IADC COMMITTEE NEWSLETTER

PRODUCT LIABILITY

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IN THIS ISSUE

The reasonable alternative design concept is well-known in product liability law, but its purpose and importance differ by jurisdiction. Understanding the concept's underpinnings and its alternative applications can be the key to presenting an effective defense.

Alternative Approaches to Alternative Design: Understanding the Reasonable Alternative Design Requirement and Its Different Applications

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In 1997, the American Law Institute (ALI) adopted the final draft of its Restatement (Third) of Torts on the topic of product liability. The most notable—and controversial—feature of the ALI's work was its requirement that plaintiffs in design defect cases prove the "foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design." Restatement (Third) of Torts: Products Liability § 2(b) (1998).

Although the reasonable alternative design (sometimes referred to as the "feasible alternative design") concept was by no means new to product liability, the Third Restatement elevated the concept to new prominence and sparked a furor in the legal academy, the bench, and bar. Some viewed the Third Restatement's reasonable alternative design requirement as the beautiful harmonization of all design defect jurisprudence. Others viewed it as a betrayal of the law's most fundamental precepts and the end of product liability as a distinct field because it infused negligence principles into design defect cases, whereas the Second Restatement seemingly had not. *See* Restatement (Second) of Torts § 402A (1965); *but see* Aaron D. Twerski & James A. Henderson, Jr., *Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 Brook. L. Rev. 1061, 1063-69 (2009) (arguing that few courts following the Second Restatement ever truly set aside negligence principles in design defect cases, even if they purported to do so). Outspoken detractors scorched the pages of law journals with personal barbs and accusations against ALI reporters and the ALI's institutional integrity, claiming that the ALI had sold out to the interests of civil defendants. To give an example, one commenter incensed over the reasonable alternative design requirement wrote that the ALI, "infected as it was with reporter bias and improper influence, has produced nothing more than a position paper reflecting the views of special interest groups with whom the reporters are aligned." Patrick Lavelle, *Crashing Into Proof of a Reasonable Alternative Design: The Fallacy of the Restatement (Third) of Torts: Products Liability*, 38 Duq. L. Rev. 1059, 1067 (2000). Another commenter—who weighed-in before the Third Restatement was finalized—accused the ALI of desecrating the legacy of Roger Traynor and concluded that the reasonable alternative design requirement "contravenes the foundational policies of products liability law." Frank J. Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 Tenn. L. Rev. 1407, 1421-25 (1994). The heated commentary left little room for a middle ground.

For the practitioner, the tenor of the commentary and criticism—which still rages on today in the halls of the legal academy and in the courts—should signal the importance of the reasonable alternative design requirement. Only a doctrine of consequence would merit such strong opinion. Indeed, anyone who has ever litigated a design defect case understands the practical significance of this issue and knows the influence that a comparison between the subject product and

an alternative design may have on judges and juries. Plaintiffs pointing to a demonstrably safer product design that a manufacturer could have adopted cite such proof as a powerful way of showing that there was something "wrong" with the subject product. For a defendant, pointing to the absence of a demonstrably safer product design may support the conclusion that the product's design was appropriate and that the plaintiff's injury was either unavoidable or resulted from a condition unrelated to design.

Background

The starting point to understanding the reasonable alternative design requirement is understanding its purpose. A design defect case requires proof that the product at issue was defective in its design, but defining what it means to be defective can be a difficult task, particularly in cases where a product functioned as it was designed to function but a personal injury occurred nonetheless. The reasonable alternative design requirement attempts to provide a framework for that task. It is, in effect, an exemplification of risk-utility analysis predicated on the notion that if a product's foreseeable risks could have been avoided by adoption of a reasonable alternative design, then the product's risks must have outweighed its utility. Twerski & Henderson, *supra*, at 1076-77. The logic underlying this analysis differs from a manufacturing defect claim, in which the product's deviation from the manufacturer's specifications provides a built-in standard of defectiveness.

Effectively litigating design defect cases across jurisdictions calls for understanding this purpose for the reasonable alternative design's existence and an appreciation of where the reasonable alternative design requirement stands today, more than seventeen years after its controversial instantiation in the Third Restatement. Understanding the way in which different jurisdictions treat the requirement will allow for the best possible defenses.

Because of its intuitive appeal, the concept of a reasonable alternative design appears to have *some* place in design defect cases in every jurisdiction, albeit in varying degrees. Jurisdictions break down into three basic approaches. First, there are jurisdictions that make a reasonable alternative design an element of every design defect claim; second, there are jurisdictions that treat a reasonable alternative design as a preferred theory, but not exactly an element of a claim; and third, there are jurisdictions that simply accept evidence of a reasonable alternative design as one possible manner of proof.

This article will attempt to describe and give examples of these three basic approaches. But before doing so, a word of caution: a strict headcount of every jurisdiction is problematic for several reasons, not least of which is that on this topic judicial reasoning and reality do not always align. How would one, for example, properly classify a jurisdiction whose highest court has *stated* that a reasonable alternative design was not required as an element of a claim, and yet upheld a directed verdict against a plaintiff

because he failed to present evidence of a reasonable alternative design? Such riddles have, through the years, added fuel to the debate over the Third Restatement, particularly to the debate over whether it is a positive or normative document. Rather than performing an absolute headcount, this article will attempt to give clear examples of the three basic approaches. Our hope is that readers who practice in jurisdictions where the law is unsettled will use these examples to focus their defenses and to assist courts in producing clearly-articulated opinions on this topic.

Type 1 Jurisdictions – Element of a Claim

The first, and most straightforward approach, is to follow the Third Restatement in treating a reasonable alternative design as one element of a claim. In jurisdictions that take this approach, the reasonable alternative design is not simply a useful and intuitive tool to focus the presentation of evidence; it is part of a plaintiff's prima facie case. Examples of jurisdictions that take this approach include Mississippi and Texas. *See Clark v. Brass Eagle, Inc.*, 866 So.2d 456, 461 (Miss. 2004); *Timpte Indus. v. Gish*, 286 S.W.3d 306, 311 (Tex. 2009).

The Mississippi Supreme Court's opinion in *Williams v. Bennett*, 921 So. 2d 1269 (Miss. 2006) nicely illustrates the approach. In that case, the plaintiff sued the store that had sold him a handgun after he dropped the gun with the safety in the off position, causing the gun to discharge a bullet into his leg. *Id*. at 1270. The plaintiff alleged a design defect, presumably based on the theory that the gun should have been designed so as to not discharge under the circumstances. In support of his claim, the plaintiff submitted an expert's affidavit stating that the "firearm industry expects guns to be dropped without the safety on" and "that the standard of care within the industry is that guns will not unintentionally fire when dropped." *Id*. at 1277. The court affirmed a summary judgment granted to the defendant based on the plaintiff's failure to set forth an alternative design for the handgun. It reasoned that the expert's affidavit was insufficient because it provided "no proof concerning a feasible design alternative" and therefore "failed to provide the circuit court with any basis of comparison from which to determine that the design of the . . . handgun was indeed defective." *Id*. The court embraced the logic of the Third Restatement, and noted that design defect cases occupied a special place in the product liability field:

> More than with any other type of products liability case, a trier of fact in a design defect case depends on objective evidentiary mechanisms to determine liability. In Mississippi, the legislature has codified the requirements unique to a design defect claim and laid out an explicit blueprint for claimants to prove when advancing such a claim. When claimants do not fulfill their statutory obligation, they leave the courts no choice but to dismiss their claims because they fail to proffer a key element of proof requisite to the

> court's determination of whether the claimant has advanced a valid claim under the statute.
>
> *Id*.

Hence, the court recognized that design defect cases are analytically dissimilar to manufacturing defect cases, in that design defect cases require some outside, external, objective standard for defectiveness, which cannot be found in generalized references to industry expectations. Instead, that standard must be found in reasonable alternative designs.

Jurisdictions that follow this first approach can require plaintiffs to be quite specific regarding their alternative designs, and may even require plaintiffs to produce actual products, drawings, or prototypes that are consistent with the plaintiffs' theory. *See, e.g.*, *Guy v. Crown Equip. Co.*, 394 F.3d 320, 325-27 (5th Cir. 2004). Thus, the reasonable alternative design requirement can prove to be a trap for unprepared plaintiffs and their experts, and a valuable asset to defendants putting plaintiffs to their proofs.

Type 2 Jurisdictions – Preferred Theory

In the second type of jurisdiction, the reasonable alternative design is not an element of a claim, but it is a preferred theory. In these jurisdictions, a plaintiff's failure to put forward a reasonable alternative design can still prove fatal in certain cases, but the legislature and courts have declined to make the reasonable alternative design a per se rule for every case. Examples of this type of jurisdiction include Colorado and New Hampshire. *See Armentrout v. FMC Corp.*, 842 P.2d 175, 183-85 (Colo. 1992); *Vautour v. Body Masters Sports Indus*., 784 A.2d 1178, 1182-84 (N.H. 2001). Generally, these jurisdictions apply a multi-factor test to determining whether a product was defective. The reasonable alternative design is a preferred theory in the sense that it carries greater weight—at least practically speaking—relative to other factors in the test.

The case of *Trust Department of First National Bank of Santa Fe v. Burton Corp*. illustrates this second approach. 2013 Prod. Liab. Rep. (CCH) ¶ 19,224 (D. Colo. Sept. 11, 2013). In that case, the plaintiff alleged a design defect in a helmet worn during a snowboarding accident. The plaintiff offered expert testimony at trial, but the plaintiff's expert only testified that the helmet's shell could have been made "harder" and that its liner could have been made "softer." *Id*. at *10-11. He "offered no testimony suggesting what, if any, combination of these materials might have been used to create a helmet capable of preventing or mitigating the type of injury [the plaintiff] suffered." *Id*. at *11. The court found this hole in the expert's testimony especially important and devoted much more of its attention to this factor than to any other factor in Colorado's multi-factor test, ultimately granting the manufacturer judgment as a matter of law. It reasoned that because the plaintiff's expert "had not considered any specific alternative design at all" and the defendant's expert had specifically testified that "no such feasible

alternatives existed," the plaintiff had failed to sustain his burden of proof. *Id*. at *12-13. It is impossible to read the court's opinion and not conclude that the plaintiff's failure to present a reasonable alternative design was especially detrimental.

It is worth mentioning that although jurisdictions, like Colorado, that follow this approach are not entirely faithful to the Third Restatement's view of the reasonable alternative design requirement, they are not entirely unfaithful either. Even the Third Restatement recognizes that there are *some* design defect cases that are so straightforward, a court may conclude that a product was defective based on inference, and a plaintiff may not even have to specify whether the defect was in the product's design or manufacture. Restatement (Third) of Torts: Products Liability § 3 cmt. b (1998). Whereas the Third Restatement makes the reasonable alternative design requirement a per se rule subject to exceptions, the jurisdictions that follow this second type of approach are simply less absolute—they note the importance of a reasonable alternative design but leave open the possibility in more general terms that a plaintiff may present a prima facie case without presenting a design alternative. *See, e.g., Vatour*, 784 A.2d at 1183-84.

Type 3 Jurisdictions – One Manner of Proof

The third approach is to accept evidence of a reasonable alternative design as one manner of proof, but to disclaim the concept of reasonable alternative design as an element of a claim or even a factor that courts must always consider. This approach is most common in jurisdictions like Kansas, Oregon, and Wisconsin, which purport to maintain a pure consumer expectations analysis for determining whether a product was defective, instead of a risk-utility analysis. *See Gaumer v. Rossville Truck & Tractor Co*., 257 P.3d 292, 302 (Kan. 2011); *McCathern v. Toyota Motor Corp*., 23 P.3d 320, 330 (Or. 2001); *Horst v. Deere & Co*., 769 N.W.2d 536, 550-51 (Wis. 2009). In jurisdictions that purport to define defectiveness based on whether the product was "in a condition not contemplated by the ultimate consumer" there is less analytical space for a reasonable alternative design to operate. *Compare* Restatement (Second) of Torts § 402A *cmt. g* (1965) *with* Restatement (Third) of Torts: Products Liability § 2 *cmt. g* (1998). The whole concept of reasonable alternative design is bound up with the risk-utility analysis instead. Twerski & Henderson, *supra*, at 1076-77.

But parties litigating cases in jurisdictions that purport to use a pure consumer expectations analysis still often tend to channel the presentation of their design defect cases through the prism of alternative designs. *See, e.g.*, *Horst*, 769 N.W.2d at 539 (noting that the plaintiffs "argued that designing a mower to operate in reverse is unreasonably dangerous and that the mower should have had an alternative design"). The tendency to gravitate toward alternative designs even when the law purportedly does not account for them says much about the reasonable alternative design concept's intuitive appeal (discussed above) and also the inherent

shortcomings in the consumer expectations test itself. *See id*. at 555-60 (Crooks, J., concurring); *see also* Twerski & Henderson, *supra*, at 1062-68.

The consumer expectations test's shortcomings are so great, in fact, it would typically be unwise to submit to the test in its purest form, particularly where the product at issue is complex in its design and not readily understood by ordinary consumers. In such cases, even jurisdictions that embrace the consumer expectations analysis, generally, recognize that risk-utility evidence—and, relatedly, reasonable alternative design evidence—may be necessary to inform a jury's analysis. In *McCathern v. Toyota Motor Corp*., for example, a design defect case involving a rollover car accident, all parties relied on testimony regarding alternative designs, despite Oregon's supposed adherence to the consumer expectations analysis. 23 P.3d at 332. While the Oregon Supreme Court reaffirmed its adherence to the consumer expectations analysis in affirming a plaintiff's verdict, it also reasoned that "some design-defect cases involve products or circumstances that are 'not so common that the average person would know from personal experience what to expect.'" *Id*. at 331 (citing *Heaton v. Ford Motor Co*., 435 P.2d 806, 809 (1967)). The court reasoned that in such cases, even though the jury would still consider consumer expectations, "evidence that the magnitude of the product's risk outweighs its utility" would necessarily inform the jury's consideration of product design. *Id*.

Put simply, in Oregon and elsewhere, whenever ordinary consumers cannot possibly be expected to form meaningful expectations about a product's design and performance, objective evidence of alternative designs or the absence thereof can fill the void. Even in jurisdictions that regard the concept of a reasonable alternative design as simply one manner of presenting a case, there is room to argue that reasonable alternative design evidence is practically imperative.

Conclusion

Seventeen years after the ALI adopted the Third Restatement of Torts on the topic of product liability, lawyers across the country continue to wrestle with the reasonable alternative design requirement, including with whether it is (or should be) a requirement at all. As a legal concept, it has at least *some* significance in every jurisdiction and has the power to push the evaluation of a product's design out of a theoretical vacuum and into the real world. For anyone on the front line of litigating design defect cases, understanding the reasonable alternative design's various manifestations is key to making the clearest possible argument and helping to shape the law toward clarity and consistency.

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