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The Restatement Third, Torts: Products Liability: Progress or a Radical Departure for West Virginia

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THE RESTATEMENT THIRD, TORTS: PRODUCTS LIABILITY: PROGRESS OR A RADICAL DEPARTURE FOR WEST VIRGINIA?

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I. INTRODUCTION

Throughout its history of decisions concerning product liability, West

Virginia has consistently been a forward-looking jurisdiction, chiefly concerned with best protecting its residential consumers. Accordingly, the West Virginia Supreme Court of Appeals has rendered a number of product liability decisions premised on two underlying concerns. First, the court has consistently adopted rules and policies liberal to a plaintiff's recovery.¹ Second, the court recognizes that product liability is a tort concept and must be developed within the guidelines of tort terminology.² Therefore, West Virginia will consistently adopt rules most favorable to a plaintiff's recovery provided that these rules are consistent with the governing principles of tort law.

Even at the earliest stages of development of product liability law in West Virginia, the courts have taken a liberal stance. Accordingly, in *Morningstar v. Black & Decker Mfg. Co.*, Justice Miller stated that "it is apparent that while we have not been in the vanguard of the movement, neither have we languished in the rear."³ Indeed, from its earliest decisions in the area of product liability the court has held that privity of contract was never a bar to tort recovery against a manufacturer in West Virginia.⁴ In *Webb v. Brown & Williamson Tobacco Co.*, West Virginia became one of the earliest jurisdictions to allow the doctrine of *res ipsa loquitur* to establish negligence against a manufacturer.⁵ *Webb* effectively "permitted proof of the defect along with its being the proximate cause of the injury as a sufficient factual basis for recovery."⁶ In fact, *res ipsa loquitur* performs a function similar to strict liability by "allowing deserving plaintiffs to succeed notwithstanding what would otherwise be difficult or insuperable problems of proof."⁷

¹ See generally *Blankenship v. General Motors Corp.*, 406 S.E.2d 781 (W. Va. 1991); *King v. Kayak Mfg. Corp.*, 387 S.E.2d 511 (W. Va. 1989); *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603 (W. Va. 1983); *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W. Va. 1982); *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666 (W. Va. 1979).

² See generally *Morningstar*, 253 S.E.2d at 682 (holding that what constitutes a defective product must be analyzed in traditional tort terminology). See also *Star Furniture Co.*, 297 S.E.2d at 859 (unwilling to extend strict liability to mere loss in value cases holding that reduction in value merely because of a product flaw is outside the scope of tort law).

³ *Morningstar*, 253 S.E.2d at 680.

⁴ See *Peters v. Johnson, Jackson & Co.*, 41 S.E. 190 (W. Va. 1902) (effectively discounting the privity rule of *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842) and anticipating by some fourteen years the seminal decision to abolish privity of contract found in *MacPherson v. Buick Motor Co.*, 111 N. E. 1050 (N.Y. 1916)).

⁵ See *Webb v. Brown & Williamson Tobacco Co.*, 2 S.E.2d 898 (W. Va. 1939); see also *Ferrell v. Royal Crown Bottling Co.*, 109 S.E.2d 489 (W. Va. 1959) (using *res ipsa loquitur* to hold a manufacturer-bottler liable in tort for injuries to a store patron resulting from the explosion of a soft drink bottle).

⁶ *Morningstar*, 253 S.E.2d at 680.

⁷ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2, comment *a* at 15 (1997).

Although the principles and decisions on product liability in West Virginia have existed for decades, West Virginia might soon be faced with a decision that could radically alter the existing law on product liability. On May 20, 1997, the American Law Institute (ALI) officially adopted the new *Restatement Third, Torts: Products Liability*. This *Restatement* is an attempt to revise Section 402A of the ALI's *Restatement of Torts, 2d*, a cornerstone in the field of product liability law for the last three decades. With the ALI's adoption of this new *Restatement*, courts in West Virginia will, no doubt, soon be asked to recognize and adopt this *Restatement* as the governing principle on product liability. However, the West Virginia courts should refrain from adopting this *Restatement* because it is contrary to the established precedent and policy of this state.

The new *Restatement of Products Liability* contains a number of changes to the existing law on product liability. The new *Restatement* abolishes Section 402A for all design defect cases; abolishes the consumer expectation test as a standard of defectiveness, except in food product cases; abolishes negligence and implied warranty as a separate basis for recovery and allows only one claim to go to the jury; requires proof of a reasonable alternative design in most design defect cases; and creates a negligence test for product warning cases.⁸

The *Restatement* presents at least two gross departures from established precedent in West Virginia. First, the *Restatement* generally provides that sellers and distributors of defective products are subject to liability only for harm caused by product "defects," thus, effectively abolishing causes of action against sellers and distributors based in negligence and warranty.⁹ Under the new *Restatement*, there would be only one form of product liability action. Regardless of whether it is labeled strict liability, warranty, or negligence, only one claim could go to the jury.

The second and more radical departure from West Virginia's current laws on product liability is found in Section 2(b) of the new *Restatement*. This section provides the absolute requirement that before an injured party can recover from a manufacturer or seller of a defectively designed product that has caused the injury, the plaintiff must prove that the product could have been designed in some manner that would have avoided the injury.¹⁰ Thus, this section requires a consumer to prove a reasonable alternative design (RAD) in all design defect cases, regardless of how dangerous a product might be, before the product's manufacturer can be held liable.¹¹

This comments addresses the new *Restatement's* departures from current West Virginia product liability law. The new *Restatement's* view goes against the

⁸ See generally RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1997).

⁹ *Id.* at § 1.

¹⁰ See *id.* at § 2(b).

¹¹ See *id.*

West Virginia courts' policy of adopting liberal rules for a plaintiff's recovery in product liability.¹² Since the new *Restatement* departs from established policy and precedent in West Virginia, the West Virginia courts should refrain from adopting the new *Restatement's* view on product liability.

II. THE RESTATEMENT'S ABOLITION OF SEPARATE BASES FOR RECOVERY

Section 1 of the new *Restatement* effectively abolishes the right of a plaintiff to present multiple theories of recovery to a jury.¹³ Because of the Reporter's insistence on liability only for product defects, causes of action premised on negligence and implied warranty theories are basically eliminated. Therefore, only one claim can go to a jury. The rationale for this limitation is that the claims, whether premised on a theory of negligence, implied warranty, and/or strict liability, are factually identical. However, this view does not consider the "conceptual differences between such claims. [For instance], negligence claims focus on the conduct of the defendant; implied warranty claims on the fitness of the product; and strict liability claims on the safety of the design."¹⁴

Section 1 of the new *Restatement* represents a significant departure from the law in West Virginia. West Virginia allows a product liability action to be brought under three independent theories -- strict liability, negligence, and warranty — and permits a jury instruction on each of these causes of action supported by evidence.¹⁵ In *State v. Hall*, the West Virginia Supreme Court of Appeals first entitled a plaintiff to a jury instruction on each cause of action brought that was supported by sufficient evidence.¹⁶ In *Ilosky v. Michelin Tire Corp.*, the court extended this policy to the realm of product liability just four years after *Morningstar* was decided.¹⁷

Ilosky involved an action brought against a tire distributor for injuries sustained by the plaintiff in an automobile accident.¹⁸ The appellee alleged multiple

¹² See *supra* note 1.

¹³ Section 1 of the *Restatement Third, Torts: Products Liability* provides the following "[o]ne 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 product defect." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1997).

¹⁴ Larry S. Stewart, *A New Frontier: Design Defect Cases and the New Restatement*, TRIAL, Products Liability, 21-26 (Nov. 1988).

¹⁵ See *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603, 613 (W. Va. 1983).

¹⁶ See *State v. Hall*, 298 S.E.2d 246, 255 (W. Va. 1982).

¹⁷ See *Ilosky*, 307 S.E.2d at 613.

¹⁸ See *id.* at 607.

theories of recovery including strict liability and negligence on the part of the tire distributor.¹⁹ The appellant argued that the trial court erred by not granting its motion to force the appellee to choose only one theory for the jury to consider.²⁰ In upholding the trial court's denial of the appellant's motion, the Supreme Court of Appeals held that

[e]ach theory contains different elements which plaintiffs must prove . . . to recover. No rational reason exists to require plaintiffs in product liability actions to elect which theory to submit to the jury after the evidence has been presented when they may elect to bring suit on one or all of the theories. . . . To permit plaintiffs to plead alternative causes of action, but to force them to choose one theory to submit to the jury after the taking of evidence would force some plaintiffs to forego the strict liability cause of action if they believed they had stronger negligence or warranty cases. We decline to adopt this view of the law.²¹

Thus, although no "rational reason" exists for plaintiffs to elect one theory to submit to a jury, the *Restatement* asks plaintiffs to do just that, effectively ignoring the formidable bodies of jurisprudence on negligence and warranty law. Therefore, Section 1 of the new *Restatement* represents a significant deviation from the current law in West Virginia. However, this departure from West Virginia law is not the grossest departure.

The new *Restatement's* biggest and most significant deviation from current product liability law in West Virginia is the reasonable alternative design requirement (RAD), necessary to prove a product defect and recover under a product liability cause of action. Before delving into the RAD requirement, it is first necessary to lay out the history and principles of the doctrine of strict liability as they exist in West Virginia.

III. WEST VIRGINIA'S LAW OF STRICT LIABILITY IN TORT

A. *The Underlying Policies Behind West Virginia's Rule of Strict Liability*

The overwhelming and primary reason for adopting strict liability both nationally and in West Virginia was to relieve the consumer from the burden of

¹⁹ See *id.*

²⁰ See *id.* at 608.

²¹ *Id.* at 613.

proving negligence.²² To recover under the current West Virginia theory of strict liability, a plaintiff need only show that the product was defective and that the defect was the proximate cause of the plaintiff's injury.²³ The basic premise behind West Virginia's strict liability law is "to insure that the costs of injuries resulting from defective products are borne by the manufacturer that put such products on the market rather than by the injured persons who are powerless to protect themselves."²⁴ This rationale is based on a risk distribution theory, recognized in West Virginia as the idea that "manufacturers may spread the cost of compensating such injuries to society by including the cost of insurance or judgments as part of a product's price tag."²⁵ Therefore, the key component under the doctrine of strict liability is to "remove the burden from the plaintiff of establishing in what manner the manufacturer was negligent in making the product."²⁶ An additional reason for strict liability is that it enables a plaintiff to avoid some of the defenses to warranty actions.²⁷

B. Morningstar and the Origins of the Strict Liability Doctrine in West Virginia

The West Virginia rule of strict liability was first pronounced by the court in *Morningstar v. Black & Decker Mfg. Co.* In *Morningstar*, the court adopted West Virginia's current rule on strict liability holding that "[a] manufacturer is strictly liable in tort when an article he [or she] places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."²⁸ In adopting this rule, West Virginia chose to follow the decision and standard first enunciated by the Supreme Court of California in *Greenman v. Yuba Power Products, Inc.*²⁹ In so doing, West Virginia explicitly declined to adopt the Section 402A of the *Restatement of Torts*, 2d position on

²² See *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 682 (W. Va. 1979).

²³ See *id.* at 680.

²⁴ *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854, 856 (W. Va. 1982)(quoting *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 901 (Cal. 1963)).

²⁵ *Star Furniture*, 297 S.E.2d at 856.

²⁶ *Morningstar*, 253 S.E.2d at 680.

²⁷ See *Star Furniture*, 297 S.E.2d at 857. These defenses include notice of breach of warranty, disclaimers of liability, and privity. See *id.*

²⁸ *Morningstar*, 253 S.E.2d at 677 (quoting *Greenman*, 377 P.2d at 900).

²⁹ See *Greenman*, 377 P.2d at 900.

strict liability.³⁰ The *Restatement of Torts, 2d* contained a requirement that a defective product must be "unreasonably dangerous" to recover under strict liability.³¹ The *Greenman* Court rejected this requirement because it injected "a concept of foreseeability into the tort product liability law which is inappropriate, since the manufacturer's liability is not based on negligence and the issue of foreseeability is a part of negligence law."³² Accordingly, feeling that the *Greenman* rule was more appropriate to alleviate consumers of the burden of proving negligence, the West Virginia Supreme Court of Appeals, in *Morningstar*, chose to adopt it as the strict liability standard in West Virginia.³³

The *Morningstar* Court recognized that products liability cases require a case-by-case analysis.³⁴ Nevertheless, the court provided a general outline to be followed with regard to strict liability analysis.³⁵ The court said, "the cause of action rests in tort, and . . . the initial inquiry, in order to fix liability on the manufacturer, focuses on the nature of the defect and whether the defect was the proximate cause of [the] plaintiff's injury."³⁶ To this end, West Virginia recognizes three broad, non-mutually exclusive categories of defective products.³⁷ These include design defectiveness and structural defectiveness, both of which involve the "physical condition of the product which renders it unsafe when . . . used in a reasonably intended manner."³⁸ The third category involves defectiveness arising out of a lack of, or the inadequacy of, warnings, instructions, and labels.³⁹ This category is often referred to as "failure to warn."⁴⁰

C. Further Developments on Strict Liability in West Virginia Following

³⁰ "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property . . ." RESTATEMENT (SECOND) OF TORTS § 402A (1965).

³¹ *Id.*

³² *Morningstar*, 253 S.E.2d at 680.

³³ *See id.*

³⁴ *See id.* at 682.

³⁵ *See id.*

³⁶ *Id.*

³⁷ *See Morningstar*, 253 S.E.2d at 682.

³⁸ *Id.*

³⁹ *See id.* at 680.

⁴⁰ *Johnson by Johnson v. General Motors Corp.*, 438 S.E.2d 28, 36 (W. Va. 1993).

Morningstar

Although there have not been a great number of decisions in West Virginia on product liability since *Morningstar*, the West Virginia Supreme Court of Appeals continues to render decisions and adopt doctrines favorable to a plaintiff's recovery, so long as these principles are developed in the context of tort principles. Thus, West Virginia recognizes strict liability to recover for property damage,⁴¹ circumstantial evidence to prove a "defect,"⁴² and a second collision theory of recovery for automobile accidents.⁴³

1. Strict Liability to Recover for Property Damage

Some three years after *Morningstar*, the West Virginia Supreme Court of Appeals decided *Star Furniture Co. v. Pulaski Furniture Co.* and allowed strict liability to be used to recover for property damage to defective products in the absence of personal injury, provided that the damage resulted from a "sudden calamitous" event.⁴⁴ By declining to follow the extreme liberal position (imposing product liability on a manufacturer for *any* damage to a product), as well as the extreme conservative position (rejecting any product liability for damage to the product itself), the court has taken an intermediate position concerning strict liability recovery for property damage.⁴⁵ The *Star Furniture* Court declined to adopt the extreme liberal position because, in those instances where a defect in a product creates a mere reduction in the value of the product, as opposed to significant physical harm to the product, the court recognized that the proper remedy lies with contract law.⁴⁶ Thus, recognizing the general boundaries of tort and contract theory, West Virginia permits recovery under a strict liability cause of action for property damage to products resulting from a sudden calamitous event.⁴⁷ Damages that result because of a "bad bargain" fall outside the scope of strict liability.⁴⁸

⁴¹ See *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854, 857 (W. Va. 1982).

⁴² *Anderson v. Chrysler Corp.*, 403 S.E.2d 189, 193 (W. Va. 1991).

⁴³ See *Johnson by Johnson*, 438 S.E.2d at 33.

⁴⁴ *Star Furniture*, 297 S.E.2d at 859.

⁴⁵ See *id.* at 858-59.

⁴⁶ See *id.* at 859.

⁴⁷ See *id.* "Tort law traditionally has been concerned with compensating for physical injury to person or property. Contract law has been concerned with the promises parties place upon themselves by mutual obligation." *Id.*

⁴⁸ *Id.* In *Capitol Fuels, Inc. v. Clark Equipment Co.*, 382 S.E.2d 311 (W. Va. 1989) the Supreme Court of Appeals stated

2. Circumstantial Evidence to Prove a Defect

Another doctrine of strict liability that is favorable to plaintiffs concerns the use of circumstantial evidence. In West Virginia, the courts let plaintiffs present circumstantial evidence to make a strict liability case.⁴⁹ In *Anderson v. Chrysler Corp.*, where a buyer's strict liability action was granted against an auto manufacturer to recover for loss sustained when an automobile caught fire, the court held that direct evidence was not necessary to make out a *prima facie* case.⁵⁰ Instead the court permitted

circumstantial evidence [to be used] to make out a *prima facie* case in a strict liability action, even though the precise nature of the defect cannot be identified, so long as the evidence shows that a malfunction in the product occurred that would not ordinarily happen in the absence of a defect.⁵¹

By allowing a plaintiff to establish a *prima facie* case of strict liability with circumstantial evidence, the West Virginia Supreme Court of Appeals adopted another rule that is beneficial for a plaintiff's recovery.

3. The Crashworthiness Doctrine

Finally, the adoption of the crashworthiness doctrine represents a paradigm to the idea that West Virginia adopts policies liberal to a plaintiff's recovery. First recognized in West Virginia in *Blankenship v. General Motors Corp.*⁵², the crashworthiness doctrine is complex and involves two collisions.⁵³ In adopting the

under the "bad bargain" concept, the fact that the product may be flawed or defective, such that it does not meet the purchaser's expectations or is even unusable because of the defect, does not mean that he may recover the value of the product under a strict liability in tort theory.

Id. at 313.

⁴⁹ See *Anderson v. Chrysler Corp.*, 403 S.E.2d 189, 193 (W. Va. 1991).

⁵⁰ See *id.*

⁵¹ *Id.* at 194.

⁵² 406 S.E.2d 781 (W. Va. 1991).

⁵³ The concept of the crashworthiness doctrine is as follows:

In the first phase of the accident, the plaintiff's automobile collides with another automobile or with a stationary object. Most of the property damage results from the first collision, but the occupants of the vehicle usually sustain little or no injury at this stage. Personal injuries occur most frequently in the second collision, in which the occupants are thrown against or collide with some part of their automobile. A manufacturer is liable for the plaintiff's loss in the second collision only if the defective

crashworthiness doctrine, the *Blankenship* Court chose to follow the more liberal rule that a plaintiff need show only that a defect was a factor in causing some aspect of the plaintiff's harm.⁵⁴ "Once a plaintiff has made . . . [a] *prima facie* showing, the manufacturer can then limit its liability if it can show that the plaintiff's injuries are capable of apportionment between the first and second collisions."⁵⁵ This rule places the burden of allocating the injuries on the manufacturer.⁵⁶

In contrast, the more conservative standard requires the plaintiff to "prove that the product defect was the cause of a particular enhanced or aggravated injury that [the] plaintiff suffered."⁵⁷ Under this standard, first, a plaintiff must offer proof of an alternative safer product design to establish that the product in question was defective.⁵⁸ Second, the plaintiff must prove what injuries would have resulted had the alternative design been used.⁵⁹ Third, and finally, the plaintiff must offer a method of establishing the extent of enhanced injuries attributable to the defective design.⁶⁰

The West Virginia Supreme Court of Appeals flatly rejected the conservative standard in *Blankenship* stating that "West Virginians are not going to pay product liability insurance premiums so that all the residents of the 10th Circuit, where *Fox v. Ford Motor Co.* was decided, can collect the benefits."⁶¹ Recognizing that West Virginians are already paying the costs of insurance and judgments each time they purchase a General Motors automobile, the court went on to hold that "in any crashworthiness case where there is a split of authority on any issue, . . . we adopt the rule that is most liberal to the plaintiff."⁶²

design of the automobile caused or exacerbated the injury.

Note, *Apportionment of Damages in the "Second Collision" Case*, 63 VA. L. REV. 475, 476 (1977).

⁵⁴ See *Blankenship*, 406 S.E.2d at 786.

⁵⁵ *Id.*

⁵⁶ See *id.*

⁵⁷ *Id.* at 785; see also *Huddell v. Levin*, 537 F.2d 726, 737-38 (3d Cir. 1976).

⁵⁸ See *Huddell*, 537 S.E.2d at 737.

⁵⁹ See *id.*

⁶⁰ See *id.* at 738.

⁶¹ *Blankenship*, 406 S.E.2d at 786.

⁶² *Id.* Indeed, Justice Neely rationalized this decision by saying that "for a tiny state incapable of controlling the direction of the national law in terms of appropriate trade-offs among employment, research, development, and compensation for the injured users of products, the adoption of rules liberal to plaintiffs is simple self-defense." *Id.*

Based on the court's adoption of strict liability doctrines, West Virginia follows concepts and policies that best aid the plaintiff in bringing a cause of action premised on strict liability, so long as these policies are within the realm of tort principle. The new *Restatement* is at odds with this policy because of the substantial hurdles the RAD requirement presents to the consumer/plaintiff.

IV. THE NEW RESTATEMENT OF PRODUCTS LIABILITY AND ITS DEVIATIONS FROM WEST VIRGINIA'S STANDARDS ON STRICT LIABILITY

A. *Section 2 of the Restatement of Products Liability*

The most significant proposed change in the law of products liability involves Section 2 of the *Restatement*.⁶³ This section establishes the standards for manufacturing defects, design defects, and inadequate warnings—the traditional defect categories present in West Virginia.⁶⁴ Section 2(a) of the *Restatement* concerning manufacturing defects retains strict liability for these types of defects.⁶⁵ Thus, if the product departs from its intended design and causes harm, the manufacturer is liable even though all possible care was exercised in the preparation and marketing of the product. This is consistent with West Virginia law. However, Section 2(b) of the new *Restatement* is truly at odds with West Virginia law.

B. *Section 2(b) of the New Restatement and its Conflicts with West Virginia Law*

Section 2(b) of the new *Restatement* represents the most extreme change to the law on products liability and the greatest potential obstacle to a consumer's right to recovery for injuries from a defectively designed product. Section 2(b) defines design defect as existing when the risk of reasonable harm posed by the product might have been reduced or avoided by employing a "reasonable alternative design (RAD)," and the failure to utilize that design makes the product not reasonably safe.⁶⁶ Under the new *Restatement* position, for a plaintiff to

⁶³ Specifically the Section 2(b) requirement that to prove liability for a design defect, one must show that there existed a reasonable alternative design (RAD) to the manufacturer's design that is claimed to have caused the injury. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1997).

⁶⁴ West Virginia categorizes these defects as structural defectiveness, design defectiveness, and use defectiveness respectively. See *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 682 (W. Va. 1979).

⁶⁵ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(a) (1997).

⁶⁶ *Id.* at § 2(b).

successfully litigate an action under strict liability, that plaintiff must prove that a technologically feasible and practical RAD existed at the time of the manufacture of the product and that the defendant failed to employ it.⁶⁷ This RAD requirement is at odds with West Virginia's law on product liability in several respects. First, the Reporter's insist on the use of a risk-utility standard to measure design defects. This is not the standard set forth by the West Virginia Supreme Court of Appeals. The RAD requirement also seriously conflicts with *Daubert* as interpreted in West Virginia. Finally, overshadowing these other deviations, the RAD requirement presents significant hurdles to a plaintiff's recovery – effectively discouraging a plaintiff from bringing a product liability cause of action.

1. Hurdles Involved with the RAD Requirement

Assuming, for the sake of argument, that the RAD requirement is a product liability standard in a majority of American courts (as claimed by the Reporters)⁶⁸, it still creates a major barrier to the ability of consumers injured by defective products to recover from the manufacturers and sellers of products. As Professor Vandall points out, “the reasonable alternative design provision . . . contravenes the foundational policies of products liability law . . . in many important respects.”⁶⁹ The RAD requirement places the burden of knowledge on the plaintiff and ignores the fact that many of today's products are complex and beyond the understanding of the average consumer.⁷⁰ By increasing the expense of bringing suit, the RAD requirement also seriously impacts the economics of consumer litigation because the loss is shifted more toward the consumer.⁷¹ This runs contrary to the idea that the loss should fall with the manufacturer because the manufacturer can build a safer product or obtain insurance.⁷² Additionally, shifting loss to the consumer

⁶⁷ See *id.*

⁶⁸ It is worth noting that this is a rather large assumption. Indeed the representative character of this *Restatement* has been criticized by a number of scholars. See Frank J. Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 TENN. L. REV. 1407, 1409 (1994) (concluding that “the majority of jurisdictions do not make reasonable alternative design an element of the plaintiff's prima facie case”); John 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, 536 (1996) (summarizing results and reviewing the law of design defect, state by state, in categories of case law, statutes and pattern jury instructions).

⁶⁹ Vandall, *supra* note 68, at 1423.

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See *id.*

assumes that the consumer is as well insured as the seller, which is rarely true.⁷³ Another problem with the RAD requirement is that it violates the basic premise behind strict liability, namely to allow a plaintiff to avoid the higher hurdle of proving negligence.⁷⁴ In fact, this requirement places an arguably higher hurdle on the plaintiff than does the negligence standard.⁷⁵ Moreover, the RAD requirement "violates the policy that, since a manufacturer causes a product to be purchased through skillful advertising and marketing, it should bear the losses inherent in selling a dangerous product."⁷⁶

a. The Danger Lies in the Details

The full impact of Section 2(b) can only be discerned from a reading of the Section comments. A fair reading of those comments reveals that a case based on a faulty design will not reach the jury without a "design expert" with a "redesign" of the product.⁷⁷ Furthermore, in some cases, a "design expert" might not be enough. Although the *Restatement* does not require a plaintiff to produce a prototype, a plaintiff must convince a jury that the alternative design is the better design in order to prevail at trial.⁷⁸ This involves a consideration of a number of factors stated in the *Restatement*.⁷⁹ These include the effects of the design on "production costs, product longevity, maintenance and repair, esthetics, and marketability."⁸⁰ Furthermore, the *Restatement* also requires that the design be "technologically feasible and practical,"⁸¹ a burden that is placed on the plaintiff.

⁷³ See *id.*

⁷⁴ See Vandall, *supra* note 68, at 1424.

⁷⁵ See *id.*

⁷⁶ *Id.*

⁷⁷ The reporters point out that Section 2(b) does not require a plaintiff to produce expert testimony in every case. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2, comment *f* at 23 (1997). For instance, in those cases where 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." *Id.* However, cases of this nature are rare and do not represent a typical product liability action. Thus, for all practical purposes, an expert is needed when dealing with most product liability actions. In fact the Supreme Court of Connecticut has held that "such a rule would require plaintiffs to retain an expert witness even in cases in which lay jurors can infer a design defect from circumstantial evidence." *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319, 1332 (Conn. 1997).

⁷⁸ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2(b) (1997).

⁷⁹ See *id.* at § 2, comment *f* at 23.

⁸⁰ *Id.*

⁸¹ *Id.* at 24.

Thus, the plaintiff must present evidence to prove that the proposed alternative design is better. Assuming that the plaintiff's evidence would be admissible under *Daubert*, the considerations outlined in the *Restatement* comments will no doubt be emphasized by counsel for the manufacturer as a means to disqualify an expert who has not considered all these factors. Also, these considerations can be used to defeat an otherwise qualified expert if all the facts have not been carefully studied.

RAD presents a number of problems and obstacles to consumer recovery. First, in cases involving simple products, regardless of how obviously dangerous they might be, the plaintiff must retain an expert to re-design the product.⁸² This might be economically practical if dealing with death or serious injury. However, if the injury is not so serious, the expense involved in a re-design will likely make it impossible for a reasonable recovery to be had. This same concern is present in cases dealing with highly complex products. For example, the expense involved in re-designing an aircraft could be enormous "even though common sense tells one that the design was defective if a single engine failure could make a three-engine aircraft practically uncontrollable."⁸³ Another problem with the RAD is that "if plaintiffs cannot develop a 'better' IUD, a 'better' breast implant, or 'better' asbestos, and prove the safety and marketability of the 'better' product, claims based on what are now recognized as dangerous products will be eliminated."⁸⁴ Finally, even in cases involving mass recalls of products, a plaintiff could theoretically lose because of an inability to create a "better" design.⁸⁵

b. What the RAD Requirement Means for West Virginia Consumers

As Professor Shapo points out,

the [*Restatement's*] formula not only gives away the ball game on litigation but on design itself. It places not only the business decision, but also the legal decision about product risk exclusively with the manufacturer. It simply does not allow anyone to challenge a product design on the seemingly obvious ground that the design was, in the general environment in which it was

⁸² See Bill Wagner, *Restatement of the Law III—Torts: Products Liability—Restatement or Reform*, REFERENCE MATERIALS, Vol. 2, at 1646 (ATLA Annual Convention 1995).

⁸³ *Id.*

⁸⁴ *Id.* at 1647.

⁸⁵ *Id.*

offered, too dangerous.⁸⁶

The practical effect of these types of scenarios is to discourage plaintiffs from bringing valid causes of action under the theory of product liability. This is the very result that the West Virginia Supreme Court of Appeals sought to avoid in *Ilosky v. Michelin Tire Corp.*⁸⁷ Furthermore, in *Blankenship v. General Motors Corp.*, the West Virginia Supreme Court of Appeals has already rejected one alternative design component (found in the *Huddell* crashworthiness standard).⁸⁸ The court rejected this standard because it was not the national standard. Instead, the court established a policy in adopting a standard that would be most liberal to a plaintiff's recovery in all crashworthiness cases.⁸⁹ The rationale behind this was one of "simple self-defense" to West Virginia consumers.⁹⁰

The RAD requirement is at odds with the above rationales because it is not a national standard for strict liability and adoption of the RAD requirement would seriously impair West Virginia's ability to protect its resident consumers. Although the Reporters of the new *Restatement* declare that some 28 states have adopted a RAD requirement and that it represents a majority standard, Professor Vargo's exhaustive research indicates that only three states have clearly adopted this requirement under common law.⁹¹

Furthermore, due to the substantial burdens to recovery that a plaintiff must face under the RAD requirement, it would be more difficult for a plaintiff to recover under or even bring a strict liability cause of action (even in cases where the product is clearly defective). The plaintiff, as a consumer, is still paying the costs of liability and insurance (factored into the overall price of the product) to the manufacturer each time he or she purchases a product. However, this same consumer, if RAD is adopted, may be unable to collect for injuries suffered from a defective product. As a result, West Virginians would essentially be paying product liability insurance premiums so that residents of states where proof of a RAD is not

⁸⁶ Marshall S. Shapo, *ALI Legislation as a Consumer Product: Should Courts Buy the Proposed Restatement of Products Liability?*, in POSSIBLE STATE COURT RESPONSES TO THE ALI'S PROPOSED RESTATEMENT OF PRODUCTS LIABILITY 13, 15 (Roscoe Pound Foundation ed. 1997).

⁸⁷ See *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603, 613 (W. Va. 1983) (refusing to require a plaintiff to present only one theory of recovery to a jury based on the premise that some plaintiff's would forego strict liability actions if they believed they had stronger warranty or negligence cases).

⁸⁸ See *Blankenship v. General Motors Corp.*, 406 S.E.2d 781, 786 (W. Va. 1991).

⁸⁹ See *id.*

⁹⁰ *Id.*

⁹¹ See Vargo, *supra* note 68, at 529; see also Vandall, *supra* note 68, at 1409 (stating that the Reporters statement that the reasonable alternative design requirement is supported by the majority of the jurisdictions is not accurate).

required could collect the benefits. This is the very result our court in *Blankenship* sought to avoid by adopting a liberal crashworthiness doctrine.⁹²

2. Risk-utility Analysis as the Exclusive Test to Determine “Defect”

Intertwined with the reasonable alternative design requirement is the Reporter’s insistence on a single risk-utility standard for a design defect and the de-emphasis of other tests, particularly the consumer expectation test.⁹³ Therefore, under the new *Restatement*, a RAD is to be measured by a “risk-utility” test that would include a broad range of factors including the cost of the RAD; the effects of the RAD on longevity, maintenance, repair, and aesthetics; the magnitude and probability of harm as the product was designed; the instructions and warnings accompanying the product; the nature of the consumer expectations about the product; and the overall safety of the product.⁹⁴ Again the Reporters claim that this is the dominant standard to judge the defectiveness of product designs in the majority of jurisdictions.⁹⁵

While it is true that risk-utility is the standard in many jurisdictions, it is important to distinguish between the general risk-utility test and the specific, absolute requirement of the new *Restatement’s* proof of an alternative design. The problem does not lie with the general risk-utility test. Instead, the problem lies with the Reporters’ requirement that within the risk-utility analysis, plaintiffs must prove an alternative design that would have eliminated or lessened the injury. Failure to do so subjects a plaintiff’s case to dismissal under the new *Restatement*.

Because the risk-utility model is the only one that will accommodate the RAD requirement, the *Restatement* essentially eliminates the consumer expectations test for defectiveness. The Reporters state “consumer expectations do not constitute an independent standard for judging the defectiveness of product designs.”⁹⁶ This particular view is based on the Reporters insistence on a reasonable alternative design.⁹⁷ They say the consumer expectations “concept does not take into account whether the proposed alternative design could be

⁹² See *Blankenship*, 406 S.E.2d at 786.

⁹³ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2, comment *g* at 27 (1997) (making it clear that the test [for a RAD] is a “risk utility” test, never a “consumer expectations” test). This is not true of food products where the consumer expectations test is retained to prove liability. See *id.* at comment *h* at 28.

⁹⁴ See *Wagner*, *supra* note 82, at 1646.

⁹⁵ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, comment *f* at 22 (1997).

⁹⁶ *Id.* at comment *g* at 27.

⁹⁷ See *id.*

implemented at reasonable cost, or whether an alternative design would provide greater overall product safety.”⁹⁸

As Professor Shapo points out,

[t]his is a remarkable comment, for it refuses to admit of a consumer who would, for any one of a number of reasons, expect a certain level of safety from a product that it did not turn out to provide. The consumer’s image of the product, derived from sources that include direct advertising and widespread social agreement about the capabilities of products in that general category, does not necessarily comprehend the question of what the potential alternative designs might be, or even if an alternative design exists. That image centers on the good at issue – the product that the consumer buys or chooses to encounter.⁹⁹

Moreover, at least three articles challenge the Reporters’ assertion that the risk-utility test is the standard to determine design defect in a majority of jurisdictions.¹⁰⁰ One article declares that “[m]ore than half the cases [on which the reporters rely] fail to provide anything but the most fanciful support [for their interpretation].”¹⁰¹ Another concludes that “a large majority of the cases which have addressed this issue have held that a design defect is to be determined by the consumer expectations test of section 402A.”¹⁰² Therefore, there is strong evidence that the risk-utility standard is not the dominant standard in a majority of jurisdictions.

The West Virginia Supreme Court of Appeals considered adopting the risk-utility analysis suggested by *Cepeda v. Cumberland Engineering Co., Inc.*¹⁰³ The risk-utility analysis in *Cepeda* was originally proposed by Dean Keeton and Dean Wade and consists of seven factors to weigh to determine if a product is defective.¹⁰⁴ The *Morningstar* Court recognized that the risk-utility standard has a

⁹⁸ *Id.*

⁹⁹ Shapo, *supra* note 86, at 16 (citation omitted).

¹⁰⁰ See Roland F. Banks and Margaret O’Connor, *Restating the Restatement (Second), Section 402A – Design Defect*, 72 OR. L. REV. 411 (1993); Howard F. Klemme, *Comments to the Reporters and Selected Members of the Consultative Group, Restatement of Torts (Third): Products Liability*, 61 TENN. L. REV. 1173 (1994); John Vargo, *supra* note 68.

¹⁰¹ Klemme, *supra* note 100, at 1174-75.

¹⁰² Banks & O’Connor, *supra* note 100, at 415.

¹⁰³ See *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 681 (W. Va. 1979); see also *Cepeda v. Cumberland Engineering Co., Inc.*, 386 A.2d 816, 826-27 (N.J. 1978).

¹⁰⁴ See Page Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY’S L.J. 30, 37-38

place in product liability but did not adopt it to define defect.¹⁰⁵ Instead the court recognized risk-utility as necessary to an expert witness's analysis of a product.¹⁰⁶ Thus, the court recognizes that when an expert witness goes through his or her methodology in determining if a product is defective, that expert naturally employs a balancing test, utilizing risk-utility factors, before he testifies as to a product's defectiveness.¹⁰⁷ However, according to *Morningstar*, risk-utility is not the method the courts in West Virginia use to determine whether a product is defective.¹⁰⁸

Another variant from the rigid risk-utility standard of the *Restatement* comes with the Fourth Circuit's utilization of the consumer expectation test.¹⁰⁹ The West Virginia courts have not yet used a consumer expectation test in any of its

(1973); John W. Wade, *On the Nature of Strict Liability for Products*, 44 MISS. L.J. 825, 834-35 (1973). The seven factors to consider are as follows:

The usefulness and desirability of the product, its utility to the user and to the public as a whole.

The safety aspects of the product, the likelihood that it will cause injury, and the probable seriousness of the injury.

The availability of a substitute product that would meet the same need and not be as unsafe.

The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

The user's ability to avoid danger by the exercise of care in the use of the product.

The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of the general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Cepeda, 386 A.2d at 826-27.

¹⁰⁵ See *Morningstar*, 253 S.E.2d at 682.

¹⁰⁶ The *Morningstar* Court stated that a risk/utility analysis does have a place in a tort product liability case by setting the general contours of relevant expert testimony concerning the defectiveness of the product. In a product liability case, the expert witness is ordinarily the critical witness. He serves to set the applicable manufacturing, design, labeling, and warning standards based on his experience and expertise in a given product field. Through his testimony the jury is able to evaluate the complex technical problems relating to product failure, safety devices, design alternatives, the adequacy of warnings and labels, as they relate to economic costs. In effect, the expert explains to the jury the risk/utility standards and gives the jury reasons why the product does or does not meet such standards, which are essentially standards of product safety.

Id.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.* at 683.

¹⁰⁹ See *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331 (4th Cir. 1991) (holding that a product can only be defective if it is imperfect when measured against a standard existing at the time of sale or against reasonable consumer expectations held at the time of sale in a product liability action arising out of a dirt bike accident).

product liability decisions. However, the Fourth Circuit has recognized this test as a standard by which to measure product defectiveness on an appeal from a judgment of the U.S. District Court for the Southern District of West Virginia.¹¹⁰ Therefore, based on precedent, the West Virginia Supreme Court of Appeals might employ this standard given the opportunity. Since the new *Restatement* removes this option, the *Restatement* again restricts a plaintiff's ability to bring a strict liability cause of action.

Based on the reasonable alternative design requirement and its rigid insistence on a risk-utility analysis, the new *Restatement* is significantly burdensome and somewhat restrictive to a plaintiff's product liability action. This is problematic to the current law and policy on product liability in West Virginia. However, the new *Restatement* is also problematic because evidence of a reasonable alternative design (RAD) is all but impossible to admit under *Daubert*.

3. Conflicts with *Daubert*

The RAD requirement of the new *Restatement* presents an additional problem because expert witness testimony about the scientific validity of a theoretical design might be practically impossible to admit under the *Daubert* standard for scientific evidence.¹¹¹ The West Virginia Supreme Court of Appeals first adopted the *Daubert* standard in analyzing the admissibility of expert testimony, under Rule 702 of the West Virginia Rules of Evidence, in *Wilt v. Buracker*.¹¹² Under the *Daubert* analysis,

[t]he . . . initial inquiry must consider whether the testimony is based on an assertion or inference derived from scientific methodology. Moreover, the testimony must be relevant to a fact at issue. Further assessment should then be made in regard to the expert testimony's reliability by considering its underlying scientific methodology and reasoning. This includes an assessment of (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory's actual or potential rate or error is known; and (d) whether the scientific theory is generally accepted within the

¹¹⁰ See *id.* at 337.

¹¹¹ See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

¹¹² See *Wilt v. Buracker*, 443 S.E.2d 196, 203 (W. Va. 1993) (concluding that *Daubert's* analysis of federal Rule 702 should be followed in analyzing the admissibility of expert testimony); see also *Gentry v. Magnum*, 466 S.E.2d 171 (W. Va. 1995); *Mayhorn v. Logan Medical Foundation*, 454 S.E.2d 87 (W. Va. 1994).

scientific community.¹¹³

Wilt is notably significant because, in that case, the court recognized that Rule 702 is not confined to scientific expert testimony but applies to scientific, technical, or other specialized knowledge.¹¹⁴ This very issue is currently before the United States Supreme Court in *Kumho Tire Company Ltd. v. Carmichael*.¹¹⁵ The Ten Circuit Courts that have addressed the issue are split five to five as to whether *Daubert* applies to non-scientific expert testimony.¹¹⁶ Thus, until the United States

¹¹³ *Wilt*, 443 S.E.2d at 203.

¹¹⁴ *See id.* at 203 n.11.

¹¹⁵ *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433 (11th Cir. 1997), *cert. granted sub nom. Kumho Tire Co., Ltd. v. Carmichael*, ___ U.S. ___, 118 S. Ct. 2339 (1998). The Supreme Court granted Kumho Tire's petition for a writ of certiorari to review whether the *Daubert* standard should apply to expert engineering testimony.

¹¹⁶ The Circuits that have held that *Daubert* does not apply include the following:

Tenth Circuit: In *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1519 (1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 611 (1996), the court held it was inappropriate to apply a *Daubert* analysis to the testimony of an aerospace and mechanical engineering expert. The court reasoned that the testimony was not based on any particular methodology or technique, but on general engineering principles and the expert's 22 years experience as an automotive engineer.

Fourth Circuit: *Freeman v. Case Corp.*, 118 F.3d 1011, 1016 n.6 (1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 739 (1998) (holding that a mechanical engineer's testimony about an alleged pedal defect in a lawn mower was based on his experience and training and used no particular methodology to reach his conclusions, therefore, application of *Daubert* was unwarranted).

Ninth Circuit: *McKendall v. Crown Control Corp.*, 122 F.3d 803, 806 (1997) (holding that a district court erred in applying the *Daubert* factors, which are "relevant only to testimony bearing on 'scientific knowledge,'" to a mechanical engineer's testimony).

Eleventh Circuit: *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433, 1435 (1997) (holding that *Daubert* covers only the "scientific context" and does not apply to a mechanical engineer's testimony about the cause of a tire failure).

Second circuit: *Stagl v. Delta Air Lines, Inc.*, 117 F.3d 76, 82 (1997) (holding it was error to exclude, pursuant to *Daubert*, the testimony of a mechanical engineer that a baggage-delivery system was unreasonably unsafe for older people).

The Circuits that have held that *Daubert* does apply include the following:

Sixth Circuit: *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299, 303-04, *cert. denied*, ___ U.S. ___, 118 S. Ct. 67 (1997) (holding that an Ohio trial court failed to adequately perform its "gatekeeping" function by admitting the testimony of a biomechanical engineer who said a defective shoulder belt in a pickup truck caused the driver to be injured in an auto accident).

Seventh Circuit: *Cummins v. Lyle Industries*, 93 F.3d 362, 370 (1996) (rejecting plaintiff's argument that *Daubert* applies only to novel scientific testimony). The Seventh Circuit held that an engineering expert regarding the feasibility of alternative designs and the adequacy of warnings and instructions properly applied

Supreme Court rules on *Kumho Tire*, in those jurisdictions where *Daubert* does not apply to non-scientific evidence, RAD testimony is admissible. However, West Virginia is not such a jurisdiction. West Virginia applies *Daubert* to non-scientific evidence.¹¹⁷ Thus, the *Daubert* requirements apply to the admissibility of expert testimony concerning a RAD. Therefore, in light of *Daubert* any RAD testimony is inadmissible in our courts.

Expert testimony concerning a RAD is inadmissible under *Daubert* for two reasons. First, there is no way to calculate a theory's error rate without testing the alternative design. Furthermore, there is no way of testing the alternative design short of building a prototype and studying it. This could prove very costly in certain situations. The Reporters contend that building a prototype is not required to satisfy the alternative design requirement.¹¹⁸ However, in light of *Daubert* and *Wilt*, this is simply not true in West Virginia.

The second, and more significant, reason that expert testimony on a RAD is inadmissible under *Daubert* is because the scientific theory behind the reasonable alternative design would often be created specifically for litigation. Scientific theories of this type are not admissible under *Daubert II*¹¹⁹ because of several concerns. These concerns include the bias of the researcher, expert shopping, and that theories developed for litigation do not provide "objective proof that the research comports with the dictates of good science."¹²⁰ Therefore, because the

the *Daubert* factors to testimony. *See id.*

Eighth Circuit: *Peitzmeier v. Hennessy Industries, Inc.*, 97 F.3d 293, 297 (1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 155 (1997) (holding that a district court properly excluded the testimony of an expert who was to testify that design changes in a tire changer would eliminate the potential for injuries and that the tire changer was defective in design).

Fifth Circuit: *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 990 (1997) (following *Peitzmeier* and *Cummins* by holding "that the *Daubert* analysis applies to the type of expert testimony presented by [plaintiffs' civil engineering expert]").

Third Circuit: *Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 1055-56 (1997) (holding that it was not error for a district court to exclude an electromechanical engineer's testimony pursuant to *Daubert*).

¹¹⁷ *See Wilt v. Buracker*, 443 S.E.2d 196, 203 (W. Va. 1993).

¹¹⁸ *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, comment *f* at 24 (1997).

¹¹⁹ *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) [hereinafter *Daubert II*] (stating that "in determining whether proposed expert testimony amounts to good science, we may not ignore the fact that a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office.").

¹²⁰ *Id.* The fact that *Daubert II* does not allow scientific theory developed for litigation to be admissible is consistent with the *Daubert* view that judges must perform a two-part, "gatekeeper" analysis when analyzing evidence of this type. First, the court "must determine nothing less than whether the experts' testimony reflects 'scientific knowledge,' whether their findings are 'derived by the scientific method,' and whether their work product amounts to 'good science.'" *Id.* at 1315. Second, "[the court] must ensure that the proposed expert testimony is 'relevant to the task at hand,' i.e., that it logically advances a material aspect

theories behind alternative designs will often be developed for litigation, they will be inadmissible under *Daubert* II. In addition, since *Daubert* currently applies to non-scientific theories in West Virginia, there will be no practical way to introduce expert testimony concerning a RAD. If expert testimony concerning a RAD cannot be introduced, then a plaintiff can never satisfy the *Restatement's* RAD requirement in those instances necessitating an expert. Since a plaintiff cannot satisfy the RAD requirement, a plaintiff cannot recover in West Virginia on an otherwise valid product liability action.¹²¹

4. Other Jurisdiction's Reactions to the New *Restatement*

To date, no court has adopted the *Restatement Third, Torts: Products Liability*, however, courts can expect to be asked to do so in upcoming cases. In fact, some courts have already been asked to adopt an alternative design requirement. One such court is the Supreme Court of Connecticut in *Potter v. Chicago Pneumatic Tool Co.*¹²² In *Potter*, the Supreme Court of Connecticut was asked to require proof of an alternative design by the plaintiff to recover for vibration-related injuries suffered from pneumatic hand tools.¹²³ In addition, the court was asked to eliminate the consumer expectation test and adopt an exclusive risk-utility test to determine a design defect.¹²⁴ The court rejected both of these suggestions stating that case law does not support the change and that such a

of the proposing party's case." *Id.* (citation omitted). These views have been followed by the Fourth Circuit, see *Cavallo v. Star Enterprise*, 892 F. Supp. 756, 760 (E.D. Va. 1995) and by the West Virginia Supreme Court of Appeals, see *Gentry v. Mangum*, 466 S.E.2d 171, 179 (W. Va. 1995).

¹²¹ The new *Restatement* does provide scenarios where proof of a reasonable alternative design is not required to recover. For instance,

Section 3 provides that when circumstantial evidence supports the conclusion that a defect was a contributing cause of the harm and that the defect existed at the time of sale, it is unnecessary to identify the specific nature of the defect and meet the requisites of § 2. Section 4 provides an alternative method of establishing defect. A plaintiff is not required to establish the standard for design or warning under § 2, but merely to identify a government-imposed standard. Comment *e* . . . recognizes the possibility that product sellers may be subject to liability even absent a reasonable alternative design when the product design is manifestly unreasonable.

RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2, comment *b* at 17-18 (1997).

However, these represent a narrow class of products liability cases, and there is no exception to the RAD requirement for the typical product liability action.

¹²² 694 A.2d 1319 (Conn. 1997).

¹²³ See *id.* at 1331. In urging the court to adopt an alternative design, the defendants pointed to the second tentative draft of what is now the *Restatement Third, Torts: Products Liability*. See *id.*

¹²⁴ See *id.* at 1334.

change would impose an undue burden on plaintiffs.¹²⁵

The Georgia Supreme Court reached a similar conclusion in its decision in *Banks v. ICI Americas, Inc.*¹²⁶ In *Banks*, the court examined an alternative design requirement and a risk-utility standard when parents of a nine year old child who died after ingesting rat poison brought a product liability action against the poison manufacturer.¹²⁷ The *Banks* Court held, based on its exhaustive review of foreign jurisdictions and learned treatises, that design defect cases should be decided using a risk-utility analysis where alternative designs may be considered, but are not absolutely required, to prove a claim.¹²⁸

V. CONCLUSION

West Virginia should refrain from adopting the *Restatement of Torts, Third: Products Liability* as its standard for deciding product liability cases because the *Restatement* presents concepts that are foreign to, and at odds with, the established policy and precedent behind West Virginia's current law on product liability. The new *Restatement* abolishes negligence and implied warranty as separate bases for recovery, abolishes the consumer expectations test as an independent basis for liability, relegates strict liability to a matter of mere terminology, and forces a reasonable alternative design requirement into a mold that does not accommodate it, particularly in light of *Daubert* and *Wilt*.¹²⁹ For a state concerned with adopting liberal product liability policies to protect its residential consumers, the new *Restatement* represents a fallacy. Indeed the *Restatement* promotes the very problems that the West Virginia Supreme Court of Appeals has sought to avoid because the RAD requirement will likely deter consumers from bringing otherwise valid products liability actions. Furthermore, because of the *Restatement's* rigid insistence on a RAD requirement, a plaintiff is practically precluded from bringing an otherwise valid product liability action because there is no practical way to satisfy the RAD requirement under *Daubert*.¹³⁰

¹²⁵ See *id.* at 1331-32 (holding that an independent review of the prevailing common law reveals that the majority of jurisdictions do not impose upon plaintiffs an absolute requirement to prove a feasible alternative design). "[Furthermore,] [i]n our view, the feasible alternative design requirement imposes an undue burden on plaintiffs that might preclude otherwise valid claims from jury consideration." *Id.* at 1332.

¹²⁶ 450 S.E.2d 671 (Ga. 1994).

¹²⁷ See *id.* at 672.

¹²⁸ See *id.* at 674-75.

¹²⁹ See generally RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2 (1997).

¹³⁰ This statement refers to the *Daubert* standard as currently applied in West Virginia under *Wilt*.

The West Virginia Supreme Court of Appeals has clearly and consistently adopted rules and policies liberal to a plaintiff's recovery in its decisions on product liability, so long as these policies were consistent with tort principles.¹³¹ The new *Restatement* asks the court to abandon this philosophy in favor of a system that is more problematic and more restrictive to a plaintiff's recovery for product liability actions. The *Restatement* asks West Virginia to abandon its long history of decisions and policies on product liability law and adopt guidelines that, arguably, do not even represent a majority view. West Virginia should not adopt the new *Restatement* simply because it is not favorable to a plaintiff's recovery. The overwhelming reason West Virginia should refrain from adopting this *Restatement* is because of the policy behind the great body of law on product liability.

It is unclear to this author why the Reporters seek such a radical change to product liability law.¹³² Product liability litigation represents only 1.7 percent of civil cases in state general jurisdiction courts.¹³³ Nor is it an unreasonably high number of plaintiff's verdicts, since plaintiffs win in less than half of all product liability cases.¹³⁴ Whatever the reasons for the Reporters insistence on a change, one thing remains clear. That is, according to the manufacturers themselves, the current products liability rules promote safer products by affecting the management decision-making process. Managers say "products have become safer, manufacturing procedures have been improved and labels and use instructions have become more explicit."¹³⁵ In fact, the consumer Federation of America reports that annually about 6,000 deaths and millions of injuries are prevented because of product liability actions.¹³⁶

Thus, the overall effect of current laws on product liability is to prevent

¹³¹ See cases cited *supra* notes 1-2.

¹³² One argument for this change is that the Reporters are heavily biased in favor of product liability tort reform, and rather than promote progressive, pragmatic social reform (which is the stated purpose of the ALI), this project was designed to achieve a kind of political balance between consumer and manufacturer interests. See *Just What You'd Expect: Professor Henderson's Redesign of Products Liability*, 111 HARV. L. REV. 2366 (1988).

¹³³ See NATIONAL CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1996, 25 (B. Ostrom & N. Kauder, eds. 1997).

¹³⁴ See STEPHEN DANIELS & JOANNE MARTIN, AMERICAN BAR FOUND., CIVIL JURIES AND THE POLITICS OF REFORM 172 (1995); see also U.S. GENERAL ACCOUNTING OFFICE, PRODUCT LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES (1989).

¹³⁵ NATHAN WEBER, THE CONFERENCE BOARD, PRODUCT LIABILITY: THE CORPORATE RESPONSE 2 (1987).

¹³⁶ See *Hearing Before the Subcomm. On Consumers of the Senate Comm. On Commerce, Science & Transportation*, 100th Cong. 54 (Sept. 18, 1987) (testimony of Gene Kimmelman, Legislative Director, Consumer Federation of America).

injury by increasing the safety of products that reach the marketplace. Not only is this the humane thing to do, but it also saves manufacturers money in the long run because, by spending a little money up front to prevent injury, a manufacturer does not have to make large compensation payments for injuries resulting from a defective product. West Virginia's stance on product liability reinforces these ideas and recognizes a manufacturer's ability to better absorb the costs of injuries. The new *Restatement* undermines these concepts and, in those instances where a plaintiff fails to prove a reasonable alternative design, causes the costs of injury to be borne by society at large rather than by the manufacturer who produced the dangerous product and is better able to absorb the loss. It is for this reason that West Virginia should decline to adopt the new *Restatement's* position on product liability law.

J. Zachary Zatezalo *

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