Product Category Liability: A Critical Analysis

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PRODUCT CATEGORY LIABILITY:  
A CRITICAL ANALYSIS

by Richard C. Ausness

INTRODUCTION

Professor Wertheimer has proposed that courts be allowed to hold producers strictly liable for product-related injuries, even though their products are not otherwise defective, as long as the overall risks associated with such products outweigh their benefits. However, this would subject the sellers of inherently dangerous products, such as cigarettes, to potentially devastating liability since their products cannot be made less dangerous. There are better ways to control the consumption of hazardous products if society wishes to do so.

Part I of this article discusses the scope and purpose of the defect requirement in section 402A and in the proposed Restatement (Third) of Torts. Part II examines the concept of product category liability and chronicles its universal rejection by the courts. Part III analyzes various policy arguments for and against categorical liability. Part IV considers some of the problems associated with using tort law to regulate product safety. Finally, Part V identifies some alternatives to an expansion of tort liability.

1. Professor Richard C. Ausness is the Ashland Oil Professor of Law at the University of Kentucky.
I. STRICT PRODUCTS LIABILITY

A. The Defect Requirement

Strict liability, as codified in section 402A of the Restatement (Second) of Torts, has now largely replaced negligence and implied warranty as the preferred theory of recovery against product sellers.5 Section 402A imposes strict liability upon any product seller who sells a product which is in a defective condition unreasonably dangerous to a user or consumer or to their property.6 Under this approach, the focus is theoretically on the product's condition, rather than the manufacturer's conduct.7 Consequently, an injured party may recover without proving that the product seller was at fault.8

However, strict liability is not intended to impose absolute liability.9 Thus, product sellers are subject to liability only when their products are defective in some way.10 Courts11 and com-

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6. Section 402A provides:

(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 stated 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.


8. See Waterson v. General Motors Corp., 544 A.2d 357, 372 (N.J. 1988) (“The essence of an action in strict liability is that the injured party is relieved of the burden of proving the manufacturer’s negligence.”).


10. See Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 879 (Alaska 1979) (“A product must be defective as marketed if liability is to attach, and ‘defective’ must mean something more than a condition causing physical injury.”); Michael J. Toke, Note, Categorical Liability for Manifestly Unreasonable Designs: Why the Comment d
mentators have traditionally divided product defects into three categories: manufacturing defects, design defects and defective warnings. A manufacturing defect is an unintended condition that arises from some mishap in the production process. A design defect occurs when the entire product line shares a common dangerous characteristic. Finally, a product that is otherwise properly manufactured may be rendered defective because of inadequate warnings or instructions provided to product users.

Since no single definition of defect is broad enough to cover every type of dangerous condition, courts have employed a variety of tests to determine if a product is defective. For example, under the "deviation from the norm test," a product is considered defective if it deviates from the manufacturer's intended design or if it is inferior in workmanship to products of the same description. A second test, known as the "consumer expectation

Caveat Should Be Removed from the Restatement (Third), 81 CORNELL L. REV. 1181, 1205-06 (1996).


13. See Barker v. Lull Eng'g Co., 573 P.2d 443, 454 (Cal. 1978) (stating that a product with a manufacturing or production defect is "one that differs from the manufacturer's intended result or from other ostensibly identical units of the same product line"); Caprara v. Chrysler Corp., 417 N.E.2d 545, 552-53 (N.Y. 1981) (explaining that "a defectively manufactured product . . . results from some mishap in the manufacturing process itself, improper workmanship, or because defective materials were used in construction").

14. See Thibault v. Sears, Roebuck & Co., 395 A.2d 843, 846 (N.H. 1978) ("A design defect occurs when the product is manufactured in conformity with the intended design but the design itself poses unreasonable dangers to consumers.").


16. See, e.g., Barker, 573 P.2d at 453 (recognizing that the term "defect" "is neither self-defining nor susceptible to a single definition applicable in all contexts").

17. See O'Brien v. Muskin Corp., 463 A.2d 298, 304 (N.J. 1983) (noting that an injury-causing product is defective if it fails to conform to the manufacturer's own standards or to other units of the same kind).
test,” is derived from implied warranty principles.\textsuperscript{18} According to this test, a product is deemed to be defective if it turns out to be more dangerous than an ordinary consumer would expect it to be.\textsuperscript{19} A third test, commonly referred to as the “risk-utility test,” provides that a product will be considered defective if the risks associated with the product exceed its overall utility.\textsuperscript{20} This test is often used in design defect litigation to treat a product as defective when the utility of the product with an alternative and more safe design outweighs the utility of the product as actually designed.\textsuperscript{21}

\textbf{B. Inherently Dangerous Products}

Many products are inherently dangerous. For some products, the danger cannot be eliminated without impairing the product’s intended function.\textsuperscript{22} For example, the sharp edge of a knife can be hazardous to users of the product, but a knife cannot perform its intended function properly if its blade is dull.\textsuperscript{23} Another group of inherently dangerous products is characterized by hazards that are not consciously designed into the product.\textsuperscript{24} For example, the carcinogenic properties of asbestos do nothing to enhance its fire retardant qualities.\textsuperscript{25} Tobacco also appears to fit

\textsuperscript{18} See Fischer, supra note 10, at 348 (“The law of implied warranty is vitally concerned with protecting justified expectations since this is a fundamental policy of the law of contract.”).

\textsuperscript{19} See Tiderman v. Fleetwood Homes, 684 P.2d 1302, 1305 (Wash. 1984)(en banc)(“A product is not reasonably safe when it is unsafe to an extent beyond which would be reasonably contemplated by the ordinary consumer.”).

\textsuperscript{20} See Barker, 573 P.2d at 454 (holding that a product may be found defective in design . . . if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design’); O’Brien, 463 A.2d at 306; Wilson v. Piper Aircraft Corp., 577 P.2d 1322, 1326 (Or. 1978)(en banc).

\textsuperscript{21} See Thibault v. Sears, Roebuck & Co., 395 A.2d 843, 846 (N.H. 1978) (“Liability may attach if the manufacturer did not take available and reasonable steps to lessen or eliminate the danger of even a significantly useful or desirable product.”).

\textsuperscript{22} See Joseph A. Page, Generic Product Risks: The Case Against Comment K and for Strict Liability, 58 N.Y.U. L. REV. 853, 857 (1983). Professor Page refers to the risk from this type of product as a “generic design risk.” Id.

\textsuperscript{23} Id.

\textsuperscript{24} Id. at 857-58. Professor Page refers to the risk from this type of product as a “generic nondesign risk.” Id. at 858.

\textsuperscript{25} Id.
within this category. 26

1. Liability Under Section 402A

In general, it appears that section 402A does not impose strict liability on the sellers of inherently dangerous products as long as a proper warning is given. The first impediment to liability is the requirement that a product be defective. When an attempt was made to delete the word "defective" from a draft version of section 402A during a floor debate in 1961, Dean Prosser, the Reporter for the proposed Restatement, declared that the defect requirement was intended to protect the sellers of whiskey, cigarettes and other inherently dangerous products from liability. 27

The drafters also addressed this issue in comment i to section 402A 28 which purported to define the term "unreasonably dangerous." In comment i, the drafters declared that "[g]ood whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics." 29 Thus, only "bad whiskey," such as whiskey contaminated with dangerous levels of fusel oil, could be described as unreasonably dangerous. 30 The drafters also observed that "[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful." 31 To be treated as unreasonably dangerous, tobacco would have to contain "something like marijuana." 32 Similarly, "good butter" is not to be regarded as unreasonably dangerous simply because it deposits cholesterol in the arteries and leads to heart attacks; only "bad butter," such as butter contaminated with poisonous fish oil, would qualify for unreasonably dangerous status. 33

According to the drafters of comment i, the reason good whiskey, good tobacco and good butter are not unreasonably dangerous is because the consuming public is aware of the health risks associated with these products. 34 This same reasoning underlies

26. Id.
27. Id. at 861-62.
29. Id.
30. Id.
31. Id.
32. Id.
33. Id.
34. Id.
comment g, which defines what is meant by a "defective condition." In this provision, the drafters state that a product seller is strictly liable "only where a product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Presumably, ordinary consumers would be sufficiently familiar with the risks associated with commonly used inherently dangerous products, such as knives, cigarettes and whiskey, that these products would not be regarded as defective according to the criterion set forth in comment g.

It should be mentioned that another provision, comment k, also deals with inherently dangerous products. Comment k classifies certain products as "unavoidably unsafe" and excludes them from section 402A's strict liability regime. However, section 402A's legislative history indicates that comment k was primarily concerned with pharmaceutical products.

2. Liability Under the Third Restatement of Torts

The drafters of the Restatement (Third) of Torts have also exempted inherently dangerous products from liability. One provision of the new Restatement imposes liability on product

35. See RESTATEMENT (SECOND) OF TORTS § 402A, cmt. g (1965).
36. Id.
38. See id. ("There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs."). See generally Richard C. Ausness, Unavoidably Unsafe Products and Strict Products Liability: What Liability Rule Should Be Applied to the Sellers of Pharmaceutical Products?, 78 KY. L.J. 705 (1989-90).
39. See Page, supra note 22, at 864-66. Since section 402A's adoption, most courts have refused to extend it to other products. See, e.g., Blevins v. Cushman Motors, 551 S.W.2d 602, 608 (Mo. 1977) (holding that golf carts were not unavoidably unsafe products because they could be made safe for their intended use); Netzel v. State Sand & Gravel Co., 186 N.W.2d 258, 264 (Wis. 1971) (declaring that ordinary concrete mix could not be found unavoidably unsafe merely because it contained caustic ingredients). But see Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 516 (5th Cir. 1984) (suggesting that asbestos products might qualify as unavoidably unsafe), cert. denied, 478 U.S. 1022 (1986); Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 814 (6th Cir. 1982) (also suggesting that asbestos products might qualify as unavoidably unsafe).
sellers who distribute defective products. Other provisions enumerate and define the three types of product defect: manufacturing defect, design defect and inadequate instructions or warnings. Yet, since none of these definitions appear to cover inherently dangerous products, one may reasonably conclude that they are not subject to liability under the new Restatement.

It is possible that inherently dangerous products could fall within the category of defectively designed products. However, a product is considered to be defectively designed only if the risk “could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor ...” This alternative design requirement effectively insulates such inherently dangerous products as cigarettes, alcoholic beverages and firearms from design defect liability. Indeed, in comment c the drafters themselves acknowledge that sellers of inherently dangerous products should not be held strictly liable under the principles of liability set forth in the Restatement (Third) of Torts:

The requirement in § 2(b) that plaintiff show a reasonable alternative design applies even though the plaintiff alleges that the category of product sold by the defendant is so dangerous that it should not have been marketed at all. Thus common and widely distributed products such as alcoholic beverages, tobacco, firearms, and above-ground swimming pools may be found to be defective only upon proof of the requisite conditions in § 2(a), § 2(b), or 2(c).

Thus, it seems clear that the sellers of inherently dangerous products, such as cigarettes, will not be subject to strict liability under the traditional approach of section 402A, or under the liability scheme proposed by the drafters of the Restatement (Third) of Torts.

41. See Restatement (Third) of Torts: Products Liability § 1 (a).
42. Id. §§ 1 (b), 2.
43. Id. § 2 (b).
44. See Wertheimer, supra note 2, at 1443; Teke, supra note 10, at 1200.
45. See Restatement (Third) of Torts: Product Liability § 2, cmt. c at 21.
II. PRODUCT CATEGORY LIABILITY

Since conventional product liability doctrines do not appear to work very well, plaintiffs have been obliged to develop new liability theories to support their claims against the sellers of inherently dangerous products. The most promising group of theories involves categorical product liability. Under this approach, a court may conclude that an entire product category, such as handguns or cigarettes, is subject to liability even in the absence of a specific defect.46

A. Theories of Liability

Two theories of categorical product liability have emerged during the past fifteen years: under the first theory, the manufacture and sale of certain types of products is labeled "ultrahazardous"; under the second theory, strict liability is imposed on product sellers if the risks associated with a particular class of product outweigh its utility.

1. The Ultrahazardous Activity Theory

One legal theory that plaintiffs have frequently invoked is the doctrine that individuals or enterprises engaged in ultrahazardous or abnormally dangerous activities should be held strictly liable for any injuries that they cause to others.47 It has been proposed that this form of strict liability, based on the principle of Rylands v. Fletcher,48 should be applied to sellers of inherently dangerous products.49 The "ultrahazardous activity" theory

46. See James A. Henderson, Jr. & Aaron D. Twerski, Closing the American Products Liability Frontier: The Rejection of Liability Without Defect, 66 N.Y.U. L. REV. 1263, 1297 (1991) (hereinafter Frontier) (explaining that "once a category is identified as appropriate for strict liability, by implication all the products within that category would be measured according to a no-defect strict liability standard . . . ").
47. This theory of strict liability was first suggested by an English court in Rylands v. Fletcher, L.R. 3 H.L. (1868). In the United States, it was incorporated into the Restatement of Torts, which imposed strict liability on those who engaged in "ultrahazardous" activities. See RESTATEMENT OF TORTS §§ 519-520 (1939). The Restatement (Second) of Torts broadened the scope of strict liability to include "abnormally dangerous" activities. See RESTATEMENT (SECOND) OF TORTS §§ 519-20 (1977).
has often been invoked by those who have been injured by hand-
guns or other firearms.  

For a variety of reasons, however, almost no court has been 

willing to find that the manufacture or sale of firearms is an 

ultrahazardous activity.  

First of all, courts have been reluctant to broaden the scope of a doctrine which has traditionally been limited to landowner liability.  

Second, they have been unwilling to extend strict liability to an activity that is a matter of common usage.  

Finally, they have been concerned about the possible economic effects of such a liability rule.  

should be imposed on the manufacturers of products that are abnormally dangerous in all uses and applications.


51. See, e.g., Shipman, 791 F.2d at 1534; Moore, 789 F.2d at 1328; Perkins, 762 F.2d at 1268; Martin, 743 F.2d at 1205-06; Caveny, 665 F. Supp. at 531; Armijo, 656 F. Supp. at 775; Hammond, 565 A.2d at 563; Kelley, 497 A.2d at 1147 (holding that the abnormally dangerous activity doctrine does not apply to the manufacture or marketing of handguns); Knott, 748 P.2d at 664-65 (holding that the manufacture, distribution and sale of a handgun is not a high-risk, ultrahazardous activity). But see Richman, 571 F. Supp. at 208 (concluding that the plaintiff could proceed with her claim under the law of ultrahazardous activities).

52. See, e.g., Shipman, 791 F.2d at 1534 (recognizing that Florida courts have all applied the ultrahazardous activity doctrine to impose strict liability for damages resulting from activities which occur on land and pose an unusual and unnecessarily high risk of harm to neighboring land owners and their property); Perkins, 762 F.2d at 1267 (explaining that all Louisiana courts have imposed absolute liability under the label “ultrahazardous” in cases involving activities relating to immovables); Kelley, 497 A.2d at 1147 (holding that the abnormally dangerous activity doctrine does not apply because “[t]he dangers inherent in the use of a handgun in the commission of a crime . . . bear no relation to any occupation or ownership of land”).

53. See, e.g., Moore, 789 F.2d at 1328 (stating that “[t]hey are widely used, and the harm they pose comes from their use rather than by the nature of their existence alone”); Caveny, 665 F. Supp. at 532 (holding that the ultrahazardous activity doctrine does not apply to matters of common usage, and stating that “[w]ithout a doubt manufacturing and distributing handguns is a matter of common usage”); Armijo, 656 F. Supp. at 774; Richman, 571 F. Supp. at 202; Hammond, 565 A.2d at 563.

54. See, e.g., Perkins, 762 F.2d at 1269 (explaining that if the court were to classify the marketing of a handgun as an ultrahazardous activity, nothing would pre-
2. The Risk-Utility Theory

The risk-utility theory is even more popular with plaintiffs. According to this concept, manufacturers and other sellers may be held strictly liable under section 402A even in the absence of a conventional defect. Such products are considered "defective" because the accident costs that they generate outweigh the benefits that the public derives from their use and consumption. During the past decade or so, plaintiffs have invoked this theory in connection with such inherently dangerous products as above-ground swimming pools, trail bikes, firearms, tobacco products, alcoholic beverages and asbestos. However,
plaintiffs have been successful in only three instances.63

a. Cases Applying the Risk-Utility Theory

One of the first cases to recognize product category liability was O'Brien v. Muskin Corp.,64 decided by the New Jersey Supreme Court in 1983. O'Brien involved a lawsuit by an individual who was injured while diving into a shallow above-ground swimming pool.65 The injured party brought suit against Muskin Corporation, the manufacturer of the swimming pool, alleging that the product was defectively designed because its vinyl liner was too slippery.66 The trial court refused to submit the design defect claim to the jury and the plaintiff appealed.67 On appeal, the O'Brien court acknowledged that it was appropriate to consider available alternative designs as part of a risk-utility analysis.68 However, the court also declared that there are some products which are so dangerous and so useless that the risks associated with their use outweigh their benefits.69 In such instances, product sellers should bear the cost of liability for harm to injured consumers even though no safer alternative is available.70 The court then concluded that "the trial court should have permitted the jury to consider whether, because of the dimensions of the pool and the slipperiness of the bottom, the risks of injury so outweighed the [pool's] utility . . . as to constitute a defect."71 In the court's words:

[v]iewing the evidence in the light most favorable to plaintiff, even if there are no alternative methods of making bottoms for above-ground pools, the jury might have found that the risk posed by the pool outweighed its utility.72

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64. 463 A.2d 298 (N.J. 1983).
65. Id. at 302. The plaintiff was injured when he struck his head on the bottom of the pool. Id.
66. Id.
67. Id. at 303.
68. Id. at 305 ("The assessment of the utility of a design involves the consideration of available alternatives.").
69. Id. at 306.
70. Id.
71. Id.
72. Id.
The second case when strict liability was imposed on an entire product category was *Kelley v. R.G. Industries, Inc.* In *Kelley*, the victim of a grocery store robbery brought suit against the manufacturer of the “Saturday Night Special” handgun that was used by the perpetrator of the crime. The plaintiff contended that the manufacturer was subject to strict liability under the provisions of section 402A. The Maryland Supreme Court acknowledged that the handgun in question was not defective under the consumer expectation test because a consumer would expect a handgun to have the capacity to fire a bullet. Further, the handgun was not defective under conventional risk-utility analysis because nothing went wrong with the product. However, the court went on to consider whether manufacturers and sellers of handguns might be strictly liable to gunshot victims on a categorical basis.

The court did not engage in any sort of formal risk-utility analysis. Instead, it examined various gun control statutes to see if Congress or the state legislature had reached any conclusions about the risks and benefits of handguns. This examination led the court to conclude that the existence of state statutory provisions expressly allowing private persons to own and carry handguns indicated that such activities were not contrary to public policy. Presumably, this meant that the risks of handguns in general did not outweigh their utility. For this reason, the court declined to increase the burden of manufacturer liability on all handguns. However, the court then acknowledged an

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73. 497 A.2d 1143 (Md. 1985).
74. See H. Todd Iveson, Manufacturers' Liability to Victims of Handgun Crime: A Common Law Approach, 51 FORDHAM L. REV. 771, 791-92 (1983) (stating that the risks of Saturday Night Specials are great because they are “easily concealable” and “relatively inexpensive,” and that their countervailing utility is minimal because the poor quality of manufacture “precludes their use for most legitimate purposes”).
75. See *Kelley*, 497 A.2d at 1144-45.
76. Id. at 1147-48.
77. Id. at 1148.
78. Id. at 1148-49.
79. Id. at 1150 (acknowledging that “[t]he fact that a handgun manufacturer or marketer generally would not be liable for gunshot injuries ... under previously recognized principles of strict liability is not necessarily dispositive”).
80. Id. at 1151-53.
81. Id. at 1152-53.
82. Id. at 1153 (stating that “to impose strict liability upon the manufacturers or
exception for a limited category of handguns. Specifically, the court determined that the treatment of Saturday Night Specials in state and federal gun control statutes indicated that such weapons were largely unfit for any legitimate use. In addition, the court found that the manufacturers and sellers of Saturday Night Specials were well aware that the principal use for their products was criminal activity. Consequently, the court concluded that it was appropriate to place such weapons in a special category for purposes of civil liability.

The third case when a court applied a risk-utility analysis to achieve categorical product liability was *Halphen v. Johns-Manville Sales Corp.* The injured party in *Halphen* allegedly died as the result of exposure to asbestos and his widow brought suit against an asbestos manufacturer. The case was tried in federal district court and the jury found in the plaintiff’s favor. The federal appeals court first affirmed the lower court’s judgment, but then certified to the Louisiana Supreme Court the question of whether, under state law, the defendant could be held liable notwithstanding the fact that the inherent risks associated with the product were scientifically unknowable at the time it was marketed.

The Louisiana court declared that an injured party could recover against the seller under principles of strict liability if the product was unreasonably dangerous because of a manufacturing defect, an inadequate warning or an unsafe design. However, the court also declared that some products could be considered “unreasonably dangerous per se.” According to the *Halphen* court, a product is unreasonably dangerous per se “if a reason-

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83. *Id.*
84. *Id.* at 1158.
85. *Id.* at 1159.
86. *Id.* (holding that it is consistent with public policy to hold manufacturers and marketers of Saturday Night Specials strictly liable to victims of gunshot injuries that result from criminal use of their products).
87. 484 So. 2d 110 (La. 1986).
88. *Id.* at 112.
89. *Id.* at 112-13.
90. *Id.* at 113.
91. *Id.* at 114-15.
92. *Id.* at 113.
able person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product. The court also pointed out that a hindsight test would be used to evaluate a product’s risks and benefits for purposes of determining whether it would be subject to categorical liability. Specifically, the court stated that:

[...]his theory considers the product's danger-in-fact, not whether the manufacturer perceived or could have perceived the danger, because the theory's purpose is to evaluate the product itself, not the manufacturer's conduct. Likewise, the benefits are those actually found to flow from the use of the product, rather than as perceived at the time the product was designed and marketed.  

The Halphen court concluded that if a plaintiff proved that a product was unreasonably dangerous per se, it would not matter that the case could have been tried as a conventional design defect case. In reaching that conclusion, the court thereby suggested that categorical liability would not be limited to products that were inherently dangerous.

O'Brien, Kelley, and Halphen are the only cases in which courts have held that categorical liability can be imposed upon product sellers within the framework of section 402A. However, each of these cases generated intense criticism at the time they were decided and each was eventually overruled by legislation.

b. Cases Rejecting the Risk-Utility Theory

The vast majority of courts have refused to accept the notion of categorical product liability based on a risk-utility analysis.
Products where this approach has been rejected include firearms, alcoholic beverages and, of more importance, tobacco products. Some of the cases which have rejected categorical liability for cigarettes are discussed in more detail below.

In Gunsalus v. Celotex Corp., a former asbestos worker brought suit in federal court against various asbestos manufacturers and a cigarette company, alleging that the synergistic effect of smoking and working with asbestos products caused him to develop lung cancer. The plaintiff argued that the defendant's cigarettes were defectively designed and that they failed the risk-utility test. The federal district court dis-

100. See Shipman v. Jennings Firearms, Inc., 791 F.2d 1532, 1533-34 (11th Cir. 1986) (recognizing that "Florida law will not apply ... strict products liability ... to a gun manufacturer who produces and distributes weapons that perform as intended and designed"); Perkins v. F.I.E. Corp., 762 F.2d 1250, 1274 (5th Cir. 1985) (stating that "[n]o court in this jurisdiction has ever applied a general risk/utility analysis to a well-made product that functioned precisely as it was designed to do"); Armijo v. Ex Cam, Inc., 656 F. Supp. 771, 773 (D.N.M. 1987), aff'd, 843 F.2d 406 (10th Cir. 1988) (stating its belief "that New Mexico courts would follow the overwhelming weight of authority which rejects strict products liability as a theory for holding handgun manufacturers liable for the criminal misuse of their products"); Richardson v. Holland, 741 S.W.2d 751, 754 (Mo. Ct. App. 1987) (acknowledging that "[t]he cases uniformly hold that the doctrine of strict liability under the doctrine of 402A is not applicable unless there is some malfunction due to an improper or inadequate design or defect in manufacturing"). See also Knott v. Liberty Jewelry & Loan, Inc., 748 P.2d 661, 664 (Wash. Ct. App. 1988); Delahanty v. Hinckley, 564 A.2d 758, 762 (D.C. 1989); Riordan v. International Armament Corp., 477 N.E.2d 1293, 1299 (Ill. App. Ct. 1985).


102. See Kotler v. American Tobacco Co., 926 F.2d 1217, 1225 (1st Cir. 1990), vacated, 505 U.S. 1215, reafl'd on remand, 981 F.2d 7 (1st Cir. 1993) ("It is illogical to say that a product is defective in its generic form when 'defect' has historically been measured in reference to the availability, or at least the feasibility, of safer alternatives."); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 236 (6th Cir. 1988) ("Because the record contains no evidence whatever that the use of the defendant's cigarettes presents risks greater than those known to be associated with smoking, we find that a reasonable jury could not find that the cigarettes were defective."); Miller v. Brown & Williamson Tobacco Corp., 679 F. Supp. 485, 489 (E.D. Pa.), aff'd, 856 F.2d 184 (3d Cir. 1988) (concluding that "Pennsylvania courts have not adopted, and will not adopt, the risk-utility theory of liability as the present state of the law"). See also Gunsalus v. Celotex Corp., 674 F. Supp. 1149, 1159 (E.D. Pa. 1987); Hite v. R.J. Reynolds Tobacco Co., 578 A.2d 417, 421 (Pa. Super. Ct. 1990).


104. id. at 1151.

105. id. at 1157.
missed the design defect claim because the plaintiff failed to show that the cigarettes were defective in any way.\footnote{106}

Liability under the plaintiff's second claim was predicated on the theory that "the risks caused by cigarettes outweigh their social utility."\footnote{107} The court, however, concluded that Pennsylvania courts would refuse to recognize a claim based on categorical liability.\footnote{108} Accordingly, the \textit{Gunsalus} court granted the defendant's motion for summary judgment on the plaintiff's risk-utility claim.\footnote{109}

Similarly, in \textit{Gianitsis v. American Brands, Inc.},\footnote{110} the plaintiff sought damages from several tobacco manufacturers and distributors, claiming that smoking caused his lung cancer.\footnote{111} In his complaint, the plaintiff contended that "the risks associated with smoking an ordinary cigarette, far outweigh the social value or utility of cigarettes to our society."\footnote{112}

The court declared that, as an initial matter, the plaintiff must show that the product in question was defective.\footnote{113} This meant that the product must have contained either a manufacturing flaw, a defective design or an inadequate warning.\footnote{114} Only after establishing the existence of a defect would the plaintiff need to prove that the defect in question made the product unreasonably dangerous.\footnote{115} In the court's view, the risk-utility test, as formulated by Dean Wade,\footnote{116} was only relevant to the question of whether the product was unreasonably dangerous.\footnote{117} Consequently, since the plaintiff did not show the cigarettes to be defective, the court concluded as a matter of law, that the plaintiff could not recover simply by proving that the

\footnotesize{\begin{itemize}
    \item \footnote{106} Id. at 1158-59. The court also ruled that any claim based on failure to warn was preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1341 (1988). Id.
    \item \footnote{107} \textit{Gunsalus}, 674 F. Supp. at 1159.
    \item \footnote{108} Id.
    \item \footnote{109} Id.
    \item \footnote{110} 685 F. Supp. 853 (D.N.H. 1988).
    \item \footnote{111} Id. at 854.
    \item \footnote{112} Id. at 855.
    \item \footnote{113} Id. at 856 (stating that the basis of any 402A claim is an allegation of a defect associated with the product).
    \item \footnote{114} Id.
    \item \footnote{115} Id.
    \item \footnote{117} \textit{Gianitsis}, 685 F. Supp. at 858.
\end{itemize}}
risks of this product outweighed its utility.\footnote{118} 

Finally, in \textit{Kotler v. American Tobacco Co.},\footnote{119} the widow of a smoker who had died of lung cancer brought suit against several cigarette companies on the theories of negligence, breach of warranty and misrepresentation.\footnote{120} A federal district court, applying Massachusetts law, ruled in favor the defendants.\footnote{121} On appeal, the plaintiff argued that a design defect claim was cognizable under Massachusetts law on the basis of its inherently dangerous characteristics.\footnote{122} According to the plaintiff, "when one balances risk against utility, cigarettes \textit{per se} are so unreasonably dangerous as to be actionably defective."\footnote{123} 

While Massachusetts did not recognize strict liability in tort, the federal appeals court observed that state warranty law was "congruent in nearly all respects with the principles expressed in Restatement (Second) of Torts § 402A (1965)."\footnote{124} Accordingly, the court applied a tort liability analysis while utilizing the rhetoric of warranty law. Applying these principles to the plaintiff's case, the court concluded that in order to maintain a claim for defective design under warranty theory, the plaintiff must establish the existence of a safer alternative design.\footnote{125} Moreover, the \textit{Kotler} court flatly refused to change the existing case law to allow a risk-utility test to be used.\footnote{126} Specifically, the court stated that:

\begin{quote}
[i]t is illogical to say that a product is defective in its generic form when "defect" has historically been measured in reference to
\end{quote}

\footnotesize

\begin{itemize}
\item \textit{Id.} at 859.
\item 926 F.2d 1217 (1st Cir. 1990).
\item \textit{Id.} at 1219-20.
\item 121. First, the district court held that all claims based on inadequate warnings subsequent to 1966 were preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1341 (1988). See \textit{Kotler v. American Tobacco Co.}, 685 F. Supp. 15, 18 (D. Mass. 1987). The court later dismissed the plaintiff's design defect claim because no evidence had been produced that the cigarettes were defective in a manner beyond the inherent characteristics of tobacco. See \textit{Kotler v. American Tobacco Co.}, 731 F. Supp. 50, 55-57 (D. Mass. 1990). The case was eventually tried on a negligence theory and resulted in a jury verdict for the remaining defendant. \textit{Kotler}, 926 F.2d at 1220.
\item \textit{Kotler}, 926 F.2d at 1224.
\item \textit{Id.} (emphasis added).
\item 124. \textit{Id.} (quoting \textit{Back v. Wickes Corp.}, 378 N.E.2d 964, 968 (1978)).
\item \textit{Id.} at 1225 (holding that "a design defect case premised on breach of warranty is . . . dependent on proof of the existence of a safer alternative design").
\item \textit{Id.}
\end{itemize}
the availability, or at least the feasibility, of safer
alternatives.\textsuperscript{127}

Accordingly, the federal appeals court upheld the lower court's
dismissal of the plaintiff's design defect claims.\textsuperscript{128}

3. The Doctrinal Argument Against Product Category Liability

As the foregoing discussion has shown, injured parties must
prove that a product is defective in order to recover against a
product seller. Furthermore, this requirement cannot be satisfied
by merely showing that the product is inherently dangerous.\textsuperscript{129}
Instead, the plaintiff must be able to point to some sort of modi-
fication or alternative design that would have made the product
safer without changing its inherent nature or function.\textsuperscript{130} Thus,
the doctrine of strict products liability, at least in its convention-
al form, appears to offer little support for the imposition of cate-
gorical liability on product sellers. Nor can the traditional rules
with respect to ultrahazardous or abnormally dangerous activi-
ties be stretched to extend categorical liability to inherently
dangerous products.\textsuperscript{131} Consequently, given the present state of
the law, it seems unlikely that cigarette smokers will be able to
recover against tobacco companies for smoking-related injuries.

Of course, courts could depart from existing doctrine and rec-
ognize categorical liability as a new theory of recovery for injured
consumers. This would permit smokers to argue that the risks of
ordinary cigarettes outweigh their social utility. However, most
courts seem to be unwilling to embrace categorical liability in the
absence of a compelling public policy basis to do so. Accordingly,
the next part of this article will consider policy arguments for
and against the imposition of categorical liability on cigarette
manufacturers.

\textsuperscript{127} Id.

\textsuperscript{128} Id. at 1226.

\textsuperscript{129} This assumes, of course, that the danger is a matter of common knowledge or
that the product seller has provided an adequate warning.

\textsuperscript{130} See e.g., Kotler, 926 F.2d at 1225.

\textsuperscript{131} See supra notes 51-54 and accompanying text.
Those who favor the imposition of categorical liability upon tobacco companies have relied upon various policy arguments to support their position. However, opponents of such liability have raised policy concerns of their own.

A. The Case for Product Category Liability

Proponents of categorical liability contend that subjecting tobacco companies to categorical liability will reduce accident costs by forcing these companies to internalize the costs of smoking-related injuries. They also claim that it is desirable to hold cigarette companies liable for smoking-related injuries because they can reduce the cost of such injuries to individual victims and spread them among the smoking public. Finally, they argue that imposing liability on cigarette manufacturers will prevent them from receiving an unmerited windfall and will punish them for their antisocial behavior.

1. Accident Cost Avoidance

Conventional wisdom assumes that accident costs will be reduced to an optimal level if product sellers are held liable to consumers for product-related injuries. In the absence of such liability, producers have little incentive to make their products safer; however, when producers are required to compensate injured consumers, they have an incentive to avoid such liability by investing more resources in product safety. A manufacturer will spend money on accident cost avoidance as long as the marginal cost of additional accident cost reduction is less than the marginal reduction of expected tort liability. The same

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132. See discussion infra part III.A.1.
133. See discussion infra part III.A.2.
134. See discussion infra part III.A.3.
135. 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, 520 (1985) ("Society will benefit from internalizing the costs of operation to product manufacturers, including losses from resulting product-related injuries.").
136. See Craig Brown, Deterrence and Accident Compensation Schemes, 17 W. ONT. L. REV. 111, 128 (1978) (explaining that "[s]trict liability] provides an incentive for those engaged in a particular activity to make it safer, for by doing so, their costs will be lower").
137. See James A. Henderson, Jr., Product Liability and the Passage of Time: The
manufacturer, however, will choose to pay damages to injured parties when the marginal cost of additional accident cost avoidance exceeds the marginal benefit of further accident cost savings.\textsuperscript{138}

Of course, tort liability will have little effect on manufacturer behavior if cigarettes are inherently dangerous and cannot be made any safer.\textsuperscript{139} However, even in this situation, tort liability can have an indirect effect on accident costs. This is because inherently dangerous products cost less and are thus in higher demand than market forces would ordinarily dictate if the price of the product does not reflect the true costs of production, including accident costs associated with the use or consumption of the product.\textsuperscript{140} But tort liability forces the sellers of inherently dangerous products to raise their prices in order to offset the costs of increased liability\textsuperscript{141} and this, in turn, causes the demand for such products to decline.\textsuperscript{142} As use and consumption fall, so do the accident costs associated with such products.\textsuperscript{143}

This analysis seems to apply nicely to cigarettes: at the pres-

\textsuperscript{138} See \textit{Imprisonment of Corporate Rationality}, 58 N.Y.U. L. REV. 765, 768 (1983) (stating that "a manufacturer will respond to threatened liability by investing in safety up to, but not beyond, the point at which the marginal costs of the investment equal the marginal costs of accidents thereby avoided").

\textsuperscript{139} See Richard A. Posner, \textit{A Theory of Negligence}, 1 J. LEGAL STUD. 29, 33 (1972) (arguing that "\textit{w}hen the costs of accidents is less than the cost of prevention, a rational profit-maximizing enterprise will pay tort judgments to the accident victims rather than incur the larger cost of avoiding liability").

\textsuperscript{140} Some commentators argue that cigarettes can be made safer. See e.g., Donald W. Garner, \textit{Cigarettes and Welfare Reform}, 26 EMORY L.J. 269, 275-76 (1977) (stating that tar, nicotine and carbon monoxide levels can be reduced by using more efficient filters, developing new types of tobacco leaf, and by using better processing methods).

\textsuperscript{141} See generally GUIDO CALABRESI, THE COSTS OF ACCIDENTS 70 (1970).

\textsuperscript{142} See Andrew O. Smith, \textit{The Manufacture and Distribution of Handguns as an Abnormally Dangerous Activity}, 54 U. CHI. L. REV. 369, 376 (1987) ("Under a strict liability regime, manufacturers will face a higher marginal cost curve and will correspondingly charge higher prices.").

\textsuperscript{143} See \textit{Frontier}, supra note 46, at 1273 ("D\textit{e}fect-free products liability would reduce the consumption of relatively risky products by increasing their monetary costs to users and consumers, thereby placing such products at a competitive disadvantage in the market.").
ent time, the price of cigarettes does not reflect the full health costs of smoking because a substantial share of these costs are shifted to nonsmokers. Consequently, smokers "overconsume" tobacco products, thereby causing society to expend more resources on smoking-related health care than are justified by the economic benefits of smoking. However, if some of the health costs of smoking are shifted to tobacco companies, they will be forced to raise their prices, with a concomitant decrease in consumption and smoking-related injuries.

2. Risk Spreading

Conventional wisdom assumes that the economic dislocation associated with product-related injuries can be lessened if accident costs are spread among a large group instead of being borne entirely by individual victims. When product-related injuries are involved, product sellers are in a better position than consumers to spread these losses. In a normally competitive market, producers can compensate those who are injured by their products (either directly or through the purchase of liability insurance), and can pass these costs on to their customers in the form of higher prices.

144. See Note, Plaintiffs Conduct as a Defense to Claims Against Cigarette Manufacturers, 99 Harv. L. Rev. 809, 823 (1986) (stating that "[t]hose smoking-related health care costs not paid for by public programs are largely absorbed into private-sector loss spreading mechanisms—like pooled health insurance—and are consequently not reflected in the price of cigarettes . . . .").

145. Id. at 824.

146. Id.

147. See Stanley Ingber, Rethinking Intangible Injuries: A Focus on Remedy, 73 Cal. L. Rev. 772, 794 (1985) ("Spreading the impact of loss over time or among a class of individuals will decrease economic dislocation, thereby reducing secondary costs.").

148. See Sheila L. Birnbaum, Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence, 33 Vand. L. Rev. 593, 596 (1980) (explaining that "[t]he manufacturer can spread risk through insurance and price adjustments, whereas the individual might suffer a crushing blow underwriting the loss himself"); Kathleen M. McLeod, Note, The Great American Smokeout: Holding Cigarette Manufacturers Liable for Failing to Provide Adequate Warnings of the Hazards of Smoking, 27 B.C. L. Rev. 1033, 1072 (1986) (stating that a principle purpose of the imposition of strict liability is to place the cost of injury on the manufacturer who can spread the cost among all consumers by adjusting the price of the product).

This risk-spreading rationale appears to support the imposition of liability on cigarette companies. The market for tobacco products is large: at least fifty million Americans presently smoke\(^1\) and tobacco companies sell more than 600 billion cigarettes a year.\(^2\) Moreover, despite the public concern about health risks, the tobacco industry continues to be highly profitable.\(^3\) For these reasons, tobacco companies should be easily able to spread accident costs.

3. Moral Issues

Some commentators argue that moral considerations have a significant role to play in the law of products liability.\(^4\) One important moral consideration is corrective justice, which is concerned with rectifying wrongful gains and losses.\(^5\) The principle of corrective justice requires those who profit from wrongdoing to compensate those who are injured as the result of their improper conduct.\(^6\) From this perspective, it can be argued that cigarette manufacturers who profit from the sale of a dangerous product are obliged, as a matter of corrective justice, to compensate those who are injured from the consumption of tobacco products.\(^7\)

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150. See Note, supra note 144, at 809 n.5.
156. See Wertheimer, supra note 2, at 1447 (stating that “[cigarette manufacturers . . . receive a windfall because they collect profits on sales of their product, but do not pay its true costs”).
B. The Case Against Product Category Liability

Most commentators agree that the sellers of dangerous products ought to pay for the injuries that their products cause to innocent consumers. However, there is little agreement about whether this objective can best be achieved by subjecting producers to product category liability. This section identifies some of the arguments against the imposition of categorical liability.

1. Accident Cost Avoidance

As mentioned earlier, the imposition of categorical liability upon product sellers is supposed to force them to raise prices, which will thereby lower consumer demand for dangerous products and reduce product-related accident costs. Unfortunately, however, subjecting sellers to such liability may actually increase accident costs in some circumstances.

Specifically, consumers will turn to substitutes if the price of a product or activity substantially rises because of government regulation or increased tort liability. This substitution is a manifestation of the "theory of the second best." The effect can be beneficial if consumers seek less dangerous alternatives to the activity or product in question; however, accident costs may actually increase if consumers choose more dangerous substitutes. For example, deaths and injuries from the consumption of contaminated whiskey rose dramatically during the Prohibition period because drinkers who were unable to purchase liquor legally purchased bootleg whiskey instead.

It is hard to say what smokers would do if the price of cigarettes increased enormously or if tobacco companies were driven out of business by overwhelming tort liability. Given the ad-

157. See discussion supra part III.A.1.
158. See Frontier, supra note 46, at 1291 (explaining that a system of regulation "increases the liability costs of the regulated firms to the point where they and the consumers with whom they deal turn to new patterns of essentially unregulable behavior to escape the higher liability costs of the regulated markets").
159. For a more detailed discussion of the theory of the second best, see Boundaries, supra note 143, at 1059-65.
160. See Peter Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 COLUM. L. REV. 277, 292 (1985) ("Patchy, erratic risk internalization may impose greater costs on the safer substitutes within particular markets, and so may encourage a shift in consumption toward the more hazardous.").
161. See Frontier, supra note 46, at 1291 n.105.
162. See Mary Griffen, Note, The Smoldering Issue in Cipollone v. Liggett Group,
dictive nature of cigarettes, it is possible that frustrated smokers would turn to bootleg products if cigarettes became difficult to obtain at reasonable prices. However, a more likely scenario is that new cigarette companies would enter the market. Since existing tobacco companies would immediately feel the effects of enhanced tort liability, they would have to raise their prices at once. However, new producers would not have to worry about liability for many years and, therefore, could sell their cigarettes for less. This, in turn, would force existing companies to lower their prices or leave the market. In either event, cigarette prices would not rise as predicted by the theory of market deterrence. Thus, cigarette consumption would not decrease nor would smoking-related illnesses decline.

2. Risk Spreading

It was suggested above that product sellers could spread risks better than consumers. This view, however, has not gone unchallenged. For example, it has been pointed out that tort law often duplicates other loss-spreading mechanisms such as private insurance and workers compensation. Furthermore,
the tort system is regressive because every consumer pays the same "premium" for protection against injury, but wealthier claimants tend to receive higher damage awards.\textsuperscript{168}

Of more importance, for risk spreading to work properly, the losses involved must not exceed the resources of the risk spreader. As the recent experience of the asbestos industry demonstrates, accident costs cannot be spread effectively when the legal system retroactively imposes massive liability upon an industry. When faced with such overwhelming liability, product sellers invariably seek protection in bankruptcy.\textsuperscript{169} When this occurs, only few victims will be fully compensated and many will receive inadequate compensation or nothing at all. Consequently, if cigarette companies are subjected to excessive liability, they may be unable to function effectively as loss spreaders.\textsuperscript{170}

There is yet another reason why product category liability will not promote risk spreading. As mentioned earlier, under some circumstances, the imposition of categorical liability will encourage the entry of new sellers into the market because they will not be subject to tort liability for many years to come.\textsuperscript{171} Some of these firms may choose to market their products for ten or twenty years and then go out of business before any of their customers begin to develop smoking-related illnesses.\textsuperscript{172} Of course, if this occurs, there will be no funds available to compensate smokers when they eventually become ill and file claims. In this author's view, it is not unlikely that new entrants into the cigarette market will adopt such hit-and-run tactics, leaving their former customers high and dry.

\begin{supertabular}{l}
\textbf{SAN DIEGO L. REV.} 795, 798 (1987) (stating that "once tort law finally does deliver money to victims, a considerable sum goes to duplicate compensation that they otherwise have or will receive from other sources, such as health insurance, sick leave, Social Security, and the like").
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\textsuperscript{168} See George L. Priest, \textit{Modern Tort Law and Its Reform}, 22 VAL. U. L. REV. 1, 17 (1987) ("[T]ort law's lumping of low-income consumers and high-income consumers into the same insurance pool and charging them a similar premium for insurance forces low-income consumers to subsidize high-income consumers.").
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\textsuperscript{170} See \textit{Smoking-Related Injuries}, supra note 154, at 1120.
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\begin{supertabular}{l}
\textsuperscript{171} See discussion supra part III.B.1.
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\textsuperscript{172} See Taxin, \textit{supra} note 164, at 247 (arguing that some manufacturers "will plan on being long gone by the time a cause of action ripens").
\end{supertabular}
Thus, while risk spreading is viewed as an attractive goal by many, there is no assurance that product category liability will improve the chances of compensation for injured consumers. Indeed, if the legal system imposes excessive liability on product sellers, their ability to spread losses may be completely destroyed.

3. Moral Issues

Moral concerns do not provide much support for a general rule of product category liability because the moral positions of product sellers and product users vary according to the product in question. However, principles of corrective justice appear to support the imposition of some liability upon tobacco companies.\(^ {173} \)

For more than a century, tobacco companies have sold a dangerous product to the public. Despite growing scientific evidence that smoking causes lung cancer and other diseases, tobacco companies failed to provide any warnings about the health risks of smoking until required to do so by statute.\(^ {174} \) Even now, the tobacco industry continues to deny that smoking is hazardous.\(^ {175} \) Other practices, if true, such as directing cigarette advertising at children\(^ {176} \) and regulating nicotine levels in cigarettes,\(^ {177} \) are also morally wrong. Consequently, the level of wrongdoing attributable to tobacco companies may be sufficient to give rise to an obligation to compensate.

However, the duty to compensate may also be affected by the moral position of the victim. In the case of smokers, this position

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173. See Wertheimer, supra note 2, at 1447.
174. See Marc Z. Edell, Cigarette Litigation: The Second Wave, 22 TORT & INS. L.J. 90, 97 (1986) (declaring that medical literature “confirms the fact that the medical and scientific community was concerned with the potential cancer-causing effects of tobacco products as early as the 1920s, and certainly by the late 1930s medical and scientific research demonstrated a strong association between cigarette smoking and cancer”).
176. See McLeod, supra note 148, at 1066-67 (“[C]igarette manufacturers deny the health hazards of smoking and challenge any medical studies as ‘biased’ and ‘unscientific.”’).
177. According to the FDA, advertising by tobacco companies has created a “pervasive and positive imagery that has for decades helped to foster a youth market for tobacco products.” 60 Fed. Reg. 41,314, 41,326 (1995).
is somewhat ambiguous. Arguably, many consumers were not really aware of the actual health risks of smoking when they began to smoke.\textsuperscript{179} Moreover, once individuals have taken up the habit, the addictive nature of tobacco has made it very difficult for many of them to stop smoking. On the other hand, cigarette packages have contained health warnings for more than thirty years. Thus smokers cannot claim to be ignorant of the dangers of smoking.\textsuperscript{180} Furthermore, while smoking is habit-forming, and perhaps even addictive, millions of smokers have successfully quit over the past three decades.\textsuperscript{181}

Furthermore, if smokers are allowed to recover under a theory of product category liability, they will not only seek compensation for medical expenses and lost wages, but they will also demand large sums for pain and suffering and punitive damages. Considering that injured smokers are at least partly responsible for their situation, a more limited level of compensation seems appropriate.

IV. THE USE OF TORT LIABILITY TO CONTROL THE CONSUMPTION OF INHERENTLY DANGEROUS PRODUCTS

Even if we conclude that some products, such as cigarettes, are so inherently dangerous that society should discourage their consumption, it remains to be seen whether tort law should be used for this purpose. First, it is difficult to apply the risk-utility analysis as a liability standard. Second, courts are not competent to make decisions about what products are suitable for consumers. Third, tort law is an extremely expensive way to regulate product safety.

\textsuperscript{179} See McLeod, supra note 148, at 1061 (claiming that "even today, despite the accumulation of scientific evidence . . . the American public remains remarkably unaware of the specific dangers of cigarette smoking").

\textsuperscript{180} See Donald W. Garner, Cigarette Dependency and Civil Liability: A Modest Proposal, 53 S. CAL. L. REV. 1423, 1429 (1980) ("The days when plaintiff could honestly claim that he did not know that cigarettes are injurious are over.").

\textsuperscript{181} OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL 175 (1994) (noting that over forty-four million Americans have quit smoking since 1994).
A. Problems with the Liability Standard

Under the risk-utility test, a product is regarded as defective if the risks associated with a product as designed outweigh the benefits of the same product equipped with a feasible alternative design. In this context, the risk-utility test is reasonably manageable because the fact-finder is ordinarily required to compare a specific aspect of the product’s design with a relatively close substitute. In contrast, the risk-utility analysis is much more difficult to apply to an entire category of products. This is partly because it is very hard for private litigants to obtain reliable information about the overall costs and benefits of products. Take the case of cigarettes. The costs of smoking are known in a general sort of way. Smoking is known to cause lung cancer and may be responsible for other forms of cancer as well; smoking also contributes to heart disease; and, finally, smoking has also been linked to a variety of chronic obstructive lung diseases. However, it is virtually impossible to quantify these costs in dollar terms. Estimates of the annual health care costs attributable to smoking range from $13 billion to $22 billion, while estimates of productivity losses due to smoking vary even more widely. It is even more difficult to put a dollar value on smoking-related deaths or to the pain and suffering that is inflicted on the victims of smoking-related illnesses.

Quantifying the benefit side of smoking is even more problematical. Smoking does give pleasure. However, this benefit is hedonic and, therefore, not easily monetizable. One way to measure the utility of smoking is to calculate the amount of money that consumers are willing to pay for tobacco products. However,

182. See supra notes 20-21 and accompanying text.
183. See Frontier, supra note 46, at 1305.
184. See generally Taxin, supra note 164, at 222-33 (describing the various health effects of smoking); Michael K. Mahoney, Comment, Coughing Up the Cash: Should Medicaid Provide for Independent State Recovery Against Third-Party Tortfeasors Such as the Tobacco Industry?, 24 B.C. ENVTL. AFF. L. REV. 233, 235-36 (1996) (also describing the health effects of smoking).
185. See, e.g., Mahoney, supra note 184, at 238 ($21.9 billion); McLeod, supra note 148, at 1072 n.317 ($13 billion).
187. See Griffin, supra note 162, at 616.
even if one could calculate the actual retail sales price of all cigarettes sold in America during a given period, this figure would not necessarily represent the true utility of smoking because consumers might actually be willing to pay much more for cigarettes. The difference between the price consumers are willing to pay for a product and the price they actually pay in the market is known as the "consumer surplus." Unless we can calculate this consumer surplus, we cannot determine the utility of smoking for purposes of risk-utility analysis.

B. Institutional Competence

The vagueness of the risk-utility test potentially allows courts and juries to exercise enormous power over the economic welfare of entire industries. As numerous courts and commentators have observed, it is better that important social decisions be made by other institutions of government. The adversarial nature of the litigation process, limited resources, and restrictive rules of evidence all limit the courts' access to information and public input. This makes them social engineers.

190. See Kotler v. American Tobacco Co., 731 F. Supp. 50, 53 (D. Mass.), aff'd, 926 F.2d 1217 (1st Cir. 1990) (arguing that "the risk/utility theory is a radical doctrine which imprudently arrogates to the judicial process some very significant social determinations").
191. See, e.g., Patterson v. Rohm Gesellschaft, 608 F. Supp. 1206, 1216 (N.D. Tex. 1985) ("Moreover, the judicial system is, at best, ill-equipped to deal with the emotional issues of handgun control."); Hilberg v. F.W. Woolworth Co., 761 P.2d 236, 241 (Colo. Ct. App. 1988), overruled on other grounds by Casebolt v. Cowan, 829 P.2d 352 (Colo. 1992) ("Questions concerning the social or societal utility of firearms and how and by whom they may be possessed and used are major public policy questions which properly reside with constitutional assemblies and legislative bodies.").
192. See, e.g., Grossman, supra note 55, at 407 (acknowledging that "the court system does not possess the necessary tools to make fair and rational categorical assessments as called for by categorical liability, and that ... assessments, therefore, should be left to the legislature"); Larsen, supra note 189, at 2061; Toke, supra note 10, at 1210.
193. See Toke, supra note 10, at 1209 ("The judiciary, however, lacks the instruments or techniques needed to ascertain and evaluate vast amounts of relevant social and behavioral data."); Note, Handguns and Products Liability, 97 HARV. L. REV. 1912, 1926 (1984) ("Courts are designed to handle discrete cases on the basis of an evidentiary record; they are not efficient regulators. They cannot continually check
In contrast, legislative bodies and administrative agencies are better equipped to address broader social issues such as those associated with product safety.\textsuperscript{194}

C. Litigation Costs

In comparison to other regulatory mechanisms, another problem with the tort system is its high operating cost.\textsuperscript{195} According to one estimate, plaintiffs spend between $7 billion and $9 billion each year in legal fees and expenses, while defendants and their insurers spend another $8 billion to $10 billion to defend against claims.\textsuperscript{196}

Furthermore, there is reason to believe that litigation costs would be particularly high if cigarette companies were suddenly subjected to tort liability. In the first place, the imposition of product category liability would generate a massive number of lawsuits.\textsuperscript{197} Moreover, many of these suits would involve multiple parties.\textsuperscript{198} Finally, lawsuits against tobacco companies would require the adjudication of complicated causation issues.\textsuperscript{199}

V. ALTERNATIVES TO PRODUCT CATEGORY LIABILITY

There are a number of approaches that are more promising than product category liability. These approaches include increased government regulation, narrowly-targeted statutory compensation schemes, and increased taxation of dangerous products.


\textsuperscript{195} See JOHN G. FLEMING, THE AMERICAN TORT PROCESS 18 (1988) ("The most negative feature of the tort system is its staggering overhead cost.").

\textsuperscript{196} See JAMES S. KAKALIK & NICOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION vii-viii (Rand Institute for Civil Justice 1986).

\textsuperscript{197} See Smoking-Related Injuries, supra note 154, at 1121.

\textsuperscript{198} Id. at 1121-22.

\textsuperscript{199} See Frontier, supra note 46, at 1303 ("The questions whether the plaintiff's illness was caused by smoking and, if so, which producers' products are implicated, in many cases, would defy coherent resolution.").
A. Government Regulation

If society is concerned with reducing product-related accident costs, it should consider direct regulation as an alternative to increased tort liability. Tort rules are often vague and uncertain, and therefore often send weak signals to product sellers. In contrast, regulatory agencies have the necessary competence and resources to make informed decisions about product safety; their regulations are uniform and specific; and they have the means to monitor and enforce compliance.200

In the past, tobacco products have not been subject to product safety regulation by the federal government except in the area of health warnings.201 Recently, however, the Food and Drug Administration began to regulate the advertising, distribution and sale of tobacco products to children and adolescents.202 Although one may question the FDA's existing authority to regulate cigarettes as medical devices,203 there is little doubt that Congress has the power to regulate tobacco products if it chooses to do so. Such regulations could take the form of required warnings or disclosures, control over nicotine content, required safety devices such as filters, or quality standards for tobacco.

B. Statutory Compensation Schemes

If compensation is an important goal, a narrowly-focused compensation scheme might serve this purpose better than tort law. Tort law is much more expensive to operate than compensation mechanisms like social security and workers compensation.204 Tort victims typically receive less than half of the money paid out by defendants to settle claims,205 while private health in-

203. See Noah, supra note 178, at 21 ("Even assuming that the nicotine in tobacco products falls within the FDA's authority over drugs, the treatment of such products as medical devices seems tenuous.").
204. See Stephen D. Sugarman, Doing Away with Tort Law, 73 CAL. L. REV. 555, 596 (1985) ("The tort system is fabulously expensive to operate in comparison to modern compensation systems.").
205. See Robert L. Rabin, Some Reflections on the Process of Tort Reform, 25 SAN
insurance plans and workers compensation systems require much less than that to operate.\textsuperscript{206} It would certainly be feasible to set up a system, modeled after the federal Black Lung program, under which tobacco companies could be assessed a certain amount to compensate injured smokers according to a specific compensation formula.\textsuperscript{207}

A more modest compensation scheme might rely on Medicare and Medicaid programs. Recently, a number of states have sued tobacco companies to recover medical costs for smoking-related illnesses that they have paid out through their Medicaid programs.\textsuperscript{208} Regardless of the outcome of these suits, Congress might enact appropriate legislation to require tobacco companies to pay for some of the Medicaid and Medicare costs that are attributable to smoking.

C. Taxation

At present, both the states and the federal government levy excise taxes upon tobacco products.\textsuperscript{209} However, the revenues from these taxes are not earmarked for any particular purpose, but instead go into a general fund.\textsuperscript{210} It would be possible, and perhaps desirable, to increase these taxes substantially and dedicate them to the funding of Medicare, Medicaid, and other programs that treat smoking-related injuries.\textsuperscript{211} This would ensure

\begin{itemize}
  \item DIEGO L. REV. 13, 35 (1988) ("Reduced to a single figure, injury victims were receiving less than half of every dollar expended by the system on accident claims.").
  \item 206. See ROBERT E. LITAN, THE LIABILITY EXPLOSION AND AMERICAN TRADE PERFORMANCE: MYTHS AND REALITIES, IN TORT LAW AND THE PUBLIC INTEREST 127, 135 (Peter H. Schuck, ed. 1991) ("In contrast, 'transaction costs' consume 30\% of the costs of the workers compensation system, 15\% of health insurance, and just 1\% of the social security system.").
  \item 207. See Smoking-Related Injuries, supra note 154, at 1124-33 (describing a proposed compensation system for smoking-related injuries).
  \item 208. See Mahoney, supra note 184, at 239-44 (describing state suits against tobacco companies).
  \item 211. See Ahron Leichtman, The Top Ten Ways to Attack the Tobacco Industry and
that tobacco companies pay for some of the social costs of smoking. At the same time, however, tax rates could be kept low enough to prevent tobacco companies from going out of business.

CONCLUSION

As a general proposition, product sellers should be made to pay for the injuries caused by their products. However, tort law is a crude, and often ineffective, tool for this purpose. In their present form, tort law principles effectively immunize the sellers of inherently dangerous products from liability as long as they properly warn consumers about these unavoidable risks. Professor Wertheimer proposes to remedy this deficiency by allowing courts to subject product sellers to liability when product-related risks outweigh benefits. If this approach is accepted, courts would be able employ this risk-utility analysis to impose liability on tobacco companies. Although this extension of tort liability would force tobacco companies to bear a share of the social costs associated with their products, in the long run it would have a variety of undesirable consequences.

Win the War Against Smoking, 13 ST. LOUIS U. PUB. L. REV. 729, 741 (arguing that “tobacco tax revenues should be earmarked for specific anti-tobacco or health-related purposes”).