MYTH SURRENDERS TO REALITY: DESIGN DEFECT LITIGATION IN IOWA

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TABLE OF CONTENTS

I. INTRODUCTION

Products liability continues to be a flash point for debate over the proper role of the civil justice system in personal injury cases. Calls for national reform of the tort system often include the product liability area within the scope of what needs to be changed.[1] In part, these criticisms are a result of the incoherence that

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1. *See, e.g.*, AM. TORT REFORM ASS'N, *at* http://www.atra.org/show/7341 (last visited Feb. 5, 2003). The American Tort Reform Association has noted:

has characterized products liability doctrine. As a pair of commentators put it, "the rhetoric of products liability law is, undeniably, a mess."[2]

One of the biggest "messes" in products liability doctrine relates to the standard courts employ in deciding whether a manufacturer's product design that causes injury is legally flawed.[3] Over the past forty or so years, many court decisions have articulated a standard that emphasizes consumer expectations for all types of product liability cases, whether the product's deficiency relates to its materials and construction, its marketing and accompanying warnings, or its design.[4] These decisions typically look to section 402A of the *Restatement (Second) of Torts: Products Liability* (hereinafter *Restatement Second*) as setting the standard for strict products liability.[5] Section 402A has demonstrated extraordinary staying power, and still enjoys widespread fealty among many commentators[6] and some courts.[7] However, in 1998 the American Law Institute

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> Product liability laws are intended to protect consumers from injury due to the manufacturing and sale of unreasonably unsafe products. The standard of absolute liability aims to encourage accident prevention by holding manufacturers, who are in the best position to reduce or eliminate injuries, fully liable for injuries caused by their products.
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> This premise, however, unfairly holds manufacturers liable for any injury related to their activity regardless of their ability to foresee an imminent injury or the consumer's ability to prevent it.
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> As the brunt of responsibility has fallen on manufacturers, product liability insurance premiums have risen twice the rate of inflation in recent years. As a result, many U.S. firms have opted to discontinue product research, cut back on introducing new product lines, and raise prices. Ultimately, the abuse of product liability laws offers consumers fewer domestic products at higher prices and compromises the competitiveness of U.S. firms in foreign and domestic markets.

Id.

2. James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 871 (1998).

3. The phrase "legally flawed" is used in this context because, as will be discussed, one of the points of contention in the debate over design standards is the appropriate phraseology to be used. Is the design so deficient that it causes the product to be in a "defective condition unreasonably dangerous" to users? RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter RESTATEMENT SECOND]. Or, is it sufficient to refer to the faulty design simply as making the product "defective?" RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998) [hereinafter RESTATEMENT THIRD].

4. *See infra* text accompanying notes 23-60 (discussing the development of Iowa products liability doctrine since 1970).

5. RESTATEMENT SECOND § 402A.

6. *See infra* text accompanying notes 61-117 (discussing the debate over the adoption of the *Restatement Third*).

7. *See, e.g.*, Potter v. Chi. Pneumatic Tool Co., 694 A.2d 1319 (Conn. 1997). The *Potter* court noted:

adopted the *Restatement (Third) of Torts: Products Liability* (hereinafter *Restatement Third*).[8] Part of the *Restatement Third* discards consumer expectations and strict liability as a liability template for design defect claims.[9] Rather than the liability-defining role consumer expectations had formerly occupied in the *Restatement Second*, they were now relegated by the *Restatement Third* to a mere supporting role.[10] Further, the venerable notion of strict liability for design defects was unceremoniously jettisoned by the *Restatement Third*. Despite the *Restatement Third*'s recasting of the analysis to be given to design defects, the debate has continued. Some courts have rejected the *Restatement Third*'s analysis of design defect,[11] and some commentators lament the diminished role for consumer expectations.[12]

Iowa has not escaped this controversy. Throughout the 1990s and the early part of the twenty-first century, the Iowa Supreme Court has refined products liability doctrine in Iowa in a moderate fashion. In many respects, the court continued to articulate and attempt to apply strict liability principles that harkened back to the days of the *Restatement Second*.[13] Central to this effort was the court's continued assessment of the role strict liability played in warning and design defect cases.[14] For warning cases, the court made the move to negligence

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> This court has long held that in order to prevail in a design defect claim, "[t]he plaintiff must prove that the product is unreasonably dangerous." We have derived our definition of "unreasonably dangerous" from comment (i) to § 402A, which provides that "the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." This "consumer expectation" standard is now well established in Connecticut strict products liability decisions.
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> The defendants propose that it is time for this court to abandon the consumer expectation standard and adopt the requirement that the plaintiff must prove the existence of a reasonable alternative design in order to prevail on a design defect claim. We decline to accept the defendants' invitation.

Id. at 1330-31 (citations omitted).

8. *See* RESTATEMENT THIRD.

9. *Id.* § 2 cmt. a.

10. *See id.* § 2 cmt. g ("[C]onsumer expectations do not play a determinative role in determining defectiveness.").

11. *See infra* text accompanying notes 118-50 (discussing case law).

12. *See, e.g.*, Rebecca Korzec, *Dashing Consumer Hopes: Strict Products Liability and the Demise of the Consumer Expectations Test*, 20 B.C. INT'L & COMP. L. REV. 227, 229 (1997) ("Reconsideration of the consumer expectations test suggests that, properly constructed and applied, the consumer-oriented test promotes considerations of safety, equity, and efficiency.").

13. *See, e.g.*, Mercer v. Pittway Corp., 616 N.W.2d 602, 619 n.4 (Iowa 2000) (discussing both the consumer expectations test prescribed in section 402A and the risk-utility analysis used in judging whether a product's design was defective).

14. *See infra* notes 26-31 and accompanying text.

in a 1994 decision.[15] Despite the urging of some[16] that the court adopt a negligence based risk-utility analysis in design defect cases as well, the court had, as recently as 2000, reaffirmed the use of consumer expectations and strict liability in design defect cases.[17] This tenacity, however, has given way to a realization that strict liability and consumer expectations discourse in design defect cases is ultimately incoherent. In the Iowa Supreme Court's 2002 decision in *Wright v. Brooke Group Ltd.*,[18] the court adopted the *Restatement Third*'s conclusion that strict liability for design defect cases was not workable,[19] and that consumer expectations should not have a central role in determining liability.[20] For design defects, the negligence-focused risk-utility analysis has triumphed in Iowa.[21]

This Article will examine the current landscape of design defect litigation in Iowa. To know where we are, we have to understand the path we have traveled. The tracing of this path will place emphasis on the 1990s and our current decade.[22] Moreover, while the *Wright* decision adopted sections 1 and 2 of the *Restatement Third*, many questions remain to be resolved. Other aspects of Iowa products liability doctrine, statutory and common law, are implicated by the court's decision, and will inevitably arise. The effort to bring coherence to products liability cases will continue. Wise choices need to be made so that products liability doctrine in Iowa does not become a "mess."

II. THE PROGRESSION TO *WRIGHT*

The Iowa Supreme Court had addressed many aspects of design defect prior to its decision in *Wright*. This history extends at least as far back as 1978.[23] In three especially informing decisions extending from 1978 to 1990, the court

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15. *See* Olson v. Prosoco, Inc., 522 N.W.2d 284, 289 (Iowa 1994) (holding that "the correct submission of instructions regarding a failure to warn claim for damages is under a theory of negligence and the claim should not be submitted as a theory of strict liability").

16. *See* Keith Miller, *Design Defect Litigation in Iowa: The Myths of Strict Liability*, 40 DRAKE L. REV. 465, 500 (1991).

17. *See* Mercer v. Pittway Corp., 616 N.W.2d at 619.

18. Wright v. Brooke Group Ltd., 652 N.W.2d 159 (Iowa 2002).

19. The *Restatement Third* did not statedly eliminate strict liability. Rather, its text discarded all doctrinal labels used previously in products liability cases in favor of rules that operated "functionally." RESTATEMENT THIRD § 2 cmt. n.

20. *Id.* § 2 cmt. g (stating that "[c]onsumer expectations do not play a determinative role in determining defectiveness").

21. *See, e.g.*, Wright v. Brooke Group Ltd., 652 N.W.2d at 165-66 (collecting cases).

22. For a history of the cases in Iowa dealing with design defect before 1990, see Miller, *supra* note 16, at 487-94.

23. *See, e.g.*, Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830 (Iowa 1978) (addressing five aspects of manufacturer liability).

set out its formulation of design defect analysis.[24] These decisions are dealt with at length elsewhere.[25] But it is safe to say that by 1990, the cases decided by the Iowa Supreme Court had made the following points regarding the analysis of design defects: (1) The standard of strict liability contained in the text of section 402A of the *Restatement Second*, and adopted by the court, was distinguishable from a negligence standard,[26] and applied to design defects;[27] (2) The decisions were unclear in explaining how strict liability in fact made a difference in design cases;[28] (3) Plaintiff's burden of proof in design cases was dual: the plaintiff had to establish that the product was in a "defective condition," and that the defective condition was "unreasonably dangerous" to the plaintiff as a user or consumer;[29] (4) In determining whether the plaintiff had met this dual burden of proof, the court considered the identical evidence for each standard;[30] and (5) Both a

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24. *See* Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911 (Iowa 1990); Chown v. USM Corp., 297 N.W.2d 218 (Iowa 1980); Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d at 830.

25. *See* Miller, *supra* note 16, at 487-500 (surveying the history of the Iowa Supreme Court's adoption of its approach to design defect cases).

26. Chown v. USM Corp., 297 N.W.2d at 220. In *Chown*, the court explained:

> The essential difference between an action in negligence and one in strict liability (or breach of warranty) lies not in the condition of the product but in the requirement in the negligence action of additional proof regarding the nature of the defendant's conduct. In the negligence action, not only must the product itself be found actionable, but the defendant must also be found negligent in letting the product get into that dangerous condition, or in failing to discover the condition and take reasonable action to eliminate it. In strict liability, this is not required; all that the plaintiff must do is show that the product was in the dangerous condition when it left the defendant's control.

Id. (quoting John W. Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551, 553 (1980)); *see also* Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d at 835 ("In strict liability the plaintiff's proof concerns the condition (dangerous) of a product which is designed or manufactured in a particular way. In negligence the proof concerns the reasonableness of the manufacturer's conduct in designing and selling the product as he did.") (citing Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1037 (Or. 1974)).

27. *See* Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d at 836 (holding that section 402A was the proper standard in a design defect case).

28. *See* Fell v. Kewanee Farm Equip. Co., 457 N.W.2d at 911 (failing to distinguish proof relevant under a negligence theory from that under strict liability).

29. *See* Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893, 901 (Iowa 1980) ("Essential elements to establish a cause of action under the strict liability in tort theory here are: . . . (2) the product was in a defective condition; (3) the defective condition was unreasonably dangerous to the user or consumer when used in a reasonably foreseeable use"); Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d at 834 ("Plaintiff also has the burden under the doctrine of strict liability of proving the defective condition of the product makes it unreasonably dangerous to the user or consumer.").

30. *See* Fell v. Kewanee Farm Equip. Co., 457 N.W.2d at 918 (looking at the same findings in an expert's report on alternative design for analysis of the issues of defective and unreasonably dangerous conditions).

consumer expectations and risk-utility analysis might be applied in the same design case to determine defect and unreasonable danger.[31]

These doctrinal points reflect a court captivated by the myths of strict liability in a design flaw case. Although the word "mess" might be an exaggeration, the doctrine set forth in design cases had a clumsy quality. These decisions aspired to the strict liability principles of section 402A, but gave no effective or coherent guidance as to how this was to be achieved.

The 1990s and turn of the century were active times in Iowa for products liability law doctrine, both in the courts and legislature.[32] Although the Iowa Supreme Court had occasion to reconfigure the analysis used in design cases, its decisions left that doctrine largely unchanged. Two cases illustrate the reinforcement of section 402A.

In *Lovick v. Wil-Rich*,[33] decided in 1999, a farmer was injured when the "wings" of a cultivator fell on him because the linkage attaching the cylinder to the wing had broken.[34] Among other claims against the manufacturer for his injuries,[35] the plaintiff alleged that the product had a defective design.[36] After a verdict and judgment in favor of the plaintiff, the defendant appealed.[37] The defendant complained that the trial judge had submitted the design defect claim on a strict liability theory.[38] In response to the defendant's assertion that the proper theory for a design case was a risk-utility negligence analysis,[39] the Iowa Supreme Court observed that there was "currently an academic debate over whether the distinction between strict liability and negligence theories should be maintained when applied to a design defect case."[40] This debate had been

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31. *See* McGuire v. Pabst Brewing Co., 387 N.W.2d 565 (Iowa 1986) (considering a variety of analyses to determine defect and unreasonable danger); Chown v. USM Corp., 297 N.W.2d at 220-21 (applying both analyses in reaching a conclusion on defect and danger); Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d at 834-36 (addressing the issues in the case with both consumer expectations and risk-utility theories).

32. One notable statutory development was Iowa Code section 614.1(2A), enacted in 1997, which provides a fifteen-year statute of repose for products liability cases. IOWA CODE § 614.1(2A) (2003). The fifteen-year period begins at the time one purchases the particular product. *Id.* The statute provides an exception for fraudulent concealment by the manufacturer. *Id.* It also does not apply to "a disease that is latent and caused by exposure to hazardous material." *Id.* § 614.1(2A)(b)(1).

33. Lovick v. Wil-Rich, 588 N.W.2d 688 (Iowa 1999).

34. *Id.* at 691.

35. The plaintiff also alleged that the manufacturer had breached its duty to warn about dangers in the product, even though the manufacturer had not acquired information about this danger until after the defendant had sold the cultivator. *Id.* at 692.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 698.

40. *Id.*

"stirred" by the *Restatement Third*'s adoption of a "risk-utility analysis traditionally found in the negligence standard, which in most instances will require proof of a reasonable alternative design to establish a product defect."[41] The court stated, however, that the defendant had not sought to have the court adopt the new *Restatement Third* provisions.[42] Rather, the defendant asked the court "to recognize the merger between strict liability and negligence in design defect claims."[43]

The court's ambivalence about the continued application of strict liability in a design case was evident. Its opinion noted that there had been a consistent recognition that strict liability and negligence theories were distinct. Strict liability focused on the condition of the product, while negligence was concerned with whether the manufacturer exercised reasonable care.[44] Yet, the court also "readily acknowledged the similarities between the two theories," and "recognized the growing number of commentators that have found no practical difference between strict liability and negligence theories in design defect cases."[45] While recognizing the merits of such a merger of the theories, however, the court provided several reasons for choosing not to effect such a merger.

> First, the trial court did not instruct on both negligence and strict liability theories. It only instructed on strict liability. The instruction to the jury included the risk-utility balancing analysis utilized in negligence. Thus, even if strict liability actually applies negligence principles, no prejudice occurred. Secondly, the Restatement (Third) was adopted during the pendency of this action. We should not merge the two theories without additionally considering the adoption of the new Restatement. However, because the new Restatement generally adopts an alternative design burden, we refrain from considering the matter until that issue is specifically raised. Furthermore, our legislature has adopted the state of the art defense, which could be impacted if we were to adopt the alternative design requirement.[46]

The court's decision had planted the seed of doubt regarding strict liability's continued vitality. This seed sown would soon produce a harvest.

Another opportunity to consider this matter came before the court one year later in *Mercer v. Pittway Corp.*[47] Once again, the court acknowledged the arguments suggesting the negligence/strict liability distinction should be

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41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 689-99.
45. *Id.* at 699.
46. *Id.* (footnote omitted).
47. Mercer v. Pittway Corp., 616 N.W.2d 602 (Iowa 2000).

abandoned,[48] and that the *Restatement Third* "now follows the risk-utility approach traditionally found in negligence analysis, which in most instances will require proof of a reasonable alternative design to establish a design defect."[49] But the court thought it was unnecessary to consider whether it should discard section 402A. The court stated:

> The parties do not argue that we should abandon the distinction between strict liability and negligence in design defect cases or that we should otherwise adopt the rules of the Restatement (Third) of Torts concerning product liability claims. Therefore, we will apply the principles of section 402A of the Restatement (Second) of Torts for purposes of this case.[50]

Although the *Mercer* decision did not resolve the doctrinal controversy that was simmering, its reasoning showed why the design defect doctrine was in need of clarification. For example, the court stated that a plaintiff had to prove the product was in a defective condition unreasonably dangerous to the consumer, just as the *Restatement Second* prescribes.[51] To meet this burden of proof, the plaintiff had to "show that the *defect* in the product was not one contemplated by the consumer, which would be unreasonably dangerous to the plaintiff."[52] The question-begging nature of this standard is obvious. To prove the product was in a *defective* condition, the plaintiff must show the *defect* was not contemplated by the consumer. But that is the very question we are trying to answer: Is the product's design defective? To answer that question by *assuming* there is a product defect and asking whether that defect was not contemplated by the user is circular and, ultimately, incoherent.

Mercer displayed other symptoms of the *Restatement Second*'s troubled formulation. The opinion stated that the plaintiff had to prove, among other things, that the product's design was unreasonably dangerous.[53] This "unreasonableness element of a strict liability claim is determined by balancing the utility of a product against the risk of its use,"[54] with proof of an available alternative design being "helpful" to the plaintiff's claim of unreasonable danger.[55] But the court gave no explanation of why this was a strict liability

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48. *Id.* at 619 n.4.
49. *Id.*
50. *Id.*
51. *Id.* at 620. *Restatement Second* section 402A provides that the seller is liable when a product is "in a defective condition unreasonably dangerous to the user or consumer," and this "applies although the seller has exercised all possible care in the preparation and sale of his product." RESTATEMENT SECOND § 402A.
52. Mercer v. Pittway Corp., 616 N.W.2d at 619 (emphasis added).
53. *Id.*
54. *Id.* at 619-20.
55. *Id.* at 620.

test.[56] Later in the opinion, the court addressed the plaintiff's claim that the product had been negligently designed. The court referred to *Chown v. USM Corp.*,[57] and ruled that to prove a negligent design claim, "a plaintiff must show that the product was unreasonably dangerous because of defendant's failure to use reasonable care in its design."[58] Though the court did not say so, failure to adopt a safer alternative design would undoubtedly constitute a failure to exercise due care. The result was virtually identical negligence and strict liability tests for a design flaw.

The *Mercer* decision is a classic illustration of the quandary that exists when a court holds that it will apply the *Restatement Second* analysis in design defect cases. Neither the *Restatement Second* nor any of the Iowa Supreme Court decisions provide a coherent answer to the central question that has haunted design defect litigation for the last thirty years. What does it mean to say, "we use a strict liability standard for design defect cases?" It is not enough to say that what distinguishes negligence from strict liability is that, with the latter, the focus of the analysis is on the condition of the product and not the manufacturer's conduct. What is it about the condition of the product that makes it defective? When the answer to that question employs language that sounds in negligence, the standard becomes unclear and the analysis muddled.

The Iowa Supreme Court struggled for many years to apply the *Restatement Second* formulation to design defects.[59] These decisions are not poorly reasoned. Rather, they were imprisoned by the history and language of section 402A. As the court tried to effectuate a strict liability standard by using the parlance of negligence, maintaining internal consistency was an insuperable task. Two years after *Mercer*, in the 2002 *Wright* decision, the Iowa Supreme Court recognized that the *Restatement Second* standard as a test for design defect had to go.[60]

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56. *See id.*

57. Chown v. USM Corp., 297 N.W.2d 218 (Iowa 1980).

58. Mercer v. Pittway Corp., 616 N.W.2d at 626.

59. Indeed, the history of the formulation of *Restatement Second* section 402A casts considerable doubt on whether this section was intended to apply to only mismanufactured products, rather than products with a faulty design. *See, e.g.*, Miller, *supra* note 16, at 469-72 (detailing the ways in which "confusion and haste" surrounded the formulation of section 402A); Victor E. Schwartz, *The Reality and Public Policy Behind Sound Design Cases-Section 2(B) of the New* Restatement (Third) of Torts: Products Liability, 8 KAN. J.L. & PUB. POL'Y 70, 71 (1998) [hereinafter Schwartz, *The Reality*].

60. *See* Wright v. Brooke Group Ltd., 652 N.W.2d 159, 169 (Iowa 2002) (adopting the *Restatement Third* for product defect cases).

III. THE PITCHED BATTLE OF THE *RESTATEMENT THIRD*

To understand the last twenty-five years of Iowa products liability law, including the decision in *Wright*, an essential reference point is the *Restatement Third* and the extraordinary controversy that surrounded its adoption. What is presented here does not by any means presume to be an exhaustive analysis of all aspects of the *Restatement Third: Products Liability*, the full body of which runs 382 pages.[61] Rather, emphasis will be on the central concepts of design defect that inform the *Restatement Third*'s treatment of design defects, with analysis of some of the important secondary features of design defect.

The American Law Institute's (ALI) initiative to formulate new rules for products liability cases began in the early 1990s.[62] Controversy surrounded the proceedings from the beginning as the members considered proposals to revamp section 402A. Given the depth of feeling of those with differing views, one person reportedly stated, "You might as well try to have a Restatement of abortion!"[63] The "almost total overhaul of [the] Restatement Second" may have been inevitable given the fact that "the Institute . . . had to respond to questions that were not part of the landscape 35 years ago."[64] The resolution of many of the issues came only after a spirited political debate, one that "attracted the attention of vocal and aggressive partisans in legislative forums and election campaigns."[65] Perhaps the most remarkable acknowledgement about the end product was the statement by Geoffrey C. Hazard, the Director of the ALI, that "[t]he resultant text of course 'goes beyond the law' as the law otherwise would stand."[66] For the text to be simply a "photograph" of the law would be unworthy of the Institute's efforts because of the "blurred image of confusion that would

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61. For a thorough examination of the *Restatement Third*, from quite different perspectives, compare David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, with 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, 513-36 (1996).

62. The Reporters to the *Restatement Third*, James Henderson and Aaron Twerski, were appointed in 1992. *See ALI to Begin Work on* Restatement (Third)*; Professors Propose Revisions to Section 402A*, BNA PROD. LIAB. DAILY, Mar. 13, 1992; *Law Institute Attendees Plan 5-Year Project; Members Agree on Core of Proposed Treatise*, BNA PROD. LIAB. DAILY, May 8, 1992. They presented drafts at Annual Meetings of the ALI in 1994, 1995, 1996, and 1997. For a description of the process followed by the Reporters, see Henderson & Twerski, *supra* note 2, at 871, 905-08.

63. Marshall S. Shapo, *Defective Restatement Design*, 8 KAN. J.L. & PUB. POL'Y 59, 60 (1998).

64. RESTATEMENT THIRD, introduction, at 3.

65. Geoffrey C. Hazard, Jr., *Foreword* to RESTATEMENT THIRD, at XV.

66. *Id.* at XVI.

result."[67] Nowhere is the disagreement and political nature of the *Restatement Third*'s debate more evident than in the new provisions for design defect. The ALI admits as much, cautioning "against . . . a fragmented reading" of the new document.[68] Such a fragmented reading would focus exclusively on the provisions relating to design defect—section 2(b). Who would counsel for courts such a single-minded focus on design defects? Perhaps, as the Introduction termed them, "[o]verzealous advocates."[69]

The *Restatement Third* differs in fundamental ways from the *Restatement Second* in its treatment of design defects. The *Restatement Second* established a unitary test of liability for manufacturing, warning, and design defects.[70] That one-size-fits-all standard was based on a product being in a "defective condition unreasonably dangerous to the consumer."[71] The comments to the *Restatement Second* base liability on whether the product is in a condition not contemplated by the consumer.[72] Consequently, liability hinged on the expectations of product safety and performance held by a consumer.

In section 2, the *Restatement Third* trifurcated the defect analysis, establishing separate standards for the three types of product defect:

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67. *Id.*
68. RESTATEMENT THIRD, introduction, at 4.
69. *Id.*
70. RESTATEMENT SECOND § 402A(1).
71. *Id.*
72. The *Restatement Second* section 402A comment g provides:

> g. Defective condition. The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

Id. § 402A cmt. g. Comment i uses similar consumer expectations language:

> i. Unreasonably dangerous. The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

Id. § 402A cmt. i.

manufacturing, design, and warning.[73] Further, the *Restatement Third* explained that consumer expectations would no longer "constitute an independent standard for judging the defectiveness of product designs."[74] Rather, the standard for design defect prescribed by 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."[75]

Several core points are evident in the text and comments to section 2(b). First, there is no mention of strict liability or negligence in the text. But the comments make clear what is involved. In contrast to manufacturing defects where a manufacturer's negligence is irrelevant to liability,[76] "[s]ome sort of independent assessment of advantages and disadvantages, to which some attach the label 'risk-utility balancing,' is necessary" for design defects.[77] This involves "various trade-offs" to decide who is the better risk-bearer.[78] Moreover, the "balancing of risks and benefits in judging product design . . . must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution."[79]

Second, rather than the feature role given to consumer expectations in the *Restatement Second*,[80] section 2 of the *Restatement Third* prescribes a more limited function. While consumers may properly expect product designs to be reasonable, consumer expectations, "standing alone, do not take into account whether the proposed alternative design could be implemented at reasonable cost, or whether an alternative design would provide greater overall safety."[81] Thus, the core of section 402A of the *Restatement Second* is relegated to a marginal

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73. RESTATEMENT THIRD § 2.

74. *Id.* § 2 cmt. g.

75. *Id.* § 2(b).

76. *See id.* § 2(a) (providing that 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*") (emphasis added).

77. *Id.* § 2 cmt. a. This comment applies to warning defects as well. *Restatement Third* section 2(c) provides that a product is "defective because of 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 by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe." *Id.* § 2(c).

78. *Id.*

79. *Id.*; *see also* Miller, *supra* note 16, at 482-85 (discussing the "presumed knowledge" approach by which a manufacturer would be charged with knowledge of all product risks *as of the time of trial*, rather than the foreseeable risks at the time the product was distributed).

80. RESTATEMENT SECOND § 402A cmt. g.

81. RESTATEMENT THIRD § 2 cmt. g.

supporting factor. Taking the place of consumer expectations is the provision of the *Restatement Third* around which so much controversy has swirled. Section 2(b) requires that the plaintiff establish a reasonable alternative design (RAD), the omission of which renders the product not reasonably safe.[82]

While the Reporters to the *Restatement Third* hale it as a "group effort,"[83] the RAD requirement had vocal opponents. One critic said that the requirement of a RAD "is a distinct minority position,"[84] and that the RAD requirement was "a radical restructuring of products liability theory."[85] Another critic, in a law review article exceeding 450 pages,[86] wrote that the Reporters' claim that the RAD requirement was an overwhelming majority rule was simply "incorrect."[87] While academic controversies often are full of "sound and fury,"[88] this one, at least in the minds of the Reporters, had a nasty edge.[89] According to one critic, the Reporters had engaged in "substantial misrepresentations"[90] and had rejected mainstream products liability traditions.[91] In reacting to this critic's implications that their work lacked "intellectual integrity,"[92] the Reporters labeled the criticism "ad hominem" in nature,[93] and found the analysis of the commentator who had leveled such criticisms to be the "purest sophistry."[94]

The rancorous debate regarding the prior state of products liability doctrine may never subside completely. Aside from the question of whether the *Restatement Third* accurately reflected the law, opponents voiced other

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82. *Id.* § 2(b).
83. Henderson & Twerski, *supra* note 2, at 907.
84. Frank J. Vandall, *State Judges Should Reject the Reasonable Alternative Design Standard of the* Restatement (Third), Products Liability, *Section 2(b)*, 8 KAN. J.L. & PUB. POL'Y 62, 62 (1998) [hereinafter Vandall, *State Judges Should Reject*].
85. Frank J. Vandall, *The* Restatement (Third) of Torts: Products Liability *Section 2(b): The Reasonable Alternative Design Requirement*, 61 TENN. L. REV. 1407, 1407 (1994) [hereinafter Vandall, *Reasonable Alternative Design Requirement*].
86. Vargo, *supra* note 61, at 493-955.
87. *Id.* at 536.
88. *See, e.g.*, William Shakespeare, *Macbeth*, act 5, sc. 5 ("Life's but a walking shadow, a poor player That struts and frets his hour upon the stage And then is heard no more: it is a tale Told by an idiot, full of sound and fury, Signifying nothing.").
89. *See* Howard Klemme, *Comments to the Reporters and Selected Members of the Consultative Group*, Restatement of Torts (Third): Products Liability, 61 TENN. L. REV. 1173, 1174 (1994).
90. *Id.*
91. *Id.* at 1173-75.
92. *See id.* at 1175.
93. Henderson & Twerski, *supra* note 2, at 918.
94. *Id.* at 919.

objections.[95] One challenge focused on the effect of the RAD requirement on cases on the lower end of the damage scale.[96] Clearly, to establish a RAD, expert testimony will almost always be required—expert testimony that is expensive. One commentator observed that in a case in which plaintiff's damages are in the range of $40,000, and the cost of an expert's assessment of the product and/or creation of a model demonstrating a different design is $15,000, an attorney might lack the financial incentive to take the case, it was argued.[97] The same effect would be created by the $100,000 case. "So, the *Restatement Third* with a swipe of the eraser has gotten rid of all small products liability cases," and "excised a number of $100,000 cases," this critic claimed.[98]

Products liability cases can be expensive to prepare, and lawyers representing clients on a contingent fee basis already have disincentives to take cases that have limited damage value. But it seems to be a matter of empirical conjecture to claim that this financial disincentive will be significantly enhanced by the RAD requirement. After all, unless the standard of defect applied is one that allows the jury to form its own conclusion about whether a complex product's design is defective without any expert testimony, some type of expert testimony will likely be necessary. Indeed, even under a consumer expectations test it seems logical to assume that a consumer's expectations are informed at least in part by alternative designs available to the manufacturer.[99] Thus, while proof of a RAD is not central to the determination of design defect, such proof, usually developed with the assistance of an expert, will be necessary.

Additionally, while acknowledging that the plaintiff will need expert testimony in many cases, the *Restatement Third* suggests that there will be cases where product defect can be established without the requirement of expert

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95. *See* Vandall, *Reasonable Alternative Design Requirement*, *supra* note 85, at 1408-13 (stating that the RAD requirement in *Restatement Second* section 402A "is not supported by the majority of jurisdictions" and these jurisdictions have voiced their concerns).

96. *Id.* at 1425-26.

97. Vandall, *State Judges Should Reject*, *supra* note 84, at 83.

98. *Id.*

99. *See, e.g.*, Seattle-First Nat'l Bank v. Tabert, 542 P.2d 774, 779 (Wash. 1975). The court provided:

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

Id.; *see also* Potter v. Chi. Pneumatic Tool Co., 694 A.2d 1319, 1333 (Conn. 1997).

testimony.[100] These will be cases where the feasibility of an alternative design is evident to a layperson.[101] Comment f to section 2 gives this illustration:

> For example, when a manufacturer sells a soft stuffed toy with hard plastic buttons that are easily removable and likely to choke and suffocate a small child who foreseeably attempts to swallow them, the plaintiff should be able to reach the trier of fact with a claim that buttons on such a toy should be an integral part of the toy's fabric itself (or otherwise be unremovable by an infant) without hiring an expert to demonstrate the feasibility of an alternative safer design.[102]

This illustration notwithstanding, there is no disputing that the *Restatement Third* reinforces the need for expert testimony in a design defect case.[103] But it is doubtful that any other coherent test for defect would do otherwise. When a product's design is alleged to be faulty, lay jurors will likely need help in understanding why this is so.[104]

Another comment to section 2 leaves the door open for an end run around RAD. Products which have "low social utility and a high degree of danger"[105] may be labeled "manifestly unreasonable" in their design.[106] The effect of such a finding allows a plaintiff to establish liability "even absent proof of a reasonable alternative design."[107] This provision, known by some as the Habush

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100. RESTATEMENT THIRD § 2 cmt. f.
101. *Id.*
102. *Id.*
103. *See id.* (stating that "[i]n many cases, the plaintiff must rely on expert testimony").
104. *But see id.* § 3. This provision allows for inferences of defect to be drawn similar to inferences of negligence under res ipsa loquitur. *See id.* Section 3 provides:

> § 3. Circumstantial Evidence Supporting Inference of Product Defect.
>
> It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:
>
> (a) was of a kind that ordinarily occurs as a result of product defect; and
>
> (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

Id. In such cases, expert evidence might still be necessary. In *Mercer v. Pittway Corp.*, the Iowa Supreme Court ruled that circumstantial evidence may be sufficient to prove that a product is unreasonably dangerous under section 402A of the *Restatement Second*. Mercer v. Pittway Corp., 616 N.W.2d 602, 620 (Iowa 2000).

105. RESTATEMENT THIRD § 2 cmt. e.
106. *Id.*
107. *Id.* The case that is the doctrinal reference point for this is *O'Brien v. Muskin Corp.*, in which the Supreme Court of New Jersey ruled that a jury could find that the design of an above-ground swimming pool was so dangerous that it was defective even absent proof of an alternative design. O'Brien v. Muskin, 463 A.2d 298 (N.J. 1983).

Amendment,[108] was grudgingly accepted by the Reporters. In their extensive note to section 2, the Reporters inform that "only one American jurisdiction currently recognizes such a position other than by way of dictum in cases that do not present the issue on their facts."[109]

It is unclear what sort of case will fit within comment e. Viewed broadly, comment e would permit plaintiffs to attack the design of many products as being "manifestly unreasonable." One suggestion has been that comment e simply recognizes the possibility that due to its danger and lack of utility, a product's design is so patently defective that a trial court judge could grant summary judgment in favor of the *plaintiff*.[110] It seems unlikely, however, that comment e would have such a sweeping effect.

The *Restatement Third* has clearly generated significant controversy. Much of this is attributable, as discussed, to the RAD requirement. But there is a more spiritual quality to its hostile reception. The *Restatement Second* section 402A has been cited in judicial opinions more frequently than any other provision of any Restatement,[111] and has been called the "Gospel According to Prosser."[112] Reporter Aaron Twerski has said that section 402A has been accepted uncritically as "divine" and had "achieved the status of sacred scripture."[113] Scrapping a hallowed symbol of compensation theory can be expected to incite the true believers of that tradition. The myth of strict liability created by section 402A and perpetuated by the courts is, if nothing else, resilient. Nevertheless, the *Restatement Third* may not represent an actual retreat from the application of strict liability in design defect cases, for it is questionable whether courts have clearly applied strict liability to design cases under section 402A.[114] In that respect, the passion felt for section 402A may, in many ways, be misplaced. If, as critics say, the *Restatement Third* was more a political and prescriptive tract than a "neutral" description of the law, it was simply following

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108. *See* Larry S. Stewart, *Manifestly Unreasonable Design: The Habush Amendment—An Exception to Proof of a Reasonable Alternative Design*, 8 KAN. J.L. & PUB. POL'Y 77, 78 (1998) (commenting that the Habush Amendment did not require proof of a reasonable alternative design for products that have low social utility and high risk).

109. RESTATEMENT THIRD § 2, reporters' note to cmt. e.

110. *See* Malcolm E. Wheeler, *Section 2(b), Comment E: An Invitation to a Party of Unknown Purpose*, 8 KAN. J.L. & PUB. POL'Y 82, 83 (1998).

111. *See* David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 744 n.2.

112. *Id.* at 746.

113. *Tort Reform—ALI to Begin Work on* Restatement (Third), *Remarks of Aaron Twerski; Professors' Proposal Revisions to Section 402A*, BNA PROD. LIAB. DAILY, Mar. 13, 1992.

114. *See* Gary T. Schwartz, *The Nature of the New Restatement*, 8 KAN. J.L. & PUB. POL'Y 43, 43 (1998) (stating that section 402A "deals only glancingly and confusingly with the entire areas of design defects") [hereinafter Schwartz, *The Nature*].

the tradition of the adoption of section 402A. Prosser's formulation of the law of torts and products liability in the late 1950s and early 1960s hardly represented the mainstream legal doctrine in the United States at the time.[115] Section 402A was an "enormous innovation rather than a traditional Restatement."[116] It dealt only peripherally with the concepts of design and warning that have plagued the courts since the formulation of section 402A.[117] Ultimately, the lionization of section 402A and demonization of the *Restatement Third* is based not on whatever doctrine the former represented. Rather, it is a function of the faith many retain in the persistent myth of strict liability in products liability cases. The Reporters of the *Restatement Third* acted as the mythoclasts of an idealized vision of products liability doctrine—a vision that cannot be realized.

IV. THE JUDICIAL RECEPTION OF THE RAD REQUIREMENT OF THE *RESTATEMENT THIRD*

There has been a mixed judicial reception to the *Restatement Third*'s formulation for design defects. Some courts have not embraced the *Restatement Third* formulation with open arms. One of the first cases to illustrate skepticism is *Potter v. Chicago Pneumatic Tool Co.*[118] Plaintiffs were shipyard workers who alleged that they used pneumatic hand tools manufactured by the defendants and were injured as a result of the tools' defective design.[119] The defect was that the tools "exposed the plaintiffs to excessive vibration."[120] Plaintiffs offered expert testimony advancing several vibration-reducing alternative designs and proof that many of the defendants' tools violated industry safety standards for vibration reduction.[121] The case was submitted to the jury, which returned a verdict on the design claim for the plaintiffs.[122]

Defendants' claim on appeal was that the trial judge should have granted a verdict in their favor because the plaintiffs had not met their burden of establishing that there was a feasible alternative design available at the time the product was distributed.[123] This seems like an odd claim. There were several

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115. *See* Miller, *supra* note 16, at 467-72 (discussing the background of the adoption of section 402A).

116. Schwartz, *The Nature*, *supra* note 114, at 43.

117. *See* RESTATEMENT SECOND § 402A cmt. j (referring to warning issues in the context of allergies and items for human consumption); *id.* § 402A cmt. k (referring to warning issues for drugs and vaccines). Section 402A makes no explicit reference to design defects.

118. Potter v. Chi. Pneumatic Tool Co., 694 A.2d 1319 (Conn. 1997).

119. *Id.* at 1324-25.

120. *Id.*

121. *Id.* at 1326.

122. *Id.*

123. *Id.* at 1327.

references in the record to expert testimony offered by plaintiffs on precisely that point, and the court could have easily affirmed on that basis.[124] However, the Connecticut Supreme Court viewed the case as a choice between the RAD requirement and the consumer expectations test.[125] The court held that the RAD requirement imposed an undue burden on the plaintiffs, and required the plaintiffs to offer expert testimony in all cases, even when it might not be necessary.[126] Instead of the RAD test being central to the determination of design defect, the consumer expectations test was to be the focal point of analysis.[127] Yet, consumers' expectations "may be viewed in light of various factors that balance the utility of the product's design with the magnitude of its risks."[128] The court held that proof of an available alternative design may help a plaintiff's case under this test, but it is not essential.[129]

If the court's refusal to adopt the *Restatement Third*'s analysis is because it believed such analysis always required proof of a RAD, that is a mistaken conclusion. Comment e to section 2 recognizes that the "manifestly unreasonable" product, one with little utility and high danger, could be found defective without a RAD.[130] Similarly, section 3 recognizes that in some instances, proof of defect may be inferred when the product has malfunctioned.[131] The real basis of the court's decision seems to be its refusal to surrender its ties to

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124. *See id.* at 1326 (describing plaintiff's expert testimony of vibration-reducing alternative designs).

125. *Id.* at 1331.

126. The court gave two illustrations of this:

> [The RAD requirement] would require plaintiffs to retain an expert witness even in cases in which lay jurors can infer a design defect from circumstantial evidence. Connecticut courts, however, have consistently stated that a jury may, under appropriate circumstances, infer a defect from the evidence without the necessity of expert testimony.

Id. at 1332. The court further provided:

> Moreover, in some instances, a product may be in a defective condition unreasonably dangerous to the user even though no feasible alternative design is available. In such instances, the manufacturer may be strictly liable for a design defect notwithstanding the fact that there are no safer alternative designs in existence.

Id.

127. *Id.* at 1333.

128. *Id.*

129. *Id.*

130. RESTATEMENT THIRD § 2 cmt. e.

131. *Id.* § 3. The comments to section 3 state that the inference of a defect case is most prominent in manufacturing defect cases. *Id.* § 3 cmt. b.

the consumer expectations test.[132] This would explain the court going out of its way to refute the defendants' claims that plaintiffs always had to prove a RAD.[133] As noted, the proof offered by the plaintiffs in *Potter* on a RAD was certainly sufficient to create a submissible case.[134] In rejecting the defendants' argument, the court was announcing that it was not ready for the myth of strict liability and its accomplice, the consumer expectations test, to be shattered.[135]

The Supreme Court of New Hampshire was asked to adopt the *Restatement Third* in a case where a weightlifter was injured when a leg press fell rapidly toward the plaintiff's chest.[136] Plaintiff claimed that the machine was defectively designed because of the location of "safety stops" on the item.[137] In declining the suggestion that it should adopt section 2(b), the court noted several shortcomings with that provision.[138] First, the court recognized the "considerable controversy" that surrounded section 2(b).[139] This controversy was a function of the concern that the RAD requirement would place a "'potentially insurmountable stumbling block in the way of those injured by badly designed products.'"[140] Concerns about the costs of proving a RAD and the disparity between the plaintiff's and defendant's ability to prove a RAD raised fairness questions.[141] Elevating RAD from "'a factor to be considered in the risk-utility analysis to a requisite element of a cause of action for defective design,'"[142] also risked confusing judges and juries.[143] Section 2(b) had several exceptions to the RAD requirement that "introduce[d] even more complex issues for judges and juries to unravel."[144] While risk-utility considerations would remain important in most design cases,

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132. *See* Potter v. Chi. Pneumatic Tool Co., 694 A.2d at 1333 (adhering to the long-standing rule that product defectiveness is to be determined by expectations of ordinary customers).

133. *See id.* at 1331, 1332 (finding that the RAD requirement is not supported by the majority of jurisdictions and that it imposes an undue burden on plaintiffs).

134. *See supra* note 123 and accompanying text.

135. Potter v. Chi. Pneumatic Tool Co., 694 A.2d at 1355. In the concurring opinion, Justice Berdon fears that any talk of risk-utility analysis deflects attention from the consumer expectations test and leads "down a dangerous path." *Id.* at 1356 (Berdon, J., concurring).

136. Vautour v. Body Masters Sports Indus., Inc., 784 A.2d 1178, 1182 (N.H. 2001).

137. *Id.* at 1180.

138. *Id.* at 1182-84.

139. *Id.* at 1182.

140. *Id.* at 1183 (quoting Note, *Just What You'd Expect: Professor Henderson's Redesign of Products Liability*, 111 HARV. L. REV. 2366, 2373 (1998)).

141. *Id.*

142. *Id.* at 1182 (quoting Hernandez v. Tokai Corp., 2 S.W.3d 251, 256 (Tex. 1999)).

143. *Id.* at 1182-83.

144. *Id.* at 1183.

the rigidity of section 2(b) made that approach less suitable for protecting the interests of manufacturers and consumers.[145]

The Supreme Court of Kansas also took issue with section 2(b) of the *Restatement Third*.[146] The court expressed confidence in the consumer expectations test, being convinced that consumer expectations "play a dominant role in the determination of defectiveness."[147] Although a RAD might be relevant to determination of design defect, the court held that it should not be "the standard by which the questioned product is measured."[148] In siding with the critics of the RAD requirement who claimed the Reporters had misstated the law, the court announced:

> Our own research also reflects that a majority of jurisdictions in this country do not require a reasonable alternative design in product liability actions. It is clear in Kansas that evidence of a reasonable alternative design may be presented but is not required. We adhere to this principle and believe that it represents the majority rule in this country. Moreover, we believe the focus in such actions must remain on the product which is the subject of the litigation.[149]

While other courts have also declined to adopt section 2(a),[150] some courts have adopted the reasoning of section 2(b).[151] For example, the Supreme Court of Texas ruled that its products liability statute[152] required the plaintiff to establish a safer alternative design,[153] and that section 2(b) was consistent with

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145. *Id.* at 1184.

146. Delaney v. Deere & Co., 999 P.2d 930, 943-46 (Kan. 2000).

147. *Id.* at 945.

148. *Id.*

149. *Id.* at 946.

150. *See, e.g.*, Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 65 (Mo. 1999) (requirement of RAD foreclosed by state tort reform measure which codified analysis of section 402A); Sternhagen v. Dow Co., 935 P.2d 1139, 1147 (Mont. 1997) (considering an earlier draft of the *Restatement Third*, the Supreme Court of Montana held that strict liability should apply to design defect claims, and evidence of state of the art should not be considered).

151. *See, e.g.*, Hollister v. Dayton Hudson Corp., 5 F. Supp. 2d 530, 534 (E.D. Mich. 1998) (stating that section 2(b) was consistent with the use of risk-utility analysis in Michigan); Nissan Motor Co. v. Nave, 740 A.2d 102, 117 (Md. Ct. Spec. App. 1998) (stating that the relevant inquiry is "whether a manufacturer, knowing risks inherent in [the] product, acted reasonably in putting it on the market"); Hernandez v. Tokai Corp., 2 S.W.3d 251, 257 (Tex. 1999) (noting trend in common law that availability of safer alternative design be an element of defective design cause of action).

152. TEX. CIV. PRAC. & REM. CODE §§ 16.012, 82.001-.006 (Vernon 1993).

153. Hernandez v. Tokai Corp., 2 S.W.3d at 256.

this.[154] Likewise, the Maryland Court of Special Appeals held that the plaintiff had the burden to prove an alternative design, although, because "[n]either party in this case made any reference to this new Restatement either in the lower court or here," the court did not consider its adoption.[155] The manner in which courts address the RAD requirement will likely continue to vary, but the Iowa Supreme Court had the question put squarely to it: What test was to apply to design defect cases? The *Restatement Third*'s day to be considered by the Iowa Supreme Court had arrived.

V. THE *WRIGHT* WAY

In *Wright v. Brooke Group Ltd.*, a plaintiff sued several cigarette manufacturers for damages caused by smoking the defendants' cigarettes under theories of negligence, strict liability, breach of implied warranty, breach of express warranty, breach of special assumed duty, fraudulent misrepresentation, fraudulent nondisclosure, and civil conspiracy.[156] The United States District Court for the Northern District of Iowa certified eight questions to the Iowa Supreme Court.[157] Most of these questions related to theories for imposing liability on cigarette manufacturers.[158] But one question went to the core of design defect analysis:

> "*II. In a Design Defect Products Liability Case, What Test Applies Under Iowa Law to Determine Whether Cigarettes Are Unreasonably Dangerous? What Requirements Must Be Met Under the Applicable Test?*"[159]

In answering this question, the Iowa Supreme Court did not confine its analysis to the design defect standard applicable only to cigarette cases.[160] Instead, the court's decision is a road map for design defect litigation for all products.

The opinion traced the history of the court's adoption and application of section 402A of the *Restatement Second*.[161] This dated back to a 1970 decision by the court that "implied that strict liability in tort was applicable to design

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154. *See id.* (noting that the *Restatement* "also makes a reasonable alternative design a prerequisite to design-defect liability") (citing RESTATEMENT THIRD § 2(b)).

155. Nissan Motor Co. v. Nave, 740 A.2d at 117 n.13.

156. Wright v. Brooke Group Ltd., 652 N.W.2d 159, 162-63 (Iowa 2002).

157. *Id.* at 163-64.

158. *Id.*

159. *Id.* at 164.

160. *Id.* at 164-69. Indeed, in the discussion on this point, the court made almost no reference to cigarettes. *See id.*

161. *Id.*

defects."[162] Subsequent cases built on this principle and held that the difference between strict liability and negligence in design defect cases was that the former focused on the condition of the product, while the latter looked to the reasonableness of the manufacturer's conduct.[163] However, these efforts to distinguish the two theories were "somewhat obscured by this court's explanation of the proof required in a strict liability case."[164] The "explanation" referred to was the court's ruling in *Aller v. Rodgers Machinery Manufacturing Co.*,[165] that both a consumer expectations and a risk-utility test would inform a strict liability analysis in a design defect case, and that the risk-utility analysis used in a strict liability case was identical to that in a negligence case.[166] Later cases reinforced the equation of the risk-utility analysis used in strict liability cases with those in negligence cases.[167]

In *Wright*, the court saw a parallel for design defect analysis in its handling of failure to warn cases.[168] In the 1994 *Olson v. Prosoco, Inc.*[169] decision, the court held that the attempt to distinguish strict liability from negligence in a warning defect case should be abandoned.[170] The "product/conduct" distinction had "little practical significance" because "[i]nevitably the conduct of the defendant in a failure to warn case becomes the issue."[171] Accordingly, the court in *Olson* ruled that because the strict liability and warning tests for warning defect were the same, such cases would be submitted under a negligence theory and without the references to strict liability.[172] This acknowledgement by the court was important, for it directly raised the question of why another generic product defect—that of design—should be treated differently.

One peculiar, but explainable, part of the *Wright* decision relates to the arguments raised by the parties. The defendants argued that the consumer expectations test should be applied to the issue of their responsibility for plaintiff's injuries.[173] Plaintiff, on the other hand, argued that both the consumer

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162. *Id.* at 164 (citing Hawkeye-Sec. Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970)).
163. *Id.* at 164-66.
164. *Id.*
165. Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830, 830 (Iowa 1978).
166. *Id.* at 835.
167. Wright v. Brooke Group Ltd., 652 N.W.2d at 165 (citing Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911 (Iowa 1990); Chown v. USM Corp., 297 N.W.2d 218 (Iowa 1980)).
168. *Id.* at 166.
169. Olson v. Prosoco, Inc., 522 N.W.2d 284 (Iowa 1994).
170. *Id.* at 289.
171. *Id.*
172. *Id.* at 289-90.
173. Wright v. Brooke Group Ltd., 652 N.W.2d at 166.

expectations and risk-utility tests should be employed, or, alternatively, that consumers should not be found to have expectations with regard to cigarettes and that only risk-utility analysis should be used.[174] But the plaintiff also proposed the possibility "that this case presents an appropriate opportunity for this court to adopt the principles of law set forth in section 2 of [the] *Restatement Third*."[175]

One might do a double take at these arguments. Why would a *plaintiff* urge the court to adopt the *Restatement Third*? Why would a *defendant* advance the wisdom of a consumer expectations test? Were not the battle lines of the debate over the *Restatement Third* drawn in exactly the opposite way? Was not the abandonment of consumer expectations supposed to be damaging to plaintiffs? Were not defendants proponents and not opponents of risk-utility analysis? While apparently inverted, the arguments fit the nature of the case involved. Defendant wanted the consumer expectations to be applied with the recognition that all consumers knew the risk of smoking cigarettes.[176] As such, the consumers' expectations were not "frustrated." Plaintiff championed the risk-utility analysis for fear that the consumer expectations approach might be read just as defendant suggested.[177] The arguments were tailored to the peculiarities of the cigarette case.

In discussing the appropriate test for design defects, the court stated that it was "confronted with the anomaly of using a risk/benefit analysis for purposes of strict liability based on defective design that is identical to the test employed in proving negligence."[178] Just as the *Olson* court recognized in warning cases, any stated difference between strict liability and negligence in a design case was "illusory."[179] To the extent courts have attempted to effectuate strict liability by the use of the consumer expectations test, the court expressed its "dissatisfaction" with that test and the lack of any explanation of "what truly converts it into a strict liability standard."[180] Attempts to distinguish the two theories were, then, "in vain."[181]

Once the court rejected the viability of strict liability and consumer expectations in resolving design flaws, it looked to the *Restatement Third* and its treatment of the three types of defects.[182] The court noted that the *Restatement*

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174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 167 (citing Olson v. Prosoco, Inc., 522 N.W.2d 284 (Iowa 1994)).
180. *Id.* (quoting Miller, *supra* note 16, at 473-74).
181. *Id.*
182. *Id.* at 168. The *Restatement Third* retains strict liability for manufacturing defects. A product is defective in its manufacture "when the product departs from its intended design even

Third eliminated the language of "unreasonably dangerous" contained in the *Restatement Second*, and had relegated the consumer expectations test to a secondary role.[183] Moreover, the court observed that the *Restatement Third* prescribed analysis of the three types of defects without using "conventional labels" such as negligence and strict liability.[184] Rather, the rules were stated "functionally."[185] So long as the requirements of section 2 for each type of defect were met, the labels of strict liability or negligence could be employed.[186] But the court found even this use of labels superfluous:

> We question the need for or usefulness of *any* traditional doctrinal label in design defect cases because, as comment *n* points out, a court should not submit both a negligence claim and a strict liability claim based on the same design defect since both claims rest on an identical risk-utility evaluation. Moreover, to persist in using two names for the same claim only continues the dysfunction engendered by section 402A. Therefore, we prefer to label a claim based on a defective product design as a design defect claim without reference to strict liability or negligence.[187]

In the final portion of this analysis, the court expressly adopted both sections 1 and 2 of the *Restatement Third*.[188] For design defects, the court stated, a plaintiff had the burden of proving the availability of a reasonable alternative design, the omission of which rendered the product not reasonably safe.[189]

The adoption in *Wright* of the *Restatement Third*'s formulation of design defect analysis ended Iowa's relationship with section 402A of the *Restatement*

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though all possible care was exercised in the preparation and marketing of the product." RESTATEMENT THIRD § 2(a).

183. Wright v. Brooke Group Ltd., 652 N.W.2d at 168.

184. *See id.* at 169 (noting that the *Restatement Third* "does not place a conventional label, such as negligence or strict liability on design defect cases").

185. *See id.* ("'The rules are stated functionally rather than in terms of traditional doctrinal categories.'") (quoting RESTATEMENT THIRD § 2 cmt. n).

186. *See id.* ("'Claims based on product defect at time of sales or other distribution must meet the requisites set forth in subsection (a), (b), or (c), or the other provisions in this Chapter. As long as these requisites are met, doctrinal tort categories such as negligence or strict liability may be utilized in bringing the claim.'") (quoting RESTATEMENT THIRD § 2 cmt. n).

187. *Id.* (citations omitted).

188. *Id.* Section 1 provides: "One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect." RESTATEMENT THIRD § 1.

189. In support of the reasonable alternative design requirement, the court cited *Hawkeye Bank v. State*, 515 N.W.2d 348, 352 (Iowa 1994) (requiring "proof of an alternative safer design that is practicable under the circumstances" in negligent design case), and *Hillrichs v. Avco Corp.*, 478 N.W.2d 70, 75 (Iowa 1991) (requiring "proof of an alternative safer design" under a theory of enhanced injury caused by a design defect).

Second and the consumer expectations test that extended back to 1970.[190] Since that time, the court had invoked the "defective condition unreasonably dangerous" mantra of Prosser and section 402A, and had maintained in word, if not in substance, the distinction that "strict liability focuses on the condition of the product, not the conduct of the manufacturer." It had also tried to make sense of the consumer expectations test. In *Wright*, the court acknowledged, in effect, that "strict liability" in design defect cases was an illusion.[191] Attempts to apply strict liability were "in vain";[192] they created an "anomaly"[193] and an "incongruity."[194] The court had finally had it with section 402A. The "dysfunction" had to end.[195] The myth of strict liability for design defects had been slain by the Iowa Supreme Court. It was the *Wright* thing to do.

VI. WHAT HAS *WRIGHT* WROUGHT?

One significant aspect of the *Wright* decision is that the court went beyond simply holding that consumer expectations analysis had given way to the instrumentalist risk-utility approach.[196] The court stated that it adopted sections 1 and 2 of the *Restatement Third* "for product defect cases."[197] Some of the effects of *Wright* can be observed directly, such as the requirement that a plaintiff establish a RAD.[198] But other aspects of the decision, and of the court's adoption of sections 1 and 2, raise questions about how the Iowa Supreme Court will address other inconsistencies in Iowa products liability doctrine. The court's decision in *Wright* implicates portions of the Iowa Code affecting products liability. An examination of some of these matters demonstrates that there is much work to do before products liability doctrine is settled in Iowa.

A. *Doctrinal Labels*

The *Restatement Third* prescribes that doctrinal labels, such as strict liability and negligence, could still be used by the courts, so long as the standards

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190. *See* Hawkeye-Sec. Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970) (holding "that strict liability in tort was applicable to design defects").
191. Wright v. Brooke Group Ltd., 652 N.W.2d 159 (Iowa 2002).
192. *Id.* at 167.
193. *Id.* at 166.
194. *Id.* at 167.
195. *Id.* at 169.
196. *See id.*
197. *Id.*
198. *See id.* ("[A] plaintiff seeking to recover damages on the basis of a design defect must prove '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.'") (quoting RESTATEMENT THIRD § 2(b)).

of section 2 were followed.[199] However, the *Wright* court held that to continue to use two different doctrinal labels for the same claim would "continue[] the dysfunction."[200] Accordingly, the court held that a design defect claim should be called just that, not a negligence or strict liability claim.[201] This means that pleading in a design defect case should be simplified. No longer in a design defect case should there be a negligence count and a strict liability count. The action should be one for defective product design. The court's decision, however, makes no reference to implied warranty of merchantability claims under Iowa Code section 554.2314.[202] This theory is most commonly asserted in cases of economic loss.[203] The *Restatement Third* treats the implied warranty claim the same as it does strict liability and negligence. Comment n to section 2 states that in order to have a "well-coordinated" approach to product defect doctrine, a "consistent definition of defect" is necessary, and the appropriate definition comes from tort law, regardless of whether the claim is titled implied warranty of merchantability.[204] This would also then eliminate that doctrinal label from a case involving a design defect.

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199. RESTATEMENT THIRD § 2 cmt. n ("As long as [the prerequisites set forth in Subsections (a), (b), (c)] are met, doctrinal tort categories such as negligence or strict liability may be utilized in bringing the claim.").

200. Wright v. Brooke Group Ltd., 652 N.W.2d at 169.

201. *See id.* ("[W]e prefer to label a claim based on a defective product design as a design defect claim without reference to strict liability or negligence.").

202. *Id.* Section 554.2314 provides:

> 1. Unless excluded or modified (section 554.2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
>
> 2. Goods to be merchantable must be at least such as
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> a. pass without objection in the trade under the contract description; and
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> b. in the case of fungible goods, are of fair average quality within the description; and
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> c. are fit for the ordinary purposes for which such goods are used; and
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> d. run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
>
> e. are adequately contained, packaged, and labeled as the agreement may require; and
>
> f. conform to the promises or affirmations of fact made on the container or label if any.
>
> 3. Unless excluded or modified (section 554.2316) other implied warranties may arise from course of dealing or usage of trade.

IOWA CODE § 554.2314 (2003).

203. *See, e.g.*, Manning v. Int'l Harvester Co., 381 N.W.2d 376 (Iowa 2001); Tomka v. Hoechst Celanese Corp., 528 N.W.2d 103 (Iowa 1995); Renze Hybrids, Inc. v. Shell Oil Co., 418 N.W.2d 624 (Iowa 1988); Van Wyk v. Norden Labs., Inc., 345 N.W.2d 81 (Iowa 1984).

204. RESTATEMENT THIRD § 2 cmt. n.

Because this explanation is contained in the comment to section 2 and not the text, it could be argued that the court would not consider the *Restatement*'s analysis in the comment to be part of the holding in *Wright*. Yet, in the decision the court made numerous references to the comments,[205] including a direct quote from comment n.[206] Given the court's "dysfunction" remark that followed the inclusion of comment n,[207] it seems likely that implied warranty of merchantability for personal injury and property damage relating to a defectively designed product will likewise give way to the functional rules of section 2. In any case, it is clear that the *Wright* decision should lead to less cluttered pleadings in products cases. No longer should there be a negligence claim, a strict liability claim, and so on. This should help focus the presentation of proof by the parties more sharply, and in a more understandable way for the fact-finder. Finally, this will preclude multiple submissions of liability in design cases under different doctrinal names. The only relevant label is "defective in design." The Iowa Civil Jury Instructions will need to be changed to reflect this.[208]

B. *Section 2, Comment e*

One specific comment that was a divisive part of the debate on the *Restatement Third* is comment e.[209] It suggests that courts could attach liability to products even absent proof of a RAD, if the product had demonstrably low social utility and a high degree of danger.[210] Although this provision was included in the comments to section 2, it enjoys almost no support in the courts.[211] The Iowa Supreme Court has not recognized cases where a product is defective under a similar type of analysis, so it is unlikely that comment e will have much impact.

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205. *See* Wright v. Brooke Group Ltd., 652 N.W.2d at 159 (referring to comments a, f, g, and n of section 2 throughout the opinion).

206. *Id.* at 169.

207. *See id.* ("[T]o persist in using two names for the same claim only continues the dysfunction engendered by section 402A.").

208. *See* IOWA CIVIL JURY INSTRUCTION 1000.1 (1987). This Instruction sets out the elements of recovery that will have to be scrapped, as it is based on section 402A of the *Restatement Second*. *Iowa Civil Jury Instruction* 1000.4 and 1000.5, which instruct on the meaning of "defective condition" and "unreasonably dangerous" respectively, should also be eliminated.

209. RESTATEMENT THIRD § 2 cmt. e. For a discussion of the so-called "Habush Amendment," see Stewart, *supra* note 108, at 78.

210. RESTATEMENT THIRD § 2 cmt. e (referring to these products as having a "manifestly unreasonable design").

211. The reporters' note to section 2, comment e, gives a detailed survey of courts that have declined to follow the leading case of *O'Brien v. Muskin Corp.*, 463 A.2d 298, 306 (N.J. 1983). RESTATEMENT THIRD § 2, reporters' note to cmt. e, at 90-91.

C. *Obvious Dangers and Consumer Expectations*

Comment d to section 2 of the *Restatement Third* addresses the elimination of the consumer expectations test as a stand-alone test for design defect.[212] It also refers to what is sometimes called the "patent danger" doctrine—the rule that a design defect claim could not be established if the product's dangers were open and obvious.[213] Although this rule at one time enjoyed wide acceptance in the courts, it has since been overwhelmingly rejected.[214] Comment d to section 2 states that the open and obvious nature of a product's danger is relevant to the issue of defectiveness, "but does not necessarily preclude a plaintiff from establishing that a reasonable alternative design should have been adopted."[215] Although the Iowa Supreme Court has not expressly adopted the patent danger rule, there have been cases where the court has observed that the obviousness of the risk might prevent a plaintiff from recovering under the consumer expectations test.[216] Indeed, one of the criticisms of the consumer expectations test is that it acts as a surrogate for the patent danger doctrine.[217]

One need only look as far as the *Wright* case itself to see the functional relationship between consumer expectations and the patent danger rule. Defendants in that case argued that only the consumer expectations test should be applied in evaluating design defect claims for cigarettes.[218] Because it was common knowledge that there were risks to smoking, a consumer's expectations of safety could not be said to be frustrated.[219] This same argument could just as

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212. This comment is titled, "Design defects: general considerations." RESTATEMENT THIRD § 2 cmt. d.

213. *Id.* (stating that "early in the development of products liability law, courts held that a claim based on design defect could not be sustained if the dangers presented by the product were open and obvious"); *see also* RESTATEMENT THIRD § 2, reporters' note to cmt. d, at 84 (discussing the treatment of the patent danger doctrine by the courts).

214. *See, e.g.*, Ogletree v. Navistar Int'l Transp. Corp., 500 S.E.2d 570, 571 (Ga. 1998) (holding what the court termed the "open and obvious danger" rule was not controlling in a case where the product had an alleged design defect); *see also* RESTATEMENT THIRD § 2, reporters' note to cmt. d, at 84-87 (listing citations to courts rejecting the patent danger rule).

215. RESTATEMENT THIRD § 2 cmt. d.

216. *See, e.g.*, Lovick v. Wil-Rich, 588 N.W.2d 688, 700 (Iowa 1999) ("There is no duty to warn when risks are known and obvious.") (citing Olson v. Prosoco, Inc., 522 N.W.2d 284, 291 (Iowa 1994)); Nichols v. Westfield Indus., Ltd., 380 N.W.2d 392, 400 (Iowa 1985) ("Where risks are known and obvious, there is no need for a warning . . . ."); Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830, 836 (Iowa 1978) ("Under the present test once a jury finds the ordinary buyer expected the machine to be in the condition received, it must find the plaintiff cannot recover on a theory of strict liability.").

217. Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 613 (1980).

218. Wright v. Brooke Group Ltd., 652 N.W.2d 159, 166 (Iowa 2002).

219. *Id.*

easily be stated in patent danger terms. Dangers of cigarettes were open and obvious to a consumer, thus there was no duty to design the product differently. But in following the *Restatement Third*, and rejecting the use of consumer expectations as an independent test for defect, the court in *Wright* swept aside both that doctrine and the patent danger rule.[220] The court quoted language from comment g to section 2 that left no doubt about the result, when it stated, "*The mere fact that a risk presented by a product design is open and obvious, or generally known, and that the product thus satisfies expectations, does not prevent a finding that the design is defective.*"[221] Obviousness and consumer expectations will thus continue to play a role in design defect analysis, but in a much less prominent and insidious manner. Both the *Restatement Third* provision and the *Wright* opinion make it clear that plaintiffs should not weep over the demotion of the consumer expectations test. It was never their friend to begin with.

D. *Product Misuse*

Another matter addressed in the comments to section 2 involves the effect of a plaintiff's misuse of a product. This topic has caused significant confusion in the courts. Is misuse an affirmative defense? Is it part of the plaintiff's case to establish that he was making proper use of the product, and, as such, the product was defective? Or are both issues proper for the jury to determine? The 1980 *Hughes v. Magic Chef, Inc.*[222] case laid out the basics of misuse doctrine in Iowa. Rather than plaintiff's misuse or alteration of the product being an affirmative defense, plaintiff's prima facie case required a showing that the product was defective when put to a reasonably foreseeable use.[223] Subsequent Iowa Supreme Court decisions have reinforced the principle that a manufacturer "will remain liable for an altered product if it is reasonably foreseeable that the alteration would be made and the alteration does not unforeseeably render the product unsafe."[224]

It is important to note that even if a plaintiff makes a reasonably foreseeable use of the product and can prove that the product is defective, the plaintiff's recovery can still be reduced because of the plaintiff's misuse of the product. Section 668.1 of the Iowa Comparative Fault Act provides that one type

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220. *Id.* at 167-69.

221. *Id.* at 171.

222. Hughes v. Magic Chef, Inc., 288 N.W.2d 542 (Iowa 1980).

223. *Id.* at 546: The court stated that "the burden is on the plaintiff to prove that the legal cause of the injury was a product defect which rendered the product unreasonably dangerous in a reasonably foreseeable use." *Id.*

224. *See* Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525, 530 (Iowa 1999) (citations omitted).

of fault that can reduce a plaintiff's recovery is "misuse of a product for which the defendant otherwise would be liable."[225] This must be read along with *Hughes*. According to *Hughes*, the plaintiff has to establish that the product was defective when put to a reasonably foreseeable use.[226] The reasonably foreseeable use may still be a misuse of the product, causing plaintiff's recovery to be reduced, but the manufacturer remains responsible.[227] Operating together, these principles strike a fair balance between the parties. Manufacturers have to anticipate the reasonably expectable uses made of products by consumers. At the same time, the plaintiff's recovery is reduced proportionately if the plaintiff misuses the product, even if that misuse is foreseeable.[228] This proportionate reduction is subject to the modified system of comparative fault used in Iowa whereby the plaintiff's recovery is barred completely if the plaintiff is found to bear fifty-one percent or more of the responsibility.[229]

The *Restatement Third* takes a largely hands-off approach to the misuse issue. Comment p to section 2 groups together misuse, modification, and alteration as forms of post-sale conduct that can affect liability.[230] All can be relevant to whether the product had a defect in the first place, whether there was a causal link between the defect and the plaintiff's injury in light of the misuse, and as a matter of comparative responsibility.[231] For a design defect, comment p states that product misuse, modification, or alteration may be relevant on the

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225. IOWA CODE § 668.1 (2003). Iowa Code section 668.1 states:

> As used in this chapter, *"fault"* means one or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages.

Id.

226. Hughes v. Magic Chef, Inc., 288 N.W.2d at 545.

227. *Id.*

228. *See id.* at 596 (stating that misuse is no longer an affirmative defense and that misuse is an element of "legal cause"); *see also* IOWA CODE § 668.3(1)(a) (requiring apportionment of fault in determining the cause of injury).

229. IOWA CODE § 668.3. Section 668.3 states:

> Contributory fault shall not bar recovery in an action by a claimant to recover damages for fault resulting in death or in injury to person or property unless the claimant bears a greater percentage of fault than the combined percentage of fault attributed to the defendants, third-party defendants and persons who have been released pursuant to section 668.7, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the claimant.

Id.

230. RESTATEMENT THIRD § 2 cmt. p.

231. *Id.*

issue of whether there is a RAD.[232] A product may be defectively designed but still not be the cause of injury if the consumer has misused the product.[233] Likewise, comparative fault principles can play a role even when defect and causation are established.[234] The comment notes the variation among jurisdictions on burden of proof issues, leaving those questions to local law.[235] All things considered, there is little in the *Restatement Third* that will likely affect this aspect of Iowa products liability doctrine.

E. *Evidentiary Issues*

Critics of the *Restatement Third* have raised concerns about the evidentiary implications of the RAD requirement.[236] With the United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceutical, Inc.*,[237] federal district court judges are required to act as "gatekeepers" of the expert testimony proffered under Federal Rule of Evidence 702.[238] As such, to admit expert testimony, they must determine that the evidence is based on sound technical or scientific grounds and would be helpful to the fact-finder.[239] This has been extended to product liability cases.[240] In light of *Daubert*, some have suggested that the RAD requirement of section 2(b) will cause otherwise strong cases to be "barred at the door."[241]

One particular case was said to make critics' "hair stand on end."[242] In *Stanczyk v. Black & Decker*,[243] the plaintiff injured his right forearm when it came into contact with an exposed miter saw blade.[244] Plaintiff offered expert testimony that the saw was defectively designed.[245] According to the expert witness, the saw could have been designed in such a way that only one-eighth of an inch or so of the blade would be exposed.[246] The trial court, however, found

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232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *See* Jerry R. Palmer, *General Discussion of the* Restatement (Third), 8 KAN. J.L. & PUB. POL'Y, Fall 1998, at 35, 36 (writing that a RAD requirement could bar meritorious cases from withstanding summary judgment).
237. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).
238. *Id.* at 589, 591.
239. *Id.* at 590-91.
240. *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147-48 (1999).
241. *See, e.g.*, Palmer, *supra* note 236, at 36.
242. *Id.*
243. Stanszyk v. Black & Decker, Inc., 836 F. Supp. 565 (N.D. Ill. 1993).
244. *Id.* at 566.
245. *Id.*
246. *Id.*

that the proffered testimony by the expert did not pass muster under *Daubert*.[247] While the expert was an experienced designer of saws, his testimony failed to include a testable design, and the court found that other evidence indicated that the expert's suggested design would not work.[248] Further, the expert's suggested alternative design had not been subject to any sort of peer review.[249] The expert testified that he would "'feel comfortable'" with his suggested alternative design even though it was based on a concept that was "'not fully defined, fully proven and fully documented.'"[250] Plaintiff argued that it was beyond his financial means to pay an expert to develop an alternative design that met the court's standard.[251] In excluding the evidence of the expert, the court did not take issue with the plaintiff's claim that such evidence would cost plaintiff between $20,000 and $40,000.[252] Regarding the plaintiff's claim, the court stated as follows:

> This is true, but it is the very nature of Rule 702 and *Daubert* that requires these expenditures. Proof of any kind is often expensive to gather. Scientific reliability and validity in our times is seldom cheap, but at least when once established it can be used again and again at little marginal cost.[253]

It is hard to imagine that the hair-raising feature of *Stanczyk* is the rejection of this particular expert's opinion. A plaintiff whose expert couches his opinion in terms of "feeling comfortable" with a proposed design that is based on a concept he came up with while looking at the product in question, can expect a court to be skeptical about admissibility under *Daubert*. Still, the court's open acknowledgement of the expensive nature of proving a RAD is significant. The court offers the view that the significant expense of the proof of a RAD will be repaid, because once established, the RAD "can be used again and again at little marginal cost."[254] However, the fact is that as one time players in the litigation process, plaintiffs are at a disadvantage to defendant-manufacturers in the design process. Injured plaintiffs are individual actors who would have neither the incentive nor means to undertake the expense of establishing a RAD for the benefit of other plaintiffs. Manufacturers, on the other hand, are repeat players in litigation. They have a substantial stake in being aware of and controlling the information relating to alternative designs. This stake warrants expending considerable resources in defending their design. Many plaintiffs will lack the

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247. *Id.* at 568.
248. *Id.* at 567.
249. *Id.*
250. *Id.* at 566.
251. *Id.* at 568.
252. *Id.*
253. *Id.*
254. *Id.*

means necessary to mount an effective challenge. While this does not justify casting off the RAD requirement and using a consumer expectations test, it does suggest that stingy applications of *Daubert* will simply reinforce the relative disparity between plaintiff and defendant in the means to establish and challenge a RAD.

These concerns are diminished considerably if one's case is before an Iowa state court. The Iowa Supreme Court has made it clear that it does not view the *Daubert* decision as authoritative for purposes of the Iowa Rules of Evidence. In *Leaf v. Goodyear Tire & Rubber Co.*,[255] the court considered the proper test for trial courts to use in assessing the admissibility of expert testimony.[256] Although the language of one of the pertinent provisions of the Iowa Rules of Evidence is identical to that of its Federal Rules of Evidence counterpart,[257] Iowa courts have supplied a "broad interpretation" to Iowa Rule 702.[258] The Iowa Supreme Court noted that *Daubert* itself was unclear as to whether its requirements applied exclusively to scientific testimony, or to all types of expert testimony.[259] The court further noted that trying to distinguish between these types of expert testimony could be a difficult determination.[260] The court concluded that "subjecting all expert testimony—technical as well as scientific—to a *Daubert* analysis would unnecessarily complicate and confuse the court's analysis and unduly lengthen many cases."[261] Because a *Daubert* analysis could be "'time consuming and costly,'"[262] and because the Iowa cases interpreting Iowa Rule

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255. Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525 (Iowa 1999).

256. *Id.* at 531-33. This was not the first occasion the court had had to analyze *Daubert*. There are at least five cases before *Leaf* in which the Iowa Supreme Court measured *Daubert* against the Iowa Rules of Evidence. *See* Johnson v. Knoxville Cmty. Sch. Dist., 570 N.W.2d 633, 638 (Iowa 1997) (stating that the general rule for admission of testimony based on scientific, technical, or other specialized knowledge applied to expert testimony); Mensink v. Am. Grain, 564 N.W.2d 376, 381 (Iowa 1997) (declining to apply a *Daubert* analysis to the risk factors to which the expert testified because they "do not involve a highly complex matter of scientific evidence"); Williams v. Hedican, 561 N.W.2d 817, 823-25 (Iowa 1997) (discussing the interation between Rule 702 and *Daubert*'s gatekeeping function); Carolan v. Hill, 553 N.W.2d 882, 888 (Iowa 1996) (stating that *Daubert* reaffirmed Iowa's rule on the admission of expert testimony); Hutchison v. Am. Family Mut. Ins. Co., 514 N.W.2d 882, 885-86 (Iowa 1994) (stating that *Daubert* reaffirmed Iowa's existing approach to opinion testimony).

257. Both rules provide as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." *Compare* FED. R. EVID. 702, *with* IOWA R. EVID. 5.702.

258. Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d at 532.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* (quoting Williams v. Hedican, 561 N.W.2d 817, 827 (Iowa 1997)).

702 had "served [the courts] well,"[263] there was no reason to discard them and require courts to apply a *Daubert* analysis.[264] Nevertheless, a trial court might benefit from the use of the *Daubert* factors,[265] especially in complex cases.[266]

Although the court decided against a wholesale adoption of *Daubert*, the standard it announced for Iowa courts simply restated Iowa Rules of Evidence 5.402 and 5.702.[267] The court's questioning in *Leaf* of whether *Daubert* applied to scientific and not technical expert testimony was timely, for just one day earlier the United States Supreme Court held that a *Daubert* analysis was necessary for all expert testimony offered under the Federal Rules of Evidence.[268] In *Kumho Tire Co. v. Carmichael*,[269] the United States Supreme Court decided that attempting to distinguish among and categorize forms of expert testimony was unmanageable.[270] This does not change the thrust of the Iowa Supreme

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263. *Id.* (quoting Williams v. Hedican, 561 N.W.2d at 832 (Neuman, J., concurring)).

264. *See id.* (concluding that "we see no need to replace [Iowa Rule 702 and the cases interpreting it] in favor of a mandatory application of the *Daubert* test, whether the evidence is scientific or technical in nature").

265. The "factors" referred to by the court are:

> (1) whether the theory or technique is scientific knowledge that can and has been tested, (2) whether the theory or technique has been subjected to peer review or publication, (3) the known or potential rate of error, or (4) whether it is generally accepted within the relevant scientific community. If a trial court considers these factors, the court should focus solely on the principles and methodology, not on the conclusions that they generate.

Id. at 533 (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593-94 (1993)).

266. *Id.*

267. Rule 5.402 states: "All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States or the state of Iowa, by statute, by these rules, or by other rules of the Iowa Supreme Court. Evidence which is not relevant is not admissible." IOWA R. EVID. 5.402. In *Mercer v. Pittway Corp.*, the court elaborated on the standards for admission of expert testimony:

> First, the evidence, of course, must be relevant. IOWA R. EVID. 402. Second, the evidence must be in the form of "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue." IOWA R. EVID. 702. Third, the witness must be qualified as an expert by knowledge, skill, experience, training, or education. *Id.*; *accord Leaf*, 590 N.W.2d at 533. Other evidence might be so novel or complex that the court will require proof of acceptance of the theory or technique in the scientific community before the evidence is admissible.

Mercer v. Pittway Corp., 616 N.W.2d 602, 628 (Iowa 2000).

268. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999). The *Leaf* decision is dated March 24, 1999. *See* Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d at 525. The Kumho decision is dated March 23, 1999. *See* Kumho Tire Co. v. Carmichael, 526 U.S. at 137.

269. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

270. *Id.* at 148. The Court stated as follows:

> Finally, it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction

Court's decision in *Leaf*, however. The court expressed the view in *Leaf*, and elsewhere, that the restrictive nature of *Daubert* may be appropriate for trials in federal courts, but it was not a model the court thought should be emulated.[271] The court's decision in *Wright* to adopt sections 1 and 2 of the *Restatement Third* does not affect this interpretation.[272]

Comment f to section 2 of the *Restatement Third* provides that there may be cases where expert testimony may not be required to establish a RAD.[273] If the feasibility of the RAD is "obvious and understandable to laypersons," the

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> between "scientific" knowledge and "technical" or "other specialized" knowledge. There is no clear line that divides the one from the others. Disciplines such as engineering rest upon scientific knowledge. Pure scientific theory itself may depend for its development upon observation and properly engineered machinery. And conceptual efforts to distinguish the two are unlikely to produce clear legal lines capable of application in particular cases.

Id.

271. *See* Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d at 533 (holding that "trial courts are not required to apply the *Daubert* analysis in considering the admission of expert testimony"); Mensink v. Am. Grain, 564 N.W.2d 376, 380 (Iowa 1997) (holding "we are committed to a liberal view on the admissibility of expert testimony").

272. In the *Leaf* case, then-Justice Lavorato, concurring specially, expressed concerns about the specter of *Daubert*:

> The majority tries to make it clear that the *Daubert* considerations are simply guidelines and not binding. Nevertheless, I fear there might be a tendency to routinely apply these considerations to exclude expert testimony, which we have traditionally recognized as relevant and reliable. We have repeatedly recognized that trial judges have broad discretion on the admissibility of expert testimony. It seems to me that the majority's opinion would start us down the slippery slope of blindly following *Daubert* in the future, resulting in undue restrictions on this discretion.

Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d at 537 (Lavorato, J., concurring specially).

273. Comment f provides:

> While a plaintiff must prove that a reasonable alternative design would have reduced the foreseeable risks of harm, Subsection (b) does not require the plaintiff to produce expert testimony in every case. Cases arise in which the feasibility of a reasonable alternative design is obvious and understandable to laypersons and therefore expert testimony is unnecessary to support a finding that the product should have been designed differently and more safely. For example, when a manufacturer sells a soft stuffed toy with hard plastic buttons that are easily removable and likely to choke and suffocate a small child who foreseeably attempts to swallow them, the plaintiff should be able to reach the trier of fact with a claim that buttons on such a toy should be an integral part of the toy's fabric itself (or otherwise be unremovable by an infant) without hiring an expert to demonstrate the feasibility of an alternative safer design. Furthermore, other products already available on the market may serve the same or very similar function at lower risk and at comparable cost. Such products may serve as reasonable alternatives to the product in question.

RESTATEMENT THIRD § 402A cmt. f.

jury could permissibly find the product should have been designed differently and more safely, without the need for expert testimony.[274] Despite this, the reality is that the rules affecting the admissibility of expert witness testimony can turn cases. In light of the contrast between the manner in which the applicable Federal Rules of Evidence and Iowa Rules of Evidence have been construed,[275] plaintiffs would likely consider the state court forum more receptive to expert testimony that might otherwise never see the light of the jury's day.[276]

F. *Interaction Between Warning and Design*

Although section 2 divides defect analysis among manufacturing, design, and warning defects, the interaction between warnings and design is addressed by the *Restatement Third*. Under the *Restatement Second*, when a manufacturer provides a warning, it "may reasonably assume that it will be read and heeded," and a product with a warning that makes the product safe if it is followed cannot be found defective.[277] The effect of this rule is to allow a manufacturer to escape liability by providing warnings when the better course of action was for the manufacturer to adopt a safer design. This has been criticized for the lack of recognition of the fact that it is foreseeable consumers may fail to read or comprehend warnings.[278]

The *Restatement Third* rejects the *Restatement Second* approach and notes that warnings cannot be used as a substitute for a safer design.[279] Some courts

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274. *Id.*; *see also* Mercer v. Pittway Corp., 616 N.W.2d 602, 620 (Iowa 2000) (holding that circumstantial evidence may be sufficient to prove that a product is unreasonably dangerous under section 402A of the *Restatement Second*).

275. *Compare* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593-94 (1993) (holding that a federal trial judge must act as a "gatekeeper" in screening expert testimony), *with* Mensink v. Am. Grain, 564 N.W.2d at 380 (stating that Iowa courts have a liberal view regarding the admissibility of expert testimony).

276. In addition to choosing state court for its forum, plaintiffs also need to consider a defendant's ability to remove a case filed in state court to federal court under 28 U.S.C. § 1441. Removal to federal district court is permitted "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441 (2000).

277. RESTATEMENT SECOND § 402A cmt. j.

278. *See* Howard Latin, *Good Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. REV. 1193, 1206-07 (1994) (noting that each day people are exposed to innumerable risks caused by appliances that malfunction or are mishandled, that "[p]eople would have to read, understand, remember, and follow innumerable product warnings to protect themselves from all product-related risks they may confront," and that "people must devote some of their limited time and attention to many other types of choices").

279. *Restatement Third*, section 2, comment l provides:

> Reasonable designs and instructions or warnings both play important roles in the production and distribution of reasonably safe products. In general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a

have joined the *Restatement Third* in its rejection of comment j of the *Restatement Second*.[280] In one case, the manufacturer claimed that its tire displayed a conspicuous warning of the danger of mismatched tire rims, and that comment j of the *Restatement Second* thus relieved it of liability.[281] The Supreme Court of Texas rejected comment j of the *Restatement Second* in favor of the analysis supplied in comment l of the *Restatement Third*.[282] Warnings should not be determinative on the issue of defect without consideration of the effect of a RAD. In *Uniroyal Goodrich Tire Co. v. Martinez*,[283] the court stated:

> The dissent also noted that there have been few reported mismatch accidents involving tires with this particular warning label. While this is certainly relevant, and perhaps would persuade many juries, we cannot say that it conclusively establishes that the tire is reasonably safe when weighed against the other evidence. The jury heard firsthand how an accident can occur despite the warning label, and how a redesigned tire would have prevented that accident. The jury also heard evidence that Goodrich's competitors had incorporated the single strand programmed bead by the early 1980s, and that Goodrich itself adopted this design in 1991, a year after manufacturing the tire that injured Martinez. Under these circumstances, there is at least some evidence supporting the jury's finding of product defect.[284]

The Iowa Supreme Court considered the role of comment j of the *Restatement Second* in a case similar to the *Martinez* case. In *Leaf v. Goodyear Tire & Rubber Co.*, the defendant tire company also defended its product by arguing that had the plaintiff observed the warning about using a safety cage

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> product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks. For example, instructions and warnings may be ineffective because users of the product may not be adequately reached, may be likely to be inattentive, or may be insufficiently motivated to follow the instructions or heed the warnings. However, when an alternative design to avoid risks cannot reasonably be implemented, adequate instructions and warnings will normally be sufficient to render the product reasonably safe. . . . Warnings are not, however, a substitute for the provision of a reasonably safe design.

RESTATEMENT THIRD § 2 cmt. l.

280. *See, e.g.*, Rogers v. Ingersoll-Rand Co., 144 F.3d 841, 844 (D.C. Cir. 1998) (stating that warnings alone will not "necessarily save a product from being unreasonably dangerous"); Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 337 (Tex. 1998) (stating that warnings are just one factor "for the jury to consider in determining whether the product as designed is reasonably safe").

281. Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d at 332, 335-36.

282. *Id.* at 336.

283. Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328 (Tex. 1998).

284. *Id.* at 337.

while changing a tire, he would not have been injured.[285] However, the court noted that the status of comment j was uncertain.[286] It had been deleted from the *Restatement Third* because, the court observed, it was not proper to retain a rule "'that permits a manufacturer or designer to discharge its total responsibility to workers by simply warning of the dangers of a product.'"[287] While the court expressed doubts about the applicability of comment j to a claim based on strict liability for design defect, the court withheld ruling on the matter because, having been waived, it was not before the court.[288]

It seems certain that the court will reject comment j of the *Restatement Second* in light of its decision in *Wright*, for the court's wholesale adoption of section 2 leaves little to question. The comment j analysis has been so thoroughly discredited by courts and commentators, and by comment l of the *Restatement Third*, that *Leaf*'s reservation of judgment will give way to acceptance of comment l. Accordingly, the adequacy of warnings must be considered in light of overall product safety. As comment l provides, warnings may not be used as a substitute for a design change that might reduce or eliminate the danger to the user.[289]

However, the hostility toward the *Restatement Third* felt in some quarters can result in a court repudiating the possible adoption of *Restatement Third*, even when the court agrees with the its reasoning. In *Delaney v. Deere & Co.*,[290] the Kansas Supreme Court held that although it rejected comment j of the *Restatement Second*, just as comment l of the *Restatement Third* rejects it, the court would not turn to that comment of the *Restatement Third* for support.[291] The court's distaste for the RAD requirement was clear, as the court ruled that, while an adequate warning would not preclude a finding of design defect, "this does not signify an adoption or approval of Comment l or the remainder of the Restatement (Third) of Torts."[292] A common enemy did not make friends of the court and the *Restatement Third*.

G. *State of the Art Defense—Section 668.12*

One of the most dramatic illustrations of how the court's decision in *Wright* will affect other areas of products liability doctrine is the relation of that

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285. Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525, 529 (Iowa 1999).
286. *Id.*
287. *Id.* (quoting RESTATEMENT THIRD § 2 cmt. l).
288. *Id.*
289. RESTATEMENT THIRD § 2 cmt. l.
290. Delaney v. Deere & Co., 999 P.2d 930 (Kan. 2000).
291. *Id.* at 946.
292. *Id.*

decision to the state of the art doctrine. In 1986, the Iowa Legislature passed section 668.12.[293] A pertinent part of that provision declares:

> In any action brought pursuant to this chapter against an assembler, designer, supplier of specifications, distributor, manufacturer or seller for damages arising from an alleged defect in the design, testing, manufacturing, formulation, packaging, warning, or labeling of a product, a percentage of fault shall not be assigned to such persons if they plead and prove that the product conformed to the state-of-the-art in existence at the time the product was designed, tested, manufactured, formulated, packaged, provided with a warning, or labeled.[294]

This defense is based on the idea that a manufacturer should not be subject to a finding that its product was defective if the product, at the time it was manufactured, complied with the state of the art. Prior to the decision in *Wright*, the state of the art statute had created confusion in the courts. After that decision, a conflict between Iowa common and statutory law was unavoidable.

The state of the art statute spawned confusion soon after its adoption.[295] In *Fell v. Kewanee Farm Equipment Co.*,[296] the court addressed a design defect case where the jury's answer to a special interrogatory was that the manufacturer had complied with the state of the art.[297] On appeal, the Iowa Supreme Court found that the plaintiff had also offered sufficient proof of an alternative design, and sufficient proof that consumer expectations were not met by the product, and therefore a question of material fact was raised.[298] However, the court did not reconcile that finding with the jury answer on the state of the art question. One could inquire how a product that was made according to the state of the art could have a suitable alternative design. This is especially the case when the definition for state of the art—"what feasibly could have been done" to make the product's design safer[299]—seemed to be the same test for whether an alternative design existed.

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293. IOWA CODE § 668.12 (2003).

294. *Id.*

295. The Iowa Supreme Court had considered state of the art evidence as relevant in a design defect case even before the adoption of the state of the art statute. *See* Chown v. USM Corp., 297 N.W.2d 218, 221 (Iowa 1980). In *Chown*, the court articulated the following definition of state of the art: "The question therefore is not whether anyone else was doing more, although that may be considered, but whether the evidence disclosed that anything more could reasonably and economically be done." *Id.* at 222.

296. Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911 (Iowa 1990).

297. *Id.* at 913.

298. *Id.* at 918.

299. Mercer v. Pittway Corp., 616 N.W.2d 602, 622 (Iowa 2000) (citing Chown v. USM Corp., 297 N.W.2d at 221). The court noted that "the relevant question 'is . . . whether the

One year later, the Iowa Supreme Court provided a remarkable analysis to the issue of how the availability of an alternative design, on the one hand, and state of the art, on the other, were to interact.[300] In *Hillrichs v. Avco Corp.*,[301] the manufacturer of a corn picker that injured a plaintiff offered proof that it had complied with the state of the art in the design of the product.[302] Plaintiff claimed that the corn picker was defective because it lacked safety devices, such as an emergency shut-off device that could feasibly have been implemented, and could have diminished the plaintiff's injuries.[303] To prove this, plaintiff offered testimony from experts regarding the low cost and workability of such measures.[304] The court found that this evidence was sufficient to make out a submissible case of enhanced injury for the jury.[305] The defendant, however, complained on appeal that the trial court had erred in not submitting a special verdict form to the jury on the state of the art issue.[306] The instruction to the jury had simply noted the elements of the state of the art defense, and directed it to allocate no percentage of fault to the defendant if the jury concluded the elements had been satisfied.[307] The court's reconciliation of the plaintiff's proof of an alternative design, along with the defendant's claim that the defendant complied with the state of the art, was almost matter of fact.

> We believe it is preferable, in the absence of compelling reasons not to do so, that issues involving the state of the art defense under section 668.12 be submitted by way of special verdict. Rather than giving only a general instruction on state of the art, the court should instruct that the defendant must establish this defense with respect to the specific claims that the plaintiff has made. Preferably, the instructions should be cast in an "even if" format. The jury should be advised that, *even if the plaintiff has established a particular design defect*, no percentage of fault should be assigned to the manufacturer if that party has established that the design was consistent with the state of the art.[308]

The *Hillrichs* case thus held that a plaintiff could establish a product design defect by proof of an alternative safer design that was "practicable under the circumstances," and still lose the case because the defendant had proven its

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evidence disclosed that anything more could reasonably and economically be done.'" *Id.* (quoting Chown v. USM Corp., 297 N.W.2d at 221).

300. *See* Hillrichs v. Avco Corp., 478 N.W.2d 70 (Iowa 1991).
301. Hillrichs v. Avco Corp., 478 N.W.2d 70 (Iowa 1991).
302. *Id.* at 76.
303. *Id.* at 72.
304. *Id.* at 75.
305. *Id.*
306. *Id.* at 76.
307. *Id.*
308. *Id.* (emphasis added).

product had satisfied the state of the art when it was made.[309] But if the product satisfied the state of the art, that is, "what feasibly could have been done"[310] to design the product, how had the plaintiff been able to prove the product was defective because of a failure to use an alternative safer design? Use of the "even if" format prescribed by the *Hillrichs* decision does not resolve the central conflict of this analysis: the plaintiff could not have proven that there was a feasibly, safer alternative design available if the defendant had complied with the state of the art. Conversely, the state of the art could not have been satisfied if the plaintiff proved a practicable alternative design.

The court's treatment of the state of the art issue in *Fell* and *Hillrichs* is a useful illustration of the considerable mischief and confusion that the state of the art defense has brought about.[311] The court continued its efforts to make sense of the state of the art doctrine in the 1994 *Hughes* case, where it reinforced the definition for the doctrine that it had used in *Chown*.[312] State of the art was more than just compliance with industry custom, the court held, for it refers to "what *feasibly* could have been done."[313] Industry custom might lag behind technological developments.[314] But the technological developments that comprised the state of the art were not those that necessarily reflected the best possible technology. Rather, the focus in state of the art was "'whether the evidence disclosed that anything more could *reasonably and economically* be done.'"[315] Again, the court was equating state of the art in design with a test of what a reasonable alternative design would be.

It was in *Hughes*, however, that some members of the court began to write about the incoherence and conflict of the court's treatment of the state of the art issue. Justice Ternus, in a special concurring opinion joined by Justices Harris and Lavorato, observed that "[s]tate-of-the-art is a confusing concept."[316] Despite the critics of that doctrine who argued it should be discarded,[317] however,

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309. *Id.*
310. *See supra* note 299 and accompanying text.
311. *See* Miller, *supra* note 16, at 495-97.
312. Hughes v. Massey-Ferguson, Inc., 522 N.W.2d 294 (Iowa 1994).
313. *Id.* at 295.
314. *Id.*
315. *Id.* (quoting Chown v. USM Corp., 297 N.W.2d 218, 221 (Iowa 1980)) (emphasis added).
316. *Id.* at 298 (Ternus, J., concurring specially).
317. The concurrence noted Professor Wade's opinion on the subject:

> "State of the art" is a chameleon-like term, referring to everything from ordinary customs of the trade to the objective existence of technological information to economic feasibility. Its meanings are so diverse and so easily confused that the wise course of action, I think, is to eschew its use completely.

Id. (quoting John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 750-51 (1983)).

its statutory standing precluded such an action.[318] Nevertheless, according to Justice Ternus:

> Section 668.12 is problematic for two reasons. First, it does not contain a definition of the term "state of the art." Second, the statute makes state of the art an affirmative defense that the defendant must plead and prove. Thus, it is left to the court to define "state of the art" so as to give the defendant the benefit of this defense as envisioned by the legislature. However, at the same time we must be careful that we do not define the term so broadly that the affirmative defense subsumes the plaintiff's case, thereby shifting the burden of proof to the defendant. I believe the majority has done just that. By injecting considerations of safety, economics and practicality into state of the art, this defense has become nearly indistinguishable from the concept of negligence or in the case of strict liability, the concept of unreasonably dangerous, elements we have traditionally required the plaintiff, not the defendant, to prove.[319]

Due to the way in which the court had defined state of the art, the concurrence noted that considerations of "safety, economics, and practicality" were part of both the plaintiff's burden of proof on alternative design, and the defendant's burden for state of the art.[320] This overlap of the defense with the plaintiff's case due to the court's definition could only be remedied by a redefinition of state of the art.[321] By redefining state of the art "narrowly to mean the level of scientific and technical knowledge existing at the time the product was designed and manufactured,"[322] the jury would not be in the position to find that there was an alternative safer design available, while at the same time finding the defendant had complied with the state of the art.[323]

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318. *Id.*

319. *Id.* at 298-99.

320. *Id.* at 299. The concurrence went on to note:

> Here, the majority has incorporated these factors into the state-of-the-art defense. The majority relies on evidence that the suggested alternative design was not as safe as the defendant's design, that the alternate design was impractical and made the product less functional and that the alternate design was costly. These considerations should more properly be factors in the plaintiff's case, not the defendant's affirmative defense.

Id.

321. *Id.* at 300.

322. *Id.*

323. *Id.* The concurrence summarized:

> In summary, under the approach I suggest, the court would first instruct the jury to consider the defendant's state-of-the-art defense. To be successful, the defendant would have to prove that the alternate design suggested by the plaintiff was not possible under the scientific and technical knowledge existing at the time the product was designed and manufactured. If the defendant failed in this defense,

The concurring opinion in *Hughes* attempted to extricate the court from the trap it had constructed for itself in its construction of the state of the art statute. Later in the 1990s, however, the court turned to the other part of the state of the art statute, which had its own set of difficulties.[324] Under this provision, even if a manufacturer had proven its compliance with the state of the art at the time of manufacture, section 668.12 provided:

> Nothing contained in this section shall diminish the duty of an assembler, designer, supplier of specifications, distributor, manufacturer or seller to warn concerning subsequently acquired knowledge of a defect or dangerous condition that would render the product unreasonably dangerous for its foreseeable use or diminish the liability for failure to so warn.[325]

This statute virtually negated the benefits to the defendant, such as they were, of complying with the state of the art in designing the product. So long as the plaintiff could offer proof that the defendant had learned of dangers in the product after it had been sold, a duty to warn might be found to exist regardless of the manufacturer's compliance with the state of the art in design. Indeed, this is part of the court's holding in the *Fell* case.[326]

In the 1999 *Lovick v. Wil-Rich* case, the court acknowledged that juries needed to be instructed that there were differences in imposing a duty to warn on a manufacturer at the point of sale, and a duty to warn post-sale.[327] Instructions relating to a post-sale duty needed to be more specific than the point of sale instructions, and needed to "inform the jury to consider those factors which make it burdensome or impractical for a manufacturer to provide a warning."[328] Such

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> then the jury would consider whether the plaintiff had proved that the advantages of the alternate design, already determined to be technologically possible, outweighed the disadvantages of the alternate design and should have been preferred over the design used by the defendant. This latter analysis would be made using the *Chown* factors for unreasonably dangerous as modified above.

Id. (footnote omitted).

324. The court had also held in 1994 that state of the art has no application to claims based on negligent failure to warn. *See* Olson v. Prosoco, 522 N.W.2d 284, 290-91 (Iowa 1994).

325. IOWA CODE § 668.12 (2003).

326. *See* Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911, 921 (Iowa 1990) (stating that the court must instruct on the theory of subsequent acquired knowledge); *see also* Tucker v. Caterpillar, Inc., 564 N.W.2d 410, 412 (Iowa 1997) (discussing the admissibility of evidence of measures taken subsequent to an event that would have prevented the event if the measures had been taken prior to the event). The court did not analyze the actual application of this portion of section 668.12 in these cases. It simply recognized the post-sale duty imposed by the statute. *See* Fell v. Kewanee Farm Equip. Co., 457 N.W.2d at 921; Tucker v. Caterpillar, Inc., 564 N.W.2d at 412.

327. Lovick v. Wil-Rich, 588 N.W.2d 688, 695-96 (Iowa 1999).

328. *Id.* at 695.

instructions should refer to factors listed in section 10 of the *Restatement Third*,[329] which the court adopted.[330]

The court's decision in *Lovick* resolved questions about this latter portion of the state of the art statute that addressed post-sale warnings. However, the first portion of the statute and the role of state of the art in a design defect case also played a role in *Lovick*. The court considered the proper standard to apply in determining whether the design of a farm cultivator was defective.[331] One possibility was to merge theories of negligence and strict liability and adopt the *Restatement Third* approach that required a RAD to be proven by the plaintiff.[332] While recognizing the merits of such an approach, the court "declined the opportunity" to make this switch.[333] No prejudice resulted from the instructions, as a risk-utility balancing instruction was given to the jury.[334] Second, the court expressed the view that consideration of adoption of the "new" *Restatement Third* model was not ripe.[335] The court refrained from considering that issue until it was "specifically raised."[336] But the most noteworthy basis for not adopting the *Restatement Third* approach, according to the court, was that "our legislature has adopted the state of the art defense, which could be impacted if we were to adopt the alternative design requirement."[337]

The court's acknowledgement in *Lovick* that the design defect doctrine in Iowa was on a collision course with itself was prescient. Although the court

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329. Section 10 of the *Restatement Third* provides:

> (b) A reasonable person in the seller's position would provide a warning after the time of sale if:
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> (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
>
> (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
>
> (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
>
> (4) the risk of harm is sufficiently great to justify the burden of providing a warning.

RESTATEMENT THIRD § 10.

330. Lovick v. Wil-Rich, 588 N.W.2d at 695-96 ("Accordingly, we adopt the Restatement (Third) of Torts: Products Liability § 10, including the need to articulate the relevant factors to consider in determining the reasonableness of providing a warning after the sale.").

331. *Id.* at 698.

332. *Id.* at 699.

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

construed the state of the art statute again after *Lovick*,[338] it is the decision in *Wright* that makes the impact with the statute unavoidable. As noted earlier, in *Wright* the Iowa Supreme Court adopted sections 1 and 2 of the *Restatement Third*.[339] Section 2(b) requires plaintiffs, in most cases, to establish a RAD in order to establish the defectiveness of the defendant's product design.[340] But, can the RAD standard be squared with the state of the art doctrine when we define the latter as "what feasibly could have been done?"[341] If the plaintiff has to prove a RAD in order to carry its burden of proof in establishing defect, and the defendant can escape liability by proving that the design was as safe as was "feasible," there is a logical disconnect. If a jury concludes that a plaintiff established a RAD, it could not also logically conclude that the defendant had designed the product as safely as feasibly possible. Either the RAD existed, as plaintiff would have the burden to prove, or the defendant did the best that could have been accomplished given the technological and practical considerations involved, in which case the defendant met its burden of proof on the affirmative defense of compliance with section 668.12.[342]

It is this conflict that Justice Ternus's concurring opinion in *Hughes* addressed.[343] And, it is likely what the court was referring to when it refused to adopt the *Restatement Third*'s analysis of design defects in the 1999 *Lovick* case, in part because of the impact on the state of the art statute.[344] In *Wright*, however, the court did not consider how section 2(b) of the *Restatement Third* would mesh with section 668.12.[345] That problem was left for another day.

The comments to section 2 of the *Restatement Third* do address the state of the art issue.[346] Comment d to section 2 recognizes that there has been confusion about the various definitions of state of the art, and describes that confusion as "unfortunate."[347] The plaintiff's burden is to prove a RAD at the time of the product's manufacture.[348] And comment d states that if a defendant, "demonstrates that its product design was the safest in use at the time of sale, it

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338. *See* Falada v. Trinity Indus., Inc., 642 N.W.2d 247, 251 (Iowa 2002) (holding that the state of the art statute only applied to design defects, and evidence that product had defective welds implicated manufacturing defects that were not subject to the state of the art statute).

339. *See supra* note 188 and accompanying text.

340. RESTATEMENT THIRD § 2(b).

341. *See supra* note 299 and accompanying text.

342. IOWA CODE § 668.12 (2003).

343. *See* Hughes v. Massey-Ferguson, Inc., 522 N.W.2d 294, 298-99 (Iowa 1994) (Ternus, J., concurring specially) (discussing practicality, functionality, and design considerations as factors properly in the plaintiff's case rather than the defendant's affirmative defense).

344. Lovick v. Wil-Rich, 588 N.W.2d 688, 699 (Iowa 1999).

345. *See* Wright v. Brooke Group Ltd., 652 N.W.2d 159 (Iowa 2002).

346. RESTATEMENT THIRD § 2 cmt. d.

347. *Id.*

348. *Id.*

may be difficult for the plaintiff to prove that an alternative design could have been practically adopted."[349] None of the various definitions for state of the art identified in comment d to section 2 include the definition developed by the Iowa Supreme Court of "what feasibly could have been done"[350] in designing the product.[351] The reason for this can be easily deduced. By defining state of the art as what was "practical," the analysis would plow the same doctrinal ground as the analysis of plaintiff's effort to establish a RAD. If the design proposed is not "practically attainable" it could not qualify as a *reasonable* alternative design. But to resolve that the state of the art is established by the defendant's proof that the product was designed as well as it feasibly could have been, is to bring the doctrine into hopeless conflict with the plaintiff's burden to prove a RAD. Given the centrality of the RAD requirement to section 2(b), the drafters would not have wanted to cloud its execution with a state of the art definition that duplicated the RAD definition.

It seems clear then that defining state of the art as something less than the use of the best technology available has aggravated this problem in Iowa. Duplicative standards lead to duplicative burdens of proof, and the Iowa Supreme Court has cautioned against such results in products liability cases.[352] But even if the court redefined state of the art as "the level of scientific and technical knowledge existing at the time the product was designed and manufactured,"[353] there would remain a clumsiness to the state of the art analysis. Under section 2(b), the plaintiff has to prove a reasonable RAD.[354] To refute this claim of RAD, a defendant could offer proof that the design it used was the best available using cutting-edge technology. If this proof is credible, the jury will find that the plaintiff failed in its burden. To make this also an affirmative defense, however, is to risk jury confusion and inconsistent verdicts. Most of all, it is unnecessary. So long as the proof offered by defendant is directed at *refuting* the plaintiff's claim that there was a RAD, the name attached to that proof is insignificant. Call

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349. *Id.*

350. *See supra* note 299 and accompanying text.

351. *See* RESTATEMENT THIRD § 2 cmt. d ("The term 'state-of-the-art' has been variously defined to mean that the product design conforms to industry custom, that it reflects the safest and most advanced technology developed and in commercial use, or that it reflects technology at the cutting edge of scientific knowledge.").

352. *See* Hughes v. Magic Chef, Inc., 288 N.W.2d 542, 546 (Iowa 1980) (holding that treating misuse of product as an affirmative defense in a products liability case could create the potential for conflicting jury findings because the plaintiff also had a burden to prove the product was defective when put to a reasonably foreseeable use).

353. *See* Hughes v. Massey-Ferguson, Inc., 522 N.W.2d 294, 300 (Iowa 1994) (Ternus, J., concurring specially) (suggesting the state of the art defense should be defined to mean "the level of scientific and technical knowledge existing at the time the product was designed and manufactured").

354. RESTATEMENT THIRD § 2(b).

it state of the art, industry custom, use of cutting-edge technology, or anything else; this proof is challenging the plaintiff's claim that a RAD was available at the time the product was manufactured.[355] Within that framework, the defendant offers the same proof as before, the focus is on the RAD proposed, the confusion over defining state of the art becomes irrelevant, and the jury's eye is on one ball, not two.

The court in *Wright* cast its lot with the alternative design approach when it adopted section 2 of the *Restatement Third*.[356] As discussed, this framework makes consideration of state of the art issues unnecessary. If the state of the art doctrine were a common law creation, the Iowa Supreme Court could discard it as a byproduct of the adoption of section 2 of the *Restatement Third*. But, as noted by the concurrence in *Hughes*, the state of the art defense is codified in section 668.12.[357] One hopes that the legislature would recognize that the statute is an anachronistic remnant of the perceived confusion in the 1980s over the standards applicable in design defect cases. Repeal of the statute would help to dissipate this confusion. In the meantime, however, one palliative step would be for the court to revisit its definition of state of the art. By changing the definition from a focus on feasibility to one of the ultimate in safe design, there would likely be less confusion, although the plaintiff and defendant would still be directing proof at the same issue with separate burdens. However, it would be easier to manage a case where the defendant's burden is to prove that it had used the best design science would permit at the time the product was manufactured. Such proof, if believed, would by definition seemingly make it impossible for a jury to find the plaintiff had proven that a RAD was available at that time. At the very least it would reduce the potential for confusion that presently exists with the state of the art definition which parallels all too closely the analysis prescribed in section 2 of the *Restatement Third*. But this is the second best theory. Action is needed that will eliminate unnecessary chaos in the products liability doctrine. It is time for the state of the art statute to be repealed.

H. *Section 1 of the* Restatement Third *and Intermediary Liability in Iowa Under Section 613.18*

During the 1980s, one type of legislation that found favor in many states related to the liability of nonmanufacturer sellers. Under section 402A of the *Restatement Second*, strict liability for a product that was in a defective condition

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355. *See* Hughes v. Massey-Ferguson, Inc., 522 N.W.2d at 295 (defining industry custom and state of the art).

356. Wright v. Brooke Group Ltd., 652 N.W.2d 159, 169 (Iowa 2002).

357. Hughes v. Massey-Ferguson, Inc., 522 N.W.2d at 298 (Ternus, J., concurring specially).

unreasonably dangerous to the user, extended beyond the manufacturer.[358] A nonmanufacturer who "sells" such a product can be held liable under that provision, a point reemphasized in the comments to section 402A.[359] This would include wholesalers, distributors, or retailers.[360] One justification for such a rule is that these sellers of a defective product were profiting from their sale of the product and should have to stand behind it.[361] In turn, however, nonmanufacturer sellers can argue that it is unfair to subject them to liability for defective products when they had no way of determining whether there was a defect or not. After all, a retailer might receive products from a distributor and simply place them on shelves for purchase without the retailer inspecting the products for defect. Such an inspection would be unfeasible for many products anyway, if, for example, they came in sealed containers.[362] The fact that the retailer might be able to recover indemnity from the distributor, and the distributor from another intermediary, and so forth until liability is imposed finally upon the product manufacturer, is of little comfort to intermediary parties that might be left bearing the loss.

In response to the perceived unfairness of holding a nonmanufacturer seller liable without showing negligence on its part, the Iowa Legislature, in 1986, passed section 613.18 which is titled, "Limitations on Products Liability of Nonmanufacturers."[363] This statute seemed to strike a balance so that an injured

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358. *See* RESTATEMENT SECOND § 402A.

359. *Id.* § 402A cmt. f.

360. *Id.* According to comment f, one had to be "engaged in the business of selling products," thus excluding the "occasional seller." *Id.*

361. *Id.*

362. *See* 2 DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 19.1 (3d ed. 2000) ("Some states have a doctrine that shields retail sellers and other distributors from liability for negligence when selling goods in their original, sealed containers or packages, variously known as the 'sealed-container' or 'original-package' doctrine or defense.").

363. IOWA CODE § 613.18 (2003). Section 613.18 provides:

> 1. A person who is not the assembler, designer, or manufacturer, and who wholesales, retails, distributes, or otherwise sells a product is:
>
> a. Immune from any suit based upon strict liability in tort or breach of implied warranty of merchantability which arises solely from an alleged defect in the original design or manufacture of the product.
>
> b. Not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability for the product upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent.
>
> 2. A person who is a retailer of a product and who assembles a product, such assembly having no causal relationship to the injury from which the claim arises, is not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability which arises from an alleged defect in the original design or manufacture of the product upon proof that the manufacturer is subject to

plaintiff would have a party to look to for recovery, while a nonmanufacturer seller could, in most instances, avoid liability unless it had been negligent. In short, the statute seemed to provide that so long as the manufacturer of the product was subject to the jurisdiction of Iowa courts, and had not been judicially declared insolvent, the liability of the nonmanufacturer defendants would be limited to negligence.[364] The plaintiff could sue the manufacturer under a strict liability theory and still recover from the intermediary parties if they were proven negligent.[365] On the other hand, when the manufacturer was not amenable to suit in Iowa or was insolvent, the intermediary parties would be strictly liable for the product they had sold and presumably profited from.[366]

This understanding of the statute was in issue in 1992 when the Iowa Supreme Court decided *Bingham v. Marshall & Huschart Machinery Co.*[367] The plaintiff there argued that the saving language of section 613.18 would allow for a strict liability suit against the product distributor who sold the injury-causing product to the plaintiff's employer, as the manufacturer of the product had been judicially declared insolvent.[368] Accordingly, the plaintiff argued that the defendant distributor should be held strictly liable for the plaintiff's injuries under section 613.18(1)(a).[369]

The court's analysis of the statute, however, held that the rules of statutory construction required a different result.[370] Subsection (1)(a) provided that a nonmanufacturer was immune from suit for an alleged defect under a theory of strict liability or breach of implied warranty of merchantability.[371] The plaintiff pressed the argument that the court had to read on to subsection 1(b), which stripped the immunity in cases such as the present one, where the manufacturer was insolvent.[372] But according to the court, the analysis needed to go no farther

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> the jurisdiction of the courts of this state and has not been judicially declared insolvent.
>
> 3. An action brought pursuant to this section, where the claimant certifies that the manufacturer of the product is not yet identifiable, tolls the statute of limitations against such manufacturer until such time as discovery in the case has identified the manufacturer.

Id.

364. *Id.* § 613.18(1)(b).
365. *See id.*
366. *See id.*
367. Bingham v. Marshall & Huschart Mach. Co., 485 N.W.2d 78 (Iowa 1992).
368. *Id.* at 79.
369. *Id.*
370. *Id.*
371. *See id.* at 80 (stating that Iowa Code § 613.18(1)(a) (2001) "provides for immunity from suit when the potential claim arises solely from defects in the original design of manufacture of the product").
372. *Id.*

than subsection 1(a).[373] It provided immunity to nonmanufacturer sellers *without regard* to the manufacturer's susceptibility to process in Iowa or its solvency. What explanation did the court provide for subsection 1(b)? The court looked at the language of subsection 1(a), and noted that the immunity attached when the plaintiff's claim "arises solely from an defects in the original design or manufacture of the product."[374] This meant that subsection 1(b) would "include suits under strict liability for failure to warn about the dangers of the product."[375]

In reaching this conclusion, the court acknowledged that section 613.18 was "not a model of clarity."[376] But, it is difficult to imagine that the legislature intended to distinguish between manufacturing and design defects on the one hand, and warning defects on the other. Subsection 1(b) is silent on warning defects, or any type of defect.[377] It strains credulity to think that the generic product defects—design and warning—would be split up and manufacturing defects lumped in with design. It is far more likely that the legislature inadvertently listed in subsection (a) only two of the three types of defects,[378] without the omission of warning defects having any intended legal consequence. The effect at the time of the court's decision was that a nonmanufacturer seller could be subject to strict liability when the manufacturer was insolvent *if* the plaintiff brought an action based on a warning defect.[379] But a case against that party premised on a manufacturing or design defect was to be analyzed with negligence principles.[380] While the court derided section 613.18 as "not a model of clarity,"[381] the court's analysis cleared up very little. The *Bingham* decision is premised on a tortured statutory construction that seems inconsistent with legislative intent.

The court's construction of section 613.18 in *Bingham* became completely untenable two years later in *Olson v. Prosoco, Inc.*[382] In that decision, the court held that cases alleging a product was defective for failing to have an adequate warning were to be analyzed with negligence principles, and not strict liability.[383]

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373. *Id.*
374. *Id.*
375. *Id.*
376. *Id.*
377. *See* IOWA CODE § 613.18(1)(b) (2003).
378. *See id.* § 6318.18(1)(a).
379. *See* Bingham v. Marshall & Huschart Mach. Co., 485 N.W.2d at 80 (noting that subsection 1(b) "include[s] suits under strict liability for failure to warn about the dangers of the product").
380. *See supra* text accompanying notes 378-79.
381. Bingham v. Marshall & Huschart Mach. Co., 485 N.W.2d at 80.
382. Olson v. Prosoco, Inc., 522 N.W.2d 284 (Iowa 1994).
383. *Id.* at 289. The court noted:

> Maintaining the distinction to justify submission of failure to warn claims under both strict liability and negligence theories is a vain effort. . . . We believe that the

The court recognized that trying to impose "strict liability" in a warning case by maintaining that the focus of analysis was on the condition of the product and not the manufacturer's conduct, was a futile gesture.[384] Similarly, the court declined the suggestion to adopt strict liability by imputing knowledge available at the time of trial to the defendant as of the time of manufacture.[385] This holding is correct, and was a precursor to the *Wright* decision where the court reached the same conclusion for design defects, and acknowledged that strict liability had been a myth there as well.[386]

But the *Olson* decision made *Bingham*'s analysis incoherent. With warning cases now being analyzed according to negligence principles, there was nothing left for subsection (1)(b) of section 613.18 to apply to. It became legislative surplusage. Again, one can fairly question whether the court's reasoning in *Bingham* did the legislative intent of that statute justice. In any event, after *Olson*, nonmanufacturer sellers could not be held to a strict liability standard in any situation, nor for any defect. The manufacturer's insolvency was irrelevant, as was the inability of the plaintiff to bring the manufacturer before an Iowa court.

The decision in *Wright* may have made the design defect analysis consistent with that of its generic defect partner, but it also implicated section 613.18. In *Wright*, the court adopted sections 1 and 2 of the *Restatement Third*.[387] Section 1 provides: "One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is

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> correct submission of instructions regarding a failure to warn claim for damages is under a theory of negligence and the claim should not be submitted as a theory of strict liability.

Id.

384. *Id.* The court also went on to provide:

> We also find the product/conduct distinction made by several jurisdictions to justify maintaining a strict liability/failure to warn theory of little practical significance . . . . According to courts taking stock in this distinction, under a strict liability theory the focus is on the unreasonably dangerous condition of the product . . . . In contrast, these courts hold the question in negligence cases is whether the defendant's conduct breached a duty to exercise reasonable care . . . . In practice, the courts basing the application of a strict liability theory on this distinction cannot help but slip back into the type of analyses virtually identical to those employed in negligence cases.

Id.

385. *See id.* at 288-89 ("To prove strict liability in failing to warn, plaintiffs must prove that defendant did not adequately warn of risk 'known or knowable in light of the generally recognized and prevailing best scientific knowledge at the time of manufacture and distribution.'") (quoting Anderson v. Owens-Corning Fiberglass Corp., 810 P.2d 549, 558 (Cal. 1991)).

386. *See* Wright v. Brooke Group Ltd., 652 N.W.2d 159 (Iowa 2002).

387. *Id.* at 169.

subject to liability for harm to persons or property caused by the defect."[388] The court's decision made no mention of what effect the adoption of section 1 would have on section 613.18.[389] However, an examination of the comments to section 1 of the *Restatement Third* demonstrates that it would be difficult to square those comments with that statute.[390]

Comment e to section 1 specifically addresses the liability of nonmanufacturing sellers.[391] The comment extends the liability for defective products to:

> all commercial sellers and distributors of products, including nonmanufacturing sellers and distributors such as wholesalers and retailers, are subject to liability for selling products that are defective. Liability attaches even when such nonmanufacturing sellers or distributors do not themselves render the products defective and regardless of whether they are in a position to prevent defects from occurring.[392]

Applying this comment, a retailer would be liable for selling a defective product even if the retailer had nothing to do with making the product defective, and even when it had no opportunity to make the product safe.

Comment e also takes note of the statutes that immunize, to some extent, nonmanufacturer sellers from strict liability.[393] The statutes referred to by Comment e conjure up section 613.18.

> To assure plaintiffs access to a responsible and solvent product seller or distributor, the statutes generally provide that the nonmanufacturing seller or distributor is immunized from strict liability only if: (1) the manufacturer is subject to the jurisdiction of the court of plaintiff's domicile; and (2) the manufacturer is not, nor is likely to become, insolvent.[394]

In fact, the Reporters' Note to this assertion cites section 613.18 as representative of this approach.[395] The *Bingham* case is not cited, however.[396] Perhaps the Reporters could not contemplate that a state would construe a statute such as the court did in *Bingham*. In any event, the court's adoption in *Wright* of sections 1

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388. RESTATEMENT THIRD § 1.
389. *See* Wright v. Brooke Group Ltd., 652 N.W.2d at 159.
390. *Compare* RESTATEMENT THIRD § 1 cmt. e, *with* IOWA CODE § 613.18 (2001).
391. *See* RESTATEMENT THIRD § 1 cmt. e.
392. *Id.*
393. *See id.*
394. *Id.*
395. RESTATEMENT THIRD § 1, reporters' note to cmt. e.
396. *See id.*

and 2 of the *Restatement Third* creates a collision with their construction of the statute in *Bingham*.

The intent of section 613.18 was to preclude strict liability from applying against nonmanufacturer sellers, with the exception of cases of manufacturer insolvency, or its non-amenability to the court's jurisdiction.[397] With the adoption of sections 1 and 2 in *Wright*, however, the relevance of the statute becomes uncertain. For manufacturing, warning, and design defects, strict liability, in name, does not apply to *any* party. As noted, the provisions of section 2 eschew the doctrinal labels of strict liability, negligence, or implied warranty of merchantability, or any other label, in favor of the functional tests set forth.[398] Thus, the immunity from strict liability claims conferred on nonmanufacturer sellers by section 613.18 is inapposite.

According to section 1 of the *Restatement Third*, nonmanufacturer sellers would be subject to the rules of liability prescribed in section 2(b) and (c).[399] These provisions impose liability on manufacturer sellers if the product is defective under the provisions of section 2, even if they "do not themselves render the product defective and regardless of whether they are in a position to prevent defects from occurring."[400] In one sense, this is another way of holding retailers strictly liable, although the bases of liability against the manufacturer for design and warning defects sound in negligence. A retailer, for example, would be liable under section 2(b) if the product were defectively designed by the manufacturer, even if the retailer simply passed the product along for sale without inspection and did not participate in any aspect of the design process. Would the court conclude this was a form of strict liability and construe section 613.18 as precluding such a result, or does the language of strict liability in that statute make the provision anachronistic?

It also remains to be seen what the role of section 613.18 will be in relation to manufacturing defects. Although section 2 of the *Restatement Third* does not use the term strict liability to measure liability, the provision imposes liability for 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."[401] Imposing liability on the retailer in such a case is, in every way but name, strict liability.

The Iowa Supreme Court, at some point, will need to consider the implications of its adoption of section 1 of the *Restatement Third*. Whether the court will construe section 613.18 in such a way that it accommodates the

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397. *See* IOWA CODE § 613.18 (2003).
398. *See* text accompanying notes 207-08.
399. RESTATEMENT THIRD § 1.
400. *Id.* § 1 cmt. e.
401. *Id.* § 2(a).

terminology of the *Restatement Third* is uncertain. But at least that statutory construction will provide the court an opportunity to revisit *Bingham* and correct the rather unfortunate analysis supplied by that decision.

VII. WHAT DOES THE ADOPTION OF THE *RESTATEMENT THIRD* MEAN FOR THE FUTURE OF PRODUCTS LIABILITY IN IOWA?

The progress from the *Restatement Second* to the *Restatement Third* in Iowa has been deliberate and studied. It is a mistake to assume that the adoption of the *Restatement Third* will work to the disadvantage of plaintiffs in products liability cases. Discarding the rhetoric of strict liability in design defect cases was a necessary step toward a clearer, fairer, and more functional set of liability rules. The *Restatement Second* and the confusion generated by attempts to apply section 402A to design defect cases served to create the "mess" of past products liability doctrine. Clinging to a standard because it engendered confusion is not a position for any principled student of the law. Moreover, it is questionable whether the rhetoric of strict liability ever benefited plaintiffs in products cases.[402]

An obsessive focus on the lost strict liability doctrine and the RAD issue may also imprudently minimize the effects of other measures. In products liability settings, statutes of repose, such as the fifteen-year statute of repose under Iowa law,[403] can extinguish causes of action before they even accrue. The effects of such laws are more pernicious and deadly than the RAD requirement. Correspondingly, plaintiffs in Iowa need to take full advantage of the Iowa Supreme Court's rejection of *Daubert*, and the court's commitment to rules of evidence that emphasize liberal admissibility.[404] Along similar procedural lines, plaintiffs should seek jury instructions that charge the manufacturer with the knowledge and skill of an expert in the particular field of its product.[405]

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402. *See* Richard L. Cupp, Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. 874, 900 (2002) (presenting an empirical study of how negligence versus strict liability language influences mock jurors, and showing support for the conclusion that negligence language may favor plaintiffs more than strict liability language). Negligence language drew on "hot" notions of fairness and fault, while strict liability had a "cold" technical feel. *See id.* In the study, jurors were more likely to find in favor of the plaintiff when negligence language was used, and on average, the damage awards under negligence were almost twice the amount for strict liability awards. *See id.*

403. Under Iowa law, no products liability claim can be commenced more than fifteen years after the first purchase of a product, unless it is warranted for a longer period of time, or there is fraudulent concealment by the manufacturer. IOWA CODE § 614.1(2A)(a) (2003). The time limit does not "apply to the time period in which to discover a disease that is latent and caused by exposure to a harmful material." *Id.* § 614.1(2A)(b).

404. *See supra* notes 236-76 and accompanying text.

405. *See* Miller, *supra* note 16, at 485-87.

The *Wright* decision did not completely resolve the doctrinal mess that has characterized products liability doctrine for the last forty years. Many questions remain. But the decision was another important step in the effort to bring needed clarity to this vexing area of tort law.


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