was available.[101]

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[94] *See supra* note 37.
[95] Sampson v. Shaw's Supermarket, Inc., 2000 WL 426207, *2 (Mass. App. Ct. 2000).
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] Saldana v. Michael Weinig, Inc., 766 A.2d 304, 311 (N.J. Super. Ct. App. Div. 2001).
[100] McCathern v. Toyota Motor Corp., 22 P.3d 320, 333 (Or. 2001).
[101] *Id.* at 331-32. The court stated:

Similar to the previously mentioned states, it can be inferred from the court's statement that proof of a reasonable alternative design may be an absolute requirement in some cases. This is consistent with the Restatement's risk-utility analysis for all design defect cases.

4. Mississippi, North Carolina, and Texas

In Mississippi, a plaintiff alleging a defective design must show by a preponderance of the evidence that, at the time the product left the manufacturer's control, a feasible design alternative existed that would have a reasonable probability of preventing the harm.[102] A feasible design alternative is a design that would have a reasonable probability of preventing the harm without impairing the utility, usefulness, practicality, or desirability of the product to users or consumers.[103]

To establish a products liability claim based on inadequate design in North Carolina, a plaintiff must prove that, at the time the product left the manufacturer's control, the manufacturer unreasonably failed to adopt a safer, practical, feasible, and otherwise reasonable alternative design. The plaintiff must also prove that the alternative could have been reasonably adopted, preventing or substantially reducing the risk of harm without substantially impairing the usefulness, practicability, or desirability of the product.[104]

Under Texas law, a claimant alleging a design defect must prove by a preponderance of the evidence that there was a safer alternative design and that the defect was a cause of the injury.[105] A safer alternative design is defined as: (1) a design that in reasonable probability would have prevented or significantly reduced the risk of the claimant's personal injury without impairing the product's utility; and (2) was economically and technologically feasible at the time the product left the control of the manufacturer.[106] In addition, the Texas Supreme Court recently held that the Texas statute "reflects the trend in our common-law jurisprudence of elevating the availability of a safer alternative design from a factor to be considered in the risk-utility analysis to a requisite element of a cause of action for defective design."[107]

We agree that evidence related to risk-utility balancing, which may include proof that a practicable and feasible design alternative was available, will not *always* be necessary to prove that a product's design is defective and unreasonably dangerous . . . However, because the parties did not dispute that evidence related to risk-utility balancing was necessary in this case, we leave for another day the question under what circumstances ORS 30.920 requires a plaintiff to support a product liability design-defect claim with evidence related to risk-utility balancing of the kind discussed above.

[102] MISS. CODE ANN. § 11-1-63(f) (1999); *see also* Wolf v. Stanley Works, 757 So. 2d 316, 320 (Miss. Ct. App. 2000).

[103] MISS. CODE ANN. § 11-1-63(f); *see also Wolf*, 757 So. 2d at 320.

[104] N.C. GEN. STAT. § 99B-6(b) (2003); *see also* Dewitt v. Eveready Battery Co., Inc., 550 S.E.2d 511 (N.C. Ct. App. 2001); Evans v. Evans, 569 S.E.2d 303, 309 (N.C. Ct. App. 2002).

[105] TEX. CIV. PRAC. & REM. CODE ANN. §§ 82.001-.006 (Vernon 2003).

[106] *Id.*

[107] *Hernandez*, 2 S.W.3d at 256-57. The court cited numerous Texas court opinions to support this proposition. The court further stated that the Restatement (Third), as well as most jurisdictions, also make a RAD a prerequisite to design-defect liability.

Although these statutes do not refer specifically to the Restatement's requirement of a RAD, their requirements are either identical or even more stringent than the Restatement (Third). Therefore, these statutes strengthen support for the Restatement's risk-utility analysis.

C. Jurisdictions that Reject or Criticize the Restatement's Risk-Utility Analysis

The following jurisdictions have expressly rejected or criticized the Restatement's risk-utility analysis. However, some of these same courts have positively recognized the usefulness of presenting a reasonable alternative design.[108] Therefore, despite some criticism, even those courts most hotly contesting the Restatement's risk-utility analysis find usefulness in its RAD requirement.

1. Illinois

In a 2002 opinion, an Illinois appellate court yielded to Illinois Supreme Court precedent, despite the dissent's urge to follow the Restatement (Third) in determining whether a reasonable and safer alternative design existed at the time of manufacture.[109] Because the test introduced by the Illinois Supreme Court placed the burden of proof on the *defendant*, the appellate court concluded that "until the Illinois Supreme Court determines otherwise, we believe the rule of law in Illinois is that evidence of alternative design feasibility is relevant and admissible . . . but it is not an essential element . . ."[110]

By expressly rejecting the dissent's proposal, the most recent opinion on point from Illinois also rejected the Restatement (Third). However, given its statements, it is likely that the court was merely obeying principles of *stare decisis*. Should the Illinois Supreme Court decide to adopt the Restatement's risk-utility analysis, the appellate court would undoubtedly follow suit.

2. Kansas

The Supreme Court of Kansas explicitly rejected the Restatement (Third) in *Delaney v. Deere and Co.*,[111] largely because of the RAD requirement and exclusive reliance on a risk-utility analysis in design defect cases.[112] In doing so, the court noted that, nearly twenty years earlier, "[t]his court adopted the consumer expectations test set forth in Comment *i* of the Restatement (Second) of Torts, § 402A as the standard for measuring design defects in Kansas."[113] The court recognized that "the consumer expectations test has its failings"[114]

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[108] *See* Delaney v. Deer & Co., 999 P.2d 930, 946 (Kan. 2000) ("Evidence of a reasonable alternative design may be introduced but is not required."); Vautour v. Body Masters Indus., Inc., 784 A.2d 1178, 1183 (N.H. 2001) ("While proof of an alternative design is relevant in a design defect case, it should be neither a controlling factor nor an essential element that must be proved in every case.").

[109] Wortel v. Somerset Indus., Inc., 770 N.E.2d 1211, 1226-27 (Ill. App. Ct. 2002).

[110] *Id.* at 1224.

[111] 999 P.2d 930 (Kan. 2000).

[112] *Id.*

[113] *Id.* at 944.

[114] *Id.*

and a risk-utility analysis is valid as a guide in determining the expectations of consumers in complex cases.[115] However, the court bound itself by its own outdated precedent. Although the court attempted to justify its weak reasoning using criticisms voiced by legal scholars regarding the Restatement (Third), it failed to provide any substantive rationale for its conclusion.[116]

3. Maryland

In a Maryland product liability action against a handgun manufacturer, the Maryland Court of Appeals expressed its reluctance to cast aside its existing jurisprudence in favor of the Restatement (Third) approach to design defects.[117] Similar to the Kansas Supreme Court's rationale, the Maryland court rationalized its decision entirely on its own precedent and the controversy that "continues to surround the risk-utility standard articulated for design defect cases in Section 2 of the Restatement (Third)."[118] Again, the "controversy" to which the court referred stems from the criticisms voiced by various legal commentators.[119]

4. New Hampshire

In *Vautour v. Body Master Sports Industries, Inc.*,[120] the Supreme Court of New Hampshire declined to adopt Section 2(b) of the Restatement (Third).[121] Although New Hampshire employs a risk-utility analysis, it considers proof of an alternative design as relevant, but not as a controlling or essential element that must be proved in every case.[122] Again citing the considerable controversy surrounding the RAD requirement,[123] the court concluded it was satisfied with the risk-utility test it currently applies because it protects the interests of both consumers and manufacturers in design defect cases.[124]

5. Wisconsin

Contrary to the other states, the Wisconsin court rationalized its decision to reject the Restatement (Third) Section 2(b) by examining public policy goals behind products liability law.[125] The court noted that the seller of the product can distribute the cost of risk by passing costs along to consumers, and that the manufacturer has the greatest ability to control the risk.[126] For these reasons, the court reemphasized that foreseeability of the risk of harm plays no role in Wisconsin product liability law. Because Section 2(b) of the Restatement (Third) incorporates foreseeability as an element of the risk-benefit test, the

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115 *Id.*
116 *Id.* at 944-46.
117 Halliday v. Strum, 792 A.2d 1145, 1159 (Md. 2002).
118 *Id.*
119 *Id.* at 1154-55.
120 784 A.2d 1178 (N.H. 2001).
121 *Id.* at 1182.
122 *Id.* at 1183.
123 *Id.* at 1182.
124 *Id.* at 1184.
125 Green v. Smith & Nephew AHP, Inc., 629 N.W.2d 727, 749 (Wis. 2001).
126 *Id.*

court concluded that the Restatement's risk-utility analysis departs from its consumer expectation test.[127]

As the dissent notes, the public policy goals articulated by the majority only make sense in manufacturing defect cases, not design defect cases.[128] A risk-utility balancing is necessary in the design defect context because products are not generically defective merely because they are dangerous.[129] Therefore, even though the Wisconsin court attempted to justify its decision with more than its own precedent and the controversy surrounding the Restatement (Third), its policy premises are not logical or persuasive.

Despite the on-going tension, based on the rationale outlined in this section, courts are undoubtedly beginning to understand the virtues of the Restatement's risk-utility analysis, a perception that the Reporters predicted would happen over time.[130]

V. CONCLUSION

There is no question that the debate over the Restatement's risk-utility analysis will not cease in the near future. However, as this Note has explained, the rationale used to support the Restatement's risk-utility analysis is indeed commonsensical and sufficient to persuade an increasing number of courts. As delineated above, courts from over thirteen different states have expressly accepted, implicitly accepted, or at least positively recognized the Restatement's risk-utility analysis. Thus, an increasing number of jurisdictions recognize the usefulness of the Restatement's risk-utility analysis, which will encourage its further acceptance among other jurisdictions.

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[127] *Id.* at 751.

[128] *Id.* at 765.

[129] *Id.*

[130] James A. Henderson & Aaron D. Twerski, *Will a New Restatement Help Settle Troubled Waters?*, 42 AM. U. L. REV. 1257, 1266-67 (1993).