Should a Non-Designing Manufacturer Be Held Strictly Liable for a Design Defect? An Approach for California*

When a manufacturer conforms to a buyer's design in building a product, and the product causes injury to a person because of a design defect, the question arises as to whether the manufacturer should be held strictly liable. Although the California Supreme Court has not addressed this question, two other states have taken conflicting approaches. The "Nebraska Rule" refuses to hold a non-designing manufacturer strictly liable for a design defect absent proof of fault. Conversely, the "New Jersey Rule" holds a non-designing manufacturer strictly liable for a design defect regardless of fault. This Comment contrasts these two rules in light of the policies and justifications behind both strict liability theory and traditional tort law theory. Based on this analysis, the Author recommends that the California Supreme Court adopt the rationale of the Nebraska Rule. Furthermore, the Author argues that the Nebraska Rule is actually more compatible with California's current strict liability standards, which resemble a fault-based system. Finally, the Author argues that the Nebraska Rule complements California's recent refusal to continue the expansion of strict products liability.

I. INTRODUCTION

This Comment recommends how the California Supreme Court should treat a situation in which a person is injured by a product that has a defective design, but the design is specified by the buyer, not the manufacturer. In other words, should a manufacturer be held strictly

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liable for injuries that are caused by a design defect when the manufacturer complied with the plans and specifications of the buyer? A more specific situation to be addressed is one in which the injured party is an employee of the buyer. How would the presence of worker's compensation factor into the cause of action based on strict products liability and what effect would it have on the plaintiff's choice of the potential defendants?

The inquiry will focus on manufacturers who produce custom-made products according to the specifications of non-governmental buyers. The manufacturers in this context are non-designing manufacturers; they are excluded from the buyer's designing process. In recommending an approach for the California Supreme Court on this issue, the decisions of two other state supreme courts will be examined to illustrate the sharp contrast that exists on the issue. These major approaches are called the "Nebraska Rule" and the "New Jersey Rule." The Nebraska Rule finds a non-designing manufacturer liable for a design defect only upon proof that the manufacturer was at fault for following the buyer's design. Conversely, the New Jersey Rule holds that a non-designing manufacturer is strictly liable for a design defect, even if the manufacturer was not at fault for following the buyer's design. These rules will be evaluated and compared in order to demonstrate how well each rule approximates the goals behind tort liability.

Although the California Supreme Court has not had the occasion to address the issue of whether a non-designing manufacturer can be held strictly liable for a design defect, the court is well-known for its broad application of strict liability. A ruling on this issue would, however, be of particular importance for three reasons. First, in contrast to California's comprehensive expansion of strict liability over the past several decades, the court has recently begun to limit its application; this particular issue is a potential avenue for the court's retreat from strict liability. Second, the notion of holding a non-designing manufacturer strictly liable for defects in a design is repugnant not only to traditional tort theory, but to common sense. Third, California's strict liability test for determining whether a design is defective resembles a standard based on fault, much like the Nebraska Rule. Therefore, this Comment recommends that the California Supreme Court adopt a position similar to the Nebraska Rule and refuse to hold a non-designing manufacturer strictly liable for design defects when the manufacturer was not at fault for following a buyer's plans and specifications. The discussion begins with a background examination of the evolution of strict products liability.

II. A BRIEF HISTORY OF STRICT PRODUCTS LIABILITY

Strict liability is liability without fault.[1] The imposition of liability without fault has a legacy that extends back to the English Exchequer Chamber in the 19th Century. Early English cases held defendants strictly liable for damages caused by explosions.[2] After initial judicial reluctance to impose liability without fault,[3] the application of strict liability entered into the courts of the United States.[4] In the beginning of the twentieth century American tort law began adopting compensation policies; tort law expanded, providing greater recovery. For instance, shortly after American courts displayed a willingness to impose strict liability in explosion cases, the "privity of contract" requirement in negligence cases was abolished. Manufacturers were held liable under a negligence theory to persons who were injured by the manufacturer's product, notwithstanding the fact that the person lacked privity of contract with the manufacturer.[5]

After the abolition of the privity of contract requirement, manufacturers were rendered susceptible to strict liability for injuries caused by defective products.[6] American tort law espoused a policy of compensating the victims of tortious acts, thus departing from the traditional practice of holding parties liable only upon proof of fault. Legal

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1. *See* BLACK'S LAW DICTIONARY 1422 (6th ed. 1990). From a theoretical standpoint, a case holding a manufacturer liable for design defects, when the design has been drafted by a party other than the manufacturer, is the purest form of liability without fault.
2. Fletcher v. Rylands, 1 L.R. 265 (Ex. Ch. 1866), *aff'd*, Rylands v. Fletcher, 3 L.R.-E. & I. App. 330 (H.L. 1868).
3. *See, e.g.*, Losee v. Buchanan, 51 N.Y. 476 (1873) (holding that a party who operates a steam boiler will not be held liable for damages if the boiler explodes and causes injury unless there is proof of fault); *see also* Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184, 186 (1987) ("American tort law from the late nineteenth century to the mid-twentieth century was understood primarily in terms of corrective justice.").
4. Sullivan v. Dunham, 55 N.E. 923 (N.Y. Ct. App. 1900) (holding a party liable without proof of fault). In *Sullivan*, the defendants lawfully created an explosion on their property. The blast sent a large chunk of wood flying over an adjacent field where it struck and killed a woman walking by. *Id.* at 924. The defendants had exercised due care, but the court nevertheless held them liable on "public policy" grounds. *Id.* at 926. *But cf.* Losee v. Buchanan, 51 N.Y. 476 (1873).
5. *E.g.*, MacPhearson v. Buick Motor Co., 111 N.E. 1050 (N.Y. Ct. App. 1916).
6. Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (holding that manufacturers are strictly liable for defective products).

scholars began to recognize that this system would be beneficial to both the social and economic needs of society.[7] As Professor James explained, "Strict liability is to be preferred over a system of liability based on fault wherever you have an enterprise or activity, beneficial to many, which takes a more or less inevitable accident toll of human life and limb."[8] The underlying rationale was that an injured individual was far less capable of redressing the costs of accidents than the manufacturer, who could spread the loss as a cost of doing business.[9]

The California Supreme Court has been at the forefront of developing strict products liability in the United States. This legal evolution was predominately motivated by the concern that consumers were not able to protect themselves against injuries caused by defective products.[10] Justice Roger Traynor first expressed this notion in a concurring opinion in *Escola v. Coca Cola Bottling Co. of Fresno*.[11] Justice Traynor's rationale was founded on public policy demands, which included placing the responsibility for injuries caused by defective products where it would "most effectively reduce the hazards to life and health inherent in defective products."[12] To be sure, Justice Traynor's concern was for the consumer who suffered injury from these products, as "[t]he cost of an injury . . . may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."[13] This would be the philosophy of the California Supreme Court for decades to come.

Nineteen years after *Escola*, Justice Traynor, writing for a majority of the court, held that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a

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7. The objective of the modern tort system is no longer condemning blameworthy behavior, but advancing social welfare through compensation. *See* Stewart, *supra* note 3, at 186, 190. Thus came the advent of enterprise liability, discussed *infra* part V.B.

8. Fleming James, Jr., *General Products - Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923, 923 (1957). For an historical discussion of Professor James' contribution to modern tort law scholarship, see George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 465-83 (1985).

9. *See infra* notes 119-57 and accompanying text.

10. *Greenman*, 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701; *see also* Stephanie M. Wildman & Molly Farrell, *Strict Products Liability in California: An Ideological Overview*, 19 U.S.F. L. REV. 139 (1984-85).

11. 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring).

12. *Id.* at 462, 150 P.2d at 440.

13. *Id.*

human being."[14] Manufacturers soon after were held strictly liable for defects in a variety of situations and on a multiplicity of theories, including failure to warn cases,[15] design defect cases,[16] manufacturing defect cases,[17] and in cases where the manufacturer failed to provide adequate safety devices.[18] Strict products liability in California also expanded to hold retailers,[19] wholesalers,[20] and lessors[21] strictly liable under the same theories. Indeed, an injured plaintiff was given a vast array of alternatives in seeking recovery for injuries caused by a faulty product. Strict liability was further extended to "license to use" cases. In one case, strict liability was applied to hold an owner of a laundromat strictly liable for injuries resulting from a defective washing machine.[22]

California courts have experienced a trend of expanding strict liability and the virtual abandonment of contract theory[23] in decisions involving

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14. Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963).

15. Canifax v. Hercules Powder Co., 273 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965); *see also* Rawlings v. D.M. Oliver, Inc., 97 Cal. App. 3d 890, 159 Cal. Rptr. 119 (1979) (holding that a manufacturer may be strictly liable for its failure to warn of the potential hazards in using the product); *cf.* Powell v. Standard Brands Paint Co., 166 Cal. App. 3d 357, 212 Cal. Rptr. 395 (1985) (noting that a manufacturer's duty is restricted to warnings about the manufacturer's own product).

16. *See, e.g.*, Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 470, 467 P.2d 229, 232, 85 Cal. Rptr. 629, 632 (1970) (quoting Varas v. Barco Mfg. Co., 205 Cal. App. 2d 246, 22 Cal. Rptr. 737 (1962)).

17. Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *see also* Dart Equip. Corp. v. Mack Trucks, Inc., 9 Cal. App. 3d 837, 88 Cal. Rptr. 670 (1970).

18. *See, e.g.*, Titus v. Bethlehem Steel Corp., 91 Cal. App. 3d 372, 154 Cal. Rptr. 122 (1979) (holding that a product may be deemed defective if it fails to include a safety device necessary for its reasonable safety).

19. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

20. *E.g.*, Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968).

21. Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970).

22. Garcia v. Halsett, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970).

23. Insofar as "contract theory" is concerned, the requirement of privity of contract as a prerequisite for recovering for personal injuries caused by defective products has been abolished. *See supra* note 5 and accompanying text. However, recovery for *economic* injury in the sale of goods is governed by the notion of implied warranties, a contract principle.

> Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind . . . . Goods to be merchantable

injuries that are caused by defective products. As far as the bargaining process is concerned, a manufacturer cannot avoid the imposition of strict liability, even at the outset of any dealings. A clause in a contract that purports to absolve the manufacturer from any future strict liability claims is not valid[24] because the injured party's claim falls under the law of strict liability in tort, not contract.

With that approach in mind, it seems almost axiomatic that a manufacturer in California that expressly contracts with a buyer to produce a product in accordance with the buyer's plans and specifications will ultimately be susceptible to strict liability for injuries arising out of that product's design defects. If a strict liability claim is one that necessarily falls under tort law,[25] the fact that the two parties explicitly contracted that the manufacturer follow the buyer's plan seems to be of little relevance.[26] More importantly, the public policy of victim

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> must be at least such as . . . are fit for the ordinary purposes for which such goods are used.

U.C.C. § 2-314(1), (2)(c) (1977); *see also id.* § 2-315 (implied warranty where the seller knows of both the buyer's purpose and the buyer's reliance on the seller's skill); *id.* § 2-316 (Exclusion or Modification of Warranties). An injured plaintiff may bring a products liability cause of action based on express or implied warranties as well. *See* Hauter v. Zogarts, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975). *But cf.* Airlift Int'l, Inc. v. McDonnell Douglas Corp., 685 F.2d 267 (9th Cir. 1982) (holding that as a matter of California law, strict liability in tort does not apply between large commercial entities who have bargained for the allocation of the risk). Also, courts have held that the doctrine of strict liability has not superseded recovery with respect to the warranty provisions of the Uniform Commercial Code. *See* Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

24. *E.g.,* Dart Equip. Corp. v. Mack Trucks, Inc., 9 Cal. App. 3d 837, 848, 88 Cal. Rptr. 670, 677 (1970); Crane v. Sears Roebuck & Co., Inc., 218 Cal. App. 2d 855, 860, 32 Cal. Rptr. 754, 757 (1963). Nevertheless, an indemnity clause in a contract that addresses the specific type of liability involved will be upheld by most courts. Hence, the party that suffers an adverse judgment will remain liable, but the indemnity action will restore that party financially. However, in the context of non-designing manufacturers that comply with a buyer's design, the courts have stringent standards regarding the permissibility of indemnity actions. *See infra* notes 132-35 and accompanying text. This is due to the presence of worker's compensation liability limits whenever an employee is injured. *See infra* notes 160-67 and accompanying text.

25. Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). In *Greenman*, a manufacturer defendant argued that because the plaintiff did not comply with notice requirements under a statutory breach of warranty remedy, the plaintiff could not recover. The court noted, however, that the plaintiff did not need to rely on breach of warranty to recover. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700. Breach of warranty, a contract remedy, was not needed because the plaintiff's claim for injuries was in tort. As the court held, "[strict] liability is not one governed by the law of contract warranties but by the law of strict liability in tort." *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

26. *See id.* ("[L]iability is not assumed by agreement but imposed by law . . . ."). A common sense rebuttal would be that the buyer wanted something a certain way and the manufacturer simply carried out the buyer's wish. Thus, the manufacturer should not be blamed, even in a tort action, if the design is inept. However, even the courts

compensation is so compelling that such a manufacturer would inevitably be a potential defendant in order to provide a plaintiff more sources of recovery. As Professor James explained, "the risk of loss from dangerously defective products [should] be put upon (and distributed by) the producer rather than upon the consumer or innocent bystander, *even where the producer is also innocent.*"[27] The California Supreme Court embraced this rationale again in *Becker v. IRM Corp.*,[28] where in his majority opinion Justice Broussard explained that "[t]he paramount policy of the strict products liability rule" is to compensate injured victims by spreading the loss throughout society.[29] When juxtaposed with the California Supreme Court's stringent public policy convictions, a non-designing manufacturer that complies with a buyer's specifications seems to be a viable candidate for strict liability in design defect cases.

The California Supreme Court has not had the occasion to address this issue. However, in the face of rapidly expanding strict liability, California courts have recently shown a degree of hesitation to apply strict liability liberally to manufacturers in every instance where injury is caused by a product that is in some respect defective. For example, in *Anderson v. Owens-Corning Fiber Glass Corp.*,[30] the California Supreme Court asserted that "[s]trict liability . . . was never intended to make the manufacturer . . . of a product its insurer."[31] Justice Panelli, writing for the majority in *Anderson*, added that "strict liability has never been, and is not now, absolute liability . . . ."[32] Under this rationale, it seems as if a court would resist holding a manufacturer that merely carries out a buyer's plans and specifications strictly liable to a plaintiff who is injured by a design defect. On the surface, such a manufacturer

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that preclude the application of strict liability to such a manufacturer will hold that liability will be imposed if the buyer's specifications are so obviously defective that an ordinary and reasonable manufacturer in a similar situation would not have followed them. *See infra* notes 62-63 and accompanying text.

27. James, *supra* note 8, at 927 (emphasis added). It should be noted, in all fairness, that Professor James qualified this quotation somewhat with the following sentence: "This enterprise liability should not be unlimited, but it should extend to all casualties and hazards that are injected into society by the activity of the enterprise, at least to the extent that they are *reasonably foreseeable.*" *Id.* (emphasis added).

28. 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985) (en banc).

29. *Id.* at 466, 698 P.2d at 123, 213 Cal. Rptr. at 220.

30. 53 Cal. 3d 987, 810 P.2d 549, 281 Cal. Rptr. 528 (1991) (en banc).

31. *Id.* at 994, 810 P.2d at 552, 281 Cal. Rptr. at 531.

32. *Id.* (quoting Daly v. Gen. Motors Corp., 20 Cal. 3d 725, 733, 575 P.2d 1162, 1166, 144 Cal. Rptr. 380, 384 (1978)).

has no reasonable connection with the design; intuitively, strict liability in this instance would be in fact *absolute* liability.

However, the California Court of Appeal for the Fourth District expressed a willingness to hold a manufacturer strictly liable for a design defect, even when the manufacturer conformed to the buyer's plans and specifications.[33] Four years later, the same court distinguished its previous holding from a situation where the buyer is the federal government,[34] yet nonetheless remained steadfast in maintaining that strict liability could apply to a manufacturer in a case where the buyer that provides the plans and specifications is not governmental.[35] These initial holdings may not be undisputed precedent for this type of case after the California Supreme Court's decision in *Barker v. Lull Eng'g Co., Inc.*,[36] which created a two-part test to determine whether a product's design was in fact defective. This two-part test includes factors that sound in negligence rather than strict liability.[37] A discus-

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33. Rawlings v. D.M. Oliver, Inc., 97 Cal. App. 3d 890, 159 Cal. Rptr. 119 (1979). Discussed *infra* part VI.A.

34. The issue of a non-designing manufacturer that complies with the plans and specifications of a buyer is extremely different when the buyer is the federal government. In essence, the manufacturer cannot be held liable for a design defect, regardless of whether an action is based on strict liability or fault. This is known as the government contractor defense. "[T]he defense allows the [manufacturer] to share in the government's sovereign immunity upon proof that certain conditions were met." Terrie Hanna, Note, *The Government Contractor Defense and the Impact of* Boyle v. United Technologies Corporation, 70 B.U. L. REV. 691, 691 (1990). These conditions have been set by the United States Supreme Court as a matter of federal common law.

> Liability for design defects in military equipment cannot be imposed [on manufacturers], pursuant to state law, when
> (1) the United States approved reasonably precise specifications;
> (2) the equipment conformed to those specifications; and
> (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Boyle v. United Tech. Corp., 487 U.S. 500, 512 (1988). Thus, when the buyer/designer is the federal government, the debate over whether a non-designing manufacturer should be held to a strict liability standard or a fault standard is moot. For further discussion about the government contractor defense, see Ronald A. Cass & Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257 (1991); Neil G. Wolf, Boyle v. United Technologies Corp.: *A Reasonably Precise Immunity—Specifying the Defense Contractor's Shield*, 39 DEPAUL L. REV. 825 (1990).

35. *See* McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 203, 208-09, 211-12 n.4, 195 Cal. Rptr. 764, 766, 768 n.4 (1983). "[T]he formula for recovery for a defective product has no exception stated in a California case for those conforming to customer specifications . . . ." *Id.* at 218, 195 Cal. Rptr. at 773 (Cologne, J., concurring and dissenting).

36. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

37. The two *Barker* standards do not superficially focus on a manufacturer's conduct. Yet each standard each implicitly attaches blame to a defendant that does not meet its requirements. Consider the language employed by the *Barker* court:

sion of these cases will be postponed until after a review of other state supreme court decisions squarely addressing design defect cases involving non-designing manufacturers.[38]

III. THE NEBRASKA RULE

The Nebraska Supreme Court addressed the issue of whether a manufacturer that complies with the plans and specifications of a non-governmental buyer can be held strictly liable for design defects in *Moon v. Winger Boss Co., Inc.*[39] The court ultimately resolved the issue by

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> [I]n design defect cases, a court may properly instruct a jury that a product is defective in design if (1) the plaintiff proves that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) the plaintiff proves that the product's design proximately caused injury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.

Id. at 426-27, 573 P.2d at 452, 143 Cal. Rptr. at 234. For a discussion of *Barker*, see *infra* part VI.B.2.

38. For a concise discussion of the varying rationales, both within state and federal courts, regarding the application of strict liability to non-designing manufacturers in design defect cases, see 1 MARSHALL S. SHAPO, THE LAW OF PRODUCTS LIABILITY ¶ 12.10(1) (2d ed. 1990); LEWIS BASS, PRODUCTS LIABILITY - DESIGN & MANUFACTURING DEFECTS § 4.20 (1986).

39. 287 N.W.2d 430 (Neb. 1980). The Nebraska Supreme Court recognizes that a defective design can be the basis for a cause of action in either strict liability or common law negligence. Kohler v. Ford Motor Co., 191 N.W.2d 601 (Neb. 1971); *see also Moon,* 287 N.W.2d at 432 (citing Hancock v. Paccar, Inc., 283 N.W.2d 25 (Neb. 1979) as authority for applying strict liability in design defect cases). For a thorough discussion of the development of strict products liability in the Nebraska Supreme Court, see Francis J. Reida, Comment, *Strict Products Liability in Nebraska—Nebraska's Defective Test for Detecting Product Defects:* Rahmig v. Mosley Machinery Co., 22 CREIGHTON L. REV. 535 (1988).

In Nebraska, a plaintiff must prove six elements in order to recover on a claim of strict liability for a design defect:

> (1) The manufacturer placed the product on the market and knew or should have known that the product would be used without inspection for defects;
> (2) the product was defective when it left the manufacturer's possession;
> (3) the defect was the proximate cause of the injury;
> (4) the defect made the product *unreasonably dangerous*;
> (5) there was an alternative design that made the design safer; and
> (6) the damages were a direct result of the defect.

Rahmig v. Mosley, 412 N.W.2d 56, 69 (Neb. 1987). The term "unreasonably dangerous" has been defined by the Nebraska Supreme Court to mean a product that "has a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer . . . ." Nerud v. Haybuster Mfg., Inc., 340 N.W.2d 369, 375 (Neb. 1983), *overruled on other grounds by Rahmig*, 412 N.W.2d at 81.

holding that a manufacturer is free from liability for design defects on both claims of negligence and strict liability, unless the manufacturer was at fault for following a defective design.[40] The final rule stated in the opinion used language that suggested a straight negligence standard, even with respect to the strict liability claim. Hence, the Nebraska rule requires a showing of fault on the part of the manufacturer who complies with a buyer's plans and specifications, notwithstanding the fact that the cause of action is one in strict liability. In other words, under the Nebraska Rule, strict liability—liability without fault—actually requires a certain degree of fault by the manufacturer; a non-designing manufacturer following the instructions of a buyer is not necessarily at fault just because the design itself is defective.

A. The Facts

In *Moon*, the plaintiff worked near an assembly line at a meat processing plant owned by Iowa Beef.[41] After a fall, his arm became entangled in a "pinch point" where a chain and sprocket merged in a conveyor system called a "breaking table."[42] After the accident, screen guards were placed over the pinch points, but prior to the plaintiff's accident, no safety devices were installed. Plaintiff brought an action against the manufacturer, Winger Boss, based on negligence and strict liability for design defects in the breaking table conveyor system.

The plaintiff maintained that the finished product had a defective design because Winger Boss did not include a safety screen over the pinch points. However, Winger Boss built the breaking table conveyor system in strict compliance with the specifications of Iowa Beef. Winger Boss had been invited to bid[43] on the manufacture of several breaking tables, including the one that injured the plaintiff.[44] The contract was awarded to Winger Boss, but Winger Boss did not assist in

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40. *Moon*, 287 N.W.2d at 434.

41. *Id.* at 431.

42. Iowa Beef Processors was also named as a defendant in the case. Because the cause of action against Iowa Beef Processors was not of substantial relevance in the *Moon* opinion, and because that cause of action is not pertinent to this Comment, it will not be discussed.

43. For a discussion of the relevance of the bidding process, see *infra* note 130 and accompanying text.

44. *Moon*, 287 N.W. 2d at 431. This process of bidding is characteristic of the manner in which manufacturers who conform to a buyer's specifications get jobs. When evaluating the policies behind applying strict liability to a non-designing manufacturer for a design defect, the relevance of the bidding process is heightened. Because a major policy behind strict liability is the concept of risk spreading, a manufacturer who attempts to deflect liability costs upon customers will inevitably alter its position in the bidding process. *See infra* notes 130, 155-56 and accompanying text.

designing the product. Furthermore, Iowa Beef refused to give Winger Boss a full layout of the section of the Iowa Beef plant where the breaking tables were to be used. Thus, the conveyor system was manufactured according to Iowa Beef's explicit plans and specifications, which did not include a safety device over the pinch points. The District Court entered judgment for Winger Boss and the plaintiff appealed.

B. *The Nebraska Supreme Court's Holding*

The Nebraska Supreme Court acknowledged that although a cause of action for strict liability existed in design defect cases, the court had "never before considered the situation in which a manufacturer follows completely the design of [its] employer."[45] Initially, the court referred to section 404 of the Second Restatement of Torts. Under the reasoning of that section, an independent contractor who negligently makes a product for another "is subject to the same liability as that imposed upon negligent manufacturers of chattels."[46] However, the court specifically focused on comment a of section 404, which qualifies an independent contractor's liability in a case where plans and specifications are provided by the employer (buyer).[47] If a buyer provides the specifications, the manufacturer is not required to "sit in judgment" on those specifications; the manufacturer is only liable for defects in the specifications if the specifications are so bad that a reasonable manufacturer would refuse to follow them.[48] The court reasoned that because Winger Boss did not participate in the design process of the breaking table, it was not required to sit in judgment on the plans and specifications provided by Iowa Beef.[49]

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45. *Moon*, 287 N.W.2d at 432-33.
46. RESTATEMENT (SECOND) OF TORTS § 404 (1965) [hereinafter RESTATEMENT].
47. *Moon*, 287 N.W.2d at 433.
48. RESTATEMENT, *supra* note 46, § 404 cmt. a. Under comment a,

> [T]he contractor is not required to sit in judgment on the plans and specifications . . . provided by his employer. The contractor is not subject to liability if the specified design . . . turns out to be insufficient to make the chattel safe for use, *unless* it is so *obviously bad* that a competent contractor would realize that there was a grave chance that [the] product would be dangerously unsafe.

Id. (emphasis added). Section 403 holds an independent contractor liable if the contractor "knows or has reason to know" that its work is unsafe. *Id.* § 403. Section 404 deals with instances where a contractor is *negligent*. The quote of comment a above then carves out an exception for cases where the design is supplied by a third party.

49. *Moon*, 287 N.W.2d at 433-34.

The court refused to find Winger Boss strictly liable for the design defect. Building on the rationale of section 404 and the accompanying comment a, the court announced the Nebraska Rule for strict liability cases involving a design defect and a non-designing manufacturer:

> [A] manufacturer is not liable for injuries to a user of a product which it has manufactured in accordance with plans and specifications of one other than the manufacturer, *except* when the plans are so obviously, patently, or glaringly dangerous that a manufacturer exercising ordinary care under the circumstances then existing would not follow them.[50]

Ironically, the court relied on a 1963 California case, where the same rationale was applied to a contractor who built a grandstand in accordance with the plans and specifications of an owner.[51] Builders have generally been excused from liability in negligence cases when the builder followed the plans and specifications of the owner.[52] As articulated by the *Moon* court, such a contractor would be held liable only if the plans and specifications were so inherently dangerous that any ordinary and reasonable contractor would not follow them.[53] Fault would rest with the contractor who followed unreasonable plans and

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50. *Id.* at 434 (emphasis added).

51. Barnthouse v. California Steel Bldgs. Co., 215 Cal. App. 2d 72, 29 Cal. Rptr. 835 (1963). The California Fourth District Court of Appeal pointed out that the *Barnthouse* opinion was limited to situations involving a small builder in a negligence action, where the owner supplied the plans and accepted the completed product. *See* Rawlings v. D.M. Oliver, Inc., 97 Cal. App. 3d 890, 896 n.1, 159 Cal. Rptr. 119, 121 n.1 (1979).

52. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 104A, at 723-24 (5th ed. 1984). Keeton explains the theory by which building contractors can be viewed as within the service industry, that is, a party "engaged primarily in the rendition of a service." *Id.* at 724. Thus, in following the plans and specifications of the owner, the building contractor provides a service and strict liability is generally not applicable. *See id.* Yet some courts have expressed the notion that a completed building or structure is actually a product and have thus imposed strict liability on the building contractor. *E.g.*, Worrell v. Barnes, 484 P.2d 573 (Nev. 1971). *But cf.* Belcher v. Nevada Rock & Sand Co., 516 F.2d 859 (9th Cir. 1975) (interpreting Nevada law to hold a building contractor who follows the plans and specifications of the owner to be absolved from strict liability notwithstanding the ruling in the *Worrell* case). Non-designing manufacturers provide a *service* in a sense; they build something for a buyer/designer that, for whatever reason, does not want to do it.

53. *Moon*, 287 N.W.2d at 434.

specifications.[54] The *Moon* court insisted that the same rationale should apply to the instant strict liability case involving a manufacturer.

In *Moon*, the plaintiff sued under a theory of strict liability. Recall that by definition, strict liability does not depend on the fault, blameworthiness, or culpability of the defendant against whom it is to be applied.[55] Once the court determined that defendant Winger Boss was neither negligent nor at fault by virtue of complying with Iowa Beef's faulty plans and specifications, the court presumably still should have decided whether or not to apply strict liability. Instead, the *Moon* court analyzed the strict liability claim in the same manner as the negligence claim.[56] Thus, if the plaintiff was to recover from defendant Winger Boss, the plaintiff would first have to show that the design that Iowa Beef provided to Winger Boss was defective. Second, the plaintiff would have to show that by following the design, Winger Boss failed to act as a reasonable manufacturer that was similarly situated would have—that a reasonable manufacturer would refuse to follow the design because the design was unsafe, unsound, or unworkable. Although the plaintiff demonstrated that the design was defective, the plaintiff was unable to show that Winger Boss was at fault for following the design.[57]

C. *Analysis of The Nebraska Rule*

The *Moon* court's holding is a departure from the traditional notion behind strict liability—that victims of defective products will be compensated without having to prove fault on the part of the defendant. By requiring fault, the Nebraska Rule in effect rejects strict liability as

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54. *Id.* Also, when a contractor/builder departs from the owner's plans and specifications, without the owner's consent, the manufacturer is liable despite the defective plans and specifications. In this situation the contractor proceeds at its own risk. *See* Edward A. Hannan, *Whose Design Is It? Sorting Out Liability In Construction Cases*, 60 DEF. COUNS. J. 576, 578 (1993). The *Moon* court noted that Winger Boss fully complied with all of Iowa Beef's specifications. Implicitly, Winger Boss was not negligent in actually building the product. *Moon*, 287 N.W.2d at 432 ("There is no evidence to support a finding of improper manufacture.").

55. *See supra* note 1.

56. *Moon*, 287 N.W.2d at 432-33.

57. *Id.* at 434. The *Moon* court concluded that the trial court should have issued a direct verdict on this issue. However, one Justice felt that there was a sufficient question of fact as to whether Winger Boss recognized the defectiveness of Iowa Beef's plans. *Id.* at 435 (Krivosha, C.J., concurring).

a cause of action against a non-designing manufacturer in a design defect case. The *Moon* court did not, however, fully explain the theory behind the Nebraska Rule. Yet an analysis of the *Moon* court's holding yields two underlying rationales of why strict liability was not imposed in this instance.

First, in seeking the party responsible for a defective design, it is illogical to look to a party who had no role in the design process.[58] If a manufacturer complies with the terms of a contract entered into with the buyer, it can be said that the buyer impliedly warrants that the plans are adequate and sufficient.[59] The buyer has asked for a product to be made in a certain way and has bargained for that product's design to be as the buyer wants it; the manufacturer is contractually bound to follow the buyer's design.[60] Hence, as the *Moon* case illustrates, in that situation a manufacturer does not participate in the making of the design.[61] The Nebraska Supreme Court was uncomfortable with extending strict liability for a design defect to a party with absolutely no connection to the designing process. As a result, a showing of fault was made a prerequisite to liability.

Because the Nebraska Rule imposes this requirement of fault, a non-designing manufacturer cannot be liable for a defective design itself. Rather, a manufacturer can only be liable for *following* an unreasonable design.[62] If the manufacturer is not at fault for following a defective design, then the manufacturer is free from liability; a non-designing manufacturer could not possibly be liable for the design itself if the manufacturer had no role in the design process.[63] Whereas the

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58. *See id.* at 434. A counter-argument is that strict liability is not concerned with seeking out the party who is responsible for the design. A manufacturer is strictly liable when the manufacturer simply produces a defective product that causes injury. *See* Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

59. *See* Hannan, *supra* note 54, at 577 ("In general, contractors are entitled to rely on the accuracy of the contract documents.").

60. Viewed in this light, the manufacturer is providing a "service" for the buyer—namely, performing a task that the buyer presumably does not have the time, resources, or equipment to do itself. *See* KEETON ET AL., *supra* note 52, § 104A, at 723-24; *see also supra* note 52.

61. *See, e.g.*, *Moon*, 287 N.W.2d at 431-32.

62. Note that this requires an injured plaintiff to prove two elements. First, the plaintiff must prove that a design was unreasonable, i.e., that it was defective. Second, the plaintiff must prove that the manufacturer should not have followed it, i.e., that an ordinary and reasonable manufacturer would not have followed the design. *See supra* text accompanying notes 56-57.

63. Garrison v. Rohm & Haas Co., 492 F.2d 346 (6th Cir. 1974). In *Garrison*, a plexiglass producer ordered the production of specialized dollies to transport boxes containing sheets of plexiglass. The plexiglass producer designed the dollies and supplied the manufacturer, Orangeville Co., with express plans and specifications. *Id.*

manufacturer will not be held liable for the *design's* defectiveness, under the Nebraska Rule liability attaches to the manufacturer that followed an unreasonable design where an ordinary and reasonable manufacturer would not have. In this latter scenario, actual fault is attributable to the manufacturer because the manufacturer is responsible for its act of following the design. This implies that the Nebraska Supreme Court felt that although there are some instances where the non-designing manufacturer should be held liable, it is indeed illogical to attach liability for a design defect to a party that had no role in the design process.

The second rationale underlying the Nebraska Rule is the idea that a manufacturer of complex machinery should be treated in the same way a builder or "handy-man" would be treated in any tort case where plans and specifications are provided by an owner. To justify this rationale, the *Moon* court relied on comment a of section 404 of the Second Restatement of Torts.[64] As mentioned above, comment a states that a builder enjoys virtual immunity when an owner provides the plans and

at 348. An employee of the plexiglass producer was injured by one of the dollies. The injured plaintiff sued the employer and manufacturer, based on strict liability for a design defect. The Sixth Circuit held that "even if there was a defective design . . . the party responsible was not Orangeville. Rohm and Haas was the designer, not Orangeville. To hold Orangeville liable for [a] defective design would amount to holding a non-designer liable for [a] design defect. Logic forbids any such result." *Id.* at 351.

The circuit court sought to apply the law of Kentucky, as the incident occurred in Louisville, Kentucky; the faulty dollie was actually produced in Pennsylvania. Jurisdiction was based on diversity of citizenship, pursuant to 28 U.S.C. § 1332(a)(1) (1983). The circuit court followed the rationale of the Kentucky Court of Appeal regarding design defects: "[t]he distinction between the so-called strict liability principle and negligence is of no practical significance so far as the standard of conduct required of the defendant is concerned." *Id.* at 351 (quoting Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 66, 69 (Ky. Ct. App. 1973)).

It is interesting to note, however, that if the circuit court had decided to rely on Pennsylvania law, a similar result likely would have been reached. *E.g.*, Lesnefsky v. Fischer & Porter Co., Inc., 527 F. Supp. 951 (E.D. Pa. 1981) (holding that a manufacturer that complies with the plans and specifications of a third party would, under Pennsylvania law, not be liable for design defects unless the manufacturer knew or should have known the plans were unsafe); Orion Ins. Co., Ltd. v. United Tech. Corp., 502 F. Supp. 173 (E.D. Pa. 1980) (non-designing manufacturer's liability in a design defect case, under Pennsylvania law, is to be judged using a reasonableness standard with respect to the manufacturer's conduct).

64. Moon v. Winger Boss, 287 N.W.2d 430, 433 (Neb. 1980).

specifications and the builder adheres to them.[65] Yet the standard articulated in comment a pertains to negligence rather than strict liability and it also contemplates an "independent contractor" or builder that "makes, rebuilds or repairs a chattel for another," as opposed to a manufacturer of complex machinery.[66] The extension of the rationale of comment a to a non-designing manufacturer of machinery is, however, equally appropriate.

Because the Nebraska Rule has a prerequisite of showing fault, the reasoning of comment a, with respect to negligence, is applicable to the Nebraska Rule's fault-based strict liability. Moreover, the comparison of manufacturers to "builders" is also appropriate within this context. A builder that follows an owner's plans is usually constructing a custom-made product, such as a house. Because they are custom-made, products that builders make using an owner's plans are neither mass-produced nor widely distributed among the populace.[67] This is also the case when a manufacturer conforms to a buyer's design—the products are custom-

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65. *See supra* notes 47-48, 52-53 and accompanying text; *see also* RESTATEMENT, *supra* note 46, § 404 cmt. a. This rationale was articulated by the United States Supreme Court. United States v. Spearin, 248 U.S. 132 (1918). In *Spearin*, a contractor agreed to build a dry-dock at the Brooklyn Naval Yard. The government had provided the plans and specifications, which included instructions to divert an already existing six-foot brick sewer. A heavy downpour of rain and a rising tide flooded the dry-dock after breaking the diverted drainage system. *Id.* at 133-34. The Court asserted the general rule: "[I]f [a] contractor is bound to build according to [the] plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." *Id.* at 136. *But cf.* Hannan, *supra* note 54, at 578 ("[T]here is an exception when the contractor, without the owner's consent, departs from the [owner's] plans and specifications, albeit the plans and specifications are defective.").

However, the cause of action in *Spearin* was not one in which a personal injury was caused by a design defect. Rather, the contractor had refused to proceed with the contract due to the government's refusal to pay for the additional costs incurred by the flooding. The holding is an exception to the general rule that one who undertakes to build something assumes the risk that unforeseen difficulties may make performance more burdensome. *Spearin*, 248 U.S. at 136. I have used this case only to illustrate the traditional position a contractor/builder is in when an owner provides the plans and specifications.

For a more general look at contract theories involving impossibility and frustration between an owner and a contractor, see E. ALLAN FARNSWORTH, CONTRACTS § 9.6 (1990). For a particularly detailed analysis of the notions of implied warranties, impossibility, and risk allocation in public contracts, see Steven L. Schooner, *Impossibility of Performance in Public Contracts: An Economic Analysis*, 16 PUB. CONT. L.J. 229 (1986).

66. RESTATEMENT, *supra* note 46, § 404 (1965). Also, comment a of that section, which the court also relies on, contemplates a situation where the "owner" not only provides plans and specifications, but also materials and supplies. *Id.* § 404 cmt. a.

67. *See, e.g.*, Barnthouse v. California Steel Bldgs. Co., 215 Cal. App. 2d 72, 29 Cal Rptr. 835 (1963) (dealing with the construction of a grandstand); United States v. Spearin, 248 U.S. 132 (1918) (dealing with the construction of a dry dock).

made, not mass-produced.[68] Thus, a manufacturer in this context is just like a builder.

Accordingly, the Nebraska Rule couples the negligence standard in section 404 with the broader concept that a non-designing manufacturer, like a builder, is not liable for defects in the plans and specifications it is given by an owner. In asserting that a manufacturer is analogous to a builder, the Nebraska Rule absolves the non-designing manufacturer from liability when a buyer's design is defective. Thus, when a non-designing manufacturer follows a buyer's plans and specifications, the manufacturer can only be liable under a fault standard, wherein the plans and specifications are such that an ordinary and reasonable manufacturer would refuse to follow them.

Ultimately, under the Nebraska Rule, traditional strict liability will not be applied to a non-designing manufacturer in a design defect case that is based on the design itself.[69] The Nebraska Rule has a prerequisite of finding fault before liability will be applied to a non-designing manufacturer in a design case, regardless of whether the action is brought in negligence or strict liability. To recover from a non-designing manufacturer for a design defect, an injured plaintiff must fulfill the burden of proving not only that a particular design was

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68. *See, e.g.*, Moon v. Winger Boss, 287 N.W.2d 430 (Neb. 1980) (dealing with an automated conveyor system); Michalko v. Cooke Color & Chem. Corp., 451 A.2d 179 (N.J. 1982) (dealing with a unique transformer press); *see also* Garrison v. Rohm & Hass Co., 492 F.2d 346 (6th Cir. 1974) (dealing with dollies for transporting sheets of plexiglass).

69. *See Moon*, 287 N.W.2d at 434. Recall that traditional strict liability is liability without fault. *See supra* note 1. Under the Nebraska Rule, strict liability is the legal taxonomy in which the suit is brought. Strict liability, in the traditional sense of liability without fault, is not applied under the Nebraska Rule. Rather, strict liability under the Nebraska Rule is based on fault. Thus, although the *Moon* court referred to strict liability, it was not traditional strict liability. Moreover, with respect to traditional strict liability, both courts and commentators have recognized that the burden of proof in strict liability cases resembles a negligence standard. Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 647-49 (1980) ("[A] questionable assumption courts have relied on in applying strict liability in design defect cases is that since [strict liability] will not require proof of negligence, the conclusion derived cannot be cast in terms of negligence."); Elizabeth C. Price, *Toward a Unified Theory of Products Liability: Reviving the Causative Concept of Legal Fault*, 61 TENN. L. REV. 1277, 1297 (1994) (noting negligence factors in strict liability); Anita Bernstein, *How Can A Product Be Liable?*, 45 DUKE L.J. 1, 11-12, 13 n.39 (1995) ("Abolishing products liability and replacing it with negligence would offer a speedy remedy for various ailments within the current system."); *see also infra* notes 206-08 and accompanying text.

defective, but also that the manufacturer was *negligent* in following the design. In essence, an injured plaintiff will have to show fault on the part of a non-designing manufacturer if the plaintiff is to succeed on a strict liability claim against the manufacturer.

IV. THE NEW JERSEY RULE

The New Jersey Supreme Court has also addressed the issue of whether a manufacturer that complies with the plans and specifications of a non-governmental buyer can be held strictly liable for design defects. Contrary to the Nebraska Rule's requirement of proving fault on the part of a non-designing manufacturer, the New Jersey Supreme Court embraced the notion that such a manufacturer is strictly liable in *Michalko v. Cooke Color & Chem. Corp.*[70] The court asserted that a non-designing manufacturer need not be at fault for the design itself nor for compliance with an unreasonable design in order to be held strictly liable for a design defect. In determining liability, it is irrelevant whether the manufacturer was in any way responsible for the drafting of the design. Likewise, it is equally irrelevant whether the manufacturer was reasonable in following the plans and specifications.[71] In essence, under the New Jersey Rule, if the design is found to be defective, the manufacturer is strictly liable, even if the manufacturer was required to follow a buyer's plans and specifications as a matter of contractual obligation.[72]

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70. 451 A.2d 179 (N.J. 1982).

71. Recall from the previous discussion of the Nebraska Rule that a distinguishing characteristic of the Nebraska Rule was that a non-designing manufacturer would be held strictly liable for a design defect if the design and specifications are so obviously dangerous that a reasonable manufacturer that is similarly situated would not comply with them. *Moon*, 287 N.W.2d at 434. Thus, unreasonable or careless compliance with a defective design was the exception to the Nebraska Rule that would yield strict liability for a non-designing manufacturer in a design defect case.

Conversely, the New Jersey Rule, discussed here, is not concerned with whether or not the manufacturer was justified in complying with a buyer's plans and specifications. *See generally Michalko*, 451 A.2d at 179, 183-84. Theoretically, even if *every* manufacturer that is similarly situated would have followed the buyer's plans and specifications, and even if the plans and specifications are unquestionably sound on their face, if they are subsequently shown to be defective, the manufacturer will be held strictly liable if named as a defendant. When juxtaposed in this light with the Nebraska Rule, it becomes increasingly apparent just how much more comprehensive and ubiquitous the strict liability coverage is under the New Jersey Rule.

72. As discussed *infra*, the defendants in the *Michalko* case were required by the contract with plaintiff's employer, Elastimold, to follow Elastimold's plans and specifications. In an attempt to remove itself from strict liability under New Jersey law, the defendant alleged that it was merely following its duty under the contract. *Michalko*, 451 A.2d at 183. However, the court bluntly rejected this contention. *Id.*; *see also infra* notes 124-25 and accompanying text.

A. The Facts

In *Michalko*, the plaintiff was an employee of Elastimold. She was the operator of a thirty-five ton, vertical transformer press, which soldered wires to cable transformers in a mold cavity.[73] Sometimes, rubber strips from the press would fall out during the process, in which case the plaintiff had been instructed by her employer to hold them in the mold cavity with her left hand while she used her right hand to operate the press control panel.[74] The plaintiff followed these instructions, and as a result, her left hand was amputated when it got stuck between the mold and the cavity in the press. The press did not have any safety devices that would have prevented the plaintiff's injury.[75]

Elastimold's parent company built the transformer press that injured the plaintiff. However, Cubby Manufacturing Company (Cubby) rebuilt the press prior to the incident. Cubby's contract with Elastimold required that Cubby follow Elastimold's drawings and specifications.[76] Cubby knew that safety devices could be installed, yet adhered to the specific design supplied by Elastimold.[77] Therefore, the final product

73. *Michalko*, 451 A.2d at 181.
74. *Id.*
75. *Id.*
76. The court below had determined that it was Cubby's policy not to question the absence of safety guards when it was not building a complete machine. *Id.* Cubby's policy comported with the Second Restatement's view that a manufacturer need not "sit in judgment" on a buyer's plans. RESTATEMENT, *supra* note 46, § 404 cmt. a. The safety devices used on this type of press varied according to the purposes for which the press was used. *See Michalko,* 451 A.2d at 182 n.1. Thus, even if Cubby had "sat in judgment" on Elastimold's plans and installed a safety device, it may not have selected the most appropriate safety device.
77. *Michalko,* 451 A.2d at 181-82. This is particularly relevant because Elastimold originally built the press and Elastimold had a superior knowledge of not only the transformer press's use in production, but also of the intricacies of the press's design, including the need for a safety device. Elastimold failed to provide an adequate design. Yet the court noted that Cubby had performed several jobs for Elastimold during the 1960's and had, as a result, acquired a "knowledge" of the type of work that the transformer presses performed in the manufacturing process. *Id.*

In *Moon*, the court acknowledged that the defendant manufacturer was denied access to the buyer's plant and was not permitted to inspect the details of the overall system into which the product would be incorporated. Moon v. Winger Boss, 287 N.W.2d 430, 434 (Neb. 1980). Implicitly, the *Moon* court recognized that the manufacturer was in a position of lesser knowledge. *See id.* This enhanced a finding that, under the rule announced, the manufacturer was not at fault for following the buyer's design.

was manufactured according to Elastimold's design, which did not provide for any type of safety device.

Plaintiff brought suit against Cubby, based on negligence, breach of express and implied warranties, and strict liability.[78] The trial court held that defendant Cubby could not be held strictly liable because Cubby produced the press according to Elastimold's exact specifications and Cubby was not the designer.[79] The trial court dismissed the action

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However, if the manufacturer had possessed a greater knowledge, that would have increased the persuasiveness of an argument that the manufacturer should have known that the plans were defective.

By contrast, the *Michalko* court quickly dismissed the contention that defendant Cubby was, like the defendant in *Moon*, in a position of "lesser knowledge." The reason was Cubby's past work for Elastimold. *Michalko*, 451 A.2d at 181-82. Thus, Cubby was in a position to know that Elastimold's design *should have* had an appropriate safety device, yet Cubby nonetheless followed the design. It is peculiar that the *Michalko* court made this point. Unlike the Nebraska Rule, the New Jersey Rule is not at all dependent on fault; at least not superficially. *See infra* text accompanying note 88. Yet one can infer that the court is answering the Nebraska Rule, as if to say that Cubby *should have* recognized the defectiveness of Elastimold's design and thus, is at *fault*.

78. Plaintiff initially sued Cubby, the party who re-built and manufactured the product that caused plaintiff's injury, and Square D Co., the manufacturer of the control panel that was part of the machine. Ultimately, the plaintiff only maintained the action against Cubby. Plaintiff alleged breach of warranty, negligence, and strict liability claims. *Michalko*, 451 A.2d at 182.

79. The trial court also based its holding in part on the fact that there was not a "sale" under the traditional definition. Furthermore, the trial court reasoned that Cubby was not susceptible to New Jersey notions of strict liability, even though Cubby had installed additional hydraulic systems to the presses, because its work did not constitute a "substantial change" in the product. The trial court also held that "an independent contractor has no duty to warn a *knowledgeable* buyer that a machine is dangerously designed." *Id.* at 182 (emphasis added). Finally, the trial court found that it was "impractical to install a safety device since different uses of the machine required different devices." *Id.* An analysis of this final point is in order.

This last point made by the trial court seems to be the equivalent of saying that defendant Cubby was reasonable in not installing or recommending a safety device because to do so would be *inappropriate*; it would be unlikely that the *most appropriate* safety device would have been selected. *See supra* note 76. As a result, the trial court refused to hold Cubby strictly liable. The trial court appears to follow the Nebraska Rule's requirement of finding fault on the part of a non-designing manufacturer before strict liability is applied.

Recall from the discussion of the *Michalko* facts that Cubby was fully aware that safety devices should be installed on the presses. This indicates that Cubby, under the Nebraska Rule, may have proceeded to follow plans and specifications where an ordinary and reasonable manufacturer would not have. *See supra* text accompanying note 50. However, under the trial court's reasoning, it was inappropriate to install safety devices because "different uses of the [press] required different devices." *Michalko*, 451 A.2d at 182. Thus, if the installation was inappropriate, Cubby surely was justified in following Elastimold's instructions to omit them. Hence, Cubby would not be at fault and consequently, not subject to strict liability.

against Cubby with prejudice. On appeal the decision was affirmed.

B. The New Jersey Supreme Court's Holding

The New Jersey Supreme Court framed the issue as "whether an independent contractor that undertakes to rebuild part of a machine in accordance with the specifications of the owner has a legal duty to foreseeable users of the machine to make the machine safe or to warn of the dangers inherent in its use."[80] In order to render a final judgment on this issue, the court first faced the task of determining whether a design defect existed.[81] The transformer press had a defective design because the original design, drafted by Elastimold, omitted any specifications regarding a safety device. The absence of a safety device

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However, Cubby had a history of manufacturing transactions with Elastimold. *See Michalko*, 451 A.2d at 181. Cubby did in fact know the purposes to which Elastimold would put the press. Arguably, Cubby knew, or should have known, not only that the press design required a safety device, but also which device would be appropriate. This would constitute the requisite fault under the Nebraska Rule and hence, evoke the application of strict liability against Cubby. *See supra* text accompanying note 50. It is unclear whether the trial court considered this in making the decision not to hold Cubby strictly liable.

The New Jersey Supreme Court did not concern itself with whether Cubby was at fault. The court applied traditional strict liability: liability regardless of fault. However, the court did mention Cubby's implicit knowledge that a particular safety device *should have been* installed. *See infra* note 87 and accompanying text. *See generally* Thomas E. Powell, II, *Products Liability and Optional Safety Equipment—Who Knows More?*, 73 NEB. L. REV. 843, 865-69 (1994) (discussing the problem of assigning liability for the omission of safety devices).

80. *Michalko*, 451 A.2d at 182.

81. *See id.* at 182. The court used the following rule to establish the fact that the transformer press had a defective design:

> The elements of a *prima facie* case of strict liability for design defects [in New Jersey] are proof that (1) the product design was defective; (2) the defect existed when the product was distributed by and under the control of [the] defendant; and (3) the defect caused injury to a reasonably foreseeable user.

Id. at 183. Under the first element, the product lacked a safety device and thus, had a defective design. Clearly, this lack of a safety device existed when Cubby returned the transformer press to Elastimold, thus satisfying the second element. Implicitly, the defect's existence lasted from the inception of the product because the actual design did not include safety devices. The third element was satisfied when plaintiff sustained the injury while operating the press. Plaintiff was an employee of Elastimold and thus, was a foreseeable user of the transformer press. For a criticism of the design defect test used by New Jersey state courts prior to the time *Michalko* was decided, see Lawrence H. Haber, Note, *The Design Defect Test in New Jersey: An Unworkable Standard*, 10 HOFSTRA L. REV. 1297 (1982).

made the press unsafe and imposed a duty to warn on Cubby.[82]

Despite the fact that the transformer press design was defective, and as a result caused injury to the plaintiff, the *Michalko* court still inquired into whether Cubby could be held strictly liable for the design as a non-designing manufacturer. Elastimold, plaintiff's employer, not only built the machine, but also instructed plaintiff to operate the machine in the manner that ultimately resulted in a serious injury. Furthermore, Elastimold gave Cubby specific instructions to follow the plans and specifications supplied by Elastimold.

Nevertheless, following a traditional theory of strict liability, the court noted that "[u]nder New Jersey law, manufacturers . . . are strictly liable for damages caused by defectively designed products,"[83] whether or not the manufacturers are at fault for the defect. The court first stated that the actual product is the focus in determining whether to hold a manufacturer strictly liable.[84] Next, the court held that if the risk of injury from a dangerous defect is greater than the overall social utility of the product, then a manufacturer will be held strictly liable for any injuries resulting from a design defect. Yet this holding actually resembles a fault standard; it blames a manufacturer for creating a risk.[85]

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82. The supreme court disagreed with the trial court, in that the supreme court held that any duty to warn on the part of Cubby was owed to a foreseeable user and not to the designing buyer Elastimold. *Michalko*, 451 A.2d at 187.

83. *Id.* at 182.

84. *Id.* at 183.

85. *Id.* Indeed, notice the similarity of this quantitative relationship in determining whether strict liability applies and Judge Learned Hand's classic algebraic equation for determining an unreasonable risk. In *Michalko*, if the risk of injury outweighs social utility, then a party will be held strictly liable for a defect. *Id.* A court theoretically could find that the risk of injury is so remote and the social utility is so high that strict liability would not apply to redress an injury. Yet this is unlikely.

In the terms expressed by the *Michalko* court, however, it appears as if the court envisioned a high risk as being synonymous with fault; a manufacturer fails to exercise due care if it creates a high risk. Put another way, a manufacturer is at *fault* for creating a high risk and thus, held strictly liable. Similarly, Judge Hand's test for determining whether a party failed to exercise due care by creating unreasonable risk is as follows: A party is liable if the burden to the party in preventing the risk (B) is outweighed by the gravity of the resulting injury (L) and the probability an injury would result (P). United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). The equation is $B < PL$. *Id.* Judge Hand's test determines fault.

Both the Hand test and the *Michalko* court's test seek to balance competing concerns. In the Hand test, an unreasonable risk is the equivalent of fault and thus, a lack of due care. Where the risk is great and an injury results, liability is imposed. Likewise, under the *Michalko* court's test, the presence of a great risk invokes the application of strict liability. Strict liability is applied for creating a high risk of injury. This is the virtual equivalent of saying that a party is at *fault* for creating the risk. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 165 (3d ed. 1986) ("[T]he term strict liability is something of a misnomer . . . because in deciding whether a product is defective or

The court concluded that the principles of strict liability apply equally to manufacturers who rebuild machines and manufacturers who make component parts, just as those principles apply to manufacturers who produce new products.[86] Although a finding of fault is unnecessary in the application of strict liability, the court stated that when it is feasible for a manufacturer to affirmatively incorporate safety devices and it fails to install them, the manufacturer is deemed to have delivered a defective product.[87] Thus, Cubby was held strictly liable. The court espoused the New Jersey Rule in the following terms:

> [T]he fact that [a] product was built according to the plans and specifications of [an] owner [or buyer] does not constitute a defense to a claim based on strict liability for the manufacture of a defective product when the injuries are suffered by an innocent foreseeable user of the product.[88]

The court rejected Cubby's argument that, under the contract with Elastimold, it had no option but to comply with Elastimold's design. Under this rule, it was also irrelevant that Cubby had no role in the product's design. Likewise, it was not necessary for Cubby to have created the defect in order to hold Cubby strictly liable.[89] Nor was it necessary that Cubby even knew of the defect.[90] The relevant factor was only that the design itself was defective.[91] Under the New Jersey Rule, a manufacturer's "adherence to or reliance upon the owner's plans, even though required by its contract, is . . . irrelevant."[92]

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unreasonably dangerous in design . . . the courts often use a Hand Formula approach . . . .").

86. *Michalko*, 451 A.2d at 183.

87. *Id.* It is a virtually inescapable inference that the court in this respect again seems to be charging the manufacturer with fault. If a manufacturer *should have* installed a safety device, but did not, the manufacturer is culpable: it is at fault for delivering a defective product. Indeed, the New Jersey Rule's strict liability standards are extremely similar to negligence standards. *See id.*; *see also* sources cited *supra* note 69.

88. *Michalko*, 451 A.2d at 183.

89. *Id.* at 183-84.

90. *Cf. supra* note 77 (indicating that the *Michalko* court implied that Cubby was at *fault* for the design defect because Cubby should have known the design was defective).

91. *Michalko*, 451 A.2d at 183-84; *see also* Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140 (N.J. 1979) (holding that if a defect exists while a manufacturer is in "control" of the product, that is sufficient to hold the manufacturer liable for the defect).

92. *Michalko*, 451 A.2d at 183-84.

C. *Analysis of The New Jersey Rule*

The New Jersey Rule is pure strict liability. Regardless of fault, and regardless of the fact that a non-designing manufacturer was obligated by contract to comply with a buyer's plans and specifications, a non-designing manufacturer may be held strictly liable if the design is later proved to be defective. The *Michalko* court's holding is in accordance with the Second Restatement of Torts section 402A.[93] Section 402A purports to hold manufacturers liable for defective products even if due care was exercised.

In New Jersey, the focus of strict liability is on the product.[94] Knowledge of any hidden or unforeseen defects in the product, including design defects, are imputed to the manufacturer. "The imputation of knowledge is, of course, a legal fiction. It is another way of saying that for purposes of strict liability the defendant's knowledge of the [defect] is irrelevant."[95] Hence, even if an ordinary and reasonable manufacturer that is similarly situated would have followed a buyer's design, a non-designing manufacturer is strictly liable for any resulting design defects in the product that caused an injury.[96] Also, strict liability applies even

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93. The oft-quoted § 402A reads 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 user or 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.

RESTATEMENT, *supra* note 46, § 402A. *But cf.* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b), at 9 (Tentative Draft No. 1, 1994) [hereinafter THIRD RESTATEMENT]. The proposed Third Restatement incorporates a negligence-type standard in design defect cases. Section 2(b), which sets the standard of liability for design defects, "achieve[s] the same general objectives as does liability predicated on negligence." THIRD RESTATEMENT, *supra,* § 2(b) cmt. a, at 12.

94. *Cf.* Moon v. Winger Boss Co., Inc., 287 N.W.2d 430 (Neb. 1980) (focusing on the manufacturer's act of following a design).

95. Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 544 n.3 (N.J. 1982).

96. This notion had been previously articulated by a United States District Court. Lenherr v. NRM Corp., 504 F. Supp. 165 (D. Kan. 1980). In *Lenherr*, plaintiff was an employee of Goodyear Tire and Rubber Company. Plaintiff was the operator of a squeegee machine, which was used to make bands for tires. The machines had been built by NRM, according to the detailed design of Goodyear. *Id.* at 174. The design did not include safety devices. Plaintiff got his arm caught between two rollers of the

when a non-designing manufacturer has exercised the highest possible standard of due care in the production process.[97]

The New Jersey Rule rejects the rationale of the Second Restatement of Torts section 404 that a "construction-type" contractor or builder is not liable for the consequences that flow from the plans and specifications provided by the owner. Thus, a contractor, such as Cubby, is required to "sit in judgment" on the plans and specifications of an owner before competing for a bid from that owner.[98] In this sense, the New Jersey Rule is a classic example of section 402A. Under section 402A, if the product is deemed "unreasonably dangerous" by virtue of a defect, then the manufacturer may be held strictly liable.[99] This is the essence of the New Jersey Rule.[100]

V. A COMPARISON OF THE NEBRASKA AND NEW JERSEY RULES

A comparison of the Nebraska and New Jersey Rules sets the stage for determining the approach the California Supreme Court should take in deciding whether or not to hold a non-designing manufacturer strictly liable for a design defect. This comparison will reveal the dynamics of each rule. Accordingly, the comparison will be used in the next section of this Comment to show how each rule comports with the recent trend of the California Supreme Court.

Under the Nebraska Rule, the imposition of strict liability on a non-designing manufacturer for a design defect is justified based on the fact

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squeegee machine. Plaintiff's arm was amputated. Plaintiff sued NRM alleging strict liability for a design defect. The *Lenherr* court held for the plaintiff, relying on § 402A of the Second Restatement of Torts. "[A]nyone who sells a product in a defective condition unreasonably dangerous to the user is liable for physical harm to the user caused by such condition . . . . Under this rule [manufacturers] are held liable for [design] defects which they have not caused." *Id.* Knowledge of the design's defectiveness is imputed to the manufacturer, making actual knowledge of the defect irrelevant. *See id.* As the *Michalko* court put it, "[s]ince a strict liability standard applies, it is not necessary for plaintiff to show that the manufacturer knew or had reason to know that the product was unreasonably dangerous." *Michalko*, 451 A.2d at 187. *But cf. supra* note 77.

97. RESTATEMENT, *supra* note 46, § 402A cmt. a.

98. *But see supra* notes 47-48 and accompanying text.

99. RESTATEMENT, *supra* note 46, § 402A cmt. j. "Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." *Id.*

100. *See supra* note 88 and accompanying text.

that the manufacturer was at fault. By contrast, the New Jersey Rule attaches strict liability to a non-designing manufacturer regardless of fault. Thus, the New Jersey Rule is based on traditional strict liability theory. Traditional strict liability does not require proof of fault as a precursor to imposing liability. Consequently, holding a party strictly liability is not justified on the grounds that the party is culpable. Instead, traditional strict liability theory offers public policy justifications to warrant the imposition of liability on an otherwise blameless party. In explicating and advocating the New Jersey Rule announced in *Michalko*, one commentator articulated these public policy justifications as a three-part rationale.[101] They are the same three general justifications advanced by virtually all proponents of strict liability: deterrence, enterprise liability, and victim compensation.[102] Whereas these public policy concerns serve as justifications for strict liability under the New Jersey Rule, both the Nebraska and New Jersey Rules fulfill these goals, albeit in different ways and with distinct ramifications.

A. Deterrence

The first policy behind strict liability is to deter manufacturers from producing defective products. Imposing strict liability on a non-designing manufacturer for a design defect serves as a deterrent by "giving manufacturers the incentive to [prevent] defective products from entering the marketplace."[103] Indeed, under the New Jersey Rule, the ominous threat of strict liability would induce a non-designing manufacturer to actively ensure that it does not produce a defective product. In the face of potential strict liability, non-designing manufacturers would be compelled to carefully scrutinize a buyer's plans and specifications before following them. This in turn would effectuate the policy of deterrence: if plans and specifications are more thoroughly scrutinized by manufacturers, fewer defective products will be manufactured.

However, the New Jersey Rule goes too far in this respect. Although the New Jersey Rule may induce a non-designing manufacturer to take every precaution before following a buyer's design, many design defects

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101. Jacqueline Shubatt, *Products Liability—Application of Strict Liability to the Independent Contractor Who Conforms to the Plans and Specifications of a Non-Governmental Purchaser:* Michalko v. Cooke Color & Chem. Corp., 9 J. CORP. L. 113, 121-25 (1983).

102. *See, e.g.*, John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 826 (1973); James, *supra* note 8, at 923, 925; Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV. 1217 (1993); *see also* Shubatt, *supra* note 101, at 121-25.

103. Shubatt, *supra* note 101, at 121.

are often impossible to forecast, particularly when a buyer's design initially appears to be technologically sound. Under the New Jersey Rule, even if a non-designing manufacturer exercises every precaution before following a buyer's design, the manufacturer will nevertheless be held strictly liable for any design defects if the product causes an injury. This holds true even though the defects may not have been foreseeable. Yet once the manufacturer has taken every precaution, the New Jersey Rule's punitive nature becomes extraneous and ineffective; all deterrence value is lost at this point. The result is that beyond inducing a non-designing manufacturer to exercise due care in following a buyer's specifications, the New Jersey Rule inequitably[104] punishes a manufacturer for unforeseeable defects.[105] From a practical business standpoint, a manufacturer, in the face of the New Jersey Rule, will be compelled to stifle business with customers who want custom-made products, such as farm equipment, assembly-line machinery, and the like. This would occur out of fear of unforeseen defects with the customer's design, which are often deemed defective as a matter of law rather than as a matter of the "law of mechanics."

The Nebraska Rule better approximates the goal of deterrence. Like the New Jersey Rule, it compels a non-designing manufacturer to take all reasonable precautions in following a buyer's specifications. If the

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104. Throughout the remainder of this Comment, I will use variations of the word *equity* as an adjective. As a term, "equity has come to be employed with various special significations." 1 JOHN N. POMEROY, EQUITY JURISPRUDENCE § 44 (Spencer W. Symons ed., 5th ed. 1994). I am using the term to denote fairness—a fundamental fairness that stands for justice. Indeed,

> *[i]t is in this sense that the epithet 'equitable' is constantly used,* even at present day, by judges and text-writers, in order to describe certain doctrines and rules which, it is supposed, will tend to promote justice and right in the relations of mankind, or between the litigant parties in a particular case.

Id. § 45. Of course, other meanings have been ascribed to the term. *Id.* §§ 44-45. But equity as denoting fairness is most widely recognized. *See id.* § 45; *see also* BLACK'S LAW DICTIONARY 540 (6th ed. 1990) (Equity is "[j]ustice . . . according to fairness . . . ."); 1 DAN B. DOBBS, LAW OF REMEDIES § 2.1(3) (2d ed. 1993) ("One group of ideas associated with the term equity suggests fairness and moral quality.").

105. Put another way, the deterrence value of the New Jersey Rule is effective only insofar as it compels a non-designing manufacturer to exercise the utmost precaution before following a buyer's design. After that point, the New Jersey Rule attempts to deter manufacturers for things beyond their control, such as unforeseeable defects or defects found by a court to exist as a matter of law; these are *un-deterrable* instances. *See generally* Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994) (questioning the levels of deterrence behind economic theories of tort law).

manufacturer is unreasonable in following the buyer's design, the manufacturer will be held liable. This compels a manufacturer to carefully scrutinize a buyer's design before following it. However, the Nebraska Rule avoids the inequitable results inherent in the New Jersey Rule. Whereas the New Jersey Rule punishes a non-designing manufacturer for deficiencies in a design that the manufacturer could neither predict nor control, the Nebraska Rule effectuates the goal of deterrence through the threat of liability up until the point where deterrence is no longer feasible. In other words, if a non-designing manufacturer exercises every reasonable precaution before following a buyer's design, the manufacturer has done all it can to prevent a defective product from entering the marketplace; there is nothing left to deter.[106] The Nebraska rule purports to hold liable those manufacturers who, in the name of profit or sheer ignorance (or both), attempt to carry out unsound plans and specifications.[107] This potential liability will deter blind or uninformed adherence to unreasonable plans and thus, strive to quell defective products from entering the market. Therefore, the Nebraska Rule's deterrence value is superior to the New Jersey Rule's superfluous deterrence efforts.

B. Enterprise Liability

The second justification for imposing strict liability for design defects on a non-designing manufacturer is enterprise liability: "that the costs of injuries resulting from defective products be borne by those who placed the products on the market, rather than by the injured persons who generally are unable to protect themselves from the dangers of the product."[108] The New Jersey Rule fulfills this objective by placing the

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106. I have referred to the manufacturer taking precautions *before* following a buyer's design. Of course, if at *any* stage during the manufacturing of a product it becomes (or should have become) apparent to the manufacturer that the buyer's design is defective, the manufacturer would face liability under the Nebraska Rule. *See* Moon v. Winger Boss Co., Inc., 287 N.W.2d 430, 433-34 (Neb. 1980).

107. *See id.* at 434.

108. Shubatt, *supra* note 101, at 122 (citing Greenman v. Yuba Power Prod., Inc., 377 P.2d 897 (1963)). "The goal [of enterprise liability] has been to hold business enterprises responsible for losses resulting from their activities so that they will have appropriate incentives to reduce risk and will provide victims with needed insurance against losses." VIRGINIA E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY 3-4 (1995) (footnote omitted).

Enterprise liability, in this respect, does not refer to the concept wherein an entire industry is rendered liable for the action of one manufacturer whose identity cannot be unequivocally established. This particular notion of "enterprise liability" is frequently referred to in cases involving prescription drugs. *E.g.*, Sindell v. Abbott Lab., 26 Cal.

cost of an injury from a design defect on a non-designing manufacturer. The policy of enterprise liability is consistently effectuated under the New Jersey Rule because non-designing manufacturers are held liable for design defects regardless of fault. This ensures that whenever a design defect causes injury, the cost of injury will not be borne by the victim. Rather, the cost of injury in every case will be borne by a manufacturer. Holding a manufacturer liable based on enterprise liability is justified under three subsections of enterprise liability: public reliance, benefits from business, and risk spreading. Although each subsection will be discussed separately, they are not mutually exclusive.

1. Public Reliance

Enterprise liability, as a policy justification for strict liability, is often based on the fact that because the public must rely on a manufacturer's superior knowledge, the manufacturer should compensate the public for injuries. Proponents of the New Jersey Rule find this support for the concept of enterprise liability in the Second Restatement of Torts section 402A comment c.[109] Comment c unequivocally articulates the concept that the cost of injuries from defective products should be placed upon a party in the manufacturing or distributing process. Comment c justifies this notion by the fact that "the public . . . is forced to rely upon the seller."[110] In other words, the consuming public is unable to

3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied*, 449 U.S. 912 (1980).

109. Shubatt, *supra* note 101, at 122. The rationale of comment c has been further utilized to justify the application of strict liability upon other parties in the chain of distribution. *See supra* notes 19-21 and accompanying text; Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970) (holding that parties other than manufacturers can be held strictly liable under an enterprise liability rationale); *accord* RESTATEMENT, *supra* note 46, § 402A cmt. f ("[Strict liability] applies to any manufacturer of such a [defective] product, [and] to any wholesale or retail dealer or distributor. . . .").

Comment c of § 402A explains the rationale of enterprise liability:

> [T]he justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it . . . and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

RESTATEMENT, *supra* note 46, § 402A cmt. c; *see also* 1 SHAPO, *supra* note 38, ¶ 7.05(1)-(3) (evaluating the rationale of comment c).

110. RESTATEMENT, *supra* note 46, § 402A cmt. c.

protect itself from defective products because it is forced to rely upon parties, such as a manufacturer, that possess superior knowledge and control over the products they produce. This assumption of reliance is not, however, applicable in the context of a non-designing manufacturer that conforms to the specifications of a buyer. When a buyer insists that a manufacturer follows the buyer's own design, the buyer is not relying on the manufacturer to produce a design. Insofar as the product is concerned, it is the buyer that possesses superior knowledge—the buyer is the *designer*. Nevertheless, this justification of a non-designing manufacturer's superior knowledge is offered in support of the New Jersey Rule.[111]

Even if the buyer possesses superior knowledge with respect to the non-designing manufacturer, the non-designing manufacturer still has superior knowledge compared to the public. This becomes the argument behind the New Jersey Rule. But there are two problems with this argument. First, a non-designing manufacturer does not deal with the public; its customer is the buyer/designer. Beyond this, a second, more fundamental difficulty with the "superior knowledge" argument is that injuries caused by a faulty design intuitively result from an insufficient designing process, from which a non-designing manufacturer is excluded. The resulting product is dangerous, but it is dangerous due to its design.

In merely following a design, pursuant to contractual obligations, a non-designing manufacturer is in a superior position to the public regarding knowledge and control of the product's design *only insofar as any defects in the design are detectable*. Put another way, the concept of the public being forced to rely on a non-designing manufacturer is misguided because it assumes that a non-designing manufacturer has a greater knowledge of unforeseeable defects than the manufacturer actually has. If a design is technologically sound at the outset of production, it cannot be said that the public must rely on a non-designing manufacturer because the manufacturer does not have any superior knowledge of unforeseeable design defects.

The Nebraska Rule, by contrast, fulfills the notion of enterprise liability by imposing a duty upon a non-designing manufacturer to carry out only those designs that are not detectably defective. In cases where a non-designing manufacturer has not acted responsibly—where there is fault—the goal of enterprise liability is accomplished because the manufacturer will be held liable if sued by the victims. Unlike the New Jersey Rule, the Nebraska Rule recognizes the fact that it is inaccurate to justify a broader sense of enterprise liability on notions of forced

111. *E.g.*, Shubatt, *supra* note 101, at 122-23.

public reliance in situations where it is impossible for any party to expect that a design will later be deemed defective.

2. *Benefits from Business*

Enterprise liability is also used to justify strict liability under the "benefits from business" theory. Under the benefits theory, it is believed that a party should be made to compensate the public for injuries caused by defects because the party benefits from selling to the public. This corollary of enterprise liability is centered on the notion of deriving benefits from the public. Proponents of the New Jersey Rule adopt the idea that a non-designing manufacturer that makes a custom product gains benefits from the sale and thus, should be held liable for its defects.[112] The manufacturer's lack of connection with the source of defectiveness is irrelevant.[113]

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112. Shubatt, *supra* note 101, at 122; *see also* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (articulating the notion that a manufacturer that places a product on the market can be held liable for any injuries it causes due to defectiveness of the product); Roger J. Traynor, *Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 365-66 (1965) (explaining that strict liability will not apply to a manufacturer "for injuries from the use of non-defective products.").

113. In the context of a non-designing manufacturer that follows a buyer's design, the argument is that because *retailers* can be held strictly liable, so too should non-designing manufacturers, as they are part of the marketing enterprise. *See* Shubatt, *supra* note 101, at 122. Retailers, like non-designing manufacturers, presumably have no connection with a product's design, but are still held liable for design defects. *See supra* note 19 and accompanying text. This argument seems to comport with comment f to § 402A, which holds that strict liability "applies to *any* [party] engaged in the business of selling products." RESTATEMENT, *supra* note 46, § 402A cmt. f (emphasis added). Although the comments to § 402A do not explicitly mention non-designing manufacturers, the reasoning expressed by comment f seems easily applicable to non-designing manufacturers. *Id.* (expressing that other parties in the chain of distribution are susceptible to strict liability).

This analogy between retailers and non-designing manufacturers is not, however, without flaws. The benefit a retailer receives from distributing or selling a product comes directly from the consumer. "Retailers . . . are engaged in the business of distributing goods to the public." Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 259, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964). Conversely, a non-designing manufacturer derives its economic gain from the designer/buyer, who is the ultimate consumer. In other words, non-designing manufacturers do not benefit from the consuming public in the same way that retailers do. Rather, any benefits derived from the consuming public are indirect.

Furthermore, non-designing manufacturers, when compared with retailers, engage in a significantly lower amount of sales transactions. Whereas retailers make their entire

The benefits theory is an inappropriate justification for the New Jersey Rule. When a manufacturer makes a product for a buyer, using the buyer's design, it is not selling to the public, it is selling a custom product to a specialized buyer. Nevertheless, proponents of the New Jersey Rule argue that the manufacturer places the product on the "market" and thus, receives a benefit.[114] By phrasing the benefits theory using the word "market," the New Jersey Rule proponents seemingly encompass a non-designing manufacturer within the theory. The inquiry then turns to which party placed the product on the market.

When a buyer requires a manufacturer to use the buyer's design, the buyer is the party responsible for placing the final product on the market. The buyer designs the specifications that are the foundation of the product. The buyer then employs the product as a tool of commerce, thus exposing foreseeable users, usually the buyer's own employees, to the actual risk of injury caused by the defective design.[115] By initiating the design at the inception and then using the final product, the buyer is the party that places the product on the market.[116] Moreover,

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income from large quantities of continuous sales to the public, non-designing manufacturers are engaged in one-time sales of custom-made products. Thus, a non-designing manufacturer might not be a candidate for strict liability in the same way a retailer is. *See* RESTATEMENT, *supra* note 46, § 402A cmt. f ("The rule does not . . . apply to the occasional seller . . . who is not engaged in that activity as a part of his business.") Moreover, even the application of strict liability to retailers has not been unequivocally accepted. Frank J. Cavico, Jr., *The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products*, 12 NOVA L. REV. 213, 226-33 (1987).

114. *E.g.*, Shubatt, *supra* note 101, at 122.

115. In other words, the buyer makes the design and then, rather than building it, employs a manufacturer. The buyer then takes the product back and places it in the market by using it as a tool of commerce. Whether the buyer follows its own design or hires a manufacturer to follow the design, the defect is created by the buyer; the product, with the defect, is released into the market by the buyer. If the design is defective, it would seem that the issue of which party followed the design would be irrelevant.

116. A more tenuous rebuttal would be to quibble with semantics, namely the word "market." Market is defined as a "[p]lace of commercial activity in which goods, commodities, securities, services, etc., are bought and sold." BLACK'S LAW DICTIONARY 970 (6th ed. 1990). Even if one were to assume that the manufacturer ultimately places the product where it is susceptible to coming into contact with innocent users, a strict construction of the enterprise liability definition reveals that custom-made products are not necessarily placed in the "market." Rather, they are usually placed in the buyer's factory.

For example, as you will recall from the facts of the *Moon* case, the defendant manufacturer, Winger Boss, produced equipment for Iowa Beef Processors, Inc. *See supra* part III.A. If it is said that Winger Boss "placed" the final product somewhere, it was clearly in Iowa Beef's assembly line. An assembly line is not typically a place where commodities, services, securities, etc. are bought and sold. Therefore, it follows, from a strict semantics standpoint, that enterprise liability is inappropriate for a situation in which a manufacturer carries out the plans and specifications of a buyer and manufactures an item to be used by the buyer solely as a means of production. The

given the buyer's extensive involvement in the process, the buyer receives the largest net "benefit" from the transaction. The buyer not only creates the product's design, it reaps the benefits by enjoying the use of the product. By fixating on the buzz-phrases "placing a product on the market" and "deriving benefits from the public," the benefits theory provides little support for the New Jersey Rule.

In the context of a manufacturer complying with a buyer's design, the focus should be on the defect, rather than on which party put a product on the market and gained benefits. The focus should first be on the *buyer's* defective design and then on which party is responsible for injuries that arise as a result. Indeed, in a design defect case, the design is the problem. The Nebraska Rule, unlike the New Jersey Rule, appropriately focuses on the buyer's design at the outset. Once it has been determined that a defect exists,[117] the Nebraska Rule will impute the defective design to the non-designing manufacturer if the design is so blatantly defective that an ordinary and reasonable manufacturer would not have followed it.[118] The focus is on the buyer's defective design and then on the manufacturer's conduct.

The result of the Nebraska Rule, when juxtaposed with the New Jersey Rule in this respect, is that the Nebraska Rule fulfills the policy of enterprise liability in a more equitable manner because it is based on fault. Under the Nebraska Rule, enterprise liability in every case will be effectuated by a party, other than the victim, which should bear the burden of the cost of injury. True, it may not always be the manufacturer, but it *will* be the party responsible for the defect that causes injury. The Nebraska Rule, unlike the New Jersey Rule, is not forced to dictate liability based on abstract notions of which party "places" the product on the market and reaps the corresponding "benefits."

3. *Risk Spreading*

As a major subsection of enterprise liability, the New Jersey Rule embraces the concept of risk spreading: the view that a manufacturer is better able to bear the cost of injuries.[119] Under the New Jersey Rule,

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product never enters the "market."

117. For the standard that Nebraska courts use to determine whether strict liability applies for a design defect, see *supra* note 39.

118. Moon v. Winger Boss, Inc., 287 N.W.2d 430, 434 (Neb. 1980).

119. *See, e.g.*, Shubatt, *supra* note 101, at 123; Wade, *supra* note 102, at 826.

even if a non-designing manufacturer is not in a better position to predict or prevent design defects, and even if the focus should be on a buyer's design, the inequitable imposition of liability on a blameless party is justified under the risk spreading rationale because it is freely assumed that a non-designing manufacturer is simply the most able to sustain the financial burden of liability.[120] This concept of risk spreading is frequently argued by proponents of strict liability,[121] wherein it is maintained that the resulting burden of risk spreading on a blameless party can be alleviated through indemnity and liability insurance. Whereas the Nebraska Rule would not impose the burden of risk spreading on an innocent non-designing manufacturer, the New Jersey Rule offers indemnity and insurance alternatives in an attempt to alleviate the adverse effects of strict liability.[122] In evaluating and contrasting the Nebraska and New Jersey Rules, it is necessary to investigate how well indemnity or insurance reduces or eliminates the burden on a non-designing manufacturer under the risk spreading rationale of the New Jersey Rule.

But first, we should get our bearings straight. As a brief review: the *risk spreading rationale is justified by indemnity and liability insurance* options, which will now be discussed. Risk spreading is a subsection of enterprise liability. Enterprise liability, in turn, is one of three major justifications for imposing strict liability. The three justifications are used as alternatives to justifying liability based on fault.

(a) *Freedom of Contract and Indemnity*

In an attempt to soften the harshness of strict liability on a manufacturer that in good faith complies with a buyer's defective design, the

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120. Shubatt, *supra* note 101, at 123; Wade, *supra* note 102, at 826.

121. *Cf.* Traynor, *supra* note 112, at 375-76. Justice Traynor recognized that manufacturers are better able to sustain the costs of liability because "the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring). However, Justice Traynor recognized that limits should be imposed on the manufacturer's liability under notions of risk-spreading.

> Any system of enterprise liability or social insurance designed to replace existing tort law as the means for compensating injured parties should provide adequate but not undue compensation. . . . [O]nce adequate compensation for economic loss is assured, consideration might well be given to establishing curbs on such potentially inflationary damages as those for pain and suffering.

Traynor, *supra* note 112, at 376; *accord* Seffert v. L.A. Transit Lines, 56 Cal. 2d 498, 509, 364 P.2d 337, 344, 15 Cal. Rptr. 161, 168 (1961) (Traynor, J., dissenting). In advocating the extension of enterprise liability to include "business premises" liability cases, Professors Nolan and Ursin similarly argue that pain and suffering damages should be limited in strict liability cases. *See* NOLAN & URSIN, *supra* note 108, at 168.

122. Michalko v. Cooke Color & Chem. Corp., 451 A.2d 179, 185 (N.J. 1982).

New Jersey Rule offers alternative contractual justifications for risk spreading, based on freedom of contract and indemnity. Under traditional freedom of contract theory, parties are left free from governmental interference when entering into contracts.[123] However, the New Jersey Rule disregards the fact that a non-designing manufacturer is contractually bound to follow a buyer's design; judicial intervention trumps freedom of contract. For instance, to be held strictly liable for a defect, a manufacturer must exert "control" over a product.[124] In *Michalko*, Cubby maintained that because it was contractually bound to follow Elastimold's design, it did not exert control over the transformer press or its design. Imposing liability would frustrate the "freedom of contract" by punishing a party for following its obligations under a contract.

The *Michalko* court rejected this argument because such a policy would "leave the determination as to the safety of the product and investment allocation in safety to the private marketplace," which would ultimately be unsatisfying.[125] Under the contract, Cubby did not have control over the design and thus had no control over the product. But the court disregarded this in favor of its own social policy, and held Cubby strictly liable. As Professor Farnsworth notes, the individualism found in traditional rules of freedom of contract have, with the advent of the twentieth century, been seen as somewhat incompatible with modern social needs.[126] In other words, the sanctity of performing the

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123. FARNSWORTH, *supra* note 65, § 1.7.
124. *See, e.g.*, *Michalko*, 451 A.2d at 185.
125. *Id.*
126. FARNSWORTH, *supra* note 65, § 1.7. Professor Farnsworth notes,

> It was generally supposed during [the nineteenth century] that, as Adam Smith had proclaimed, freedom of contract - freedom to make enforceable bargains - would encourage individual entrepreneurial activity. . . . From a utilitarian point of view, freedom to contract maximizes the welfare of the parties *and therefore the good of society as a whole.* From a libertarian point of view, it accords to individuals a sphere of influence in which they can act freely.

Id. (emphasis added) (citations omitted). However, with the advent of capitalism, the concept of the free market became engulfed by the reality of monopoly. Government regulation became prevalent, leaving only some of the bargaining process to the parties. In some cases, government regulation would control all of a contract's terms, such as fire-insurance contracts and ocean bills of lading. *Id.* Restricting classic notions of freedom of contract also helped to prevent unfair commercial acts or coercion in the bargaining process.

Important inroads on the principal of freedom of contract have been made

contractual terms leaves unredressed the injuries caused by a defective design and therefore, necessitates judicial intervention and mandate. The New Jersey Rule accordingly rejects the traditional freedom of contract theory. For this reason a non-designing manufacturer's contractual obligation to build machinery according to an owner's design is irrelevant under the New Jersey Rule.[127]

In addition to alluding to the diminished importance of traditional freedom of contract notions, the New Jersey Supreme Court suggested that indemnification might limit any harsh results.[128] In essence, a non-designing manufacturer could seek indemnity from the buyer/designer and relieve itself from the threat of strict liability for the buyer's design. This could be incorporated as a term of the contract between the manufacturer and the buyer. In theory, even if the buyer's design is deemed defective, the manufacturer, as a potential defendant, can avoid the financial burden of a liability judgment. The manufacturer would be legally liable to the plaintiff, but financially insulated by indemnity.

Referring to this notion of indemnity, the *Michalko* court asserted that "[t]he question of Cubby's liability for work done at Elastimold's request and under Elastimold's directions is a matter that could have been addressed in the explicit terms of the private contract between the parties."[129] True, an agreement of indemnification does seem like a feasible solution to a non-designing manufacturer's predicament, especially when the buyer is insisting on using *its own design*. Ideally,

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> by legislation passed to redress some real or supposed imbalance of bargaining power. . . . In all these cases the main relationship between the parties is still based on agreement, but many of the obligations arising out of it are imposed or regulated by law.

G.H. TREITEL, THE LAW OF CONTRACT 3 (8th ed. 1991) (citations omitted).

Although the legislature was instrumental in effectuating this regulation, the courts had, and continue to have, an important role as well. In fact, courts in jurisdictions adopting the Uniform Commercial Code now have the authority to invalidate entire contracts that are deemed "unconscionable." U.C.C. § 2-302 (1977). This judicial power over contracts is also illustrated by the New Jersey Rule's approach to holding a non-designing manufacturer strictly liable for design defects, even in the face of the manufacturer's contractual duty to carry out the buyer's design.

127. *See Michalko*, 451 A.2d at 183-84.

128. Indemnity has been defined as follows: "Under a contract of indemnity, one party (the *indemnitor*) promises to hold another party (the *indemnitee*) harmless from loss or damage of some kind, irrespective of the liability of any third person." FARNSWORTH, *supra* note 65, § 6.3, at n.5.

129. *Michalko*, 451 A.2d at 185. Hence, pursuant to an express indemnity agreement, the manufacturer could have sought indemnity from the plaintiff's employer. Presumably, the plaintiff's employer was limited in its liability by workers' compensation statutes. *E.g.*, N.J. STAT. ANN. § 34:15-1 (West 1988). Yet an express indemnity agreement can supersede this limitation of liability on the employer. *See infra* note 135.

a reasonable-minded buyer can be expected to accommodate a request of indemnity and stand with confidence behind its design. But the New Jersey Rule's suggestion of indemnity is ineffective for three reasons.

First, a manufacturer who agrees to build according to a buyer's plans and specifications often is awarded the contract through a bidding process.[130] Presumably, a buyer looks for bids with the least financial burdens. An indemnity clause is a potential financial burden that is unattractive to a buyer considering different bids. Thus a manufacturer who requires a buyer to accept an indemnification clause may be less competitive. Similarly, the possibility of having to reimburse a liability judgment will be viewed by a buyer as an undesirable financial risk, even if the risk is remote. This makes the cautious manufacturer who seeks an indemnity clause less competitive than manufacturers who do not seek an indemnity clause.

A second reason the New Jersey Rule's suggestion of indemnity is ineffective is that an indemnity agreement may be unnecessary. As Prosser & Keeton state, in the law of torts "[t]he right to indemnity may . . . arise without agreement, and by operation of law to prevent a result which is regarded as unjust or unsatisfactory."[131] Yet even if a non-designing manufacturer that suffers a strict liability judgment is allowed to seek indemnification as a matter of law, there is still the injustice of making the manufacturer bear the cost of bringing the action of indemnity. At this point, the manufacturer has already incurred the costs of defending the buyer's faulty design in the strict liability action. Moreover, there is always the possibility that the buyer is insolvent; this would be one reason the plaintiff sues the manufacturer. Insolvency makes the indemnity action totally worthless.

The third reason the New Jersey Rule's suggestion of indemnity is ineffective is that even if a buyer/designer is solvent, a non-designing manufacturer will still most likely be unable to recover the strict liability cost through indemnity due to an employer's insulation under workers' compensation statutes. Under these statutes, an employer has a predetermined amount for which it will be liable if an injury occurs in the

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130. *See, e.g.*, Moon v. Winger Boss Co., Inc., 287 N.W.2d 430, 431 (Neb. 1980). Bids may be submitted on forms provided by the buyer. Naturally, these forms contain provisions that favor the buyer. A bidder will consequently have difficulty inserting its own terms into the bidding process.

131. KEETON ET AL., *supra* note 52, § 51, at 341.

workplace.[132] The effect this has on the injured employee will be discussed in the ensuing text, but the issue of workers' compensation arises when a non-designing manufacturer suffers a liability judgment for a design defect and then seeks indemnity. Because indemnity is the process by which the entire burden of liability is shifted from the losing party in the initial suit to another party,[133] it implicitly does violence to the legislative mandate of liability ceilings for employers in work related injuries.[134]

For example, suppose a non-designing manufacturer, free of fault, suffers a strict liability judgment for a design defect under the New Jersey Rule. The employer who created the design would only be liable to its employee pursuant to the statutory workers' compensation limit. The employee in turn would collect this payment as a matter of right. Once the non-designing manufacturer is sued for damages, it is effectively precluded from seeking indemnity by virtue of the workers' compensation statute. If the employer is made to indemnify the manufacturer for the damages awarded in the strict liability action, it will far exceed the limit of liability imposed by the legislature. Judicial activism should not trump the will of the legislature. Indeed, when dealing with claims that fall within the confines of workers' compensation, the courts have not been receptive to the idea of third parties seeking indemnity from employers for suits brought by injured employees.[135]

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132. *See, e.g.*, CAL. LAB. CODE § 3600 (West 1989 & Supp. 1994); ARIZ. REV. STAT. ANN. § 23-1022 (1995); CONN. GEN. STAT. ANN. § 31-293a (1987); DEL. CODE ANN. tit. 19, § 2304 (1985); FLA. STAT. ANN. § 440.10 (West 1991); MICH. COMP. LAWS ANN. § 418.131 (West 1985); MISS. CODE ANN. § 71-3-9 (1989); N.Y. WORK. COMP. LAW § 10 (McKinney 1992); WIS. STAT. ANN. § 102.03 (West 1988).

133. FARNSWORTH, *supra* note 65, § 6.3, at n.5; Jayne F. Lynch, *The Clash Between Strict Products Liability Doctrine and the Workers' Compensation Exclusivity Rule: The Negligent Employer and the Third-Party Manufacturer*, 50 INS. COUNS. J. 35, 48 (1983). Under indemnity, "the entire burden of lawsuit liability is transferred from the sued party to another." *Id.*

134. If an employer pays the worker's compensation payment and then indemnifies the non-designing manufacturer for the strict liability judgment, it will far exceed the limitation of liability imposed by statute. For this reason, "[t]he use of indemnity in a triad involving an injured employee, a negligent employer, and a third-party manufacturer is limited." Lynch, *supra* note 133, at 48.

135. *E.g.*, Privette v. Superior Court, 5 Cal. 4th 689, 698, 854 P.2d 721, 727, 21 Cal. Rptr. 72, 77-78 (1993); Gauthier v. O'Brien, 618 So. 2d 825, 828 (La. 1993); *see also* Lynch, *supra* note 133, at 48-49. When dealing with worker's compensation issues, the exclusivity rule inevitably arises. The exclusivity rule holds that under worker's compensation, an employer shall not be held liable over the statutory amount. 2 ARTHUR LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH §§ 65-66 (Desk ed. 1980). Indeed, when a third party seeks indemnity from an employer of an employee to whom the third party has been held liable, the courts find few exceptions to the exclusivity rule. There are, however, situations in which courts allow indemnity suits against employers despite the exclusivity rule. *See, e.g.*, Lockheed Aircraft Corp.

Thus, under the New Jersey Rule, a non-designing manufacturer held strictly liable for a design defect will, with some exceptions,[136] be

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v. United States, 460 U.S. 190 (1983). "The third party may recover over against the employer whenever it can be said that the employer breached an independent duty toward the third party and thus acquired an obligation to indemnify the third party." Arthur Larson, *Third-Party Action Over Against Workers' Compensation Employer*, 1982 DUKE L.J. 483, 500.

One exception where indemnity is allowed is when there is an express agreement where the employer agrees to indemnify the third party. *Id.*; *see also* Goodyear Tire & Rubber Co., v. J.M. Tull Metals Co., 629 So. 2d 633 (Ala. 1993) (allowing indemnity pursuant to an express agreement, thereby overruling Alabama's precedent refusing to enforce such an agreement); Benner v. Wichman, 874 P.2d 949 (Alaska 1994) (approving indemnity only if there is an express agreement); CAL. LAB. CODE § 3864 (West 1989) ("[T]he employer shall have no liability to reimburse . . . such third person . . . in absence of a written agreement to do so executed prior to injury.") Also, even if there is no express agreement, sometimes, albeit rarely, implied indemnity is allowed. *See* Karen M. Moran, Note, *Indemnity Under Workers' Compensation: Recognizing a Special Legal Relationship Between Manufacturer and Employer*, 1987 DUKE L.J. 1095, 1106. This implied indemnity is based on either the common law notion that one party should not pay for another's culpable behavior or on the notion that the employer has breached an independent duty to the third party. *Id.* However, courts are even less receptive to notions of implied indemnity. *See, e.g.*, *Benner*, 874 P.2d at 956; *Goodyear Tire*, 629 So. 2d at 638; *see also* Joel E. Smith, Annotation, *Modern Status of Effect of State Workmen's Compensation Act on Right of Third-Person Tortfeasor to Contribution or Indemnity from Employer of Injured or Killed Workman*, 100 A.L.R.3d 351, 368-84 (1980) (listing an extensive array of state court decisions where different indemnity arguments were made).

136. As an alternative to indemnity, a minority of courts allow for contribution, despite the existence of worker's compensation statutes. Whereas indemnity allows one party to shift the entire burden of liability to another, contribution requires one tortfeasor to pay a portion of a liability judgment, while transferring the remaining portion to another tortfeasor. *See* Fleming James Jr., *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941). "Contribution requires that the contributor and contributee share a common liability to the injured plaintiff as well as joint tortfeasor status." Lynch, *supra* note 133, at 49. Note, however, that the notion of contribution assumes that each party making a contribution is at fault for the injury. Hence, within the realm of a non-designing manufacturer that follows a buyer's design, proof of fault on the part of the buyer would have to be shown, presumably, before a contribution claim would even be considered by a court.

Nevertheless, insofar as the general issue of third parties seeking contribution from employers in the face of worker's compensation statutes is concerned, most jurisdictions in the United States do not permit a contribution action to be brought by a third party against the third party's employer. *See* Michael S. Schachter, Kotecki v. Cyclops Welding Corp.: *A Judicial Balancing Act*, 42 DEPAUL L. REV. 741, 759 n.125 (1992) (listing the holdings of the majority of jurisdictions); Lynch, *supra* note 133, at 49. However, the Illinois Supreme Court has held that a contribution claim may be brought by a third party, but that the employer's liability is limited by the statutory liability ceiling of worker's compensation. Kotecki v. Cyclops Welding Corp., 585 N.E.2d 1023, 1028 (Ill. 1991). Prior to *Kotecki*, the Illinois Supreme Court even allowed for

unable to relieve the financial burden through the process of indemnity.[137] Furthermore, although the blameless manufacturer faces excessive liability, the employer responsible for the defective design enjoys insulation from both strict liability and indemnity, even in cases where the employer was negligent. Conversely, in the face of workers' compensation, the Nebraska Rule's refusal to hold a non-designing manufacturer liable without culpability avoids the inequitable results produced by risk spreading.

Because a policy of strict liability is victim compensation,[138] keeping the manufacturer as a viable source of recovery helps ensure the fulfillment of one of the strict liability objectives. This does not mean, however, that indemnity principles, by party agreement or otherwise, can cure the resulting inequity of the policy of enterprise liability (namely risk spreading). The suggestion of indemnity by proponents of the New Jersey Rule as a mitigating force against the adverse effects of risk spreading is ultimately ineffective.[139] However, as an alternative to

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contribution by the employer in an amount that corresponded to the employer's degree of culpability. Skinner v. Reed-Prentice Div. Package Mach. Co., 374 N.E.2d 437 (Ill. 1977), *cert. denied*, 436 U.S. 946 (1978).

137. *Cf. supra* note 135. The *Michalko* court indicated that it would have allowed an indemnity claim by defendant Cubby against the employer, Elastimold, despite the worker's compensation statute, if there had been an express indemnity agreement specifically addressing this type of liability. "The question of Cubby's liability for work done at Elastimold's request and under Elastimold's directions is a matter that could have been addressed in the explicit terms of the private contract between the parties." Michalko v. Cooke Color & Chem. Corp., 451 A.2d 179, 185 (N.J. 1983); *accord Benner*, 874 P.2d at 956; *Goodyear Tire*, 629 So. 2d at 635-38.

138. Wade, *supra* note 102, at 826; Wildman & Farrell, *supra* note 10, at 139; Shubatt, *supra* note 101, at 123. Indeed, the *Michalko* court expressed this notion in espousing the New Jersey Rule. "[A]s 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." *Michalko*, 451 A.2d at 185; *cf.* Traynor, *supra* note 112, at 366-67 ("It should be clear that the manufacturer is not an insurer for all injuries caused by [its] products . . . [w]hen the injury is in no way attributable to a defect there is no basis for strict liability.").

139. If the indemnity concept is dissected, several scenarios surface. First, assume that a designing buyer is financially able to cover the cost of liability. If the manufacturer has implemented an indemnity agreement, the agreement should be enforced. *See Michalko*, 451 A.2d at 185. If there is not an indemnity agreement, then an indemnification of the manufacturer by the buyer may exist by operation of law. *See* Moran, *supra* note 135, at 1106; *see also* Cartel Capital Corp. v. Fireco, 410 A.2d 674, 682-83 (N.J. 1980).

Second, assume that a designing buyer is not financially able to cover the cost of liability. If an indemnity agreement exists, it should be legally enforceable, yet will remain financially unenforced. If no agreement exists, in theory it may be that the manufacturer *should* be able to seek indemnity, yet realistically it is near impossible. *See supra* note 135.

In each case, the manufacturer remains a front runner for paying compensation, whereas manufacturer indemnification remains a secondary, idealistic scheme for

indemnity, the New Jersey Rule offers the concept of liability insurance as a means of alleviating the harshness of strict liability. In keeping with the policy of risk spreading, it is assumed that the non-designing manufacturer can protect itself through insurance and offset the loss as a cost of doing business.

(b) Liability Insurance[140]

As Justice Traynor of the California Supreme Court originally proclaimed in advocating strict liability, "the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."[141] As a means of reducing the harshness of the New Jersey Rule's imposition of liability on a non-designing manufacturer, however, the liability insurance alternative is unsatisfactory. Reliance on third party insurance serves to complicate, rather than eliminate, the burden that risk spreading imposes on a non-designing manufacturer.

Insurance is a system in which one party, the insured, transfers a risk to another party, the insurer, in consideration of a premium.[142]

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fairness. It is for this reason that the New Jersey Court's suggestion of indemnity is futile.

140. Liability insurance is also referred to as third party insurance. "Under a liability policy the insurer is required to make payment although the insured has not yet suffered any loss, for by definition the purpose of the liability policy is to shield the insured from being required to make any payment on the claim for which [s]he is liable." 11 MARK S. RHODES, COUCH CYCLOPEDIA OF INSURANCE LAW 2d § 44:4 (Rev. ed. 1982). Liability insurance can be specifically geared to protect a manufacturer against liability for injury to another party's person or property caused by the manufacturer's product. *Id.* § 44:387; *see also* 1 A.L.I. REPORTER'S STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 66-72 (1991) [hereinafter A.L.I. STUDY].

141. Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring); *see also* Wade, *supra* note 102, at 876 (explaining that a manufacturer's ability to obtain liability insurance and spread the cost as a cost of doing business is a key rationale behind strict liability); RESTATEMENT, *supra* note 46, § 402A cmt. c (explaining that a manufacturer is better able to sustain the burden of paying for accidents, mainly through liability insurance). The court in *Rawlings* also described California's theory of strict liability, as "spreading the cost of compensating victims throughout society as a cost of doing business by the manufacturer." Rawlings v. D.M. Oliver, 97 Cal. App. 3d 890, 897, 159 Cal. Rptr. 119, 122 (1979).

142. *See* ROBERT H. JERRY, UNDERSTANDING INSURANCE LAW 11-15 (1987). On a superficial level, the phrase "transfer the risk" is somewhat misleading. In a typical insurance agreement, the insured does not transfer the entire risk. Rather, the insurer provides partial coverage, 80% for example, because total elimination of the risk from

Liability insurance is viewed by proponents of the New Jersey Rule as a means for the manufacturer to relieve itself of the burden of a liability judgment: if a manufacturer is liable, the insurer will pay the victim. Through an insurance contract, the insurer assumes the risk.[143] "Yet insurance, by removing from the defendant the threat of actual liability, obviously calls into question [strict liability] law's ability to achieve deterrence."[144]

Ironically, insurance can frustrate the deterrence goal of the New Jersey Rule. With the protection of insurance, manufacturers may feel less threatened by the potential of being held strictly liable for defects. Thus, non-designing manufacturers could become moral hazards.[145] These manufacturers could hypothetically comply with designs that are obviously defective whenever it appears profitable to do so. More realistically, the reduced threat of actual liability due to the shield of insurance would make a non-designing manufacturer less discriminating when undertaking compliance with a buyer's design, enabling more defective products to reach the market.

In this respect, the New Jersey Rule's goal of risk spreading through insurance lessens the impact of deterrence. By contrast, the Nebraska Rule would prevent this moral hazard altogether by holding only culpable manufacturers liable. Liability would be imposed in more *predictable* instances: when a manufacturer is at fault. In other words, the Nebraska Rule's fault standard would not present the same unforeseeable risk of liability as the New Jersey Rule's strict liability, where liability can attach simply because the manufacturer was the named party. Because there is less risk of unforeseeable liability under the Nebraska Rule, less insurance is needed. A non-designing manufacturer would be compelled to abstain from following unreasonable designs, by the threat of liability based on fault, and would likewise not need extra

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the insured might encourage the insured to take less precautions because of the coverage. *Id.* at 13. This is known as co-insurance. *Id.*

143. The risk to the insurer is not of the same magnitude as it is to the insured. This is due to the fact that the insurer can pool the risks with those of other insureds. This is known as a pooling effect. Under this effect, "[i]nsurers are willing to assume the risk because with a large number of exposures, the number of losses becomes more predictable." ROBERT I. MEHR ET AL., PRINCIPALS OF INSURANCE 31 (8th ed. 1985). This is due to the law of large numbers: "[t]he greater the number of exposures, the more nearly will the actual results obtained approach the probable result expected with an infinite number of exposures." *Id.* at 34. Hence, by accumulating a pool of risks, an insurer is better able to predict its losses and can thus deal more effectively with risks.

144. Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 313 (1990).

145. Moral hazard refers to "the tendency of any insured party to exercise less care to avoid an insured loss than would be exercised if the loss were not insured." KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION: CASES AND MATERIALS 4 (1990).

insurance coverage for unforeseeable strict liability judgments. Conversely, the New Jersey Rule requires more insurance and then spreads the loss for torts that the Nebraska Rule would deter from occurring. The New Jersey Rule necessitates a greater reliance on liability insurance because strict liability yields a greater quantity of tort liability, since plaintiffs do not have to prove fault. The necessary insulation of insurance, however, reduces the deterrence value of liability.

The reliance on insurance as a means of decreasing the impact of expansive liability under the New Jersey Rule also makes insurance expensive. As illustrated by the insurance crisis of the mid-1980s,[146] expanding tort liability can hamper both the availability and affordability of liability insurance.[147] Expanding tort liability[148] evolved from the judicial system's attempt to provide compensation to more people through the vehicle of enterprise liability. "Thus, courts have interpreted policy coverage provisions broadly and policy exclusions narrowly to achieve the compensation goal."[149] Greater liability causes the cost of

146. During this period, the tort litigation volume significantly increased and insurance premiums skyrocketed in response. A.L.I. STUDY, *supra* note 140, at 3-7 (providing discussions of various theories explaining the crisis).

147. George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1525 (1987) (arguing that the increase in tort liability has led to the diminished availability of insurance coverage); *cf.* Steven P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1, 59-81 (1991) (arguing that expansion of tort liability promotes the goals of the insurance system and furthers the deterrence objective of tort law).

148. As Professor Priest explains, the expansion in tort liability is illustrated by the reduction in the availability of many defenses, such as contributory negligence, assumption of the risk, and product misuse. Priest, *supra* note 147, at 1535-36; *see, e.g.*, Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 422-28 (Tex. 1984) (abolishing assumption of the risk and unforeseeable product misuse defenses). Liability, by contrast, has been extended through such notions as strict liability. Priest, *supra* note 147, at 1536. In addition to strict liability, further relaxations in the standards of liability have become integrated into the tort system. *E.g.*, Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 434, 573 P.2d 443, 457, 143 Cal. Rptr. 225, 239 (1978) (invoking hindsight to judge the defectiveness of a product); Sindell v. Abbott Lab., 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied*, 449 U.S. 912 (1980) (establishing "market share" theory in order to ease causation requirements).

149. Priest, *supra* note 147, at 1536. A notorious example of this is the notion that any ambiguities in an insurance contract are interpreted against the insurer. E. Neil Young et al., *Insurance Contract Interpretation: Issues and Trends*, 625 INS. L.J. 71, 75 (1975). Thus, an insured need only offer an alternative interpretation that is reasonable and the insured may overcome any adverse provisions. *See, e.g.*, Rusthoven v.

premiums to increase, often drastically, whereas liability insurance becomes less affordable and less available.[150]

In particular, a non-designing manufacturer faces a further paradox regarding the cost of liability insurance: adverse selection.[151] Non-designing manufacturers that carry out the specifications of buyers typically perform relatively few projects per year, especially when compared with the sophisticated production and distribution systems of larger multinational manufacturers. The discrepancy in the quantity of products produced makes these two groups of manufacturers subject to different levels of risk. Larger manufacturers face an even greater threat of liability under the expansion of tort liability. Because the insurance industry offers liability insurance policies that are relatively universal, small-scale manufacturers are sometimes in the same risk pool with larger manufacturers that face greater risk. The value of insurance to a smaller manufacturer is thus less than it is to a higher-risk manufacturer. The eventual result is that lower risk manufacturers will cease purchasing liability insurance and rely on self-insurance mechanisms. As lower risk manufacturers drop out, the premiums are increased for the manufacturers that retain the insurance. According to Professor Priest, this was a reason for the mid-1980s insurance crisis. In the context of the New Jersey Rule, this phenomenon frustrates the concept of risk spreading through the use of insurance; insurance becomes too expensive.

Nevertheless, assume a non-designing manufacturer operating under the New Jersey Rule is easily able to obtain and maintain liability

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Commercial Standard Ins. Co., 378 N.W.2d 642 (Minn. 1986). With approaches such as the "ambiguity rule," greater insurance coverage complements the expansion of tort liability to fulfill the goal of enterprise liability.

150. *See* Schwartz, *supra* note 144, at 320 ("[T]he insurance company sets its premiums by taking into account the recent liability record of the insured . . . ."); Priest, *supra* note 147, at 1525 ("[C]ontinued expansion of tort liability on insurance grounds leads to a reduction in total insurance coverage available . . . .").

151. Adverse selection refers to a situation where an insurer lacks relevant information about the risks to which some insureds are susceptible. In other words, the insureds know better than the insurer whether the insureds have high risks.

> When insurers charge each party the same price for coverage, then high-risk parties elect to be insured in greater proportion than low risk parties, and insurers are forced to raise the price of coverage. As a result, some of the comparatively low-risk parties that had previously been insured decline to purchase coverage, the average degree of risk posed by the insurer's policyholders rises, and the insurer is forced to raise prices again . . . .

ABRAHAM, *supra* note 145, at 4. According to Professor Priest, this phenomena of adverse selection contributed intensely to the mid-1980s insurance crisis. Priest, *supra* note 147, at 1550-66, 1582-87. "Adverse selection in consumer risk pools explains why the increase in insurance premiums has been extreme for products and services in recent years." *Id.* at 1566.

insurance to protect itself from any unforeseen defects in a buyer's design. According to proponents of the New Jersey Rule, the cost to the manufacturer can now be distributed to customers who insist on using their own designs.[152] Simply put, these manufacturers could raise their contract prices. However, these non-designing manufacturers are usually relatively small, independent contractors, not world renowned financial powerhouses like the Coca-Cola Bottling Company in *Escola*. Small-scale manufacturers who rely on a buyer's plans and specifications are typically engaged in single-sale transactions of custom-made products.[153] Whereas a mass-producer of manufactured goods may be able to realistically increase prices on products to cover liability costs, a non-designing manufacturer may not; thus, a non-designing manufacturer may not be able to pass on the price of liability insurance. Mathematically, there is a tremendous difference between a mass-producer slightly increasing its price by a few pennies on each of the millions of bottles of soda produced and a non-designing manufacturer attempting to deflect the cost of liability insurance through single-sale transactions of custom-made products. Remember that in this context, insurance for design defects is perversely necessitated by the question of the viability of the *buyer's* design.[154]

A buyer might understand, however, that any increased contract prices stem from the buyer's desire to use its own design. But the practice of giving contracts to the lowest bidder undermines the manufacturer's ability to pass on the cost of insurance.[155] When a designing buyer accepts a variety of bids, it seeks out a manufacturer that can complete the project for the lowest price. If a manufacturer feels compelled to protect itself from unforeseen defects in the buyer's design—a wholly

152. *See, e.g.*, Shubatt, *supra* note 101, at 123.

153. *E.g.*, Moon v. Winger Boss, Inc., 287 N.W.2d 430 (Neb. 1980); Lenherr v. NRM Corp., 504 F. Supp. 165 (D. Kan. 1980). For a discussion of *Lenherr*, see *supra* note 96.

154. This assumes the manufacturer never designs its own goods. On the other hand, a manufacturer that does any design work might carry liability insurance. However, the premiums of such a manufacturer would presumably increase if it engaged in following the designs of other parties. The risk of defectiveness would increase, especially from the perspective of the insurer, who is now being asked to insure against possible defects in the designs of presently unknown third parties.

155. *E.g.*, *Moon*, 287 N.W.2d at 430; *Lenherr*, 504 F. Supp. at 165.

voluntary decision[156]—any attempt to pass the subsequent cost on to a one-time buyer in a bidding contest makes the manufacturer less competitive.

The insurance alternative, like the indemnity option, ultimately proves to be an ineffective way of reducing the burden that the New Jersey Rule places on a non-designing manufacturer. The problems with liability insurance in this context serve as an illustration of how the process of risk spreading behind the goal of enterprise liability is not achieved by the New Jersey Rule. Conversely, the Nebraska Rule approximates enterprise liability in a more effective manner. There is no need to justify imposing liability on a non-designing manufacturer because the manufacturer will be liable only upon a showing of fault. The Nebraska Rule obviates the need for justifying liability based on idealistic theories,[157] such as risk spreading through insurance; the results under the Nebraska Rule are equitable and thus, justifiable. The strength of the New Jersey Rule is, however, demonstrated by the third and final goal of strict liability: victim compensation.

C. *Victim Compensation*

The major purpose behind the theory of strict liability is the goal of victim compensation.[158] Both the Nebraska Rule and the New Jersey

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156. Eventually, all manufacturers will need to purchase insurance under the New Jersey Rule. This is the only way these manufacturers will be able to cover losses due to increased liability. A counter argument to the contention that insurance is not a viable means to deal with the effects of enterprise liability is that buyers will actually *insist* that manufacturers have insurance coverage because the buyer is the next logical target if the manufacturer cannot provide redress to an injured plaintiff. However, this argument loses weight when worker's compensation statutes are considered because the buyer's employee can only recover the statutory limit from the buyer; the threat of having an injured employee sue her employer is minor.

In any event, if the New Jersey Rule is implemented in California, for example, initially many manufacturers may be uninsured, or rely on self-insurance schemes. *See* A.L.I. STUDY, *supra* note 140, at 83-84. The insured manufacturers that attempt to deflect the cost of insurance through increased contract prices may not have as many customers as manufacturers that rely on cheaper means of self-insurance or otherwise remain uninsured. However, this will last until uninsured manufacturers are held liability or otherwise realize that they must insure to deal with the New Jersey Rule. Thus, manufacturers, under the New Jersey Rule, will be compelled to buy insurance.

157. Here I am speaking of risk spreading only in the context of non-designing manufacturers. Admittedly, risk spreading may be a more workable theory in other situations.

158. Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. 2d 435, 150 P.2d 436 (1944) (Traynor, J., concurring); *see also* Shubatt, *supra* note 101, at 121-24; William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1120-24 (1960) (articulating arguments in favor of strict liability as a means of victim compensation and giving critical responses).

Rule stress victim compensation, but they do so in drastically different ways and in significantly different amounts. By imposing strict liability, the New Jersey Rule ensures that a non-designing manufacturer will be available as a source of recovery.[159] The legal theory of strict liability further purports to ease the burden of proof on an injured party, which facilitates recovery. However, this is not without costs. In contrast, the Nebraska Rule offers a means of victim compensation which avoids the inequity of deflecting the burden of liability for a design defect to an innocent non-designing manufacturer. The Nebraska Rule quells the inequity of the New Jersey Rule.

Yet the Nebraska Rule leaves a victim of a design defect in a compromising situation insofar as compensation is concerned. The Nebraska Rule makes an injured party shoulder the burden of proving fault on the part of a non-designing manufacturer. Moreover, if a manufacturer is not at fault, a plaintiff may not recover from the manufacturer, thus closing the door to one source of victim compensation. No matter how well each rule approximates the goal of victim compensation, the profound impact of workers' compensation alters the analysis. Workers' compensation statutes accentuate the existing inequities and complicate notions of compensation. Thus, each rule must be evaluated with it as a backdrop.

1. The Effects of Workers' Compensation

Workers' compensation statutes cover an injured party's employer in a strict liability suit for a design defect.[160] The same holds true even

159. The New Jersey Rule offers an innocent victim of dangerously defective machinery more sources for recovery. As the *Michalko* court stated, "[A]s between plaintiff, an innocent user of [a] machine, and [defendant] Cubby, which rebuilt and remade part of the product without a needed safety device, it is incontestably fairer to impose the cost of the accident on the latter." Michalko v. Cooke Color & Chem. Co., 451 A.2d 179, 185 (N.J. 1983); *accord* Shubatt, *supra* note 101.

160. Under the California Labor Code, a cause of action against an employer by an employee is strictly limited.

> Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person . . . shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment . . . [w]here, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment

CAL. LAB. CODE § 3600(a)(2) (West 1989 & Supp. 1994). *See generally* 1 ARTHUR

if the action is based on negligence.[161] Under workers' compensation statutes, the employer's liability for "work-related" injuries is a statutorily established amount, pre-determined by payment schedules.[162] Because the amount recoverable is significantly lower than what a liability judgment could yield, actions against third parties are presumably irresistible to a plaintiff, regardless of any workers' compensation payments received.[163] Although a detailed discussion about workers' compensation is beyond the scope of this Comment, it is necessary to briefly examine the effect it has on the New Jersey and Nebraska Rules' respective ability to fulfill the goal of victim compensation.

A plaintiff whose injury is work-related and caused by a design defect in the *employer's* plans and specifications will be entitled to a workers' compensation payment. If the non-designing manufacturer were at fault, as defined by the Nebraska Rule,[164] then under both the New Jersey and the Nebraska Rules the plaintiff would be able to seek additional recovery from the manufacturer in a tort action.[165] In this situation, both rules provide comparable opportunities to achieve equal levels of victim compensation. But if a non-designing manufacturer is not at fault for following the buyer's defective design, there is an acute divergence between the two rules.

LARSON, WORKMEN'S COMPENSATION LAW *passim* (1995) (discussing the history and theory of worker's compensation).

161. CAL. LAB. CODE § 3600 (West 1989 & Supp. 1994).

162. *Id.* Workers' compensation is an injured employee's sole remedy against the employer:

> Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this [title] . . . the sole and exclusive remedy of the employee or his or her dependents against the employer, and the fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer.

CAL. LAB. CODE § 3602(a) (West 1989).

163. CAL. LAB. CODE § 3852(A) (West 1989 & Supp. 1994) (stating that neither a worker's compensation claim nor judgment shall bar suits against third parties); *See also* Caroline Mitchell, *Products Liability, Workmen's Compensation and The Industrial Accident*, 14 DUQ. L. REV. 349, 361 (1975-1976) (stating that relatively low worker's compensation payments make tort actions more attractive).

164. See *supra* note 50 and accompanying text for the Nebraska Rule.

165. Of course, it may be contended that because an injured plaintiff must show fault on the part of a non-designing manufacturer to recover under the Nebraska Rule, the Nebraska Rule does not provide the same opportunity for recovery in this instance as the New Jersey Rule. Yet the difference in proof in the two rules is not as different as one might imagine. *See, e.g.*, Birnbaum, *supra* note 69, at 648. In fact, something analogous to proving fault may be required of a plaintiff in a strict liability action, namely proof of defectiveness. *See* sources cited *supra* note 69.

If a manufacturer is not liable under the Nebraska Rule, the injured employee would be stuck with only a workers' compensation payment. Conversely, under the New Jersey Rule, the injured employee would be able to recover an additional sum from the manufacturer in a strict liability action, even if the manufacturer is completely free of fault. Therefore, the New Jersey Rule's application is seemingly able to provide greater victim compensation in light of the comparatively low workers' compensation payment. Yet allowing a plaintiff to recover workers' compensation from an employer, and then allowing the plaintiff to sue a third party manufacturer, is unfair and inefficient.[166] The New Jersey Rule forces a blameless manufacturer to pay because of an employer's inept design; employers who are at fault for the design are in essence protected by workers' compensation statutes, which leave the manufacturer with the burden of paying the bulk of redress under strict liability.[167] The result is that a blameless manufacturer may be the

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166. *See* Pierre J. Schlag, Comment, *A Critique of the Justifications for Employee Suits in Strict Products Liability Against Third Party Manufacturers*, 25 UCLA L. REV. 125, 126 (1977).

> It . . . becomes difficult to determine whether an employee injured by a product on the job should be compensated under workers' compensation or strict products liability. The proper resolution of the paradox in terms of the employee's rights against third party manufacturers would be to administer compensation for those product injuries typical of the employment under workers' compensation and those not typical of the employment under the common law of strict products liability.

Id. at 165. As both *Moon* and *Michalko* illustrate, usually an injury resulting from a buyer's design will happen in a work setting.

167. Lynch, *supra* note 133. An employer/designer/buyer would be able to draft defective plans with the confidence that it would never be held liable over the statutory limit. Thus, out of a concern for excessive costs for example, an employer would not be completely reluctant to make a machine's design cheaper and less safe.

> The workers' compensation exclusivity rule, which limits an employer's liability to the statutory compensation paid to the employee for work-related injuries, operates to protect the negligent employer for the consequences of its wrongdoing to a considerable degree. The employer's immunity in turn operates to saddle the manufacturer with the burden to compensate the employee in amounts much greater than the manufacturer would have been required to pay but for the employer-employee relationship and the exclusivity rule of workers' compensation.

Id. at 35; *see also* Nancy A. Weston, *The Metaphysics of Modern Tort Theory*, 28 VAL. U. L. REV. 919 (1994) (arguing that products liability suits are desirable even with worker's compensation payments). The Nebraska Rule would deter *buyers* from designing "less safe" products in order to save money because manufacturers under the Nebraska Rule would not comply with "cheap" designs. *See supra* part V.A.

only source of recovery for a plaintiff injured by virtue of a product's defective design because, although the plaintiff's employer made the defective design, workers' compensation statutes eliminate the employer as a potential defendant.

True, if the Nebraska Rule is applied, some may argue that an injured employee will be barred from recovery—except for the workers' compensation payment—by the fortuitous fact that the employee was within the scope of employment. A non-employee, on the other hand, would be able to sue the employer for the same injury and reap a higher recovery. It must be recognized, however, that workers' compensation is a legislative enactment—the legislatures have determined that workers' compensation systems provide the greatest social utility by guaranteeing an injured employee a source of recovery. The trade-off for this guaranteed recovery is a lower payment. At first glance, the New Jersey Rule avoids this situation by ensuring the manufacturer remains a source of recovery. Yet consider the inequity involved in the New Jersey Rule. An innocent non-designing manufacturer is forced to pay a judgment to the benefit of the ultimate tortfeasor. The plaintiff is compensated in excess of its statutory rights of recovery at the expense of a blameless party.

2. *Proposals to Change Workers' Compensation*

This resulting inequity has led to two noteworthy proposals to change the workers' compensation system. One proposal suggests that strict liability actions against third parties should be barred and that the injured employee should only have one source of recovery.[168] In essence, a plaintiff would have to choose between a workers' compensation

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168. *See* Philip D. Oliver, *Once is Enough: A Proposed Bar of the Injured Employee's Cause of Action Against a Third Party*, 58 FORDHAM L. REV. 117 (1989). This proposal goes even a step further and argues that *all* actions against third parties be barred. "[T]he proposal would bar the employee's suit against a third party, except in those rare cases when the third party's actions, if committed by the employer, would allow the employee to sue the employer under present law." *Id.* at 119. This is the situation where the employer intentionally injures the employee. *See* 2A LARSON, *supra* note 160, § 68.15.

But the proposal could present constitutional problems. By limiting the employee's ability to seek recovery by banning suits against third parties in cases where workers' compensation is applicable, it may be argued that the employee is being denied possible property rights. Jonathan M. Weisgall, *Product Liability in the Workplace: The Effect of Workers' Compensation on the Rights and Liabilities of Third Parties*, 1977 WIS. L. REV. 1035, 1078. Likewise, if this proposal inhibits adequate compensation, a similar claim of denial of property rights may exist. However, any claim would have to refute the fact that the legislature has made a determination that the workers' compensation system provides adequate compensation to injured employees.

payment or a suit against a third party. This proposal recommends that the workers' compensation payments should be *increased*, making suits against third parties unnecessary.[169] In this respect, the Nebraska Rule would allow the victim to recover for negligence if the victim can prove that the non-designing manufacturer was at fault in causing the injury. Of course, the more prudent route would be for the injured employee to opt for the worker's compensation payment without the hassle and uncertainty of litigation.[170] With an increased workers' compensation payment, culpable employers could accordingly be held liable and victims would receive adequate compensation by virtue of the larger payments.[171]

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169. Oliver, *supra* note 168, at 123.

> [W]orkers' compensation should be the injured employee's sole remedy. The principles underlying worker's [sic] compensation demand adequate compensation for all injured workers without reliance on additional tort recovery. If present benefits are too low they should be increased, but adequate compensation should not depend upon the chance existence of a legally culpable third party who is able to respond in damages.

Id. (citations omitted). Other commentators have suggested that where an employer has been negligent, the injured employee should be allowed to maintain a second suit against the employer. *See, e.g.*, Theodore F. Haas, *On Reintegrating Workers' Compensation and Employers' Liability*, 21 GA. L. REV. 843, 844 (1987) (indicating that because workers' compensation payments are low, an injured employee should be able to recover from the employer in tort as well—provided the employer was negligent).

170. On this topic I have two thoughts in mind. First, without resorting to litigation, the plaintiff can avoid having to carry the burden of proving fault. *See* sources cited *supra* note 132. By contrast, the workers' compensation payment would provide the plaintiff with comparatively quick compensation without the delays of litigation. In making this comparison between an immediate workers' compensation payment and the delays of litigation, I am assuming, of course, a situation where settlements between the parties are not reached.

A second thought is that by choosing to litigate a claim based on fault, an injured plaintiff would be wagering that its claim will pay off. A lawsuit might pay more than a workers' compensation award. With plaintiffs wanting maximum compensation, and their attorneys working on contingent fees, it is conceivable that in the face of a reliable payment, many plaintiffs will take their chances in a lawsuit. Ultimately, increased workers' compensation payments would be essential to preventing lawsuits.

171. The increased payments would, however, place the burden of compensation entirely on the employer. Workers' compensation insurers would undoubtably offset increased payments with corresponding increases in premiums. This seems to contradict the purpose behind workers' compensation, i.e., limiting the liability of employers. As a solution, manufacturers would be called on to contribute to the workers' compensation payments.

> Since the cost of workers' compensation insurance is borne exclusively by employers, an increase in workers' compensation benefits as part of an exclusivity proposal would shift the entire burden of workplace injuries from manufacturers to employers . . . . It would therefore appear that workers'

A second proposal to reform workers' compensation is to replace it with strict employment liability.[172] Under this system, an employer would be held strictly liable for work-place injuries.[173] In our context of non-designing manufacturers, innocent manufacturers would be spared the burden of strict liability. This proposal would leave a non-culpable manufacturer free from undue liability if coupled with the Nebraska Rule. However, the proposal may go too far, especially in cases where a non-designing manufacturer should have recognized and corrected a design defect.

If the Nebraska Rule is applied, liability will be based on fault. With strict employment liability, the inverse of our original problem would result. For instance, under the Nebraska Rule, a non-designing manufacturer could be liable because of compliance with plans and specifications that a reasonable manufacturer would not have followed. But this same manufacturer escapes the imposition of deserved liability by virtue of the employer being held strictly liable. It would be easier for a plaintiff to recover from the employer in strict liability, rather than having to prove a manufacturer was at fault.[174] Although this proposal

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> compensation as [a virtually] exclusive remedy would be viable only if a manufacturer contributed to the increased costs of maintaining higher workers' compensation benefit levels.

Weisgall, *supra* note 168, at 1072. To effectuate manufacturers making contributions to workers' compensation schemes in order to increase workers' compensation payments, several proposals have been offered. One way would be to enact comparative fault statutes, such that an employer could bring an action of contribution against a manufacturer once payments have been made. *Id.* at 1072-73. Another means would be to rely on state workers' compensation boards or post-injury arbitration to determine a manufacturer's obligation. *Id.* at 1073-74.

Presumably, this entire proposal also considers the fact that upon making a payment pursuant to a workers' compensation statute, an employer or an employer's insurer can seek indemnity from a third party. *See, e.g.*, Kubiszewski v. St. John, 518 N.W.2d 4, 5 (Minn. 1994) (quoting and explaining MINN. STAT. § 176.061 (1994)).

172. Lynch, *supra* note 133, at 65-66. The workers' compensation system *is* strict liability: if an employee is injured, she can recover from her employer the statutory amount as a matter of right. Strict employment liability essentially allows an injured employee a cause of action against the employer. In reality, it is a return to the situation that existed before workers' compensation, where an injured employee's only recourse was to sue in tort. *See* Haas, *supra* note 169, at 855.

173. Lynch, *supra* note 133, at 63.

174. Note, however, that the employer would still be at fault because the fact that the manufacturer would be liable for following the plans and specifications means that the design was defective. The employer drafted the defective plans and specifications, so the imposition of liability, under strict employment liability or otherwise, is not unjust. However, the culpable manufacturer would be able to hide behind strict employment liability and avoid incurring liability in much the same way an employer can hide behind worker's compensation under the current system.

Another problem with the proposed strict employment liability is that it may cut off redress entirely. Instead of receiving automatic workers' compensation benefits, injured

protects innocent manufacturers, it would leave some employers in the same inequitable position of non-designing manufacturers under the New Jersey Rule: liable for damages more appropriately attributable to another party's failure to note and to correct the flawed design.

In any event, workers' compensation, under the current system, impacts the policy of victim compensation. Although the Nebraska Rule would hamper an employee's attempt to yield the highest possible recovery, it would nonetheless ensure equal treatment and truly prevent manufacturers from becoming insurers of their products.[175] Also, under the Nebraska Rule, manufacturers that are at fault will be fully available as a source of recovery, ensuring victim compensation.

VI. INDICATIONS OF THE CALIFORNIA APPROACH

Although the California Supreme Court has not had the occasion to address the issue of whether a non-designing manufacturer can be held strictly liable for a defect in a buyer's design, one California court demonstrated a tendency to follow the strict liability approach of the New Jersey Rule. This was illustrated by the Court of Appeal for the Fourth District's holding in *Rawlings v. D.M. Oliver, Inc.*[176] But *Rawlings* is not a solid commitment to imposing strict liability on a non-designing manufacturer, especially considering California's recent restriction of strict liability rulings. Moreover, the California method for determining whether a design is defective appears to be virtually indistinguishable from a negligence standard. In actuality, the Nebraska Rule seems to be a more appropriate means of executing the policies behind holding non-designing manufacturers liable for design defects in California.

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employees would have to sue in strict liability. Therefore, there is the risk that the employer could escape liability and thus, frustrate the policy of victim compensation behind strict liability. Haas, *supra* note 169, at 855 n.43.

175. In response to criticisms of excessive liability under strict products liability, proponents of expanding strict liability staunchly contend that strict liability will not make manufacturers the insurers of their products. *See, e.g.*, Barker v. Lull Eng'g Co., Inc., 20 Cal. 3d 413, 432, 573 P.2d 443, 456, 143 Cal. Rptr. 225, 238 (1978). While this is debatable at best, the Nebraska Rule provides greater certainty: liability based on fault *guarantees* manufacturers will not become insurers; they will not have to compensate for unforeseen injuries, thus reducing their risk of liability.

176. 97 Cal. App. 3d 890, 159 Cal. Rptr. 119 (1982).

A. *Rawlings v. D.M. Oliver*: The Fourth District Approach

In *Rawlings*, plaintiff was an employee of Kelco Company and was responsible for operating a kelp drying machine. Defendant Oliver manufactured[177] the machine in accordance with Kelco's plans and specifications.[178] Plaintiff was engaged in cleaning the interior of one of these drying machines when a co-employee mistakenly turned the machine on. As a result, plaintiff sustained an injury to one of her hands. Plaintiff sued Oliver,[179] alleging that the dryer's design was defective[180] because it contained unguarded gears and lacked a shut-down device in case of an emergency. Oliver argued that strict liability did not apply and that it could not be held strictly liable for merely following Kelco's design. Both the argument and the court's ruling against Oliver were terse.

Almost without explanation, the *Rawlings* court stated that "[a] manufacturer may be liable for product defects based on negligence or strict products liability even where the product is manufactured in accordance with the owner's plans."[181] Oliver attempted to rely on the holding in *Barnthouse v. California Steel Buildings Co.*,[182] which stated that "a general contractor is not liable to a third person for injuries resulting from a structural defect where the contractor has performed in accordance with the plans and specifications furnished by the owner . . . ."[183] The court held this rationale inapplicable to the *Rawlings* case for two reasons. First, according to the *Rawlings* court, the *Barnthouse* holding did not give license to a contractor to follow plans and specifications of an owner with impunity. If the contractor deviates from the owner's plans, performs with carelessness, or creates an

177. The machine was manufactured by Warren Industrial Sheet Metal. Oliver acquired Warren after the injury, but before the complaint. The main issue the court sought to resolve was whether Oliver could be held liable as a successor corporation.

178. *Rawlings*, 97 Cal. App. 3d at 894, 159 Cal. Rptr. at 120.

179. *Id.* at 895, 159 Cal. Rptr. at 120.

180. *See id.* The court never referred directly to a "design" defect. However, because the plaintiff alleged that the defectiveness was caused by a lack of safety devices, it is implicit that the design was defective because Kelco had provided the plans and specifications without any safety devices. As will be discussed, the application of strict liability to a non-designing manufacturer due to a design defect was really a sub-issue in this case.

181. *Id.* at 894, 159 Cal. Rptr. at 120.

182. 215 Cal. App. 72, 29 Cal. Rptr. 835 (1963). Recall that the *Moon* court relied on *Barnthouse* in articulating the Nebraska Rule. Moon v. Winger Boss Co., Inc., 287 N.W.2d 430, 434 (Neb. 1980).

183. *Rawlings*, 97 Cal. App. 3d at 896 n.1, 159 Cal. Rptr. at 121 n.1 (interpreting Barnthouse v. California Steel Bldgs. Co., 215 Cal. App. 72, 29 Cal. Rptr. 835 (1963)).

unreasonably dangerous condition, *Barnthouse* implies that the contractor faces liability.[184]

The second reason why the *Rawlings* court held *Barnthouse* inapplicable was because the *Rawlings* court claimed that there is a significant difference between a "manufacturer" and a "builder."[185] The exact difference between a manufacturer and a builder remains unclear, especially in the context of non-designing manufacturers that comply with the plans and specifications of buyers. In actuality, non-designing manufacturers, like builders, produce custom-made products according to the specifications of an owner. Recall that the *Moon* court relied on the *Barnthouse* opinion as precedent in formulating the Nebraska Rule.[186] Both *Barnthouse* and *Moon* reflect the rationale behind Restatement (Second) section 404's treatment of parties who construct, re-make, or build according to the plans of owners. Like the New Jersey Rule, the *Rawlings* holding remains unsatisfying because it fails to distinguish meaningfully between a builder and a manufacturer—especially a small-scale manufacturer who makes component parts and custom-made products or who rebuilds equipment, all according to the plans and specifications of the buyer.

The *Rawlings* court expressed that the "'paramount policy' to be promoted by strict products liability" is victim compensation.[187] Like the New Jersey Rule, the *Rawlings* holding treated this justification as sufficient for holding a non-designing manufacturer strictly liable for a defect in a buyer's design.[188] The court apparently classifies non-

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184. *See id.*; *see also* Hannan, *supra* note 54, at 577-78.

185. *See Rawlings*, 97 Cal. App. 3d at 896 n.1, 159 Cal. Rptr. at 121 n.1 ("We do not belabor the distinction in strict products liability between a conventional manufacturer and a builder."); *cf. supra* notes 50-54 and accompanying text (discussing a builder's potential liability when following an owner's design).

186. *See supra* notes 50-54 and accompanying text.

187. *Rawlings*, 97 Cal. App. 3d at 897, 159 Cal. Rptr. at 122 (citing Price v. Shell Oil Co., 2 Cal. 3d 245, 251, 466 P.2d 722, 725-26, 85 Cal. Rptr. 178, 181-82 (1970)).

188. The New Jersey Rule also relies on notions of deterrence and enterprise liability to justify the application of strict liability. Michalko v. Cooke Color & Chem. Corp., 451 A.2d 179, 185 (N.J. 1982). The notion of victim compensation as a primary objective of strict liability is expressed in the Second Restatement of Torts.

> On whatever theory, the justification for the strict liability has been said to be that the seller [or manufacturer], by marketing [its] product[s] for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it . . . [and] that public policy demands that the burden of accidental injuries caused by

designing manufacturers in the same vein as the larger manufacturers envisioned by *Escola*, which could supposedly sustain the financial burdens of strict liability. But small-scale manufacturers that perform custom projects in isolated transactions and according to a buyer's plans and specifications do not fit the court's conception of manufacturers as large entities engaged in mass marketing. Implicitly, California courts seem to assume that indemnity principals or liability insurance will ease or eliminate this burden. This assumption is mistaken in the context of a non-designing manufacturer that conforms to the specifications of a buyer, as discussed above.[189]

The *Rawlings* decision is an inappropriate approach for California. The *Rawlings* decision is inferior to the Nebraska Rule for the same reasons the New Jersey Rule is inferior. Moreover, the *Rawlings* court failed to fully develop the reasoning behind its hastily stated rule. In fact, the rule articulated by the *Rawlings* court does not fully support the New Jersey Rule. For instance, the court states that a non-designing manufacturer that conforms to the specifications of a buyer "may" be liable for a design defect.[190] The passive use of the word "may" is not as forceful as the imperative language employed by the *Michalko* court in espousing the New Jersey Rule.[191] Like the Nebraska Rule, the *Rawlings* rule, using passive language, seems to hinge on other circumstances, wherein the imposition of liability requires the fulfillment of prerequisites. In the Nebraska Rule, liability requires a showing of fault on the part of the non-designing manufacturer. It is not clear what "may" render a non-designing manufacturer liable under *Rawlings*; the court did not elaborate on this point. Also, like the Nebraska Rule, the *Rawlings* rule refers to both negligence and strict liability, whereas the

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> products intended for consumption be placed upon those who market them.

RESTATEMENT, *supra* note 46, § 402A cmt. c. Although comment c assumes the context of commercial trade by using words that deal with marketing and consumption, it illustrates the notion of victim compensation. This is equally applicable to the New Jersey Rule.

189. *See supra* part V.B.3(a) (discussing indemnity); *supra* part V.B.3(b) (discussing liability insurance).

190. *Rawlings*, 97 Cal. App. 3d at 894, 159 Cal. Rptr. at 120. "A manufacturer *may* be liable for product defects based on . . . strict products liability even where the product is manufactured in accordance with the owner's plans. . . ." *Id.* (emphasis added).

191. Recall the language the *Michalko* court used in establishing the New Jersey Rule: "[T]he fact that the product was built according to the plans and specifications of [an] owner *does not constitute a defense* to a claim based on strict liability for the manufacture[r] . . . ." *Michalko*, 451 A.2d at 183 (emphasis added). The wording of this rule suggests that the application of strict liability for a design defect is a foregone conclusion and that compliance with the buyer's design is not a defense. Compare this imperative language with the passive, even permissive, language of *Rawlings*, *supra* note 190.

New Jersey Rule exclusively contemplates strict liability.

The *Rawlings* rule is not indisputably supportive of the New Jersey Rule. Rather, the court's mention of victim compensation resembles a portion of the New Jersey Rule's rationale. *Rawlings* is the only published California case dealing with the issue of non-designing manufacturers and design defects. But *Rawlings* only represents one district in California; it is binding on neither the California Supreme Court nor other districts. It is necessary to turn our discussion to the current state of California tort law, to see how the issue of holding a non-designing manufacturer liable for a design defect fits into the overall structure.

B. Current Trends in Strict Products Liability Law in California

On a general level, strict liability standards are merging into negligence standards.[192] In California, the test for determining design defects, articulated in *Barker v. Lull Eng'g Co., Inc.*,[193] resembles a negligence standard.[194] This resemblance may make the Nebraska Rule's insistence on proving fault compatible with California tort theory. Moreover, California courts have recently begun to ease the liberal application of strict liability in defect cases. Finally, the compatibility of the Nebraska Rule with California's product liability jurisprudence can be seen by the approach California courts have taken to cases in which non-designing manufacturers comply with the plans and specifications of the federal government, which later prove to be defective.[195]

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192. Recall, for example, that in the *Moon* case, the plaintiff sued under a strict liability theory, to which the court required a showing of fault on the part of the manufacturer. *See supra* note 50 and accompanying text.

193. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

194. The California Supreme Court has defined the negligence standard as follows: "[N]egligence involves a legal duty to use due care, a breach of such legal duty, and the breach as the proximate or legal cause of the resulting injury." United States Liab. Ins. Co. v. Hardinger-Hayes, Inc., 1 Cal. 3d 586, 594, 463 P.2d 770, 774, 83 Cal. Rptr. 418, 422 (1970). "Liability [for negligence] is imposed only if the risk of harm resulting from the act is deemed unreasonable—i.e., if the gravity and likelihood of the danger outweigh the utility of the conduct involved." Weirum v. RKO Gen., Inc., 15 Cal. 3d 40, 47, 539 P.2d 36, 40, 123 Cal. Rptr. 468, 472 (1975); *compare* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (explaining the Learned Hand formula for determining unreasonable risks in negligence suits).

195. The government contractor defense shields a non-designing manufacturer from liability if the federal government supplies or approves the design. *See supra* note 34. One California court of appeal displayed a willingness to extend the government

1. *Evolution of the Strict Products Liability Standard*

Under the Second Restatement of Torts section 402A, products that are in a "defective condition," such that they are "unreasonably dangerous," render the manufacturing party strictly liable for any injuries caused.[196] Yet by making an injured plaintiff prove that a product was "unreasonably dangerous," the plaintiff has the burden of proving an "element which rings of negligence."[197] The California Supreme Court refused to impose this burden on a plaintiff in a strict liability suit[198] and instead, promulgated a substitute rule requiring proof of defectiveness. Upon proving a product was defective and the proximate cause of an injury, a plaintiff could recover under strict liability.[199]

In general, knowledge of a product's defectiveness is imputed to the manufacturer because strict liability is liability without fault.[200] In

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contractor defense into a commercial arena.

> Plaintiff seems to argue that military equipment means a product made exclusively for military use with no commercial purpose . . . . In our view, if a product is produced according to military specifications and used by the military . . . and is incidentally sold commercially as well, that product may nonetheless still qualify . . . under the [government] contractor defense.

Jackson v. Deft, Inc., 223 Cal. App. 3d 1305, 1319, 273 Cal. Rptr. 214, 222 (1st Dist. 1990). In rejecting the argument that military equipment must be made for the government in order to invoke the government contractor defense, the court apparently recognized that it is more equitable to say a non-designing manufacturer cannot be held liable for a design defect if it follows the specifications of a buyer.

196. *See* RESTATEMENT, *supra* note 46, § 402A.

197. Cronin v. JBE Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); *see also* John L. Diamond, *Eliminating the "Defect" in Design Strict Products Liability Theory*, 34 HASTINGS L.J. 529, 536 (1983). As professor Diamond notes, the problem with the "unreasonably dangerous" standard advanced by the Second Restatement § 402A is that it went beyond the burden of proof that should be on the plaintiff:

> The California [Supreme] [C]ourt has also expressed dissatisfaction with the ambiguity of the phrase "unreasonably dangerous," [because it] is potentially misleading to juries. Arguably, an "unreasonably dangerous defect" would suggest to some jurors an intent to limit liability to only abnormally dangerous or ultrahazardous defects, although such an interpretation was presumably not intended by the drafters of the Restatement.

Diamond, *supra*, at 537 (citation omitted). This suggests that the plaintiff, in proving the existence of an "unreasonably dangerous defect," would have the additional burden of overcoming exaggerated juror misconceptions. Presumably, the heavy impact of the definition of the phrase "unreasonably dangerous" is more easily appreciated by jurors as laymen terms, rather than as a legal term of art.

198. *See Cronin*, 8 Cal. 3d at 133 & n.16, 501 P.2d at 1162 & n.16, 104 Cal. Rptr. at 442 & n.16; *see also* Diamond, *supra* note 197, at 536-37.

199. *See, e.g.*, *Cronin*, 8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442; Ault v. Int'l Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974).

200. Michalko v. Cooke Color & Chem. Corp., 451 A.2d 179, 183 (N.J. 1982) ("Knowledge of a product's [defective] characteristics is imputed to the defendant."). *But*

effect, if the product is defective, it does not matter whether the manufacturer knew, should have known, or had no way of knowing about the defect. "Once this knowledge has been imputed, the standard is the same as a negligence standard."[201] This relieves the plaintiff of having to actually show negligence on the manufacturer's part.[202]

Relief from proving negligence is thought necessary for a plaintiff. As one commentator put it, "It is often difficult, or even impossible, to prove negligence on the part of the manufacturer . . . ."[203] True, in the context of a non-designing manufacturer that complies with a buyer's specifications, the Nebraska Rule requires proof of negligence. Only if the manufacturer knew or should have known the plans and specifications were unreasonable will the manufacturer be liable for the defectiveness.[204] But this burden is not impossible.

For example, in *Michalko*, the defendant manufacturer was shown to have actually known that a safety device was needed in Elastimold's design.[205] Thus, Cubby's compliance with the design was contrary to what a reasonable manufacturer would have done. A reasonable manufacturer would not have agreed to follow unsafe plans unless the appropriate safety devices could be installed. This fact would satisfy the Nebraska Rule; the Nebraska Rule would have reached the same result as the New Jersey Rule. Thus, the burden of proving fault in the context of a non-designing manufacturer is not impossible. The plaintiff must only show that a manufacturer should not have followed a buyer's design. Moreover, the argument that a plaintiff must be relieved of the

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cf. Birnbaum, *supra* note 69, at 648 (criticizing this imputation of knowledge as unnecessary).

201. Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183, 1192 (1992); Birnbaum, *supra* note 69, *passim.*

202. *See* sources cited *supra* note 201.

203. Wade, *supra* note 102, at 826. *But cf.* Birnbaum, *supra* note 69, at 648 ("[A]s almost every vigorously litigated design defect case shows, plaintiffs do in fact come forward with detailed technical evidence tending to prove that [a] manufacturer was . . . aware of the nature and gravity of the risk . . . . "). In response to the tentative draft of the Third Restatement of Torts— which has a negligence standard for design defects—it is argued that making an injured plaintiff prove fault will make it more difficult for the plaintiff to recover because such an endeavor will be more expensive. Frank J. Vandall, *The Restatement (Third) of Torts, Products Liability, Section 2(b): Design Defect*, 68 TEMP. L. REV. 167, 189 (1995).

204. *See supra* note 50 and accompanying text.

205. *See*, Michalko v. Cooke Color & Chem. Corp., 451 A.2d 179, 181-82 (N.J. 1982).

burden of proving negligence "does not necessarily deny that fault is the underlying motivation for [strict] liability."[206]

An injured plaintiff cannot escape some modicum of proof. Even under pure strict liability, a product or design must still be deemed *defective* before liability arises.[207] Requiring proof that a defect exists is inevitably the virtual equivalent of requiring proof of fault on a negligence standard. As Professor William Powers puts it:

> After making the original decision to [make] . . . [strict] liability based on defectiveness, courts have encountered difficulty defining defectiveness in a way that is both workable and maintains the distinction between strict products liability and negligence . . . .
>
> If courts define[] "defect" as "a product that injures the plaintiff," strict products liability would be in fact a version of true strict liability. If, on the other hand, courts define[] "defect" as "a product negligently manufactured," strict products liability would be merely a version of negligence parading under another banner . . . .
>
> No court has ever defined "defect" to mean "any product condition that causes injury to a plaintiff . . . ."[208]

Attempts to define defectiveness in California have undertones of a negligence standard. As will be discussed in the next section, the California tests of (1) ordinary consumer expectations and (2) risk-benefit, which are used to determine if a design is "defective," approximate the rationale behind the Nebraska Rule—a fault standard. It is for this reason that the Nebraska Rule is compatible with California strict liability law.

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206. William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639, 648; Prosser, *supra* note 158, at 1114 ("Where the action is against the manufacturer of the product, an honest estimate might very well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not."); *see also* Wertheimer, *supra* note 201, at 1192-93; Frank J. Vandall, *"Design Defect" in Products Liability: Rethinking Negligence and Strict Liability*, 43 OHIO ST. L.J. 61 (1982).

207. *Michalko*, 451 A.2d at 183 ("The focus in a strict liability case is upon the product itself."). The New Jersey Supreme Court also offered another explanation for the difference between strict liability and negligence. "[N]egligence is conduct-oriented, asking whether defendant's actions were reasonable; strict liability is product-oriented, asking whether the product was reasonably safe for its foreseeable purposes." Beshada v. Johns-Manville Prod. Corp., 447 A.2d 539, 544 (N.J. 1982).

208. Powers, *supra* note 206, at 652; Wertheimer, *supra* note 201, at 1191 ("The requirement that a product be defective before the manufacturer would be held responsible for the damage it caused opened the door to the transformation of strict products liability back into a negligence doctrine.").

The *Barker* court also acknowledged this difficult aspect of defining defectiveness. "California courts have frequently recognized that the defectiveness concept defies a simple, uniform definition applicable to all sectors of the diverse product liability domain." Barker v. Lull Eng'g Co., Inc., 20 Cal. 3d 413, 417, 573 P.2d 443, 446, 143 Cal. Rptr. 225, 228 (1978).

2. *Defining Design Defects In California*

In order for an injured plaintiff to recover in strict liability, the product in question must be deemed defective. After the California Supreme Court's rejection of Restatement (Second) section 402A's standard of "unreasonably dangerous,"[209] the court created a standard for defining design defects in *Barker v. Lull Eng'g Co., Inc.*,[210] which includes two alternative standards. The standards for defining a defective design are premised on fault. This suggests the requirement of proving fault in the Nebraska Rule is no more cumbersome than fulfilling the burden of proving a design defect. In fact, "[t]he *Barker* factors involve an evaluation of [a] manufacturer's reasonable care just as the negligence factors do."[211] Because the *Barker* test involves two separate tests, they will be discussed separately.

(a) Ordinary Consumer Expectation Test

According to the *Barker* court, "a product is defective in design . . . if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner."[212] The court stressed that this standard assures a plaintiff protection from products that do not meet expected safety standards.[213] The standard resembles proving that a manufacturer was at *fault* for producing the product.

What the test says is that a party is liable for a defect when that party has failed to meet consumer expectations of safety. The focus of inquiry is on what consumers expect. However, in general, "consumer expectations do not provide an independent standard against which to judge a product."[214] The product may be so complex that a consumer is unable to fathom the appropriate safety standards. Alternatively, a danger may be so blatant that it cannot be said that a consumer would

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209. Cronin v. JEB Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972).
210. 20 Cal. 3d 413, 432, 573 P.2d 443, 455-56, 143 Cal. Rptr. 225, 237-38 (1978).
211. Wildman & Farrell, *supra* note 10, at 151.
212. *Barker*, 20 Cal. 3d at 418, 573 P.2d at 446, 143 Cal. Rptr. at 228.
213. *Id.*
214. Powers, *supra* note 206, at 653; *see also* Price, *supra* note 69, at 1315 (explaining that the consumer expectation test is problematic).

not expect to receive an injury from it.[215] Given the sporadic oscillation of possible consumer expectations, a court's inquiry would reflect back to whether a defendant failed to meet these standards, however they are defined. In essence, the very nature of proving a product's design did not meet the ordinary consumer's idea of safety is the same as proving a party was at fault for producing a sub-standard design.

In the context of a non-designing manufacturer that conforms to the specifications of a buyer, there is a strong tendency to want to frame the issue in terms of a fault standard. The Nebraska Rule is preferable because it focuses on the buyer's design and asks if a reasonable manufacturer would have followed it. By contrast, the consumer expectation test focuses on abstract notions of what consumers expect in a particular situation, and once this is established, the design is then defined as defective if the defendant has not met these expectations.[216] A defendant is then "strictly liable" if the defect caused an injury. The Nebraska Rule provides a more clear and consistent criteria.[217]

(b) The "Risk-Benefit" Test

An injured plaintiff in a strict products liability suit has a second

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215. Two main arguments have been made to counter the consumer expectations test. One is the "obvious danger defense." *See* Wertheimer, *supra* note 201, at 1197-99. For example, could it not be argued that an ordinary and reasonable consumer *expects* that her hand will be injured when put into the closing cylinders of a transformer press? Under the obvious danger defense, it is argued that an ordinary consumer would expect to be injured, such that strict liability is thus, obviated.

The second argument is that "[i]n most design [defect] cases the offending product feature is too complex to generate concrete consumer expectations." Powers, *supra* note 206, at 653. In the context of manufacturers conforming to a buyer's plans and specifications, we are often dealing with intricate machinery and heavy duty equipment. These products are not for widespread public use and consumers, as a group, are unfamiliar with them. Hence, consumers would not have firm expectations on how these products are supposed to operate. Considering these two arguments, the consumer expectation test may make the standard of proving defectiveness, and thus liability, even more difficult for an injured plaintiff. Consequently, the tentative draft of the Third Restatement rejects the consumer expectation test. *See* THIRD RESTATEMENT, *supra* note 93, § 2(b) cmt. e, at 23.

216. If the defendant does not meet the expectations, one could say the defendant was at fault for not doing so. The defendant's failure to meet the standard justifies holding the defendant strictly liable.

217. In other words, courts following the Nebraska Rule do not have to struggle in figuring out precisely what consumer expectations are. In every case, the focus is on whether a design is defective and, insofar as the manufacturer is concerned, whether a reasonable manufacturer that was similarly situated would have followed it. The standard of judgment—fault—is a consistent one. Conversely, under the consumer expectations test, the standard of judgment varies according to whatever consumer expectations are defined as in a particular case involving a particular product. *See generally* Price, *supra* note 69.

option in proving a product's design was defective: the "risk-benefit" test. A plaintiff must show that a product's design proximately caused the plaintiff's injury.[218] At that point the inquiry becomes whether the benefits of the design exceed the inherent risks the design presents. Under this standard, the burden shifts to the defendant. This second step is the functional equivalent of presuming the manufacturer is at fault[219] and then giving the manufacturer the opportunity to overcome the presumption. In effect, the manufacturer that can disprove negligence can likewise prevent a finding of defectiveness. If the manufacturer shows the risks do not outweigh the benefits, the manufacturer will not be "at fault." The *Barker* risk-benefit test is like the Hand Formula for negligence.[220] "[I]n weighing the benefits and risks associated with a product it is difficult to appreciate any significant difference between a focus on the design of the product and a focus on the act of designing the product."[221] The risk-benefit test is just another way to determine fault.

When dealing with the issue of liability for a design defect in the context of a manufacturer that follows the specifications of a buyer,

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218. Barker v. Lull Eng'g Co., Inc., 20 Cal. 3d 413, 432, 573 P.2d 443, 456, 143 Cal. Rptr. 225, 238 (1978).

219. *See* Wildman & Farrell, *supra* note 10, at 150-51; *see also* Birnbaum, *supra* note 69.

220. The similarity between a "risk-benefit" test and the Learned Hand equation for determining negligence is striking. Both tests are analyzed together *supra* note 85; *see also* Powers, *supra* note 206, at 654.

221. Diamond, *supra* note 197, at 538. "In either case the risk of the product's design would be balanced against its benefits in determining whether the product is defective or the designer is negligent. This balancing is a classic element of negligence." *Id.* at n.60. However, it is important to note that in applying the risk-benefit test, the jury is allowed to use hindsight. *Barker,* 20 Cal. 3d at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236. This is the only thing that separates the risk-benefit standard from a pure negligence standard. *See* Diamond, *supra* note 197, at 538 (Hindsight is "a potentially significant difference between negligence and strict liability as articulated by *Barker*'s second prong."); Powers, *supra* note 206, at 655 ("[I]n [determining] defectiveness, all actual risks known at the time of trial count against the manufacturer, whether the manufacturer reasonably could have foreseen them at the time of sale.").

Hence, even if a risk was technologically unforeseeable at the time of production, according to the buyer's plans and specifications, any defect in the plans and specifications would be evaluated at the time of trial. If technology advances in the interim between injury and trial, the non-designing manufacturer would be judged by the advances in technology. Yet even in cases where hindsight may be effective, the California Supreme Court has recently established the "state of the art" defense. *See, e.g.*, Anderson v. Owens-Corning Fiberglass Corp., 53 Cal. 3d 987, 810 P.2d 549, 281 Cal. Rptr. 528 (1991) (en banc).

there is an axiomatic urge to want to place liability with the party at fault. Lay jurors, exercising common sense more than theoretical legal analysis, would feel that holding a non-designing manufacturer strictly liable for an unforeseeably defective design is improper. If the New Jersey Rule is applied, using the risk-benefit test to determine defectiveness allows the jury to consider a variety of grounds to exculpate an innocent manufacturer.[222] But the risk-benefit test could also work to frustrate the goal of victim compensation by enabling even *culpable* manufacturers to escape liability. For instance, under the risk-benefit test, it is conceivable that a culpable manufacturer could escape liability by arguing that even though a reasonable manufacturer would not have followed a buyer's design, the defendant manufacturer is not liable because a safety device is not mechanically feasible and hence, the design is not defective.

Furthermore, the risk-benefit test calls on jurors to determine fault using abstract notions of whether a particular product's benefits outweigh its dangers. The Nebraska Rule is a more direct and equitable means of determining fault because it concentrates on a manufacturer's actions and asks whether the manufacturer was reasonable in following a buyer's design. Because strict liability suits alleging design defects in California are based on what appear to be fault-type standards, the Nebraska Rule's requirement of showing fault by a non-designing manufacturer is compatible with California tort law. In addition, the Nebraska Rule blends well with the California Supreme Court's recent decline in the application of strict liability.

3. *A Decline In California's Strict Products Liability Application*

In recent cases, California courts have restricted the application of strict liability. The courts seem concerned with excessive liability and the best means of carrying out many of the public policy goals of strict liability.[223] The Nebraska Rule blends with these reforms. Recent

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222. In determining whether the risks of a design outweigh the benefits, the trier of fact, under the *Barker* opinion, may consider the "mechanical feasibility of a safer alternative design," the cost of a safer design, the gravity of the potential danger inherent in the design, the likelihood that the danger would cause injury, and any potential adverse consequences that could result to the product or the consumer from an alternative design. *Barker*, 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237. The plaintiff would be at a disadvantage because the plaintiff would have to be knowledgeable on the mechanics and technology of the design in order to contest a manufacturer's claim of design competence. *See* Wildman & Farrell, *supra* note 10, at 153. Moreover, a manufacturer could potentially escape liability, for example, if it could convince a jury that another design would "cost too much."

223. *See, e.g., supra* notes 30-32 and accompanying text.

California Supreme Court cases represent major restrictions on strict liability.

In *Murphy v. Squibb & Sons, Inc.*,[224] the California Supreme Court held that retailers of prescription drugs are exempt from strict liability. This seriously contracts strict liability. Normally, plaintiffs could sue anyone in the supply chain to recover damages.[225] Through indemnity actions, defendants could supposedly shift liability to the party who caused the defect.[226] *Murphy* exonerates one class of defendants that were not primarily responsible for the defect, even vis-a-vis the innocent victims.

The situation parallels non-designing manufacturers. Neither the retailers of prescription drugs nor non-designing manufacturers that follow a buyer's design are responsible for a defect that causes injury. In holding that retailers were not liable to the victim, the *Murphy* court squarely rejected the argument that, as between an innocent victim and an innocent seller, the innocent seller should bear the loss. That argument played a significant role in supporting the New Jersey Rule. Without it, the New Jersey Rule loses weight. Also, in *Brown v. Superior Court*,[227] the *Barker* test was held not to apply to manufacturers of prescription drugs; strict liability would not be applied in design and warning cases. As a result, only proof of negligence would invoke liability in these cases.[228] The California Supreme Court has thus recognized that the *Barker* test for design defects is premised on notions of proving fault.[229]

On a more general level, the California Supreme Court recently put a

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224. 40 Cal. 3d 627, 710 P.2d 247, 221 Cal. Rptr. 447 (1985).

225. *E.g.*, Daly v. General Motors Corp., 20 Cal. 3d 725, 739, 575 P.2d 1162, 1170, 144 Cal. Rptr. 380, 388 (1978) ("Regardless of the identity of a particular defendant or of his position in the commercial chain the basis for his liability remains that he has marketed or distributed a defective product.").

226. *See supra* part V.B.3(a).

227. 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988).

228. *See id.*

229. The California Supreme Court has also retracted the impact of the *Barker* test by introducing the "state of the art" defense. Anderson v. Owens-Corning Fiberglass Corp., 53 Cal. 3d 987, 810 P.2d 549, 281 Cal. Rptr. 528 (1991) (en banc). Recall that the *Barker* opinion held that hindsight could be used to determine defectiveness. *See supra* note 221. *Anderson* dealt with strict liability in a failure to warn case. *See Anderson*, 53 Cal. 3d at 997, 1000, 1003, 810 P.2d at 555, 557, 559, 281 Cal. Rptr. at 534, 536, 538.

halt to the expansion of strict liability. In *Peterson v. Superior Court*,[230] the court held that "neither landlords nor hotel proprietors are strictly liable . . . for injuries to their respective tenants and guests caused by a defect in the premises."[231] The problem, according to the *Peterson* court, was that in holding a landlord or hotel proprietor strictly liable, a party without a connection to the defect would unjustly face liability.[232] "[T]he decision in *Becker* went far beyond holding landlords liable for injuries caused by their own *fault*, and imposed liability for injuries caused by defects that the landlord had not created . . . ."[233] The California Supreme Court was uncomfortable with imposing liability on a party that had not created a defect. A non-designing manufacturer is like a hotel proprietor—a non-designing manufacturer does not create a design defect, the designer does. Because the Nebraska Rule comports with the rationale of *Peterson*—a refusal to impose liability without fault—the Nebraska Rule would be a logical next step for the California Supreme Court.

The above cases deal with issues where strict liability proves too much for cases in which the level of actual fault is non-existent or relatively low. The Nebraska Rule comports with these notions. There is something onerous in holding a blameless, non-designing manufacturer strictly liable for a buyer's design. The Nebraska Rule limits liability to the manufacturer that fails to exercise due care in carrying out the plans and specifications of a buyer. This is natural and fair. As the above cases illustrate, the Nebraska Rule fits into California's contemporary tort law.

VII. CONCLUSION

The California Supreme Court should adopt the Nebraska Rule and refuse to hold a non-designing manufacturer strictly liable for a defect in a buyer's design. The court should impose liability only where the manufacturer is at fault for complying with a buyer's design. Compared to the strict liability approach of the New Jersey Rule, the Nebraska Rule approximates the goals of deterrence, enterprise liability, and victim compensation in a manner that is more efficient and fair. Only culpable parties face the burden of liability. Whereas the Nebraska Rule rejects

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230. 10 Cal. 4th 1185, 899 P.2d 905, 43 Cal. Rptr. 2d 836 (1995).

231. *Id.* at 1188-89, 899 P.2d at 906, 43 Cal. Rptr. 2d at 837. This expressly overruled the portion of Becker v. IRM Corp., 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985), that held that landlords could be held strictly liable.

232. *But cf.* NOLAN & URSIN, *supra* note 108.

233. *Peterson*, 10 Cal. 4th at 1197, 899 P.2d at 912, 43 Cal. Rptr. 2d at 843 (emphasis added).

imposing liability without fault, the New Jersey Rule holds non-designing manufacturers strictly liable for design defects and then attempts to eliminate the burden of liability through notions of indemnity and liability insurance. Because the injured parties are usually the employees of the designing buyer, workers' compensation frustrates the New Jersey Rule's reliance on indemnity and insurance as justifications for imposing liability without fault. The result is that the New Jersey Rule imposes liability on innocent manufacturers in situations that shield buyers who are culpable for design defects.

The Nebraska Rule is desirable for California given the California Supreme Court's recent reduction in the application of strict liability. The California Supreme Court has recently become concerned with excessive liability and has accordingly refused to extend strict liability to cases where there are low levels of fault, such as in the retailing of prescription drugs. By comparison, when a non-designing manufacturer is reasonable in following a buyer's design, a similar situation exists where there is actually no fault on behalf of the manufacturer. Non-designing manufacturers should thus be treated like retailers of prescription drugs. The Nebraska Rule achieves this end. Furthermore, both the consumer expectations test and the risk-benefit test, which are used in California strict liability cases to determine whether a design is defective, resemble standards used to determine fault. Thus, the Nebraska Rule's insistence on holding a non-designing manufacturer liable for a design defect only upon proof of fault will complement the criteria of California strict products liability law and should be adopted by the California Supreme Court. The Nebraska Rule not only provides another means of containing California's liberal application of strict liability, it is, more importantly, the most logical and fair approach to dealing with non-designing manufacturers that have used due care.

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