I suggest the following simple ten ways to avoid malpractice in litigation:

An Overview of the Legal Standard Regarding Product Liability
Design Defect Claims and a Fifty State Survey on the Applicable Law in Each Jurisdiction

About the Authors

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It has been said that “the expansion of product manufacturer liability throughout the latter half of the twentieth century stands among the most dramatic changes ever witnessed in the Anglo-American legal system.”¹ Prior to the products liability revolution of the 1960’s, manufacturers were rarely held liable for defective products.² With the advent of the American Law Institute’s adoption of strict products liability in section 402A of the Restatement (Second) of Torts, a revolution was born.³ “Section 402A caught on like wildfire in American state courts.” In fact, “no single doctrinal common law principle was ever adopted so widely and quickly in the United States as strict products liability.”⁴

The overwhelming majority of states initially adopted a “consumer expectations” test as the measure for determining the existence of a design defect under §402A. The consumer expectations test set out to protect the ordinary consumer by requiring that “for a product to be considered unreasonably dangerous, it must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases the product, with the ordinary knowledge common to the community as to the characteristics of the product.”⁵ However, problems arose by the 1980s, and a consensus view among products liability scholars emerged: “the consumer expectations test was both indefensible in theory and unworkable in practice.”⁶ In its place, “scholars advocated for the clear cost-benefit balancing approach of the primary alternative doctrine that courts had developed for determining design defectiveness, the risk-utility test.”⁷ The risk-utility test had first been articulated in a 1973 law review article, and slowly gained some acceptance throughout the country because of its appeal as a structured approach to design defect liability.⁸

After four decades of frustration regarding the precision of the consumer expectations test, “the American Law Institute (“ALI”) appointed Professors Henderson and Twerski, two academic critics of judicial expansion of product manufacturer liability, as co-Reporters of the ALI's important project, the Restatement (Third) of Torts: Products Liability.”⁹ The ALI ultimately adopted the results of the Reporters' exceptional efforts on May 20, 1997.¹⁰ In doing so, the ALI rejected the consumer expectations test as the sole test for product design defect in exchange for the more “analytically sound” risk-utility test.¹¹

Rejection of the consumer expectations test may have been the plan, but it most certainly was not the result. In the seventeen years following promulgation of the Third Restatement, several courts have continued to issue opinions expressing varying degrees of judicial allegiance to the consumer expectations test.¹²

Even though the consumer expectations test closely resembles the risk-utility test in application, proponents of the risk-utility test criticize the consumer expectations test as

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³ *Id.* at 1374.
⁴ *Id.*
⁶ Kysar, *supra* note 1, at 1702.
⁷ *Id.*
⁹ Kysar, *supra* note 1, at 1702.
¹⁰ *Id.*
¹¹ *Id.*
¹² *Id.* at 1703.
“highly subjective, confusing, unpredictable, and unfair to manufacturers and defendants.”\textsuperscript{13} The Model Uniform Product Liability Act rejected the consumer expectations test altogether because, as the drafters stated, "the consumer expectations test takes subjectivity to its most extreme end. Each trier of fact is likely to have a different understanding of abstract consumer expectations."\textsuperscript{14} Problematically, the consumer expectations test “depends on a determination - specifically, the expectation of the consumer - that the producer may not be able to predict with any reasonable degree of accuracy at the time of production.”\textsuperscript{15}

In light of the supposed unfairness of the consumer expectations test, many scholars thrust the risk-utility test forward as the answer to the prayers of both producers and consumers. According to Prosser and Keeton, the theory underlying this “saving grace” approach is quite simple: “virtually all products have both risks and benefits and there is no way to go about evaluating design hazards intelligently without weighing danger against utility.”\textsuperscript{16} Many courts have utilized some version of cost-benefit balancing, often by weighing the seven risk-utility factors identified by Dean Wade in his highly influential 1973 article.\textsuperscript{17} More recently, however, “the trend among risk-utility jurisdictions has been to replace the aggregate cost-benefit balancing approach of the Wade test with a more narrow analysis focusing only on the marginal costs and benefits entailed by particularized safety aspects of the product design, a distinction that Professor David Owen terms ‘macro-balancing’ versus ‘micro-balancing’.”\textsuperscript{18} By allowing courts to balance the risks and rewards posed by alternative product designs, the risk-utility test provides manufacturers with incentives to constantly evaluate and adopt such reasonable alternative designs.\textsuperscript{19}

Opponents of the alternative design requirements argue that it imposes an undue burden on plaintiffs because it places a "potentially insurmountable stumbling block in the way of those injured by badly designed products."\textsuperscript{20} “Many courts have treated the existence of a reasonable alternative design as a factor to be considered in the consumer-oriented risk-utility analysis of a product design, but have refused to make it an absolute requirement.”\textsuperscript{21} A second criticism of the risk-utility test is that “it is a retrogression in products liability because it returns to negligence concepts by placing the burden on the plaintiff.”\textsuperscript{22}

\textsuperscript{14} Id. at 1674.
\textsuperscript{15} Keith N. Hylton, The Law and Economics of Products Liability, 88 NOTRE DAME L. REV., 2457, 2491 (2013).
\textsuperscript{17} Kysar, supra note 1, at 1711-12.
\textsuperscript{18} Id. at 1712.
\textsuperscript{19} Id. at 1717.
\textsuperscript{20} Id.
Some scholars have suggested a merger of the two tests; they wish to employ the risk-utility test with a consumer expectations prong. In their view, “the Restatement (Third) allows a consumer's expectations to establish the foreseeability and risk of harm under the risk portion of the risk-benefit test.”\(^{23}\) Though not an autonomous standard, consumer expectations "may still substantially influence or even be ultimately determinative on risk-utility balancing."\(^{24}\)

A survey of the fifty states reveals no consensus with respect to application of either the consumer expectations test or the risk-utility test. Set forth below is a summary of the respective design defect standards utilized by each state as well as each state’s position regarding any requirement for a claimant to demonstrate a feasible alternative design.

**CONSUMER EXPECTATIONS TEST**

**Arkansas:**

**Indiana:**

**Kansas:**

**Maryland:**
- Generally, consumer expectation test. *Halliday v. Sturm, Ruger & Company, Inc.*, 792 A.2d 1145, 1152 (Md. 2002). However, when a product malfunctions, Maryland courts utilize the in risk/utility test. See 792 A.2d at 1153.

**Nebraska:**

**New Hampshire:**

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\(^{23}\) Id. at 615.
\(^{24}\) Id.
North Dakota:
- Consumer expectations test. N.D. Cent. Code § 28-01.3-01(4).
- Requirement of feasible alternative design? Has not been addressed in North Dakota.

Oklahoma:
- Consumer expectations test. Woods v. Fruehauff Corp., 765 P.2d 770, 774-76 (Okla. 1988) (citing Restatement (Second) of Torts § 402A, cmt. k (1965)).

Oregon:
- Consumer expectations test, generally. Risk-utility may be required when the jury is “unequipped,” either by general background or facts supplied, to decide whether a product failed to perform as safely as an ordinary consumer would have expected. In this situation, additional evidence about the ordinary consumer’s expectations is necessary. That evidence may consist of a risk utility balance. McCathern v. Toyota Motor Corp., 23 P.3d 320, 331 n.15 (Or. 2001).
- Requirement of feasible alternative design? Generally no. But maybe when the risk-utility analysis is applied. McCathern v. Toyota Motor Corp., 23 P.3d 320, 331 (Or. 2001) (recognizing that evidence that the magnitude of the product’s risk outweighs its utility is often demonstrated by proving that a safer design alternative was both practicable and feasible.)

Rhode Island:

Tennessee:

Utah:

Vermont:
- Consumer expectations test. See Zaleske v. Joyce, 333 A.2d 110, 113-114 (Vt. 1975) (adopting § 402A); see also Farnham v. Bombardier, Inc., 640 A.2d 47, 48 (Vt. 1994) (Product is defective if it is not “safe for normal handling and consumption.”).
- Requirement of feasible alternative design? Undetermined. It appears no showing is required, but the issue has not been directly addressed. See Manning v. Goodyear Tire & Rubber Co., 2005 Vt. Super. LEXIS 126, fn. 6 (July 20, 2005) (“The adoption of a reasonable alternative design standard based on risk-utility analysis has
moved this area of law away from § 402A’s strict liability standard toward negligence. The Vermont Supreme Court has considered this view but has not necessarily adopted it.” (citations omitted)).

Wisconsin:

Wyoming:
- Consumer expectations test. “A prima facie case that a product was defective and that the defect existed when it left the manufacturer’s control is made by proof in the absence of abnormal use or reasonable secondary causes the product failed ‘to perform in the manner reasonable to be expected in light of [its] nature and intended function.” Sims v. General Motors Corp., 751 P.2d 357, 364-65 (Wyo. 1988) (emphasis added).

**RISK-UTILITY TEST**

Alabama:

Colorado:
- Requirement of feasible alternative design? No. See Armentrout v. FMC Corporation, 842 P.2d 175, 185 n.11 (Colo. 1992).

Georgia:

Idaho:

Kentucky:

Louisiana:
- Requirement of feasible alternative design? Yes. See La. R.S. 9:2800.56.
Massachusetts:

Michigan:

Minnesota:

New Jersey:

New Mexico:

New York:

North Carolina:
- Requirement of feasible alternative design? No, as long as the claim is based on the second theory of liability, which provides that “at the time the product left the control of the manufacturer, the design or formulation of the product was so unreasonable that a reasonable person, aware of the relevant facts, would not use or consume a product of this design.” N.C. Gen. Stat. § 99B-6(a).

Ohio:

Pennsylvania:
- Requirement of feasible alternative design? Generally, yes. *Berrier v. Simplicity Mfg., Inc.*, 959 A.2d 900, 902 (Pa. 2008). But some cases have limited this requirement to

**South Carolina:**

**Texas:**

**West Virginia:**
- West Virginia has adopted its own version of the risk/utility test. Accordingly, the general test for establishing strict liability in tort is whether the involved product is “defective” in the sense that it is not reasonably safe for its intended use as determined by what a reasonably prudent manufacturer’s standards should have been at the time the product was made. Phillip Combs and Andrew Cooke, *Modern Products Liability Law in West Virginia* 113 W. Va. L. Rev. 417, 425-426 (2011); See also Betty v. *Ford Motor Co.*, 574 S.E.2d 803 (W. Va. 2002).
- Requirement of feasible alternative design? Likely Yes. Although the West Virginia Supreme Court has not stated whether a design defect claim requires proof of a safer alternative design of the allegedly defective product, this is likely because “as a practical matter, plaintiff’s counsel almost always put[s] forth an alternative design in the absence of a requirement.” Phillip Combs and Andrew Cooke, 113 W. Va. L. Rev. 417, 427 (2011); See also Hines v. *Wyeth Pharm., Inc.*, 2011 U.S. Dist. LEXIS 55419, at *23 (S.D. W.Va. May 23, 2011).

**COURTS CAN APPLY EITHER TEST**

**Alaska:**

**Arizona:**
- Requirement of feasible alternative design? It is unclear under Arizona law.

**California:**
- Courts apply either the consumer expectations test or risk-utility analysis. *Soule v. General Motors Corp.*, 882 P.2d 298, 308-09 (Cal. 1994).
Connecticut:

- Courts apply a “modified consumer expectations test” where if the ordinary consumer would not be able to form his or her own expectation of the safety of a given product based on everyday experience, the risks and utilities are then considered. See Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1330 (Conn. 1997).

Florida:


Hawaii:

- Courts recognize the consumer expectations test; the risk-utility analysis; and the latent danger test. See Acoba v. General Tire, Inc., 986 P.2d 288, 304 (Haw. 1999).
- Requirement of feasible alternative design? Undetermined. It appears no showing is required, but the issue has not been directly addressed.

Illinois:


Mississippi:

- Courts require that a product must pass both a risk-utility and consumer expectations test. See Glenn v. Overhead Door Corp., 935 So.2d 1074, 1081 (Miss. Ct. App. 2006).

Washington:

- Courts can apply either the risk-utility analysis or consumer expectations test. See Soproni v. Polygon Apartment Partners, 971 P.2d 500, 504-05 (Wash. 1999).

UNCLEAR WHICH TEST APPLIES

Delaware:

- It is unclear whether Delaware courts employ either test. Delaware has never adopted strict liability, declaring it to be “impermissible judicial legislation.” Cline v. Prowler Industries, Inc., 418 A.2d 968, 974 (Del. 1980). “A product defect may take the form of a design defect, where an entire product line is designed improperly, or a manufacturing defect, where a product line is properly designed but a
Requirements of feasible alternative design?

**Missouri:**
- “Missouri courts have consistently refused to impose any `judicial definition [of unreasonably dangerous] whether derived from consumer expectations, risk-utility, or otherwise.'” *Sappington v. Skyjack, Inc.*, 512 F.3d 440, 446 (8th Cir. 2008).

**Montana:**
- It is unclear which test Montana follows. A design is improper or “defective if at the time of manufacture an alternatively designed product would have been safer than the original designed product and was both technologically feasible and marketable reality.” *Krueger v. Gen. Motors Corp.*, 783 P.2d 1340, 1345 (Mont. 1989).

**Nevada:**
- It is not clear whether Nevada applies the risk-utility analysis or the consumer expectations test.

**South Dakota:**
- “It is unclear whether South Dakota has adopted, or would adopt, the so-called ‘risk-utility test,’ in addition to the consumer expectations test of section 402A, for determining the existence of a defective condition.” *Robinson v. S.D. Brandtjen & Kluge, Inc.*, 500 F.3d 691, 698 n.2 (8th Cir. 2007).
- Requirement of feasible alternative design? Has not been addressed in South Dakota.

**Virginia:**
- Product defective if it “fails to satisfy applicable industry standards, applicable government standards, or reasonable consumer expectations.” *See Redman v. John D. Brush & Co.*, 111 F.3d 1174, 1177 (4th Cir. 1997).
- Requirement of feasible alternative design? Yes. *See Tunnell v. Ford Motor Co.*, 385 F. Supp. 2d 582, 583 (W.D. Va. 2005) (“To satisfy his burden a plaintiff must do more than merely demonstrate that a proposed alternative design would make the produce ‘safer’ than it currently is.”)
NEITHER TEST APPLIES

Iowa:

- Iowa adopted Sections 1 and 2 of the Restatement (Third) of Torts: Product Liability. Iowa’s standard for design defect cases focuses on if “the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design, and the omission of the alternative design renders the product not reasonably safe.” See Wright v. Brooke Group Ltd., 652 N.W.2d 159, 169-170 (Iowa 2002).


Maine:


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