The Impact of the Restatement (Third), Torts: Products Liability on Product Liability Law

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By Vicki Lawrence MacDougall

"Fame is like a river, that beareth up things light and swollen, and drowns things weighty and solid."

1. Introduction

The purpose of the Restatements of Law is to restate the current law, not create new law. The Restatement Second of Torts, Section 402A (Section 402A) was an anomaly. Section 402A was adopted in 1964 when California was the only jurisdiction that had adopted the concept of strict products liability in tort. Although scholarly debate had proposed adopting strict products liability in tort, courts were still utilizing negligence or implied warranty as the primary theories of recovery for injuries caused by defective products when Section 402A was promulgated. Section 402A became a guiding light for jurisdictions when they moved to adopt strict products liability in tort, and served as the foundation for the doctrine throughout the country. Clearly, Section 402A did not restate the law; Section 402A created or molded products liability law for decades and has been referred to as the "holy grail" of products liability law.

Because courts had no current law on strict products liability, courts understandably sought guidance from Section 402A. Times change. Jurisdictions now have established laws regarding strict products liability, either adopted by the judiciary as part of the developing common law or legislatively crafted. The recent adoption of the Restatement (Third) Torts: Products Liability [Restatement Third] came after forty years of developing law, and theoretically should have only attempted to restate the current law as adopted throughout the country. However, certain provisions of the Restatement Third go farther than merely attempting to restate the law and instead follow in the anomalous footsteps of Section 402A in seeking to craft new law.

As a result, the Restatement Third goes beyond the accepted purposes of the Restatements of Law, and the success of the Restatement Third is questionable. It is one thing to shape the path of the law when jurisdictions lack precedent on point, as with Section 402A. But states may be hesitant to overture existing precedent to adopt certain provisions of the Restatement Third. Stare decisis will likely be a formidable obstacle. An educated guess would be that certain Restatement Third provisions will be more influential than others in shaping the future of products liability law throughout the country.

The influence of the Restatement Second is still reflected in the product liability laws of most jurisdictions.

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4. VICKI LAWRENCE MACDOUGALL, OKLAHOMA PRODUCT LIABILITY LAW ch. 2 (Volume 8, Oklahoma Practice Series 2006); available at OKLRAC 2 and at http://vickilm2.wicitlaw.com (for other information about this publication, see www.oklawbooks.com/book).
Furthermore, many jurisdictions retain the consumer expectation test from comment i of Section 402A even in design defect cases. 6 Oklahoma is one such state, 7 and Oklahoma law will be used in this article to illustrate the likely impact of the Restatement Third in a jurisdiction that developed its doctrinal law around the Restatement Second.

11. Provisions That Restate the Law

Some provisions of the Restatement Third simply do as promised; they restate the current law. As such, they have the possibility of helping to unify the law when jurisdictions confront issues that come within the scope of these sections or confront issues that have yet to be decided in that jurisdiction. The copious citations of authority found within the Reporters' Notes following the individual sections of the Restatement Third provide an invaluable research tool for practitioners and probably will contribute meaningfully to the development of the law. 8

Section I of the Restatement Third simply sets forth the general statement that sellers or distributors of defective products are subject to liability for harm caused to persons or property caused by the defect. 9 Section 20 defines sellers and distributors. 10 Guidelines regarding the scope of potential liability of a component part manufacturer are set forth in Section 5. 11 Liability is imposed on a seller of a product that is sold under the seller's name (product endorsement or apparent manufacturer theory) even if manufactured by another under Section 14. 12

Many jurisdictions, including Oklahoma, have yet to define what is encompassed within the term "product." For example, does a product include the provision of erroneous information in literature resulting in harm, 13 or the provision of electricity, 14 or the sale of a prefabricated home, 15 or the sale of a living animal? 16 Section 19 defines the term "product." 17 If a jurisdiction has yet to define "product," Section 19 would be a likely source for the definition.

Section 21 adopts the economic loss rule as it exists in the vast majority of jurisdictions; generally, recovery must be sought for breach of warranty under UCC Article 2, if the only loss is an economic loss caused by the defective product. Recovery in tort is restricted to cases where the economic loss is accompanied by personal injury or damage to property other than the defective product. 18

Section 4 sets forth the general rule regarding the impact of compliance or noncompliance with an existing regulation. 19 Liability for an innocent, negligent, or fraudulent misrepresentation is set forth in Section 9. 20 Section 18 provides in accordance with existing law that disclaimers or other contractual limitations of liability are not applicable to causes of action brought in tort, including strict products liability in tort. 21

The prevailing rules control to determine whether a product defect caused the harm to a person or property under Section 15.22 Section 15 is complemented by Section 16 which provides for recovery where the product defect decreases the resulting harm beyond the harm that would have resulted from other causes. Thus, Section 16 attempts to clarify the law in predominately crash-worthiness litigation. 23 Generally speaking, these provisions seek to restate current law as it exists throughout the country and are not particularly controversial. Because these provisions represent the prevailing legal doctrine, they provide guidance to courts.

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6. Connecticut, Washington, Iowa, California, Tennessee, Alaska, Arkansas, Hawaii, Nebraska, Oklahoma, and Wisconsin retain the consumer expectation test in design defect cases according to the data collected in the Reporters' Notes to the Restatement Third. Furthermore, Indiana, Ohio, Arizona, and Kansas might also follow, in part, the consumer expectation test in design defect litigation. RESTATEMENT (THIRD), Torts: Products Liability § 7, Reporters' Notes (1988). See also discussion of the consumer expectation test, infra Part III (T).


10. Id. § 20 (1988). (Section 20 expands liability to the seller of personal property in some instances. For example, liability could be imposed for a defective lemon car when a consumer takes his or her new car to get repaired.)

11. Id. § 5 (1988). (liability is imposed upon the component part manufacturer if the component is defective or the component (Continued in next column))
II. The Tests for Defectiveness

A. Consumer Expectation Test

Section 2 of the Restatement Third sets forth the tests to determine whether a product is defective and the tests for defectiveness vary according to whether the product contains a manufacturing flaw, defect in design, or marketing flaw, e.g., a failure to provide adequate warnings or instructions to enable safe use. This approach is not surprising because, almost from the inception of products liability law, most scholars have suggested using differing tests for determining defectiveness based on the type of defect involved.

The Restatement Third rejects the consumer expectation test of defectiveness found in comment i of the Restatement Second of Torts, Section 402A. However, the consumer expectation test is retained for defective foodstuffs cases in the Restatement Third under Section 7, wherein food is considered defective if a “reasonable consumer would not expect the food product to contain” the harmful substance. Although a few jurisdictions retain the alternative foreign/natural doctrine, the vast majority of jurisdictions, including Oklahoma, use the consumer expectation theory for defective foodstuffs cases.

Overall, the consumer expectation test has been the subject of vast criticism as an appropriate test. However, some states, including Oklahoma has remained firmly committed to the consumer expectation test of defectiveness. Oklahoma first adopted the consumer expectation test and Second 402A of the Restatement Second in Kirkland v. General Motors in 1974. Although Oklahoma eagerly adopted the Restatement Second, Oklahoma may not be so eager to adopt Section 2 of the Restatement Third, because Oklahoma would have to overturn thirty years of case law in the process. That proposition does not appear likely to your author.

B. Manufacturing Flaws--Deviation from the Norm Test

The test for a manufacturing flaw under the Restatement Third Section 2(a) is “when a product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.” Although this is a solid definition of a manufacturing flaw (a deviation from the norm test), your author would argue that for manufacturing flaws the consumer expectation test provides a simpler formulation for imposing liability.

At least one court has rejected the argument that a plaintiff must prove the “intended design,” i.e., the precise design specifications of the manufacturer, before the plaintiff may prevail in any case under the language of the Restatement Third. Arguably, it is impossible to prove a departure from the intended design until proof is offered of the intended design. Thus, the explicit language of the Restatement Third would appear to add an unnecessary burden to the plaintiff’s proof in many cases. For example, if a product would appear irrelevant and a waste of funds and judicial time to establish the exact recipe of Campbell’s vegetable soup in order to establish that the product was defective if the soup contained a decomposed mouse. However, in some cases, the manufacturing specifications might be very relevant especially where there is a lack of sufficient proof that the product, in fact, departed from the manufacturer’s standards.

Furthermore, the test in the Restatement Third does not preclude liability for manufacturing flaws that are obvious nor does it encompass explicitly the notion that unreasonable danger must be created by the flaw before liability is imposed. For example, French fries sold with a misplaced onion ring would meet the Restatement Third’s definition of a manufacturing flaw but clearly the French fries would not be more dangerous than the ordinary consumer would expect.

Danger is only indirectly encompassed within the Restatement Third by the requirement that the defect cause damage. Or, consider the example of a new tire sold with a defect that is visible...
to the consumer (perhaps at a resulting discounted price). Again, liability could be imposed under the test of the *Restatement Third* whereas the tire might not be considered more dangerous than expected if the defect was clearly visible to the consumer under the *Restatement Second*. The obvious nature of a danger would operate only to reduce recovery under the comparative responsibility provision of *Restatement Third*, Section 17, a concept that Oklahoma and other jurisdictions have failed to adopt in the context of strict products liability in tort. Because the consumer expectation test provides a satisfactory test and arguably a more straightforward test for manufacturing flaws, Oklahoma courts may not be likely to forsake that test for the proposed one from the *Restatement Third*.

C. Warning Flaws

The test for warning of defects, contained in the *Restatement Third*, is subject to the criticism noted above. Section 2(c) provides that a product is defective "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings...and the omission of the instructions or warnings renders the product not reasonably safe." This seems merely to set forth the general statement that a product needs adequate warnings and instructions to enable safe use. However, obviousness does not negate the warning obligation under the explicit wording of the *Restatement Third*. Even the comments imply that a warning obligation may exist for obvious dangers in some cases. Although there may be difficulty in determining from case to case whether there may not be considered obvious, it has generally been black letter law that there is no duty to warn of obvious dangers. The obvious danger provides more warning to the consumer than could possibly be provided by a written warning. For example, there is no duty to warn that the blades of a lawn mower are sharp because the sharpness of the blades is obvious. The lawn mower is not "more dangerous than the ordinary consumer would expect with the ordinary knowledge common to the community as to its characteristics," because the ordinary consumer knows that blades are sharp, and thus there would be no duty to warn of the obvious danger.

Under the *Restatement Third*, a warning obligation could still be required, despite the obvious nature of the danger, with any consideration of obviousness being directed to reduction of the recovery under the standard of comparative responsibility. This may seem to many an inadvisable approach, designed to expand the scope of litigation issues. In contrast, the consumer expectation test works well in warning cases and courts may not be likely to overturn this precedent and adopt the *Restatement Third*’s more controversial approach.

D. Design Flaws

The *Restatement Third* test for defective design is found in Section 2(b), which 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 by the seller...and the omission of the alternative design renders the product not reasonably safe." The Achilles heel of the consumer expectation test is in the arena of design defects. It is an awkward test for determining when a product is defectively designed. Thus, the "risk/utility test" has probably moved to the forefront as the premier test for design defects.

Regardless of the many alternative tests used throughout the country for design defects, a plaintiff’s attorney’s goal generally is to establish that there was a feasible alternative design, practicable under the circumstances, that would have avoided the injury. A common thread in most design defect litigation is the plaintiff’s need to offer proof of a feasible alternative. The *Restatement Third* approach has been criticized because of the requirement that there must be a feasible alternative in all cases before a design may be considered defective.

The position of the *Restatement Third* is that the American Law Institute was simply restating the law regarding design defects as represented in the majority of jurisdictions. According to the *Restatement Third*, only eight states do not require

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34. The comments to the *Restatement Third* provide that generally there is no duty to warn of an obvious danger; however, this is not contained in the actual provision, *Restatement Third*, TORTS: PRODUCT LIABILITY § 2, comment c (1988).

35. *Id.* § 402A, comment 1 (1965).

36. MacDougall, supra note 4, at 300-304, 319-328. However, as noted supra at notes 25 and 29, the Council of the European Communities adopted a Directive for products liability binding member States which uses a form of consumer expectation test. Article 8 of the Directive provides that a product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including: (a) the presentation of the product; (b) the use to which it could reasonably be expected that the product would be put; (c) the state in which the product was put into circulation." *Council Directive* EEC Directive on Liability for Defective Products (1985).

37. (Continued from previous column)

As noted supra at note 29, Professor Henderson & Tovanski consider this to be a "substantial misuse" because consumer expectation should be "relegated to the waste bucket." See Henderson & Tovanski, supra note 26. In response, one might note again that many countries have developed a meaningful standard for imposing liability in the product liability context through the use of a variation of the consumer expectation test. Perhaps we can learn from the European version of the consumer expectation test. For example, in *Sloth v. General Motors Corp.*, 8 Cal. 4th 548, 34 Cal. Rptr. 2d 697, 892 P.2d 298 (1994), the plaintiff’s motorcycle was badly injured when another car struck her left foot when she was on the street at about 50 or 60 mph. The front wheel collapsed downward and struck the forehead into the plaintiff’s face. Arguably, the ordinary consumer might not expect this type of injury and might consider the product more dangerous than the ordinary consumer would expect. This illustrates one criticism of the consumer expectation test which is: The ordinary consumer might not have realistic expectations about product safety and the ordinary consumer might not be able to evaluate the risk versus benefit level of complex products. However, the slightly different wording of the European version of the consumer expectation test might be very significant and might be a more feasible test when applied to mundane cases. Using the European test, was the Camaro defective because it did not provide the safety a consumer is entitled to expect, taking all circumstances into account? Would it appear that the European test is much more straightforward and would easily allow a court to consider whether there was a feasible alternative and whether the benefits of the design outweigh any risk of harm? If there was a benefit to the design of the Camaro and there was no feasible alternative to the current design, the product is probably providing the safety which a person is entitled to expect.

38. *Id.*

proof of a feasible alternative. However, some contend that this prerequisite for recovery in almost all cases of proof of a feasible alternative did not represent the developing case law throughout the country at the time it was promulgated.

The Supreme Court of Connecticut rejected the approach of the Restatement Third and, according to that court, only eight states require a feasible alternative compared with the Restatement Third's interpretation of the data that only eight states do not. Although a small handful of courts have recently adopted the Restatement Third approach, perhaps the safest conclusion is that jurisdictional law still varies drastically and it is difficult to truly "restate" the law and have the "restatement" reflect the approach of most courts. Arguably, Section 2(b) of the Restatement Third would have come closer to restating the current law by providing that the plaintiff must prove that the risks of the current design outweigh its benefits which in most cases would require proof of a feasible alternative.

E. Critique of the Restatement Third

It is hard to deny that the concept of a feasible alternative is a constant thread in design defect cases. However, it is also hard to deny that in a rare case a product may be more dangerous than society is willing to accept even if there is no proven feasible alternative to the current design. Kanas v. Emerson Electric Co. illustrates this point. The defendant manufactured the XR-90, a brush-cutting device which consisted of a hand-held gasoline-powered engine on a long shaft. At the end of the shaft, various cutting tools could be attached including a ten-inch circular saw steel blade. The plaintiff's uncle was using the XR-90 with the saw blade attached when it struck something, causing the machine to swing violently. The XR-90 struck the plaintiff and amputated the plaintiff's arm. The plaintiff contended that the XR-90 was more dangerous than the ordinary consumer would expect. The manufacturer contended that the "plaintiff failed to establish the feasibility of safer, alternative designs, or that the danger of the XR-90 as designed outweighs its utility."

The Tenth Circuit U.S. Court of Appeals held that evidence of a design alternative was relevant on the issue of whether a product was unreasonably dangerous. However, the court concluded that proof of a feasible alternative is "not an essential element of the plaintiff's case." Given its "violent kickback potential," the jury could easily find that the design of the XR-90 was more dangerous than the ordinary consumer would expect even if there was no feasible alternative to the current design that would not reduce effectiveness. Accordingly, the Tenth Circuit affirmed the jury verdict in favor of the plaintiff.

Kanas can be reconciled with the Restatement Third. Comment e to Section 2 provides that "[s]everal courts have suggested that the designs of some products are so manifestly unreasonable, in that they have low social utility and high degree of danger, that liability should attach even absent proof of a reasonable alternative design. The example provided is an exploding cigar that would be considered defective because of the high risk of injury and low utility even if there was no alternative design that would provide the same prank characteristics.

At least the comments to the Restatement Third recognize that there may be a few products, "egregiously dangerous," that are defective due to their extreme danger even though no feasible alternative exists. The product is simply too dangerous and the benefit of the product not sufficient to tolerate the potential risk of harm. It is in society's best interest to have the product removed from the market or to have the sellers of the product continue to pay tort judgments for the injuries inflicted. But this does not square easily with the text of the Restatement Third. In such cases, it might very well make sense to retain the consumer expectation test, in order to avoid overburdening the plaintiff with unnecessary expert witness fees to prove a feasible alternative.

The Restatement Third's requirement that there be proof of a feasible alternative before a product design may be found defective springs in part from animosity regarding the generic product risk theory that evolved from the case of O'Brien v. Muskin Corp. In O'Brien, the court considered whether an above-ground swimming pool was defectively designed due to the slippery quality of the vinyl pool liner. There was no substitutable material that could be used as a liner and all above-ground pools used vinyl for the liner. The court held that a question of fact was presented to the jury regarding whether the above-ground pool was defectively designed despite the lack of a feasible alternative to the current design. The jury could find that the inherent risks of the above-ground pool outweighed its utility. Thus, the generic product risk theory was created.

The aftermath of O'Brien was extensive scholarly debate generally
condemning the theory, which arguably could be used to effectively outlaw almost any product. Although the holding of O’Brien was relatively simple (the case was for the jury to decide), the scholarly debate that resulted was not. There was fear that a jury could decide that the risks outweighed the utility of such products as guns, 54 alcohol, 55 tobacco, 56 balloons (danger of choking), 57 peanut butter (inherent danger of choking), 58 and marshmallows (danger of swelling in throat and blocking airway), 59 among others.

As a result, the generic product theory and its slippery slope were widely condemned, and the Restatement Third explicitly rejects O’Brien. 60 One reason the Restatement Third adopted the requirement of a feasible alternative in all cases was to avoid the O’Brien problem. However, in your author’s view O’Brien has been over-analyzed and over-emphasized by the scholars in the field, which has resulted in an arguably unfounded requirement in the Restatement Third for proof of a feasible alternative as a mandatory prerequisite to establish a design defect.

IV. The Malfunction Theory

Normally, the plaintiff must prove with direct evidence a product defect. However, Oklahoma recognized in Kirkland 61 that circumstantial evidence could be used to establish strict products liability in tort. Technically, the doctrine of res ipsa loquitur is not appropriate because res ipsa is a negligence concept. However, as Oklahoma Supreme Court Justice Hodges observed, “the inferences from circumstantial evidence which are the core of the doctrine of res ipsa loquitur are no less applicable to strict products liability.” 62

The Restatement Third adopts the malfunction theory. Under the Restatement Third, there is an inference that the plaintiff’s harm was caused by a product defect, without proof of a specific defect, if the accident was of the type normally to be caused by a product defect and the accident was not solely the result of other causes. 63 The plaintiff must eliminate potential causes for the accident other than the product defect.

However, “if the defect need not be the only cause of the incident, if the plaintiff can prove that the most likely explanation of the harm involves the causal contribution of a product defect.” 64 Elimination of other potential responsible causes strengthens the inference that the product was defective and the defect caused the harm. The malfunction theory is simply a form of circumstantial evidence that infers defectiveness from the fact that the product malfunctioned, the circumstances indicate that the product would not have malfunctioned absent a product defect, and there are no other probable responsible causes for the accident.

Although Oklahoma has not adopted the malfunction theory by name, several cases indicate that the malfunction theory as set forth in the Restatement Third would be ripe for adoption in Oklahoma. For example, in Tigert v. Admiral Corp., 65 the case was allowed to go to the jury on the issue of manufacturers’ products liability based upon circumstantial evidence that the product malfunctioned; basically, this was a malfunction inference without the specific adoption of the Restatement Third.

In Tigert, a two-year-old television caught fire and destroyed the plaintiff’s home. The television had not been repaired since it was first purchased from the retailer. The probable origin of the fire was the television, although a specific defect in the television was not established. 66 The trial court granted a summary judgment for the defendant, because the plaintiff’s proof did not go beyond speculation and conjecture. 67 The court of appeals reversed, because the circumstantial evidence was sufficient to submit the case to the jury. 68 The court of appeals took judicial notice that “[d]efect-free television sets do not ordinarily start fires and if a set does ignite one the proximate cause of the fire can reasonably be ascribed to a defect in that television.” 69 The court of appeals essentially used a malfunction inference approach: A product that malfunctions during normal use implies a defective condition.

Another example is Dutsch v. Sea Ray Boats, Inc., 70 wherein the Oklahoma Supreme Court allowed circumstantial evidence to infer defectiveness. The plaintiff’s four-month-old boy exploded after the plaintiff smelled gas fumes. The circumstances of the accident were sufficient proof to infer defectiveness (new boats don’t explode without a product defect) and to sustain the jury verdict.
in favor of the plaintiff.\textsuperscript{71} Furthermore, the Tenth Circuit has remarked that the use of circumstantial evidence to prove a product defect was very appropriate when the "defective product has largely destroyed itself."\textsuperscript{72} Thus, case law indicates that Oklahoma indirectly embraces the multifactor theory, so it would not be a bold step for Oklahoma to formally adopt the Restatement Third's provision.\textsuperscript{73}

V. Prescription Drugs

A. Impact on Unavoidably Unsafe Products

The Restatement Third contains a separate provision addressing prescription drugs, Section 6.\textsuperscript{74} The Restatement departs from well-established law in some of the provisions of this section. Oddly, two minority judicial opinions in Oklahoma have proposed adoption of Section 6.\textsuperscript{75} The vast majority of jurisdictions have adopted the concept of an unavoidably unsafe product from comment k of the Restatement Second, Section 402A.\textsuperscript{76} Unavoidably unsafe products are those products that carry a risk of injury which cannot be eliminated; however, the benefits society gains from the marketing of an unavoidably unsafe product justifying their use.

To qualify as an unavoidably unsafe product, the benefits of the product must outweigh the inherent danger of its use. Unavoidably unsafe products are not defective even though the design or formula contains a known danger. The most common examples of unavoidably unsafe products are prescription drugs.\textsuperscript{77}

In Oklahoma, comment k of the Restatement Second is an affirmative defense that requires that the manufacturer prove that the benefits of the product outweigh its risk of harm. Comment k is not a "blanket protection" for all drugs and devices;\textsuperscript{78} rather, it is an affirmative defense only when the following criteria are met: (1) the product is properly manufactured and contains adequate warnings, (2) its benefits justify its risks, and (3) the product was at the time of manufacture and distribution incapable of being made more safe.\textsuperscript{79}

The Restatement Third departs from the concept of an unavoidably unsafe product despite the practically universal acceptance of that concept throughout the country. The Restatement Third provides that a "prescription drug or medical device is not reasonably safe due to defective design if the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable health-care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients."\textsuperscript{80} Under this test, for example, DES would not be considered defective because it is used in veterinarian medicine.\textsuperscript{81} This change does not appear to be consistent with the purpose of the Restatement Third, which is to "restate" the law, not create new law.

Comment k of the Restatement Second, Section 402A is well-established jurisprudence throughout the country. The Restatement Third's attempt to displace the law of almost every jurisdiction in this respect seems misplaced, especially with a test that appears rather difficult to apply. Under the language of the Restatement Third, for example, the Dalkon Shield arguably would not be defective, because the Dalkon Shield was shipped overseas and used in third world countries as birth control for impoverished women. The philosophy apparently was that defective birth control was better than nothing.\textsuperscript{82} But the Dalkon Shield does not become suddenly non-defective because some

\textsuperscript{71} 46 S.D. at 100-01.

\textsuperscript{72} Udden v. Susquehanna Corp., 46 F.3d 1151 (10th Cir. 1995).

\textsuperscript{73} For a further discussion of the multifactor theory, see MacDougall, supra note 4, at 383-90. However, it is important to remember that only a few cases would come under the possessors of the multifactor theory and most cases would still require expert testimony to establish a defective condition despite the presence of an independent accident. See, e.g., Smith v. Diane's, Inc., 421 N.E.2d 471 (10th Cir. 1981). In Smith, the plaintiff's two-year-old child was killed when she was struck by a garbage truck whose garbage door opener malfunctioned. The plaintiff's case could not survive a motion for summary judgment without qualified expert testimony. The garbage door opener was twenty-four feet long and there were numerous other explanations for the accident besides a defect in the door when it left the possession and control of the manufacturer. Other potential causes included improper installation, improper lubrication, and the fact that the motor may have simply worn out and lacked sufficient power to retract the dense mechanism.

\textsuperscript{74} RESTATMENT (THIRD), TORTS: PRODUCT LIABILITY § 6 (1998).


\textsuperscript{76} For a discussion of the concept of unavoidably unsafe products, see MacDougall, supra note 4, at 274-279.

\textsuperscript{77} Although the California Supreme Court held that all prescriptions drugs were unavoidably unsafe, which created a de facto grant of immunity to drug manufacturers from all claims for defective design, very few courts followed the lead of California. Brown v. Sharp Hospital, 44 Cal. 3d 1005, 245 Cal. Rptr. 674, 751 P.2d 700 (1988). For a critique of the Brown decision, see Vicki Lawrence MacDougall, Product Liability Law in the Nineties: Will Federal Pre-Emotion Control and Consumer Product Liability Be the Answer? 47 Conn. L. Rev. 327, 378-381 (1985).


\textsuperscript{79} RESTATMENT (THIRD), TORTS: PRODUCT LIABILITY § 6(2) (1998) (emphasis added).

\textsuperscript{80} Dalkon Shield (Hull) was first produced in 1958 and was evaluated by over 320 drug manufacturers as a mischance preventative. In 1953, DES was shown to be ineffective in preventing miscarriages. In 1971, the FDA warned that daughters of the women who ingested DES were at increased risk for the development of cancer of the vagina and cervix due to a rare congenital disorder. The current use of DES is restricted to clinical trials and veterinary prescriptions. See DES: Pharmacology. Data Indicating Lack of Efficiency for Prevention of Miscarriage. Clinicians' Evaluation, and Current Use, at http://www.des-association.org/lackofefficacyindex.html (last visited Oct. 26, 2007). See also Shrideh v. Abbott Laboratories, 26 Cal. 3d 595, 605-609, 607 P.2d 859 (Cal. 1980).

\textsuperscript{81} In 1971, the Dalkon Shield (Hull) was introduced and 2.2 million women in the U.S. used it over the next four years. See Orienti, Stepping on the Bottle Field, ch. 17, at http://www.dalkonshield.com/ls/lschapter17.html (last visited Oct. 26, 2007). In the U.S., it is estimated that the Dalkon Shield caused over 200,000 cases of severe sterility problems plus ectopic pregnancies, perforation of the uterus, hydrosalphinx, and 17 deaths. Furthermore, some estimate that over $30 million was spent in this country in medical problems rising from the use of the Dalkon Shield for every million dollars in profit earned by R.H. Robinson, the manufacturer. Due to the problems in this country, the manufacturer with the assistance of John Hopkins University and with funding provided by the U.S. government "updated" the Dalkon Shield in population control centers in Paraguay, India, Thailand and other countries. The "discount contraceptive drug" ended with an international recall of the product. The efficacy of the recall is third-world countries is unknown. In 1979, five years after the recall, the Dalkon Shield was still being issued in Pakistan, India and possibly South Africa, and many might still be in the drawers of rural family planning clinics. Barbara Luerber, Mark Davis & Stephen Mikulak, The Chinese Gynaecide, 1979, at http://www.motherpeace.com/ (last visited Oct. 26, 2007). The manufacturer, R.H. Robinson, filed bankruptcy following the interaction set with 320,000 claimants. Unroe, Stepping on the Bottle Field, ch. 17, at http://www.dalkonshield.com/ls/lschapter17.html (last visited Oct. 26, 2007). Instrumentation devices (IUDs) remain a popular method of birth control in parts of Africa (Egypt, Botswana and Kenya) because it only requires one trip to the clinic (thereby being a hard and long user) and the IUD will prevent pregnancies for years after insertion. Unroe, Stepping on the Bottle Field, ch. 17, at http://www.dalkonshield.com/ls/lschapter17.html (last visited Oct. 26, 2007).
"reasonable doctors" prescribed it to impoverished women in other countries. The Restatement Third's approach would allow a finding that a drug was not defective even when the FDA has pulled the drug from the U.S. market after finding that the drug was too dangerous to remain on the market, if an expert could be found to testify that a reasonable doctor would prescribe the drug to "a class of patients." After all, many plastic surgeons would still have evidently used silicone breast implants even after they had been pulled from the market by the U.S. Food and Drug Administration (FDA). 83

Part of the difficulty in applying the Restatement Third's test is an inherent problem with the medical profession. Physicians are trained to believe that they must be infallible. Studies have shown that an impediment to risk management in the medical field is the inability on the part of physicians to admit that they have made a mistake. 84 Doctors could be psychologically reluctant to admit they erred in prescribing a drug regardless of the circumstances. A "reasonable doctor" might easily testify that he or she would still prescribe a defective drug in particular circumstances. For example, a physician has testified that he would still have prescribed Pondimin (commonly called Phen-fen when prescribed with phentermine) to a patient based on the patient's height (five feet, one inch), weight (172 pounds), and risk factors (a history of hypertension and a family history of heart disease), if adequate warnings had been provided regarding the danger of valvular heart disease (VHD). 85 Inasmuch as some practitioners might prescribe Phen-fen to a class of patients, it might not be considered defective under the Restatement Third.

The comments to the Restatement Third seem to negate this suggestion. Comment f provides:

That some individual providers do, in fact, prescribe defendant's product even though it is not itself sufficient to defeat the plaintiff's claim. Evidence regarding the actual conduct of the health-care providers, while relevant and admissible, is not necessarily controlling. The issue is whether, objectively viewed, reasonable providers, knowing of the foreseeable risks and benefits of the drug or medical device, would prescribe it for any class of patients. Given this very demanding objective standard, liability is likely to be imposed only under unusual circumstances. 86

However, the only way to establish liability would appear to be to present anadotomical testimony of the individual prescribing habits of health

83. Silicone breast implant insert, first used in 1964. Abbott in 1976 the FDA called for a regulatory mechanism to regulate medical devices and breast implants by exempting the approval process. The FDA would later rely on the other clauses to FEDA regulations. The FDA did not request repairs of breast implants until 1986 and did not classify breast implants as potentially dangerous until 1992. "Silicone gel breast implant that leaked from its capsule, fatal in a woman, toll to her Jury," by J. E. Salmon and R. S. Weinberg, New England Journal of Medicine 300 (1997). A petition from the American Society for the Advancement of Science to the FDA regarding breast implants stated that "small breasts are a disease that required medical treatment." 84. As early as 1990, lawyers representing women at a class-action suit against the manufacturers of silicone breast implants said they had discovered a 1975 Dow Corning study showing that the silicone in the implants harmed the hormonal system of women. 85. This approach was adopted to avoid known mistakes. 86. Out of about 1000 medical experts surveyed in 1988 on the safety of medical devices, only 48 indicated that they would change their practice in response to the new regulations. 87.

85. (Continued from previous column)

86. (Continued from previous column)

be out of a fear of potential legal liability. The study referred therein were examining psychological reactions due to the presence of silicone in the body, the two years later.
care providers, clearly relevant and admissible under comment $f$, instead of concentrating on the scientifically shown risks and benefits of the individual prescription drug or medical device.

The rationale for the test in the \textit{Restatement Third} was that "as long as a given drug or device provides net benefits for a class of patients, it should be available to them, accompanied by appropriate warnings and instructions." It is hard to disagree with that policy justification. Arguably, however, courts were already sensitive to that concern and were incorporating that concept within the doctrine of an unavoidably unsafe product.

The \textit{Restatement Third} cites three cases in support of its test that a prescription drug is not defective if "a reasonable physician would prescribe the drug to any class of patients." It is a stretch to contend that the cited cases really support the \textit{Restatement Third}'s approach. All three cases supported the use of a risk/utility test to ascertain whether the design of a prescription drug is defective, and two of the three cases explicitly endorsed the concept of an unavoidably unsafe product as contained in comment $k$ to \textit{Restatement Second}.

\textbf{B. Learned Intermediary}

The \textit{Restatement Third} adopts the learned intermediary doctrine. Under this doctrine, prescription drug manufacturers only have a duty to warn the learned intermediary, i.e., the prescribing physician, of the dangers regarding prescriptions drugs. Thus, the manufacturer of a prescription drug has no duty to warn the patient of the side effects of the drug. When the patient sues the drug manufacturer, the question is whether the information provided by the drug was sufficient to allow safe administration of the drug by the medical profession. Furthermore, testimony by the prescribing physician that he or she would still have prescribed the drug even if stronger warnings were given is typically fatal to a plaintiff's case.

However, the \textit{Restatement Third} provides an exception to the learned intermediary doctrine and states that warnings must be provided to the patient when the manufacturer knows or has reason to know that health-care providers will not be in a position to reduce the risk of harm in accordance with the instructions or warnings. At least one court has used this provision as a springboard to adopt a duty to warn consumers as well as the prescribing physician when the use of the drug was influenced by direct-to-consumer advertising. Furthermore, the comments to the \textit{Restatement Third} leave open the question of whether there is a duty to consumers.

\textbf{3. Comment $k$}

Third's comment $k$ refers to a risk/utility analysis when discussing its own test. Furthermore, comment $k$ and the concept of an unavoidably unsafe product from the \textit{Restatement Second} provides greater consistency, because the FDA must make a determination that the benefits of a prescription drug or medical device outweigh its risks of harm before approval of the drug or device. The test created by the \textit{Restatement Third} was not used by courts prior to its promulgation, has not meet with subsequent approval in the courts, and seems contrary to the time-honored principles of stare decisis.
as well as physicians when direct-to-consumer advertisements are utilized, leaving this to developing case law.\footnote{101}

The learned intermediary doctrine was developed at a time when drug companies aimed their promotional efforts only at physicians. Direct-to-consumer advertising of prescription drugs began in the 1980s and, today, many do not remember a time when our lives were not inundated by prescription drug advertisements appearing on television, radio, the Internet, magazines, and billboards. This direct-to-consumer advertising has injected itself into the doctor/patient relationship and has eroded the policy justifications for the learned intermediary doctrine.\footnote{102}

Oklahoma has not specifically addressed the impact of direct-to-consumer advertising. However, Oklahoma courts have recognized an exception to the learned intermediary doctrine when the FDA requires the drug manufacturer to warn the consumer of the risks connected with a prescription drug as well as warning the prescribing physician.\footnote{103}

The FDA mandates that warnings accompany direct-to-consumer advertisements. Therefore, a logical step would be that those warnings should be adequate, and that the learned intermediary doctrine should not protect the manufacturer from the requirement to provide adequate warnings to the consumer when direct-to-consumer advertising was a substantial factor in the use of the product and the resulting injuries.

Drug manufacturers should not be allowed to encourage the use of their products through mass advertising to consumers and then hide behind the learned intermediary doctrine contending they don’t have to warn the person they voluntarily aimed their advertising campaign toward. Once a manufacturer mass markets a drug, a corresponding duty to warn should be created. For example, Oklahoma could easily follow this approach, based in part of the Restatement Third’s position and because the FDA mandates that such warnings accompany direct-to-consumer advertisements, and because Oklahoma already recognizes an exception to the learned intermediary doctrine when the FDA requires communication of warnings to the patient.\footnote{104}

C. Distributors of Prescription Drugs

Generally, liability is imposed on the retailers and distributors for selling a defective product. The Restatement Third carved out an exception to this rule for the retailers or distributors of prescription drugs or devices. Under the Restatement Third, the retailer or distributor of a prescription drug or device is liable only if the drug or device contains a manufacturing flaw or if the retailer or distributor fails to use reasonable care.\footnote{105} The rationale for this exception is the need for medical patients to have ready access to prescription drugs at reasonable prices, and that the retailer or distributor “should be permitted to rely on the special expertise of manufacturers, prescribing and treating health-care providers, and governmental regulatory agencies.”\footnote{106}

Courts might be persuaded to adopt this provision because the retailer of the drug or device is often a pharmacist, physician, or hospital. Imposing liability under strict products liability in tort upon the hospital, health care provider or pharmacist is already difficult because the transaction is likely to be considered a service rather than the provision of a product.\footnote{107} It is much more difficult to justifyably carve out an exception for the distributor who is simply profiting from injecting a defective product into the stream of commerce.

VI. Comparative Responsibility

There are many solid arguments for and against the application of comparative responsibility in causes of action founded in strict products liability in tort.\footnote{108} Oklahoma has rejected the use of comparative responsibility because that is a negligence concept and it is not appropriate to inject negligence into a strict tort cause of action. However, most other courts use comparative responsibility in determining strict products liability in tort.

Accordingly, the Restatement Third provides that the plaintiff’s recovery may be reduced if the “plaintiff’s conduct fails to conform to generally applicable rules establishing appropriate standards of care” and if the “conduct of the plaintiff combines with the product defect to cause the harm.”\footnote{109} Oklahoma recognizes two other affirmative defenses to strict products liability in tort: unforeseeable misuse, and voluntary assumption of a known defect.\footnote{109} The adoption of this section of the Restatement Third would basically add contributory negligence as a third type of defense and would broaden the scope of the plaintiff’s behavior that was relevant in strict products liability causes of action. It is currently unclear if the Oklahoma Supreme Court will move in this direction and adopt comparative responsibility and thereby inject an element of negligence back into products liability litigation.

VII. Used Products

Jurisdictions are split on whether strict products liability in tort extends to

the sale of a used product.\textsuperscript{111} Oklahoma declined to extend products liability to a used goods retailer in \textit{Allenberg v. Bently Hedges Travel Service, Inc.}\textsuperscript{112} However, \textit{Allenberg} specifically restricted its holding by stating that strict liability is "not extended to commercial sellers of used goods, at least when the alleged defects were not created by the seller, and/or the product was sold in essentially the same condition as when it was acquired for resale."\textsuperscript{113} Furthermore, \textit{Allenberg} suggests that liability might be imposed if the used product seller warranted, reconditioned, changed, altered, modified, or rebuilt the product.\textsuperscript{114}

Clearly, the \textit{Allenberg} decision leaves room for exceptions to the general rule of non-liability for used goods dealers.\textsuperscript{115} The \textit{Restatement Third's} provision is a possible source for delimiting those exceptions. The \textit{Restatement Third} provides that if the used product seller is liable for harm caused by a defect if: the defect is caused by the used product seller’s negligence; the product is marketed in a manner that would cause a consumer to expect no greater risk than from a new product and the defect is a manufacturing flaw or the product is proven defective under the malfunction theory; the product has been re-manufactured; or the product is not in compliance with a safety statute or regulation.\textsuperscript{116} Adoption of the \textit{Restatement Third's} approach may be likely given \textit{Allenberg}’s strong hint that it would be amenable to imposing liability upon the used goods retailer in certain circumstances.

VIII. Post-Sale Obligations

The \textit{Restatement Third} reflects a growing consensus regarding post-sale obligations of the product seller. A post-sale obligation to warn may exist if: the seller knows or should know that there is a substantial risk of harm; those needing the warning may be identified and would not be aware of the risk; a warning could easily be acted on to avoid the risk of harm; and the "risk of harm is sufficiently great to justify the burden of providing a warning."\textsuperscript{117} Although the Tenth Circuit has stated that a manufacturer has a "responsibility to warn of a defective product at any time after it is manufactured and sold if the manufacturer becomes aware of the defect,"\textsuperscript{118} the District Court for the Western District of Oklahoma has stated that "Oklahoma does not recognize a post-sale duty to warn or retrofit a product."\textsuperscript{119} This confusion could easily be resolved by guidance from the \textit{Restatement Third}.

Oklahoma and most state’s courts have yet to address the potential liability of a product seller for failure to recall a product, and courts could be persuaded by the approach of the \textit{Restatement Third}. Liability for failure to recall a product is imposed under the \textit{Restatement Third} if a governmental directive requires recall of the product or the seller has voluntarily undertaken a recall without a directive from an agency. However, liability is imposed only if the product seller “fails to act as a reasonable person in recalling a product,” clearly a negligence standard of care.\textsuperscript{120} Expansion of successor corporate liability was at one time a hot topic in products liability law, with the creation of the product-line theory of liability.\textsuperscript{121}

The product-line theory provides that a corporation “which acquires a manufacturing business and continues the output of its line of products... assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired.”\textsuperscript{122} Most courts, including Oklahoma, have rejected the product-line theory\textsuperscript{123} because the product-line theory is contrary to traditional corporate law principles governing the liability of a successor corporation. Traditionally, a successor corporation is only legally responsible for the liabilities of a predecessor corporation if: there is an agreement to assume liability, there is a consolidation or merger of the corporation; there is a fraudulent conveyance to escape liability; or there is a mere continuation of the predecessor by the successor corporation.\textsuperscript{124} The \textit{Restatement Third} adopts the traditional corporate rule,\textsuperscript{125} except that the \textit{Restatement Third} expands the obligation of a post-sale duty to warn onto the shoulders of the successor corporation. This approach is in some ways a de facto adoption of the product-line theory in the warning arena. The \textit{Restatement Third} imposes a duty upon the successor to warn of risks of harm created by a product sold by its predecessor where there is potential economic advantage to the successor from the relationship with the purchasers of the predecessor’s products, such as an agreement to repair or service the product, and if a reasonable person would warn. It would be reasonable to warn if: the successor knows or should know of a substantial risk; the successor could identify who to warn and they are unaware of the risk; a warning would be effective; and the risk of harm is great enough to justify the warning.\textsuperscript{126} Courts citing the \textit{Restatement Third} as persuasive authority

111. See e.g., MacDougall, supra note 4, at 364-365.
113. 22 P.3d at 230 (emphasis added).
114. 22 P.3d at 230.
117. id. § 10 (1998).
118. Smith v. PMC Corp., 754 F.2d 837, 877 (10th Cir. 1985).
121. See e.g., MacDougall, supra note 4, at 364-365.
126. Id. § 13 (1998).
could easily adopt a post-sale obligation to warn by a successor thereby expanding traditional corporate law in the process.

IX. Conclusion

The Restatement Third will probably not attain the stature of the Restatement Second in the field of products liability law. It is, quite frankly, hard to compete with a Restatement that has been referred to as the "bible" of products liability law, particularly when the Restatement Third goes beyond traditional boundaries to seek changes in existing law.

A resulting criticism is that some of the provisions of the Restatement Third are in the nature of a "search for the holy grail." For example, the creation of a new test for design defects for prescription drugs, providing that a drug is defective in formulation only if a reasonable physician would not prescribe it to any class of patients, could be perceived as a misguided attempt to share in the glory of the Restatement Second by creating a provision that would be adopted as the law of the land. But courts simply are not likely to overturn forty years of doctrine for a less satisfactory test than currently exists with the concept of unavoidably unsafe products.

Similarly, courts are probably going to hesitate to change their test for defectiveness or impose an absolute requirement for a feasible alternative. As cumbersome some of the current tests for defectiveness may be, the tests do represent established precedent. Furthermore, based on the Restatement Third, courts are probably not going to eagerly create a judicial immunity from liability for the distributors of defective prescription drugs and medical devices. However, courts could easily seek guidance from the Restatement Third in fine-tuning products liability law or resolving issues that are on the cutting edge. The Restatement Third could easily be used as citation authority for issues such as: the malfunction theory; clarification of the term "product", definition of the scope of liability of a bailor or used product seller; the liability of a component part manufacturer; establishment of a duty to warn consumers of the dangers of prescription drugs advertised direct-to-consumer; or post-sale duties to warn or recall including a post-sale obligation of a successor.

Thus, the Restatement Third will have largely the same impact as other Restatements. It will be persuasive authority on developing points of law, for whatever that is worth on a given issue. Although the Restatement Third may never achieve the glory of the Restatement Second, "persuasive authority" is not a bad epitaph.


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HUD’s New Final RESPA Rule Affects...

(Continued from page 89)

D. Escrow Account Disclosure

A technical amendment was made to section 3500.17 of Regulation X to eliminate the phase-in period for aggregate accounting for escrow accounts, which expired on October 27, 1997. The rule deletes all outdated provisions relating to the alternative accounting methods that were available during the phase-in period.

E. Severability

The rule adds a new section 3500.22 to Regulation X to make all provisions of the regulation severable (i.e., if a provision of the regulation is held invalid in a particular transaction, the remainder of the regulation is not affected). Given the potential litigation with respect to the rule, this may prove to be a key provision.

III. Provisions with an Effective Date of January 1, 2010

A. New Good Faith Estimate

Effective January 1, 2010, loan originators (i.e., a mortgage broker or lender that receives an application) must provide consumers with a new, three-page GFE that describes the terms intended to clearly answer key questions consumers typically ask when buying or refinancing their home, such as:

- What is the term of the loan?
- Is the interest rate fixed?
- What are the total costs?

HUD believes that the new GFE will help consumers to better understand the terms of their loan and to search more effectively for the lowest-cost loan. All closing costs printed on the GFE will be consolidated into major categories and printed on the first page to enable consumers to compare loan offers more easily and to prevent the charging of "junk" fees.

B. GFE Delivery

A loan originator must provide a consumer with a GFE within three days after an "application" is received. An "application" includes "information submitted in anticipation of credit decisions" including a borrower's name, Social Security number, property address, gross monthly income, the value of the house or best estimate of its value, the loan amount and any other information the loan originator deems necessary.

C. Upfront Fees

Except for a credit report fee, no upfront fees may be collected before delivery of the GFE. Also, no additional fees may be charged until after the applicant receives the GFE. This significant change will affect the operations of many lenders who currently charge an application fee at the time of application.

D. Tolerance and Cure

The rule establishes tolerances for certain settlement costs. Fees such as a loan originator’s own charges, the interest rate after it is locked-in and transfer taxes will be subject to a zero-tolerance requirement and, therefore, may not change before closing. Other charges, such as government recording charges, lender-required charges and selected (Continued on page 143)