Courts wisely reject category liability because its application would, through substantial liability exposure, lead to removal of lawful products from the market, attorneys Victor E. Schwartz and Cary Silverman say.

The authors analyze recent rulings in Mississippi for a respirator maker that were properly grounded in the tort law prohibition against holding manufacturers liable for selling a lawful product with known risks that can’t be reduced without altering the defining characteristics of the product.

Category Liability: Properly Precluding Claims That Propose An Alternative Product Rather Than an Alternative Design

In two recent cases, a Jones County, Mississippi trial court granted summary judgment to a manufacturer in claims brought by former jackhammer workers alleging that a commonly used type of disposable respirator failed to adequately protect them from inhaling silica dust.1 The Circuit Court grounded its rulings in the tort law prohibition against “category liability.” The decisions serve as a reminder that a reasonable alternative design standard should not be forced upon a lawful product that has no reasonable alternative.

Principles of Category Liability

“Category liability” is a fundamental doctrine of product liability law. It involves situations in which a manufacturer would be subject to liability for selling a lawful product with known risks that cannot be reduced

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1 See Mealer v. 3M Co. (Jones County Cir. Ct., Miss., Mar. 28, 2015), reconsideration denied (Nov. 10, 2015) (hereinafter “Mealer Order”); Harris v. 3M Co. (Jones County Cir. Ct., Miss., Apr. 1, 2015), reconsideration denied (Nov. 10, 2015) (applying reasoning of Mealer to grant summary judgment to defendant in case involving same conditions, job duties, and employer).
without altering the defining characteristics of a product. Courts wisely reject category liability because its application would, through substantial liability exposure, lead to removal of lawful products from the market.

As product liability practitioners are well aware, in most states, plaintiffs who claim that a product is defective must show that the manufacturer could have reduced or avoided a risk of injury through the adoption of a reasonable alternative design. This requirement, set forth in Section 2(b) of the Restatement Third of Torts, Products Liability (1998), moved away from an open-ended test that considered whether a product posed an unreasonable risk of harm to one that requires a plaintiff to answer a fundamental question: How could the manufacturer have designed the product at the time of sale to both avoid the plaintiff’s injury and be safer overall?

The Restatement Third outlines factors that plaintiffs must consider when proposing a reasonable alternative design. First and foremost, the plaintiff must prove that the alternative design would have eliminated or reduced the harm actually suffered by the plaintiff. It is also essential that the plaintiff show a proposed alternative design will not significantly reduce the utility of the product, increase its cost, or make it less desirable to consumers. In other words, the alternative design must result in a feasible, functional, marketable, and safer product.

Even before publication of the Restatement Third, the project’s learned Reporters, Professors James Henderson and Aaron Twerski, carefully considered and rejected category liability. They described category liability as imposing a “no-defect strict liability standard” for harms caused by certain types of products identified by courts on a case-by-case basis that are not defective in any traditional sense.

As an example, Professors Henderson and Twerski noted that if a plaintiff injured while riding a bicycle argued that bicycles should have three wheels, arranged triangularly, to achieve adequate lateral stability, that plaintiff would be making a categorical assault on bicycle ‘unavoidably unsafe’ as-as inherent.[6] They identified the key distinction between claims based on product categories (impermissible) from those that seek marginal design changes (permissible) as in the degree of substitutability of the alternative suggested by the plaintiff and the product as designed by the defendant. For example, a two-wheel bicycle with longer handlebars that increase stability is a near perfect substitute for one with shorter handlebars and would drive the older product from the market due to the burden of tort liability. Professors Henderson and Twerski observed, however:

[A] tricycle is so poor a substitute for a bicycle that if a court held that three wheels were minimally required to produce a safe cycle, it would be imposing liability not for how the defendant designed the bicycle but for having designed and distributed any sort of bicycle in the first place. Drawing on terminology currently in use, the court could be said to condemn bicycles for the ‘unavoidably unsafe’ aspect that defines two-wheeled transportation: lateral instability at low speeds. In other words, the court would be condemning the product for the very design feature—two-wheeledness—that not only rendered it more dangerous but also made it desirable to a majority of its users and consumers.

The same principles apply to other products. A hardtop car is not a reasonable alternative to a convertible. Scuba gear is not a reasonable alternative to a snorkel. Roller skates are not a reasonable alternative to rollerblades. While in each example the former may have safety benefits over the latter, these comparisons involve different products, even if they serve similar functions. The inherent risks of these products accompany the very features that define them and make them sought by consumers. The value placed on consumer choice justifies the judiciary’s widespread rejection of category liability. The alternative is a civil justice system that uses liability exposure to ban products that are regularly used by consumers when their availability should be left to the market or restricted only after careful consideration by the policymaking branches of government.

The Restatement Third and many courts recognize this view and reject category liability “like the plague.” The commentary to the Restatement recognizes that courts have traditionally refused to impose category liability on “products that are generally available and widely . . . consumed, even if they pose substantial risks of harm.” In rare instances in which courts have imposed category liability, such as in the case of an injury from diving into an above-ground pool, legislatures intervened to overrule those decisions.

The Restatement reporters did narrowly accede to the American Law Institute’s plaintiffs’ lawyer members by recognizing the possibility that courts in the future might determine that certain categories of products, other than those “generally available and widely . . . consumed,” might be so grossly dangerous and of such minimal social utility that they would be deemed defective even if no safer alternative design was available. This comment had no case law support. In sum, the Restatement “disarm[s] [category liability] by dealing with it forthrightly (and narrowly).”

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[3] Id.
[5] See id. at 1299.
[6] Id. at 1299-1300.
[8] See Harvey M. Grossman, Categorical Liability: Why the Gates Should be Kept Closed, 36 S. Tex. L. Rev. 405-410 (1995) (drawing on terminology currently in use, the court could be said to condemn bicycles for the ‘unavoidably unsafe’ aspect that defines two-wheeled transportation: lateral instability at low speeds. In other words, the court would be condemning the product for the very design feature—two-wheeledness—that not only rendered it more dangerous but also made it desirable to a majority of its users and consumers).
Disposable Respirators Fit Within the Category Liability Exception

On November 10, 2015, Jones County, Mississippi, Circuit Court Judge Dal Williamson, newly elected to the bench after 34 years in private practice, denied reconsideration of two rulings in which he found that claims alleging a defect in the design of disposable respirators fell within the prohibition against category liability. He granted summary judgment to a manufacturer of those products.

Disposable respirator manufacturers make products that shield workers from contaminants. Respirators are used throughout industrial workplaces, particularly in the manufacturing, mining, construction and chemical industries. The design and labeling of respirators are certified for compliance with federal safety standards jointly by the National Institute for Occupational Safety and Health (NIOSH) and the Mine Safety and Health Administration (MSHA). Federal regulations require employers provide employees with specific types of respirators when they are exposed to certain contaminants.

Manufacturers of protective equipment are often named among numerous defendants in toxic dust and fume-related lawsuits. For example, in the Jones County case brought by Michael Gene Mealer, Jr., the plaintiff’s family alleged that more than 20 defendants were responsible for Mr. Mealer’s exposure to silica and death from lung disease, but only respirator-maker Moldex-Metric remained when the case was scheduled to go to trial on March 30.

The plaintiffs alleged that Moldex’s disposable filtering face-piece respirator model 2200 N-95 was defective in that it did not adequately protect two workers from contracting lung illnesses stemming from silica exposure. An N-95 is the most common class of particulate filtering facepiece respirators. This type of air-purifying respirator filters particles out of the air the user is breathing. It is a simple mask made of various purifying respirator filters particles out of the air the user inhales by pulling air through the filter. As the mouth and held in place through two elastic bands. The user is breathing. It is a simple mask made of various purifying respirator filters particles out of the air the user inhales by pulling air through the filter.

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Respirators are also assigned a protection factor by OSHA, which indicates the level of protection a respirator offers over the permissible exposure limits.

14 Id. §§ 84.3, 84.11, 84.31, 84.33, 84.41, 84.42, 84.43; see also NIOSH, National Personal Protective Technology Laboratory (NPPTL) Respirator Branch, Standard Application Procedure for the Certification of Respirators Under 42 CFR 84 (Revision 1, July 2005, at http://www.cdc.gov/niosh/nptpl/resources/certpgmspt/pdfs/SAPJul2005.pdf (detailing the approval process and application requirements).


16 Centers for Disease Control & Prevention, NIOSH-Approved N95 Particulate Filtering Facepiece Respirators (2014), at http://www.cdc.gov/niosh/nptpl/topics/respirators/disp_part/n95list1.html.

17 The “N” signifies that the respirator is not resistant to oil.
Williamson grounded his ruling in the tort law prohibition of category liability. “The law of products liability demands that manufacturers take feasible steps to make their products reasonably safe,” Judge Williamson observed. “It is not rational, however, to impose liability in such a way as to eliminate whole categories of useful products from the market.”

Given the widespread use of N-95 respirators, their social utility, low-cost, and effectiveness (when used in the proper environment), disposable respirators would certainly not fit into the narrow area recognized by the Restatement Third for rarely used products that have no social utility.

**Conclusion**

Judge Williamson’s ruling avoids use of product liability law as a sledge hammer to force a beneficial product off the market.

If employers and workers are not to have access to a type of protective gear, especially a product certified and required for workplace safety by federal agencies, then that public policy choice should be made by regulatory authorities, not by potentially disparate triers of fact applying product liability law in trial courts across the country.