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Product Liability: The Problem of the Non-Designing Manufacturer

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PRODUCT LIABILITY: THE PROBLEM OF THE NON-DESIGNING MANUFACTURER

I. INTRODUCTION

Early in the development of product liability law, producers of goods were held liable only for manufacturing defects.[1] More recently, however, manufacturers have been held liable for design defects as well.[2] It is thought that a product with a design defect subjects the user to as great a risk as a product that is defective due to an error in the manufacturing process.[3] Although differing in interpretations of what constitutes a defective design,[4] virtually all jurisdictions now hold a

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1. The distinction between manufacturing defects and design defects has been explained by many legal scholars as well as in numerous judicial opinions. A clear explanation was given by Professor James Henderson, Jr.:

> Manufacturing flaws are imperfections that inevitably occur in a typically small percentage of products of a given design as a result of the fallibility of the manufacturing process. A flawed product does not conform in some significant aspect to the intended design, nor does it conform to the great majority of products manufactured in accordance with that design. . . . [On the other hand, products with a design defect] are unusually dangerous because of the manner in which they are designed or marketed. Therefore, [a product defectively designed] conforms to the intended design and is substantially identical in relevant aspects to all the other unflawed products manufactured according to the same design or marketed in the same manner.

Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1543 (1973). Henderson's references to the marketing of the product acknowledge that a design defect can consist of a failure to give proper warning if the product cannot be made safe. *See, e.g.*, Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 401-03, 451 A.2d 179, 187 (1982).

When a manufacturing defect exists, the manufacturer clearly has "caused" the harm and imposing liability is not troublesome. This comment therefore will deal only with design defects, which present a greater problem in relation to the non-designing manufacturer.

2. *See generally* 2 PROD. LIAB. (MB) § 16A[4] [f] [iv] (April, 1981 & Supp. 1983).

3. *E.g.*, Rindlisbaker v. Wilson, 95 Idaho 525, 519 P.2d 421 (1974).

4. "It is now agreed on all sides that the concept of 'defect' plays a central role in the development of the law of products liability. Yet the analysis of that concept has not yielded any general statement of what kinds of conditions are included and what kinds are not." C. GREGORY, H. KALVEN & R. EPSTEIN, CASES AND MATERIALS ON TORTS 577 (1977) [hereinafter cited as GREGORY].

In the Restatement (Second) of Torts § 402A comment i (1965), a product defect is defined as a "condition of the product [which] makes it unreasonably dangerous to the user or consumer." The product is defective when it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.* Even in states which have adopted § 402A, however, this definition is not followed by all courts at all times. Furthermore, some states have adopted varying versions of strict product liability, with different definitions of "defective." For a discussion of the problems involved in arriving at a uniform definition of "defective" products, see GREGORY, *supra*, at 577-78.

manufacturer liable for harm caused by defectively designed products.[5] A special problem arises, however, when the courts consider imposing liability for design defects on a *non-designing* manufacturer—a manufacturer having no part in the design of a product but manufacturing it in accordance with another party's specifications.[6]

The question of the non-designing manufacturer provides an excellent forum for analyzing a struggle underlying all product liability litigation: namely the problem of accommodating the competing policy interests of compensating consumers for injuries versus protecting manufacturers from excessive liability. To a large extent, shifts in the balance between these very interests are responsible for many of the dramatic changes which have occurred in product liability law in recent years.[7] The conflict is especially strong in the case of the non-designing manufacturer, where satisfying the valid interest in compensating innocent injured parties would require imposing liability for a design defect on a manufacturer which had no part in designing the defective product.

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5. *See generally* 2 PROD. LIAB. (MB) § 16A [4] [f] [iv] (April, 1981 & Supp. 1983).

6. A non-designing manufacturing arrangement most frequently arises when a business entity requires a specialized piece of equipment for its operations. The company therefore designs the product to meet its own needs and contracts with a second company to produce the equipment according to specifications which the designer supplies. (Often, the company providing the specifications is itself a manufacturer but is not equipped to produce the needed equipment.) Lawsuits against the non-designing manufacturer arise when employees of the designing company are injured while using the equipment. *See* Roy v. Star Chopper Co., 584 F.2d 1124 (1st Cir. 1978) (employee injured by electroplating equipment sued manufacturer which had produced the equipment according to her employer's specifications), *cert. denied*, 440 U.S. 916 (1979); Lenherr v. NRM Corp., 504 F. Supp. 165 (D. Kan. 1980) (injured employee of tire manufacturer sued company which had produced a "squeegee machine," used in the manufacture of tires, according to specifications provided by the tire manufacturer). *See also* Garrison v. Rohm and Haas Co., 492 F.2d 346 (6th Cir. 1974); Weggen v. Elwell-Parker Elec. Co., 510 F. Supp. 252 (S.D. Iowa 1981); Castaldo v. Pittsburgh-Des Moines Steel Co., 376 A.2d 88 (Del. 1977); Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 451 A.2d 179 (1982).

Similarly, a manufacturer requiring a specialized component part for its own end-product might design the part to meet its requirements, and then contract to have another manufacturer produce that part according to its specifications. *See* Orion Ins. Co. v. United Technologies Corp., 502 F. Supp. 173 (E.D. Pa. 1980) (suit brought by the estate of a pilot killed in a helicopter crash against the manufacturer of a component part of the helicopter. The component part had been manufactured in accordance with design specifications furnished by the helicopter manufacturer).

Conceivably, a retailer desiring to sell a particular product might also contract with a manufacturer to produce that product according to its specifications.

7. In the past 20 years, the area of product liability litigation has undergone major upheavals and "enormous doctrinal shifts." GREGORY, *supra* note 4, at 547. The rapidity with which changes have occurred in this area of the law is somewhat astounding. Some of the factors which have had an influence on the development of product liability, as noted by one author, are "long-arm jurisdiction; elimination or limitation of privity in most states; expansion of pre-trial discovery; extension of design and warning duties to include foreseeable misuse; and interpretation of statutes of limitations to run from injury or its cause rather than the time of sale of the product." Shea, *Product Liability: A Continuing Process of Change*, 68 A.B.A. J. 576, 576 (1982).

The question of the non-designing manufacturer has received little attention, perhaps because relatively few cases have presented the issue.[8] Legal scholars have virtually ignored the subject. This comment will attempt to partially fill that gap in legal literature, and will propose that non-designing manufacturers should be held liable for damage caused by design defects in goods they produce according to another's specifications. Imposing such liability would further the goals of the doctrine of strict liability[9]—a doctrine which has been almost universally accepted. In addition, holding non-designing manufacturers liable would be consistent with other situations in which parties are held liable though they are not at "fault."[10] Further, since liability would exist only if the manufacturer produced a *defective* product,[11] and because mechanisms exist by which the manufacturer can protect itself,[12] non-designing manufacturers would not be subject to an undue burden of excessive liability.

II. THE THEORIES OF PRODUCT LIABILITY

An understanding of the two different tort theories of product liability—negligence and strict product liability—is necessary before one can analyze the issue of the non-designing manufacturer's liability. It is especially important to focus on the competing interests underlying all product liability litigation and to examine how each of the theories attempts to resolve the conflict.

A. Negligence

A product liability action brought under a negligence theory applies traditional tort concepts of negligence to the manufacturer of goods.[13] Thus, the manufacturer owes a duty of due care to a potential user of the product, and can be held liable for damage caused by his act or actionable omission in breach of that duty.[14] Under the objective

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8. This fact was acknowledged by the United States District Court of Kansas, which stated in 1980 that "there are very few reported cases on the liability of a manufacturer for a defectively designed product when someone else is the designer." Lenherr v. NRM Corp., 504 F. Supp. 165, 174 (D. Kan. 1980).

9. *See infra* notes 23-24 and accompanying text.

10. *See infra* text accompanying notes 57-62.

11. *See infra* text accompanying notes 63-66.

12. *See infra* notes 67-72 and accompanying text.

13. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 641-44 (4th ed. 1971).

14. *Id.*; *see also* MacPherson v. Buick Motor Co., 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916). *MacPherson* was a major turning point in the development of product liability law. Prior to the decision, courts steadfastly adhered to the traditional privity requirement, and a consumer could bring an action for a defective product only against the retailer from whom he had purchased the product. Judge Cardozo's landmark decision in *MacPherson* abrogated the traditional privity requirement for the first time, and applied negligence concepts in a suit brought by a

"reasonable manufacturer" standard generally applied,[15] the manufacturer will be held liable if he did not act to prevent a foreseeable harm to a foreseeable user of the product.[16]

Through the reasonable manufacturer standard, the negligence cause of action attempts to balance the compensation interest against a historical reluctance to impose liability without fault.[17] This approach protects manufacturers against excessive liability by allowing injured consumers to be compensated if, but only if, the manufacturer acted negligently.[18] Under this theory, a manufacturer which acted as carefully as it could reasonably be expected to act will not be liable if an error nonetheless occurs. Central to the negligence formulation, then, is the establishment of the manufacturer's *fault* for not being as careful as the reasonable manufacturer would have been in manufacturing the product.[19]

The negligence cause of action frequently does not allow compensation because it imposes very difficult proof problems on the plaintiff.[20] Establishing the manufacturer's lack of care in testing a product, or improper maintenance of quality control, is very difficult because the plaintiff usually lacks direct access to this type of information.[21] Additionally, in a design defect action based on negligence, the plaintiff must be prepared to show that a better design was available and feasible for use.[22] A great deal of expert testimony must therefore be used. Even if the plaintiff can show that the manufacturer was negligent, the suit is therefore likely to be very lengthy and expensive to litigate.

Thus, a negligence cause of action attempts to balance a societal interest in compensating innocent victims against the opposing interest of protecting manufacturers and sellers of products from excessive liability. Because of the proof problems which a plaintiff faces in the negligence action, however, the balance seems to tip dangerously in favor of manufacturers. In order to shift the balance back toward the plaintiff[23] and to facilitate compensation, the doctrine of strict product lia-

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consumer directly against a product manufacturer.

15. W. PROSSER, *supra* note 13, at 644.

16. *See id.* at 643.

17. *Id.* at 17-19, 492.

18. *Id.* at 645.

19. *See id.* at 641-49.

20. Davis, *Product Liability Under Section 402A of the Restatement (Second) of Torts and the Model Uniform Product Liability Act*, 16 WAKE FOREST L. REV. 513, 514 (1980).

21. *See* GREGORY, *supra* note 4, at 553. Courts have frequently resorted to the doctrine of res ipsa loquitur to establish an inference of negligence when plaintiffs cannot point to specific acts of negligence. *See* Davis, *supra* note 20, at 514.

22. *See* Davis, *supra* note 20, at 517-18.

23. Comment, *The Government Contract Defense in Strict Liability Suits for Defective Design*, 48 U. CHI. L. REV. 1030, 1048 n.91 (1981). The author discusses policy justifications for

bility developed.

B. *Strict Product Liability*

With the growing emphasis on consumer protection in the law, courts and legislatures have sought to facilitate plaintiff recovery in product liability actions.[24] The vehicle for accomplishing this has been the doctrine of strict product liability. Although different jurisdictions have adopted widely varying versions of strict product liability,[25] the

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strict product liability, observing that "[i]t sometimes is argued that strict products liability is necessary to relieve the plaintiff of the difficult burden of proving negligence." *Id.*

24. In addition to compensation, several other rationales for strict product liability are frequently expressed. One of these is loss spreading:

> The loss spreading rationale [for strict liability] recognizes the devastating burdens on a consumer injured by a defective product. Strict liability instead places the burden on manufacturers and sellers who treat the cost as a cost of doing business. This ultimately is passed on to future consumers of the product, and the injured person's loss is born by society.

Lenherr v. NRM Corp., 504 F. Supp. 165, 174 (D. Kan. 1980). *See also* Comment, *supra* note 23, at 1048.

Another frequently expressed rationale for strict product liability is that applying the doctrine furthers the goal of minimizing losses. The loss minimization rationale assumes that the manufacturer is in the best position to prevent product defects and thus minimize the losses that arise out of the use of the product. This rationale was expressed by Judge Traynor in Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring) (Traynor's concurrence is famous for the variety of justifications it presents for strict liability for manufactured products). *See also* Vandall, *Undermining Torts' Policies: Products Liability Legislation*, 30 AM. U.L. REV. 673, 697-99 (1981) (rationale for strict product liability is placing burden on party best able to prevent the accident); G. CALABRESI, THE COSTS OF ACCIDENTS 26 (1970) (proposing that the principal purpose of tort law should be to reduce the costs of accidents and the costs of avoiding accidents).

Another rationale for imposing strict product liability is that it is equitable to do so. The so-called "corrective justice" argument for applying strict liability in products cases requires that we "establish the causal connection between the plaintiff and the defendant's act . . . and then ask whether, prima facie, the loss should be placed upon the party who created that condition or the party who suffered from it." GREGORY, *supra* note 4, at 554.

25. Because jurisdictions have adopted different rules, and because rapid changes in product liability law have caused confusion, there is no uniform standard for imposing product liability. Shea, *supra* note 7, at 576. "The result is billions of dollars of potential liability exposure without clear answers where the liability may fall or what should be done to minimize the risk." *Id.* A clearer standard would aid litigation, be better for allocating risks, and better serve as an incentive for manufacturers to exercise greater care. The more precise the standard, the better it can fulfill these objectives. Davison, *The Uncertain Search for a Design Defect Standard*, 30 AM. U.L. REV. 643, 645-46 (1981).

In order to alleviate the confusion and uncertainties of product liability law, there is growing interest in federal legislation which would preempt state laws and establish uniform standards to be applied in all product liability actions. The Product Liability Act, S. 2631, was approved by the Senate Committee on Commerce, Science and Transportation in late 1982. For the Report of the Senate Committee, see S. REP. NO. 670, 97th Cong., 2d Sess. (1982), *reprinted in* [Extra Edition] PROD. LIAB. REP. (CCH) No. 507 (Dec. 15, 1982). The committee report contains a discussion of the uncertainties of product liability litigation, the reasons that states cannot effectively resolve them, and the ways in which the proposed federal product liability legislation will resolve the problem. *Id.* at 2-10. See Shea, *supra* note 7, at 579 for arguments supporting the Product

most commonly accepted version is the formulation of the Restatement (Second) of Torts.[26] Under the Restatement, a seller is liable for a defective product even when "the seller has exercised all possible care in the preparation and sale of his product."[27]

The strict liability cause of action therefore facilitates a finding for the plaintiff.[28] Under section 402A and the other formulations which have been adopted, the plaintiff pursuing a strict liability cause of action need not show that the manufacturer was negligent or at fault in designing or manufacturing the product.[29] The focus is on the defective product rather than on the manufacturer's actions.[30] The plaintiff need only show that the product was defective, that the defect existed at the time the product left the manufacturer's control, and that the defect is causally linked to the injury the plaintiff suffered.[31] If these elements are satisfied, the manufacturer will be held liable for the injury. Thus, regardless of how careful the manufacturer may have been in the design or manufacture of the product, the mere fact of its defectiveness will suffice to impose liability.[32] Consequently, a manufacturer which prudently plans its product, tests the design, manufactures it with high quality control standards and even tests it after the manufacturing process, can nonetheless find itself liable if the product proves to have an undiscerned defect. Thus, the advantage for the plaintiff of the strict

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Liability Act.

26. RESTATEMENT (SECOND) OF TORTS § 402A (1964). "Judicial acceptance of the conditions of liability recited in Section 402A of the Restatement (Second) of Torts has been little short of phenomenal. As the editors of the most widely used teaching materials in torts have said, 'Section 402A has literally swept the country.' " Davis, *supra* note 20, at 513 (emphasis and footnotes omitted).

27. The RESTATEMENT (SECOND) OF TORTS § 402A (1964) states as follows:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

28. Davis, *supra* note 20, at 518.

29. W. PROSSER, *supra* note 13, at 672.

30. Lenherr v. NRM Corp., 504 F. Supp. 165 (D. Kan. 1980); Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 451 A.2d 179 (1982). *See infra* text accompanying notes 50-52 & note 56 for discussion of the focus on the defective product in *Lenherr* and *Michalko*.

31. *Lenherr*, 504 F. Supp. at 172; *Michalko*, 91 N.J. at 394, 451 A.2d at 183; Preiser, *Defenses In Strict Tort Liability Actions*, 5 AM. J. TRIAL ADVOC. 485, 487-88 (1982).

32. *See Lenherr*, 504 F. Supp. at 174, 176; *Michalko*, 91 N.J. at 395-96, 451 A.2d at 183-84 (quoting Suter v. San Angelo Foundry & Machine Co., 81 N.J. 150, 406 A.2d 140 (1979)).

product liability cause of action is that he or she need not show that the manufacturer is at *fault* in order to assure compensation.[33]

A sub-strand of strict product liability has developed which does focus on fault, but which still facilitates plaintiff compensation by not requiring that the plaintiff *prove* the fault. In this line of cases, courts have applied strict product liability principles by imputing *knowledge* of the product defect to the manufacturer. The manufacturer is then *assumed* to be at fault for marketing a product with a known defect. Thus, the manufacturer can be held liable without requiring the plaintiff to put forth proof of fault.[34] This strand of strict product liability therefore also allows plaintiff compensation more easily than a negligence cause of action would, since the plaintiff does not have to *prove* the manufacturer's fault.[35]

Essentially, then, a conflict between the competing societal interests in compensating injured parties and protecting manufacturers from excessive exposure to liability underlies the product liability area of law; the negligence and strict liability theories differ in the way they attempt to resolve this conflict. As consumerism has become an increasingly important concern and the pendulum has swung toward the compensation side of this conflict, strict product liability has increasingly been adopted as the vehicle by which the plaintiff's burden is eased and compensation more readily allowed. Furtherance of the same policies and interests which prompted the development and adoption of strict product liability mandates that we impose liability on non-designing manufacturers.

III. Analysis - Applying The Theories And Policies To The Non-Designing Manufacturer

Under a negligence theory, courts have generally found no basis for holding a non-designing manufacturer liable when a product design proves defective.[36] As one United States district court has stated,

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33. *See* Davis, *supra* note 20, at 516-18. Davis compares the proof that is required of a plaintiff under a negligence theory and under § 402A strict product liability. He concludes that, although similar questions are involved in proving each cause of action, proof under § 402A is easier because defective product design is proven more readily than is negligence.

34. Applying this reasoning, the Supreme Court of New Jersey stated that

> [t]he focus in a strict liability case is upon the product itself. Knowledge of a product's dangerous characteristics is imputed to the defendant. It is not necessary to prove that defendant knew or should have known of the harmful attributes of its product while the product was under its control in order to charge it with that knowledge.

Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 394-95, 451 A.2d 179, 183 (1982) (citations omitted).

35. *Id.*

36. *See, e.g.*, 504 F. Supp. at 174.

> [i]t is logical to absolve a manufacturer from liability for a negligently designed defective product when the manufacturer is not the designer and plaintiff's theory of recovery is negligence. Under those circumstances a manufacturer is liable only if the defect in design is sufficiently obvious to alert a reasonably competent manufacturer to the danger.[37]

Thus, it is "the generally accepted rule that the manufacturer of a product, built in accordance with plans and specifications of [a designer], will not be liable [in negligence] for damage occasioned by a defect in those specifications, unless the plans are so obviously dangerous that no reasonable person would follow them."[38]

In contrast, a manufacturer which produces a defectively designed product would be liable under strict product liability theory, although another party provided the design. Because strict product liability focuses on the defective product itself and does not require proof of fault,[39] the fact that the manufacturer did not design the product is irrelevant.

A number of courts, however, have been reluctant to apply the doctrine of strict product liability to the non-designing manufacturer.[40] Apparently, these courts are fearful of allowing the pendulum to swing too far toward the compensation interest and are concerned about exposing manufacturers to excessive liability. These courts have sought to avoid imposing liability on manufacturers for design defects in products that the manufacturers did not design.

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37. *Id. Lenherr* involved an action brought by an injured employee against the manufacturer, who had produced the machine which caused the employee's injury. The machine had been manufactured in accordance with specifications provided to the manufacturer by the plaintiff's employer. The employee based her action solely on a strict product liability theory. The court noted that very few cases have applied that doctrine in the context of the non-designing manufacturer. In ruling that the manufacturer was free from liability, the court distinguished between the application of negligence and strict liability theories to the non-designing manufacturer situation. *Id.*

38. Castaldo v. Pittsburgh-Des Moines Steel Co., 376 A.2d 88, 90 (Del. 1977) (citing Ridley Investment Co. v. Croll, 56 Del. 208, 192 A.2d 925 (1963); Rawls v. Ziegler, 107 So. 2d 601 (Fla. 1958); Leininger v. Stearns-Roger Mfg. Co., 17 Utah 2d 37, 404 P.2d 33 (1965)). In *Castaldo*, the court found that even the *designer* of the equipment in question was not liable under a negligence theory because it had not designed the specific part of the equipment which caused the injury. Since its "design responsibility was terminated prior to the selection of an appropriate temperature-measuring instrument or its method of installation [the court found] no basis upon which to hold [the designer] responsible for a design decision it never made." *Id. See also* Rivkin & Silberfeld, *Compliance With Product Specifications: Shield or Sword?*, 17 FORUM 1012, 1013-14 (1982).

39. *See supra* text accompanying notes 28-33.

40. Two commentators have analyzed the cases which have confronted the issue of compliance with product specifications, and concluded that "courts are divided over the question of whether to permit the use of the defense of compliance with product specifications to claims sounding in strict products liability in cases where the specifications are furnished by non-governmental entities." Rivkin & Silberfeld, *supra* note 38, at 1033-34.

Courts which have declined to apply the strict product liability theory to non-designing manufacturers have injected negligence concepts into strict product liability actions. The Sixth Circuit Court of Appeals, for example, applied Kentucky law and stated in *Garrison v. Rohm and Haas Company*[41] that "the distinction between the so-called strict liability principle and negligence is of no practical significance as far as the standard of conduct required of the defendant is concerned. In either event the standard required is reasonable care."[42] Since the product in controversy in *Garrison* was found *not* to be defective,[43] the holding of no liability would have been the same under either negligence or strict product liability. However, the *Garrison* court reached its decision circuitously, applying "standard of conduct" and "reasonable care" negligence concepts to a strict liability cause of action,[44] where the focus should have rested solely on whether the product was defective.[45] In a different fact situation, where a manufacturer is not negligent but the product *is* defective, the "distinction between the so-called strict liability principle and negligence"[46] could have *great* practical significance, since in a strict product liability action it is not necessary to consider the manufacturer's fault.[47]

The reluctance which the *Garrison* court and other courts have exhibited toward imposing liability on non-designing manufacturers appears grounded in a fear of placing excessive liability on manufacturers by holding them responsible for design defects in products which they did not design. The policies underlying strict product liability,[48] however, indicate that the doctrine *should* be applied. The United States

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41. 492 F.2d 346 (6th Cir. 1974).

42. *Id.* at 351 (quoting Jones v. Hutchinson Mfg. Inc., 502 S.W.2d 66, 70 (Ky. Ct. App. 1973)).

43. *Id.*

44. *Id.*

45. *See supra* text accompanying notes 28-33.

46. *Garrison*, 492 F.2d at 351.

47. *See supra* text accompanying notes 28-33. The Fourth Circuit has also avoided imposing liability by declining to apply a strict liability theory independent of negligence principles. In Spangler v. Kranco, 481 F.2d 373 (4th Cir. 1973), an injured workman brought suit against a manufacturer which built an overhead crane in accordance with specifications supplied by its customer. The suit charged that the manufacturer's failure to equip the crane with a warning device rendered the crane inherently dangerous.

Spangler was originally brought under a negligence theory only, and the trial ended in summary judgment for the defendant because negligence was not proved. On appeal, the plaintiff asked that strict product liability be considered as an amended theory of recovery. As in *Garrison*, *Spangler* was ultimately decided on the fact that the product was not defective. However, the court noted that the standard of safety imposed on the manufacturer of a product "is essentially the same whether the theory of liability is labeled . . . negligence or strict tort liability." 481 F.2d at 375 n.2 (quoting Chestnut v. Ford Motor Co., 445 F.2d 967 (4th Cir. 1971)).

48. *See supra* notes 29-33 and accompanying text.

District Court in Kansas recognized this and correctly applied strict product liability to a non-designing manufacturer in *Lenherr v. NRM Corporation.*[49] The *Lenherr* court distinguished between negligence and strict product liability,[50] pointing out that the latter could be imposed "even if 'the seller has exercised all possible care in the preparation and sale of his product . . . .' "[51] The court imposed liability on a manufacturer which had produced a defective machine according to another party's specifications merely on the ground that the manufacturer had produced the machine and put it into commerce for ultimate use by consumers.[52]

Similarly, the Supreme Court of New Jersey recently relied on the policies underlying strict product liability in holding a non-designing manufacturer[53] responsible for a design defect. In *Michalko v. Cooke Color & Chemical Corporation*[54] the court focused primarily on the compensation goal, stating that the most "significant" aspect of the case was the fact that the plaintiff, an innocent party, was "grievously injured," and that "as between plaintiff, an innocent user of the machine, and [the manufacturer], . . . it is incontestably fairer to impose the cost of the accident on the latter."[55] Desiring to allow compensation, the *Michalko* court properly applied strict product liability to the non-designing manufacturer.[56]

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49. 504 F. Supp. 165 (1980). The *Lenherr* court faced the necessity of applying Kansas law, which had adopted strict liability but had "not spoken on the liability of a non-designing manufacturer of a product for a defective design." *Id.* at 175. The court decided that "[b]ased on the adoption of strict liability by the Kansas Supreme Court and the policies behind strict liability, . . . the Kansas Supreme Court would hold a manufacturer liable under a theory of strict liability." *Id.*

50. *Id.* at 174.

51. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 402A (2) (1964)); *see also* Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

52. *Id.* at 176. For a discussion of retailers' and distributors' liability, see *infra* notes 57-59 and accompanying text.

53. The defendant in this case was not actually a product *manufacturer*. Rather, the suit was brought by an employee, injured on a piece of industrial equipment, against an *independent contractor* which had rebuilt parts of the equipment according to specifications provided by the equipment owner, plaintiff's employer. The court acknowledged, however, that the principles of strict liability for a manufacturer "apply with similar force to one engaged in rebuilding machines." Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 395, 451 A.2d 179, 183 (1982). The difference between a manufacturer and an independent contractor which rebuilds parts of a product is not important for the purposes of this comment. Therefore, the contractor in *Michalko* will be referred to as a "manufacturer" for consistency with other cases discussed.

54. 91 N.J. 386, 451 A.2d 179 (1982).

55. *Id.* at 398-99, 451 A.2d at 185. This emphasis also exemplifies the "corrective justice" rationale for strict product liability. *See supra* note 24.

56. The *Michalko* court concluded that

> the fact that the product was built according to the plans and specifications of the [designer] does not constitute a defense to a claim based on strict liability for the manufacturer of a defective product.

Thus, imposing liability for design defects on non-designing manufacturers is consistent with and furthers the policies our society has chosen to promote through the development of strict product liability. Additionally, imposing liability on non-designing manufacturers is consistent with other situations in which parties are held liable although they are without "fault." Indeed, "[b]ecause liability exposure created by section 402A employs the term 'sells'[57]. . . it encompasses retailers and wholesalers who *may have had nothing to do with the design or assembly of a product* . . . . "[58] Thus, liability has been imposed on sellers who merely purchase for resale;[59] on sellers of used products;[60] and on manufacturers of an entire product for a defective component part purchased from another party.[61] As one United States district court has observed, "the non-designing manufacturer's role in a products liability action for a design defect is analogous to the role of a retailer or distributor in an action for a manufacturing defect."[62] Clearly, then, imposing liability on the non-designing manufacturer is not a radical departure from situations in which we have already imposed strict liability. The imposition does not create a new type of liability; rather, it merely calls for applying the doctrine of strict product liability as it already exists to a new set of factual circumstances. The imposition is no more burdensome on the non-designing manufacturer than on any other "seller" held liable without fault.

Furthermore, because it focuses only on *defective* products,[63] strict product liability theory is not unnecessarily harsh on the non-designing manufacturer. A manufacturer will not be held liable by virtue of merely making a product; for liability to be imposed, the product must be *defective*. Repeatedly, courts and legal scholars have pointed out that even under strict product liability, "a manufacturer [is] not an

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. . . .

. . . [A]dherence to or reliance upon the [designer's] plans . . . is irrelevant. 'It is not necessary to show that the defendant created the defect. What is important is that the defect did in fact exist when the product was distributed by and was under the control of the defendant.'

Id. at 395-96 (quoting Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 170, 406 A.2d 140, 150 (1979)).

57. *See supra* note 27.

58. Davis, *supra* note 20, at 529 (emphasis added).

59. The *Lenherr* court referred to the role of a retailer or distributor in a strict liability action for a manufacturing defect. "The [retailer or] distributor is liable under the strict liability requirements although he exercised extreme care. His liability exists by reason of his position in a chain of distribution to the consumer and the policy considerations behind the adoption of strict liability." *Lenherr*, 504 F. Supp. at 176.

60. *See generally* 2 PROD. LIAB. (MB) § 16A[4] [b] [iv] (May, 1980).

61. *See generally id.* at § 16A[4] [b] [i] (Aug. 1977).

62. *Lenherr*, 504 F. Supp. at 176.

63. *See supra* text accompanying notes 28-33.

insurer that its product [is] incapable of producing injury."[64] Where a driver whose automobile left the road and collided with a signpost brought an action against the manufacturer of the signpost,[65] for example, the Supreme Court of Illinois found no liability and stated that

> [a] manufacturer is not under a duty in strict liability to design a product which is totally incapable of injuring those who foreseeably come in contact with the product. Products liability does not make the manufacturer an insurer of all foreseeable accidents which involve its products. Virtually any product is capable of producing injury when put to certain uses or misuses. . . . Injuries are not compensable in products liability if they derive merely from those inherent properties of a product which are obvious to all who come in contact with the product. The injuries must derive from a distinct defect in the product, a defect which subjects those exposed to the product to an *unreasonable* risk of harm.[66]

Thus, the focus on defective products mitigates what some may perceive as an undue harshness of imposing liability on the non-designing manufacturer. Although the manufacturer did not design its product, the manufacturer *did* put a defective product into the marketplace. When viewed in this light, and in accordance with the policies underlying strict product liability, imposing liability on the non-designing manufacturer does not seem unnecessarily harsh.

Moreover, non-designing manufacturers will not be unduly burdened because they may employ several mechanisms to reduce their liability exposure. A manufacturer which is unwilling to assume the risk of liability for a product it did not design can, for example, include a provision for indemnification in its manufacturing contract with the product designer. In other words, the manufacturer can contractually allocate the risk of liability.

Another mechanism by which the manufacturer can reduce its liability exposure is the use of liability insurance. As the doctrine of strict product liability has developed, insurance protection has become increasingly important to manufacturers. Recognizing this, insurers have

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64. Garrison v. Rohm and Haas Co., 492 F.2d 346, 351 (6th Cir. 1974).

65. Hunt v. Blasius, 74 Ill. 2d 203, 384 N.E.2d 368 (1978).

66. *Id.* at 211, 384 N.E.2d at 372 (citing Genaust v. Illinois Power Co., 62 Ill. 2d 456, 467, 343 N.E.2d 465, 471 (1976)). The *Blasius* court found no liability because the plaintiff had "alleged no legally cognizable defect in the sign post [and] [t]he risks which inhered in the collision with the post were the same risks which attend all collisions between motorists and stationary objects which align the highway." *Id.* at 212, 384 N.E.2d at 372. *See also* Spangler v. Kranco, Inc., 481 F.2d 373 (4th Cir. 1973) (summary judgment for a defendant manufacturer which had produced a crane according to specifications supplied by the injured plaintiff's employer. "There was no defect in the crane itself nor in it any latent quality which caused [plaintiff's] injury." *Id.* at 375.)

made broader coverages available.[67] Through liability insurance, manufacturers can "spread the risk" so that no single party need bear the burden of a loss.[68] Eventually, consumers absorb the loss by paying higher prices for goods because the manufacturer passes on its insurance costs. The cost of the loss is thus spread among all consumers rather than requiring the injured party to bear it alone. At the same time, the manufacturer is not subjected to an excessive burden.

The non-designing manufacturer is further protected by the availability of an indemnity action against the party which designed and provided specifications for the defective product. Legal commentators have pointed out that compliance with product specifications can be used by a manufacturer as a "sword"—"a means of passing on some or all of the manufacturer's alleged liability to the designer."[69] As these authors have noted, the use of compliance with product specifications as a basis for indemnification is easily justifiable on policy grounds.[70] Accordingly, indemnity actions have been allowed,[71] under contract theory, by assuming an *implied* promise by the product designer to indemnify the manufacturer if the product proves defective.[72]

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67. For a discussion of product liability insurance for manufacturers, see 3A PROD. LIAB. (MB) § 50 (Aug. 1982). *But see* Shea, *supra* note 7, at 578. Professor Shea argues in support of federal product liability legislation. He maintains that the need for such legislation is due in part to the failure of insurance to meet the needs of manufacturers.

68. *See supra* note 24.

69. Rivkin & Silberfeld, *supra* note 38, at 1013.

70. A designer, expert in the field, who has specified a defective product is far more culpable than a manufacturer who, without any negligence on his part, produces the product exactly as specified. Moreover, one of the purposes of tort liability is to prevent the occurrence of future harm. Hence, such liability should be borne primarily or entirely by the entity which is in the best position to correct the tortious act and prevent future torts of a similar nature. That entity plainly is the designer, who can achieve the desired result simply by changing the specifications to eliminate the defect.

Id. at 1026 (footnote omitted).

71. *See* Roy v. Star Chopper Co., 584 F.2d 1124 (1st Cir. 1978) (employee injured on equipment designed by her employer brought suit against the non-designing manufacturer. Third party action for contribution and indemnity by employer/designer allowed), *cert. denied*, 440 U.S. 916 (1979); Weggen v. Elwell-Parker Elec. Co., 510 F. Supp. 252 (S.D. Iowa 1981) (third party indemnity action allowed by defendant non-designing manufacturer against equipment designer). The *Weggen* court held that the "general rule . . . that indemnity is not available to the manufacturer of a defective product from its purchaser" is inapplicable where the purchaser has supplied the specifications for the product. *Id.* at 254. The court reasoned that the contract for manufacture according to specifications "produced a designer/fabricator relationship instead of the ordinary vendor/vendee relationship," *id.*, and determined that "a purchaser's input into the specifications and design modifications may be so intrusive, specialized and specific that it gives rise to an independent duty requiring the purchaser to use due care in the design and specification." *Id.* If this duty is breached and the design or specifications are defective, indemnity is available. *Id.* at 255.

72. The principle of law underlying the theory of implied contractual indemnification based solely on compliance with product specifications is . . . that a party who furnishes product specifications impliedly promises to use due care in designing the product. This

IV. CONCLUSION

Historically, our legal system has been hesitant to impose liability without "fault." Because a non-designing manufacturer did not design the product it produces, imposing liability when the design proves defective seems somewhat troublesome. The manufacturer is not at fault for the product design, so imposing liability may seem inequitable. On the other hand, however, a plaintiff who has been injured by a defectively designed product is seeking compensation. The plaintiff, also, is without fault. Who should prevail?

The tension between compensating injured consumers and protecting manufacturers from excessive liability underlies all product liability litigation. Over the past two decades, strict product liability has grown as a way of accommodating this tension. Strict product liability favors the compensation side of the scale by removing some of the proof problems that plaintiffs had under negligence actions, and thus makes it easier for plaintiffs to prevail.

Imposing liability on non-designing manufacturers would further the compensation goal and would therefore be consistent with the policy our legal system has adopted in developing strict product liability. Additionally, this imposition would be consistent with other situations in which parties are liable without fault. Furthermore, non-designing manufacturers would not be subjected to undue hardship because protections are available through contractual allocation of risk, liability insurance, and suit against the product designer for indemnification. Given these mechanisms available to the manufacturer to protect itself and the societal interest in compensation, non-designing manufacturers should be held liable for design defects.

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implied promise gives rise to a further obligation on the part of the designer to indemnify the manufacturer if the product turns out to be unsafe in design and causes injury or damages for which the manufacturer is held liable.
Rivkin & Silberfeld, *supra* note 38, at 1028.