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CATEGORY LIABILITY

PRODUCT DESIGN

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

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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

[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).

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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) 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.[2] 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.[3] 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.[4] 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 bicycles as inherently unsafe.[5] They identify 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.[6]

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.[7] 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.[8]

The Restatement Third and many courts recognize this view and reject category liability ''like the plague.''[9] 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.''[10] 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.[11]

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.[12] This comment had no case law support. In sum, the Restatement ''disarm[s] [category liability] by dealing with it forthrightly (and narrowly).''[13]

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[2] *See* Restatement of the Law Third, Torts: Products Liability § 2(b), cmt. e (1998) (hereinafter Restatement Third).

[3] *Id*.

[4] *See* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev 1263 (1991).

[5] *See id.* at 1299.

[6] *Id*. at 1299-1300.

[7] *See* Mark A. Geistfeld, *The Value of Consumer Choice in Products Liability*, 74 Brook. L. Rev. 781, 799 (2009).

[8] *See* Harvey M. Grossman, Categorical Liability: *Why the Gates Should be Kept Closed*, 36 S. Tex. L. Rev. 405-410 (1995) (finding categorical liability ''calls for a form of judicially declared product outlawry'').

[9] James A. Henderson, Jr. & Aaron D. Twerski, *A Fictional Tale of Unintended Consequences: A Response to Professor Wertheimer*, 70 Brook. L. Rev. 939, 945 (2005); *see also* Aaron D. Twerski & James A. Henderson,Jr., *Manufacturer's Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 Brooklyn L. Rev. 1061, 1069-71, 1077 (2009) (discussing protection against category liability provided in the Restatement Third and finding that ''courts have almost universally rejected category liability'').

[10] Restatement Third § 2, cmt d.

[11] Henderson & Twerski, 66 N.Y.U. L. Rev at 1318; Grossman, S. Tex. L. Rev. at 397-98.

[12] Restatement Third § 2, cmt. d.

[13] Twerski & Henderson, 74 Brooklyn L. Rev. at 1071.

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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).[14] Federal regulations require employers provide employees with specific types of respirators when they are exposed to certain contaminants.[15]

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.[16] This type of air-purifying respirator filters particles out of the air the user is breathing. It is a simple mask made of various polymers that is fitted over the worker's nose and mouth and held in place through two elastic bands. The wearer inhales by pulling air through the filter. As the designation of the product indicates, an N-95 is *not* designed to block all contaminants. Rather, it is designed to filter at least 95% of particles 0.3 microns and larger.[17] Respirators are also assigned a protection factor by OSHA, which indicates the level of protection a respirator offers over the permissible exposure limits (PEL) set by OSHA. The Moldex 2200 N-95, for example, was assigned a protection factor of 10, meaning it could protect workers from exposure to particles 10 times above the PEL. An N-95 single-use respirator costs about $1.00 each ($20.00 per box of 20). As the level of filtration increases, it becomes more difficult for the user to breathe. A danger of requiring respirators that provide a higher level of protection is that discomfort in trying to breathe normally may lead workers to not regularly wear them, even if required by their employer to do so.

In the Jones County cases, the plaintiffs' expert witnesses opined that the N-95 respirator was defective in that it was impossible to perform an adequate fit check, which tests the seal between the respirator's facepiece and the user's face to verify that that product keeps out contaminants. As the trial court found, the experts did not identify any flaws in the product that could be changed to make it fit checkable.[18] In addition, the experts testified that the plaintiffs' employer should not have used disposable respirators at all because of the levels of dust present. One plaintiffs' expert took the position that an N-95, the most widely used respirator in workplaces, is unfit for anything.

The plaintiff offered elastomeric respirators (available with a full face piece or as a half mask with rubber seals) as a safer alternative design to an N-95 that could be fit checked. These products use replaceable cartridges or filters, and include inhalation and exhalation valves. They must be regularly cleaned and decontaminated in order to be reused, as compared to disposable, single-use N-95 products. Elastomeric respirators cost about $25.00 to $30.00 *each*, more costly than a box of 20 N-95 respirators.

Judge Williamson applied Mississippi law,[19] which provides that a manufacturer cannot be held liable for defective design unless the product at issue failed to function as expected *and* there existed a feasible design alternative that would have prevented the alleged harm ''without impairing the utility, usefulness, practicality or desirability of the product to users or consumers.''[20] The court properly found that an elastomeric respirator did not provide a reasonable alternative design because it is a ''completely different product'' from an N-95.[21] The proposed alternative design would have eliminated the core features of the N-95—its single-use and disposable qualities. The court similarly and correctly found that other alternatives offered by the plaintiffs, a full face piece respirator or respirators with a fresh air-fed hood, are different products as well.[22]

Judge Williamson ruled that ''[a] plaintiff cannot demonstrate the existence of a 'safer alternative design' by pointing to a substantially different product, even when the other product has the same general purpose as the allegedly defective product.''[23] In granting the manufacturer's motion for summary judgment, Judge

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[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/npptl/resources/certpgmspt/pdfs/SAPJul2005.pdf (detailing the approval process and application requirements).

[15] *See, e.g*., 29 C.F.R. § 1910.1001(g)(2)(ii). For further background on respirator regulation and litigation, *see* Victor E. Schwartz, Cary Silverman & Christopher E. Appel, *Respirators to the Rescue: Why Tort Law Should Encourage, Not Deter, the Manufacture of Products That Make Us Safer*, 33 Am. J. Trial Advoc. 13 (2010).

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

[17] The ''N'' signifies that the respirator is not resistant to oil.

[18] *See Mealer* Order at 3-4.

[19] Mississippi has codified this principle in Miss. Code Ann. § 11-1-63(f)(ii). Other states require a reasonable alternative design as a matter of common law or statutory law.

[20] *Mealer* Order at 7-8.

[21] *Id*. at 9.

[22] *Id*.

[23] *Id*. at 8 (citing *Massa v. Genetech, Inc*., 2012 BL 62879 (S.D. Tex. 2012) (citing *Brockert v. Wyeth Pharms., Inc*., 287 S.W.3d at 770 (Tex. Ct. App. 2009)); *see also* Mealer Reconsideration Order at 6 (''[T]he filtering face piece respirators and

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*.''[24]

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.

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the elastomeric respirators are completely different products. . . .'').

[24] *Mealer* Order at 8 (emphasis added).

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