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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC12-2075

WILLIAM P. AUBIN,

Petitioner,

v.

UNION CARBIDE CORPORATION,

Respondent.
_____/

BRIEF OF AMICUS CURIAE FLORIDA JUSTICE ASSOCIATION ON BEHALF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authorities

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Florida Justice Association ("FJA") is a statewide association of more than 3,000 trial lawyers, whose practices emphasize the protection of the personal and property rights of individuals and their families, including the right to non-defective products. The rules of product liability law are extremely important to FJA members' clients and to consumers generally.

The FJA often participates in appellate proceedings in cases affecting its membership and, specifically, has appeared as a friend of the court in other product liability law matters, including the recent consideration of amendments to the product liability standard jury instructions in In re: Standard Jury Instructions in Civil Cases (Products Liability), 91 So.3d 785 (2012).

SUMMARY OF ARGUMENT

In this brief the FJA will address two points. First, that §2(b) of the Restatement Third, Torts: Products Liability is contrary to the law of Florida, at odds with the rationales for and concepts of strict liability, and would amount to regression in the law and, therefore, it should not be adopted. Second, that component manufacturers cannot discharge the duty to warn product users of dangers in product components by warning intermediaries when the component manufacturer knows or has reason to believe the intermediary will not convey the information to the end users.

ARGUMENT

I. SECTION 2(b) OF THE RESTATEMENT THIRD, TORTS: PRODUCTS LIABILITY IS CONTRARY TO THE LAW OF FLORIDA, IS BASED ON UNSOUND PRINCIPLES AND POLICY, AND SHOULD NOT BE ADOPTED.

A. Section 2(b) of the Restatement Third, Torts: Products Liability

In one of the most controversial and highly contested products of the American Law Institute,[1] §2(b) of the Restatement Third, Torts: Products Liability (hereinafter "Products Liability Restatement") proposes to nullify decades of law for product design defects by abolishing §402A strict liability and the consumer expectations test of Restatement Second, Torts,[2] substituting instead a negligence only, risk/utility test that in most cases requires proof of a reasonable alternative product design,[3] and it would also restrict injured parties to a single cause of action. See Products Liability

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[1] Restatement Third, Torts: Products Liability, Foreword, p. xv; Introduction p. 4. The controversy surrounding the adoption of the Products Liability Restatement and particularly §2(b) is detailed in Larry S. Stewart, Strict Liability for Defective Product Design: The Quest for a Well-Ordered Regime, 74 Brooklyn L.Rev. 1038 (2009).

[2] Consumer expectations would remain as a test under §7 for food products and as a factor in the risk/balancing test under comment f to §2(b). Advocates of the new Restatement are unable to explain this inconsistency, since the alleged reason for the elimination of consumer expectations as a test of design defect is that it is "difficult to discern." Restatement, §2, cmt. a.

[3] Reasonable alternative design proof is not required in cases of manifestly unreasonable designs under §2 cmt. e; circumstantial evidence cases under §3; statutory violations under §4; food product cases under §7; and failure-to-recall cases under §11. For most design defect cases, however, such proof is mandatory, thus creating a "reasonable alternative design" test for design defect cases.

Restatement, §2(b) and cmts. d, g and n. Section 5(a) adopts these same restrictions for design defect claims against component manufacturers.

In the decade since their promulgation, those provisions have been largely rejected by the courts, with findings that they go "beyond the law," would amount to regression in the law, and would tilt the playing field unfairly to manufacturers' advantage. Beyond that, these provisions would represent a radical departure from Florida law. For these reasons, FJA respectfully submits that these provisions should be rejected as unsound, unwise, and not warranted.[4]

B. Florida Products Liability Law.

Although earlier decisions had already effectively adopted its principles, modern Florida Products Liability law began with the adoption of §402A in the seminal decision of West v. Caterpillar Tractor Co., Inc., 336 So.2d 80 (Fla. 1976). Specifically, West held that to impose liability, the injured party must prove:

> [T]he manufacturer's relationship to the product in question, the defect and unreasonably dangerous condition of the product, and the existence of the proximate causal connection between the condition and the user's injuries or damages. Id. at 87.

Echoing the rationale and the justification for §402A, this Court held:

[4] The Products Liability Restatement purports to be a comprehensive treatment of Products Liability law. FJA does not oppose the entire Restatement. Many of its provisions are non-controversial and either confirm existing law or would improve the administration of justice. For example, §2(a) reaffirms strict liability for manufacturing defects, and, for manufacturing defect claims, preserves to injured parties the right to pursue both strict liability and negligence claims. Id. at cmt. n.

> The obligation of the manufacturer must become what in justice it ought to be – an enterprise liability…. The cost of injuries or damages, either to persons or property, resulting from defective products, should be borne by the makers of the products who put them into the channels of trade, rather than by the injured or damaged persons who are ordinarily powerless to protect themselves. We therefore hold that a manufacturer is strictly liable in tort when an article he 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. Id. at 92.

Section 402A was adopted in response to growing dissatisfaction with warranty and negligence based claims which often failed for lack of privity, contractual defenses, or insurmountable proof requirements concerning what went wrong and how the manufacturer failed to act reasonably. It was based on the rationale that in marketing products, manufacturers implicitly represent that their products are safe; that the public has a right to expect that reputable sellers will stand behind their products; and that the burden of injuries should be upon those who market the products, rather than their users. Section 402A established a new "strict liability" regime for injuries resulting from defective products "even though the seller exercised all possible care in [their] preparation and sale []." It quickly became the law of the land and the most frequently cited section of all the Restatements.

Strict liability under §402A, and perforce West, is based on a finding that the product was "unreasonably dangerous" to users as measured by the expectations of the ordinary consumer.[5] These provisions came to be known as the "consumer

[5] Restatement Second, Torts §402A, cmt i ("dangerous to an extent beyond that which would be contemplated by the ordinary consumer…") and cmt g, ("The rule

expectation" test. Since 1976, Florida has consistently followed the consumer expectation test for design defect product liability claims.[6] And, Florida has never required proof of a reasonable alternative design as a prerequisite to liability. Adoption now of §2(b) of the Products Liability Restatement would overrule West and create a more restrictive regime than has ever existed under Florida law.

Additionally, §2(b)'s restriction of design defect claims to a single theory would overrule Ford Motor Co. v. Hill, 404 So.2d 1049, 1052 (Fla. 1981) (holding, "[i]f so choosing … a plaintiff may also proceed in negligence"). Hill is consistent with §402A, under which injured consumers have the option of bringing either a strict liability or a negligence claim or both in a single action.[7] Though strict liability is more often the theory of choice, in instances with, for example, products with sordid safety histories, cases with compelling evidence, and products with publicly known risk histories, negligent manufacturing or marketing claims are alternative choices.

…applies only where the product is … in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.").

[6] In recent years, Florida courts have expressly reaffirmed the §402A consumer expectation test. Force v. Ford Motor Co., 879 So.2d 103 (Fla. 5th DCA 2004); McConnell v. Union Carbide Corp., 937 So.2d 148 (Fla. 4th DCA 2006); Falco v. Copeland, 919 So.2d 650 (Fla. 1st DCA 2006). See also Tran v. Toyota Motor Co., 420 F. 3d 1310 (11th Cir 2005) (applying Florida law). But see Force, supra, at 110, suggesting there may be products "too complex" for the consumer expectation standard. Dicta aside, modern communication and advertizing are so pervasive it is difficult to imagine a product for which consumers do not have safety expectations.

[7] Restatement (Second) of Torts §402A, cmt. a ("The rule stated here is not exclusive, and does not preclude liability based upon the alternative ground of negligence of the seller, where such negligence can be proved").

C. The Advent of the So-Called "Risk/Utility" Test.

Restatement Second recognizes that there are some products which science and art cannot make completely safe for ordinary use but that still have utility. For those "unavoidably unsafe" products (prescription drugs, for example), comment k provides a seller will not be liable for marketing "an apparently useful and desirable product, [even though it is] attended with a known but apparently reasonable risk" as long as the manufacturer provides "proper directions and warning." Thus, comment k provides an "unavoidably unsafe" defense when a manufacturer can prove that the benefits of the product outweigh its risks. Its application is, however, conditional since it only applies when a product is "unavoidably" unsafe, and manufacturers must test designs for residual risks and adopt safer designs where possible over warning of risk. It is only when safer designs are not possible that a comment k defense applies.

Comment k to §402A embodies a risk/benefit "defense." What has come to be known as the "risk/benefit test" is different. The so-called "risk/benefit test," which is at the core of §§2 and 5 of the new Products Liability Restatement, was originally proposed in response to the adoption of §402A. It espouses a return to negligence principles as the measure of product defect. It is generally attributed to Dean John Wade and his article On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825 (1973). Dean Wade argued essentially for nullification of strict liability for all types of product defects (manufacturing and design) and a return to negligence

principles. He proposed that liability for defective products should be based on the reasonableness of the marketing decision, taking into account various factors.[8]

Manufacturer interests embraced this negligence-based risk/benefit theory. They realized, however, that there was little chance of completely overtaurning §402A liability, so they modified Dean Wade's approach by dividing product liability cases into manufacturing and design defects. For the former, §402A liability was conceded. For the latter, they argued that §402A should be replaced by a negligence-based risk/benefit theory. This became a national strategy coordinated by the Products Liability Advisory Council (PLAC).[9]

There was no reference in West to a risk/benefit test or analysis, but six years later it came up in two Florida decisions. First, in Cassisi v. Maytag Co., 396 So.2d 1140, 1145-46 (Fla. 1st DCA 1981), the First District quoted with apparent approval from Barker v. Lull Engineering Co., 573 P. 2d 443, 455 (Cal. 1978) (holding that in a design defect case the risk /benefit test shifts the burden of proof to the defendant to prove the product was not defective because the benefits of the design outweighed its risks). The Cassisi court ultimately held, however, that it did not need to decide

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[8] Dean Wade used a risk/benefit rationale, but he proposed instructing the jury on the basis of a reasonably prudent manufacturer standard. Id. at 840.

[9] PLAC is an association of corporate members and product liability defense attorneys that advocates for changes in products liability laws to favor manufacturers, principally through coordinating efforts across jurisdictions and filing amicus briefs. For a review of cases tracing PLAC's role on products liability rules, see Stewart, Courts Overrule ALI "Consensus" On Products, Trial Magazine, Nov. 2003, p. 18.

whether to authorize or how to apply the risk/benefit test because the case was a manufacturing, not a design, defect case.

In the second case, Ford Motor Co. v. Hill, supra, this Court squarely addressed the issue of whether Florida should adopt a negligence-based risk/benefit test for design defect cases. Hill involved a claim of lack of vehicle crashworthiness due to a design defect. Ford conceded that strict liability applied to manufacturing defects but contended that design defects involve complex engineering choices that could only be evaluated under a negligence standard that took into account all practical and technical problems of the design; i.e., a risk/benefit type test. This Court, however, rejected that argument, holding:

> We feel the better rule is to apply the strict liability test to all manufactured products without distinction as to whether the defect was caused by the design or the manufacturing. Id. at 1052.[10]

[10] In Hill, this Court also called for improvements in the standard jury instructions "which reflects the holding of the instant case." Id. at 1052, n. 4. The minutes of the Standard Jury Instruction Committee reflect that the Committee decided to have separate instructions for manufacturing and design defects, even though Hill specifically held that the strict liability/consumer expectation test applied to both design and manufacturing defects. In the new draft of PL 5 for design defect cases, the Committee added language expressly describing the consumer expectation test, which was consistent with this Court's rejection of Ford's contention that plaintiffs should only be able to recover in design defect cases if they prove negligence. But the Committee also resurrected Ford's argument on appeal about a negligence-based risk/benefit test and included it in the instruction because it concluded it was "widely used in other jurisdictions." From the Committee minutes it appears that the Committee either was unaware of or chose to ignore the conceptual differences between consumer expectations/strict liability and a negligence-based risk/benefit theory. See Supplemental Report (No. 82-2) of the Committee and Minutes attached thereto filed in Matter of Standard Jury Instr. (Civil Cases), 435 So.2d 782 (Fla.

Shortly after this Court approved a new standard Products Liability instruction for publication, it decided Radiation Technology, Inc. v. Ware Const. Co., 445 So.2d 329 (Fla. 1983). Some have claimed that Radiation Technology adopted the risk/benefit test for product design defects and implicitly went even further. However in Radiation Technology, as this Court noted, there was no strict liability claim. The case only involved a claim for negligently caused property damage, and the issue before the Court was whether an "inherently dangerous" product is limited to one which threatens bodily harm. In dicta, the opinion discusses the adoption of strict liability in Florida and conflates the concepts of strict liability and negligence-based risk/benefit, but it made no holdings in that regard.

1983). The inclusion of both tests in the standard instruction without guidance as to how to apply them has led to much confusion and potential error in the trial courts.

The Committee also appeared confused over the burden of proof. Burden of proof for a risk/benefit "defense" normally requires that once the plaintiff establishes a prima facie case of injury due to an unreasonably dangerous product defect, the burden shifts to the defendant to establish that it gave proper warnings and that the benefits of the product outweighed its risks. The Committee acknowledged that Cassisi and Barker held that the defendant has the burden of proving that the benefits outweigh the risks in the design, but it nonetheless decided that the "ultimate" burden of proof remains with the plaintiff, PL 5, Comment 2; and, therefore, made no provision for who bears the burden of proving that the benefits of a product design outweigh its risks. Committee Minutes, supra. In authorizing publication of the new instruction, this Court departed from its usual statement concerning the instructions to specifically note the unsettled nature of the law and emphasized that in permitting publication it was "not deciding any questions of law or correctness or applicability of the charge." Matter of Standard Jury Instr. (Civil Cases), supra.

Although other decisions allude to the risk/benefit concept in dicta,[11] no Florida court has expressly held that risk/benefit is an appropriate test for product design defect claims until the Third District Court of Appeal decided Kohler Co. v. Marcotte, 907 So.2d 596 (Fla. 3rd DCA 2005), and Agrofollajes, S.A. v. E.I. DuPont De Nemours & Co., (Fla. 3rd DCA 2010).[12] There were, however, two decisions dealing expressly with the affirmative risk/benefit defense under comment k to 402A.

First, in Adams v. G.D. Searle & Co., 576 So.2d 728 (Fla. 2d DCA 1991), the Court addressed the proper application of the risk/benefit defense of comment k and held that the test is an affirmative defense:

> We therefore hold that the seller has the burden to establish the application of comment k. Id. at 733.

While the case involved a strict liability claim for an IUD device, there is no principled reason why the decision does not apply to any allegedly unavoidably unsafe product. Logic dictates that if risk/benefit is an affirmative defense, it cannot also be a test of defectiveness. The only way that it could be a test of defect is under Dean Wade's call for replacement of strict liability with a negligence-based risk/benefit test, but that proposition was specifically rejected in Hill. Risk/benefit as

[11] E.g., Light v. Weldarc Co., 569 So.2d 1302 (5th DCA 1990). In some cases, the negligence-based risk/benefit test seems to have been voluntarily used by plaintiffs, e.g., Force, supra. The mere fact that some plaintiffs, for strategic reasons or out of ignorance, are willing to shoulder the burden of establishing that the risk of a product outweighed its benefits does not change the requirements of product liability law.

[12] Without any discussion or analysis or acknowledgment of West or Hill, the Kohler and Agrofollajes courts adopted §2(b) of the Products Liability Restatement.

an affirmative defense was later confirmed in Force v. Ford Motor Co., supra. There, in contrasting the consumer expectation and risk/benefit theories, the court explained:

> Under the risk-utility theory a product is defectively designed if the plaintiff proves that the design of the product proximately caused the plaintiff's injuries and the defendant fails to prove that on balance, the benefits of the design outweigh the risk inherent in the design. Id. at 106.

Thus, prior to the recent decisions of the Third District, no Florida court had expressly adopted the risk/benefit test for product design defects. Instead, Florida courts had only recognized risk/benefit as an affirmative defense when products were unavoidably unsafe and the manufacturer had given adequate warnings.

D. Section 2(b) of the Products Liability Restatement Is Based On Flawed Scholarship And Has Been Rejected By Most State Supreme Courts.

The Reporters for the new Products Liability Restatement claimed risk/benefit and proof of an alternative design was the majority rule for product design. That was the focus of much of the controversy surrounding the Restatement. In reality, product liability decisions were a hodgepodge of results, so varied that they defied any majority rule and, as a result, the Reporters' scholarship was directly contradicted by commentators and academics.[13]

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[13] See, e.g., Vargo, The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave, 26 U.Mem.L.Rev. 493 (1996); Popper, Restatement Third goes to Court, Trial, April 1999, p. 54; Shapo, Products Liability: The Next Act, 26 Hofstra L.Rev. 761 (1998); Vandall, The Restatement (Third) of Torts: Product Liability: Section 2(b): The Reasonable Alternative Design Requirement, 61 Tenn.L.Rev. 1407 (1994); Gray, The Draft ALI Product Liability Proposals: Progress or Anachronism? 61 Tenn.L.Rev. 1105 (1994); Little, The Place

The Reporters' "counting" of Florida illustrates the fundamental flaws in their majority rule claim. Ignoring West and Hill, the Reporters touted Radiation Technology, supra, as "the leading case in Florida," claiming this Court there adopted the risk/benefit test for design defects and implicitly required proof of an alternative design. Restatement (Third) Torts: Products Liability, §2(b), Reporters' Note at pp. 66-67. There were, however, no such holdings in Radiation Technology. And, their scholarship was not the only basis for criticism. The Reporters' partisanship,[14] their focus on "manufacturer expectations," and their claim that users should bear some of the risk of product design (§2, cmt. a) generated even more controversy.[15]

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of Consumer Expectations in Products Strict Liability Actions for Defectively Designed Products, 61 Tenn.L.Rev. 1189 (1994); Vandall, State Judges Should Reject the Reasonable Alternative Design Standard of the Restatement (Third), Products Liability, Section 2(b), 8 Kan. J.L. & Pub. Pol'y 62 (1998).

[14] Prior to becoming Reporters for the product liability project, the Reporters were associated with PLAC and advocated for the risk/benefit test. See, for example, Newman v. Ford Motor Co., 975 SW 2d 147 (Mo. 1998); Henderson and Twerski, A Proposed Revision of Section 402A of the Restatement (Second) of Torts, 77 Cornell L.Rev. 1512 (1992); Twerski, From Risk-Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Product Liability Litigation, 11 Hofstra L.Rev. 861 (1983).

[15] See, e.g., Shapo, A New Legislation: Remarks on the Draft Restatement of Products Liability, 30 U. Mich. J.L. Reform 215, 218 (1997) (§2(b) is not a description of existing law, but the invention of drafters who acted as "a sounding board for essentially political discussion"); Vandall, Constructing a Roof Before the Foundation is Prepared: The Restatement (Third) of Torts: Products Liability Section 2(b) Design Defect, 30 U. Mich. J.L. Reform 261, 261-65 (1997) (§2(b) is "a wish list from manufacturing America" in which "[m]essy and awkward concepts such as precedent, policy, and case accuracy have been brushed aside for the purpose of tort reform"); Symposium, A Critical Analysis of the Proposed Restatement (Third) of Torts: Products Liability, 21 Wm. Mitchell L. Rev. 411, 412-13, 419-20 (1995)

As the critics predicted, these provisions have now been largely rejected by the courts. Before the ink was dry, the Georgia Supreme Court (Banks v. ICI Americas, 450 S.E. 2d 671 (Ga. 1994)) refused to require proof of an alternative design, and the Supreme Courts of California (Carlin v. Superior Court, 920 P. 2d 1347 (Cal. 1996)) and Connecticut (Potter v. Chicago Pneumatic Tool Co, 694 A. 2d 1319 (Conn. 1997)) rejected §2(b). Potter was the most stunning, coming just days after final passage of the proposal. There, the Court boldly questioned the scholarship underlying §2(b) and concluded that the Reporters were wrong. The Court independently reviewed the law and found "that the majority of jurisdictions do not impose upon plaintiffs an absolute requirement to prove a feasible alternative design" and that such a requirement "imposes an undue burden on plaintiffs that might preclude otherwise valid claims from jury consideration." Id. at 1331. The Potter court also rejected the Reporters' statement that the consumer expectation test should not apply in design defect cases.

Other courts have also independently researched the law and found that §2(b) goes "beyond the law." Delaney v. Deere & Co., 999 P. 2d 930, 946 (Kan. 2000); Green v. Smith & Nephew AHP, 629 N.W. 2d 727, 751 (Wis. 2001). Those courts, as well as a majority of other state supreme courts to consider the question, have all rejected §2(b). See, Rodriguez v. Suzuki Motor Corp., 996 S.W. 2d 47, 64-65 (Mo.

(collecting numerous articles stating that §2(b) is "a vehicle for social reform" rather than a restatement of the existing law).

1999); McCathern v. Toyota Motor Corp., 23 P. 3d 320 (Or. 2001); Vautour v. Body Masters Sports Ind., Inc., 784 A. 2d 1178 (N.H. 2001); and Mikolajczyk v. Ford Motor Co., 901 N.E. 329 (Ill. 2008). Section 2(b) was also rejected by the Maryland Court of Appeals in Halliday v. Surm, Ruger & Co., 792 A. 2d 1145 (Md. 2002).[16]

E. The Requirements of §2(b) are Unfair, Unsound and Regressive.

Standing the rules of Restatement Second §402A on their head, as §2(b) of the new Products Liability Restatement would do by imposing a risk/benefit test as the sole test of design defect, would create a presumptively safe product regime– one that would fail to promote societal interest in developing and marketing safe products. No longer would product sellers implicitly represent that their products were safe; no longer would the public have a right to expect that reputable sellers will stand behind their products; and in many cases the costs of injuries would no longer rest upon those who market the products, but rather on the users of those products. Adding to the risk/benefit test an absolute requirement to prove an alternative reasonable design in most cases would create new, more draconian barriers to justice than those which prompted the enactment of §402A in the first instance. Green v. Smith & Nephew, supra, at 751-52 ("[Section] 2(b) increases the burden for injured consumers not only by requiring proof of the manufacturer's negligence, but also by adding an additional—and considerable—element of proof to the negligence standard.").

[16] While some jurisdictions have adopted §2(b), most did so because of tort reform legislation that already contained those provisions. See, Hernandez v. Tokai Corp., 2 S.W. 3d 251 (Tex. 1999), and Ray v. Bic Corp., 925 S.W. 2d 527 (Tenn. 1996).

Beyond that, dismissal of the strict liability rationales for design defects does not survive analysis. Spreading the risk of product injuries through seller liability continues to best serve societal goals, a point the new Products Liability Restatement acknowledges in the case of manufacturing defects but dismisses for design defects. However, the applicability of this rationale does not vary with the cause of the product defect. If risk-spreading is a valid liability rationale, there is no principled reason why it does not also support strict liability for design defects.

Deterrence of unsafe practices, whether in a manufacturing or design context, is even more important now in an era of rapidly changing technology, deregulation, and underfunding of regulatory agencies than it was in the 1960s. The Products Liability Restatement recognizes that fact for manufacturing defects, but glosses over it for design defect claims by arguing that too much deterrence would result in "excessively sacrificing product features," and that its different liability regime was "fair" because it would result in incentives to cause "consumers to bear appropriate responsibility for proper product use."[17]

Those arguments, however, simultaneously overstate and understate the case for dismissal of a deterrence rationale. They overstate it because the former argument applies with equal force to manufacturing defects − excessive quality control can affect product features just as excessive design. They understate it because the latter argument would also apply to manufacturing defects and is, in any event, already

[17] Products Liability Restatement, §2, cmt. a.

addressed by product misuse and comparative negligence defenses. Indeed, legal "incentives" for consumer safety would probably add little since product users already have substantial personal incentives to avoid injury.

Shifting to a negligence-based, risk/benefit regime for design defect claims, requiring proof of an alternative reasonable design would seriously undermine deterrence. Gone would be incentives to produce products that are safe for foreseeable uses, as sellers would only have to design to a standard where benefits outweighed risks and, if sued for a defective design, could take refuge in the opinions of compliant experts and the inherent difficulties of proving alternative design.

Litigation efficiencies would also be seriously undermined by a "reasonable alternative design" test regime. Strict liability was conceived to avoid the perils of negligence-based liability. The Products Liability Restatement would revive those risks and make them more onerous, since injured consumers would have to prove a previously unknown form of negligence: that the seller was negligent because there was an alternative design the seller could have adopted. Litigation in such a regime would also be more expensive and would result in more unjust results.

The reasons for dismissal of the consumer expectations test for design defects are equally unavailing; a point that is foreshadowed by the contradictions and obvious unease in the Products Liability Restatement's discussion of consumer expectations. At the same time the Restatement comments that "consumer expectations do not play a determinative role in determining defectiveness," it concedes a few lines later that

consumer expectations "may substantially influence or even be ultimately determinative on risk-utility balancing.…"[18] Its criticism of consumer expectations is also undermined by its invocation of consumer expectations as the foundation for §2, comment e "manifestly unreasonable" designs, §3 inferences of product defect, and its express retention of the test for food and used products in §§7 and 8.

Further, the Product Liability Restatement's criticism that discerning consumer expectations about product design is too difficult is unpersuasive when compared to the use of other legal tests, such as negligence, which is routinely applied in myriad complex cases like those arising from professional malpractice. Nor are products too complex for consumers to understand. It is not necessary for a consumer to appreciate all the details or intricacies of a product to have an expectation of safety.[19] If consumer expectations are sufficiently discernible that they can be "ultimately determinative" in one context, then there is no principled reason why they are not also sufficiently discernible to guide strict liability for design defects.

More important, the consumer expectations standard is consistent with the rationales for modern products liability law, especially normative expectations of

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[18] Products Liability Restatement §2, cmt, g.

[19] Green, 629 N.W.2d at 742-43 ("These standards are straightforward and may be applied even in "complex" cases. . . . As we have explained, juries are always called upon to make decisions based on complex facts in many kinds of litigation. . . The problems presented in products liability jury trials would appear no more insurmountable than similar problems in other areas of the law. For these reasons, we reject the notion that the consumer-contemplation test cannot be applied in cases involving technical or mechanical matters.") (citations and quotations omitted).

product safety and fitness that exist in the absence of disclosure or warnings of danger, which often do not occur or are carefully camouflaged for marketing considerations. Indeed, as the Products Liability Restatement acknowledges, safety and performance expectations can be readily created by the ways in which products are portrayed in modern advertising campaigns.[20] In much the same fashion, safety and fitness expectations can also be created by the absence of information about product dangers. Holding product sellers to such a standard is consistent with seller obligations to test product designs since consumers can reasonably expect that product testing will be done and its results accounted before a product is placed on the market. Indeed, it is a basic tenet of products liability law that consumers have the right to assume that products are safe, and they do not have to guard against product defects or the possibility of their existence. West, Id. at 92.

In the end, dismissal of this and the other policy rationales as support for a strict liability design defect regime just does not add up. Adoption of §2(b) would lead to the regression of products liability law for defective design beyond anything that previously existed. For all the foregoing reasons, FJA respectfully submits that this Court should not adopt §2(b) of Restatement Third, Torts: Products Liability.

II. WARNINGS BY COMPONENT MANUFACTURERS TO INTERMEDIARIES DO NOT DISCHARGE THE DUTY TO WARN END USERS WHEN THE COMPONENT MANUFACTURER KNOWS OR HAS REASON TO KNOW THE INTERMEDIARY IS NOT COMMUNICATING THE WARNINGS TO THE END USERS.

[20] Products Liability Restatement, §2, cmt. f.

In a somewhat confusing discussion that conflates learned intermediaries with intermediaries in general, the court below held that Union Carbide was entitled to a "learned intermediary" jury instruction that it could fulfill its duty to warn of the dangers inherent in its product by reasonable reliance on the final product manufacturer to convey warnings to the end user. Union Carbide Corp. v. Aubin, 97 So.3d 889, 902 (Fla. 3d DCA 2012). However, the "learned intermediary" rule is not applicable,[21] and the court misconstrued Union Carbide's duty to warn.

Component manufacturers have a duty to warn end users of any dangers inherent in their products.[22] Rest. 2d Torts §388. In some cases that duty can be discharged by warning intermediaries in the chain of distribution, such as a final product manufacturer. However, simply providing the information to an intermediary does not satisfy the duty to warn the end user because, in all cases, that duty remains. It is only when the component manufacturer knows or has reason to believe that the

[21] The joint compound and ceiling texture manufacturers involved in this case were not "learned intermediaries." To be "learned" requires (1) specialized education and training concerning the type of product at issue, (2) a special relationship with the end user that requires the use of that special knowledge in allowing access to the product, and (3) controlled access to the product imposed by law so the end user can only obtain the product through the intermediary. Thus, for example, police department employees and employees of retail stores are not "learned intermediaries." Brito v. County of Palm Beach, Fla., 733 So.2d 109 (Fla. 4th DCA 1998); Hays v. Spartan Chemical Co., Inc., 622 So.2d 1352 (Fla. 2d DCA 1993).

[22] Where there is a learned intermediary – the classic case being a licensed healthcare provider − the duty to warn extends only to the learned intermediary and not to the end user. Felix v. Hoffman-LaRoche, Inc., 540 So.2d 102 (Fla. 1989); Hoffman-LaRoche, Inc. v. Mason, 27 So.3d 75 (Fla. 1st DCA 2009); Buchner v. Allergen Pharm., Inc., 400 So.2d 820 (Fla. 5th DCA 1981). That rule does not apply here.

intermediary is conveying the warning to the end user that the component manufacturer's duty to warn may be satisfied. Union Carbide Corp. v. Kavanaugh, 879 So.2d 42 (Fla. 4th DCA 2004). When it is known or suspected that the intermediary is not conveying the information, the product supplier is liable for failure to warn "[e]ven though the supplier has no practical opportunity to give this information directly and in person to those who are to use the chattel… [Under those circumstances,] it is not unreasonable to require him to make good any harm which is caused by his using so unreliable a method of giving information" to those who need it. Rest. 2d, Torts §388, cmt. n.[23] Here, Carbide stipulated it knew the intermediary manufacturers did not place any warnings on their products. See Aubin, supra, at 892.

CONCLUSION

Section 2(b) of the new Products Liability Restatement is contrary to the law of Florida, is based on faulty scholarship and unsound principles and policy, and should be rejected. Warnings of dangers inherent in component products given only to intermediaries do not discharge the duty of component manufacturers to warn end users when the component manufacturer knows, or has reason to know, the intermediary is not communicating the warnings to end users.

[23] In this respect, Restatement Second and the new Products Liability Restatement concur. See Products Liability Restatement §2, cmt. k, holding that a factor in the sufficiency of warning an intermediary is "the likelihood that the intermediary will convey the information to the ultimate user…. Thus [if] there is reason to doubt that the employer will pass warnings on to employees, the seller is required to reach the employees directly with necessary instructions and warning if doing so is feasible."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to JAMES L. FERRARO, ESQ. (jlf@ferrarolaw.com), MELISSA D. VISONTI, ESQ. (mdv@ferrarolaw.com), JUAN P. BAUNTA, ESQ. (jpb@ferrarolaw.com), 4000 Ponce de Leon Blvd., Ste. 700, Coral Gables, FL 33146; MATTHEW CONIGLIARO, ESQ. (mconigliaro@carltonfields.com), 200 Central Ave., Ste. 2300, St. Petersburg, FL 33701; DEAN A. MORANDE, ESQ. (dmorande@carltonfields.com), 525 Okeechobee Blvd., Ste. 1200, West Palm Beach, FL 33401, by email, on June 21, 2013.

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