IN THE SUPREME COURT OF PENNSYLVANIA

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7 WAP 2008

JUDITH R. BUGOSH, Administratrix of the Estate of EDWARD J. BUGOSH, Deceased, and JUDITH R. BUGOSH, in her own right,

v.

I.U. NORTH AMERICA, INC., as successor by merger to The Garp Company, formerly known as The Gage Company, formerly known as Pittsburgh Gage and Supply Company, E.W. BOWMAN, INC., EMHART GLASS INC., formerly known as Emhart Manufacturing Company, formerly known as Hartford Empire, F.B. WRIGHT COMPANY, SURFACE COMBUSTION, INC., TAYLORED INDUSTRIES, INC.

APPEAL OF: I.U. NORTH AMERICA, INC.

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF APPELLANT I.U. NORTH AMERICA, INC.

On Allowance of Appeal from the July 18, 2007 Order of the Superior Court of Pennsylvania at Nos. 996 WDA 2006, 997 WDA 2006, 998 WDA 2006, affirming the Order of the Court of Common Pleas of Allegheny County, Civil Division, O'Brien, J., dated April 28, 2006, No. 04-018310

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW 1

STATEMENT OF THE QUESTION ADDRESSED BY *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. There Is No Valid Policy Reason For Continuing To Apply Section 402A To Downstream Entities In The Distribution Chain Such As IUNA 4

II. There Is No Valid Policy Reason For Continuing To Apply Section 402A To *Any* Defendant In A Design-Defect Or Failure-To-Warn Case, Let Alone A Downstream Entity Such As IUNA 11

CONCLUSION 17

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Pennsylvania Cases

Azzarello v. Black Brothers Co., 480 Pa. 547, 391 A.2d 1020 (1978) 5

Bialek v. Pittsburgh Brewing Co., 430 Pa. 176, 242 A.2d 231 (1968) 7

Cafazzo v. Central Med. Pavillion, Inc., 542 Pa. 526, 668 A.2d 521 (1995) 5

Carrecter v. Colson Equip. Co., 346 Pa. Super. 95, 499 A.2d 326 (1985) 11

Charlton v. Toyota Indus. Equip., 714 A.2d 1043 (Pa. Super. 1998) 14

Coyle v. Richardson-Merrell, Inc., 526 Pa. 208, 584 A.2d 1383 (1991) 2, 5, 9, 10

Davis v. Berwind Corp., 547 Pa. 260, 690 A.2d 186 (1997) 11

Department of Gen'l Servs. v. United States Mineral Prods. Co., 587 Pa. 236, 898 A.2d 590 (2006) 2, 3, 10

Kimco Dev. Corp. v. Michael D's Carpet Outlets, 536 Pa. 1, 637 A.2d 603 (1993) 13, 14

Phillips v. Cricket Lighters, 576 Pa. 644, 841 A.2d 1000 (2003) 2, 16

Other Cases

Anderson v. Owens-Corning Fiberglas Corp., 53 Cal. 3d 987, 810 P.2d 549 (1991) 15

Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) 4, 6

Fibreboard Corp. v. Fenton, 845 P.2d 1168 (Colo.1993) 16

Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897 (1963) 4

Hudgens v. Interstate Battery Sys. of Am., 393 So. 2d 940 (1981) 7

Johnson v. American Cyanamid Co., 718 P.2d 1318 (Kan.1986) 16

Jones & Laughlin Steel Corp., 626 F.2d 280 (3d Cir. 1980) 6

Olson v. Prosoco, Inc., 522 N.W.2d 284 (Iowa 1994) 15, 16

Parker v. St. Vincent Hosp., 122 N.M. 39, 919 P.2d 1104 (N.M. Ct. App. 1996) 5, 6, 9, 10

Prentis v. Yale Manufacturing Co., 421 Mich. 670, 365 N.W.2d 176 (1985) 15

Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168 (1964) 7, 8

Walker v. Decora, Inc., 225 Tenn. 504, 471 S.W.2d 778 (1971)....7, 8

Other Authorities

Richard C. Ausness, *An Insurance-Based Compensation System for Product-Related Injuries,* 58 U. Pitt. L. Rev. 669 (1997)....12, 13, 14

Frank J. Cavico, Jr., *The Strict Tort Liability of Reliability, Wholesalers, and Distributors of Defective Products*, 12 Nova L. Rev. 213 (1987)....8

Burt A. Leete, *Product Liability for Nonmanufacturer Product Sellers*: *is it Time to Draw the Line?*, 17 Forum 1250 (1982)....8

Douglas C. Montgomery, Introduction to Statistical Quality Control (2005)....12

Restatement (Second) of Torts § 402A....*passim*

Restatement (Second) of Torts § 402A cmt. c....4

Restatement (Third) of Torts § 2....*passim*

George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521 (1987)....12, 13, 14

Mark Seidenfeld, Microeconomic Predicates to Law and Economics (1996)....13

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters in all fifty States. Founded 30 years ago, WLF regularly appears before federal and state courts, including this one, to promote the free enterprise system, protect the economic and civil liberties of individuals and businesses, and to oppose the unwarranted expansion of tort liability. *See, e.g., Ieropoli v. AC&S Corp*., 842 A.2d 919 (Pa. 2004); *Mount Olivet Tabernacle Church v. Edwin Wiegand Div*., 811 A.2d 565 (Pa. 2002). WLF's Legal Studies Division also publishes policy papers and monographs on these issues.

STATEMENT OF JURISDICTION

WLF adopts the Statement of Jurisdiction of Appellant I.U. North America, Inc. ("IUNA").

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

WLF adopts the Statement of the Scope and Standard of Review of Appellant IUNA.

STATEMENT OF THE QUESTION ADDRESSED BY *AMICUS CURIAE*

Should this Court apply Section 2 of the Restatement (Third) of Torts in place of Section 402A of the Restatement (Second) of Torts?

Suggested answer: **Yes**

In the alternative, should Pennsylvania law continue to subject downstream entities in the chain of distribution -- non-manufacturing suppliers and distributors such as IUNA -- to strict liability under Section 402A, when these downstream entities are particularly unable to ascertain the risks associated with products they sell and there is no valid loss-spreading rationale to support strict liability against such entities?

Suggested answer: **No, Pennsylvania law should *not* continue to subject downstream entities to 402A liability.**

STATEMENT OF THE CASE

WLF adopts the Statement of the Case of Appellant IUNA.

SUMMARY OF ARGUMENT

As this Court has recognized, the provisions of the American Law Institute's Restatements are "not to be considered controlling in the manner of a statute. Such precepts, though they may govern large numbers of cases, are nothing other than common law pronouncements by the courts; their validity depends solely on the reasoning that supports them. Where the facts of a case demonstrate that the rule outruns the reason, the court has the power, indeed the obligation, to refuse to apply the rule." *Coyle v. Richardson-Merrell, Inc.,* 526 Pa. 208, 212, 584 A.2d 1383, 1385 (1991). Based on "the accumulated wisdom from thirty years of experience," *Phillips v. Cricket Lighters,* 576 Pa. 644, 679, 841 A.2d 1000, 1021 (2003) (Saylor J., concurring), it is now clear that Section 402A has indeed "outrun [its] reason," not just on the facts of this case, but in all cases.

This Court already has concluded that "strict liability doctrine . . . should be closely limited pending an overhaul by the Court." *Department of Gen'l Servs. v. United States Mineral Prods. Co.,* 587 Pa. 236, 254, 898 A.2d 590, 601 (2006). That pronouncement alone warrants reversal of the Superior Court. This Court hardly would be "closely limit[ing]" application of strict liability doctrine if it were to extend strict liability to a distributor such as IUNA, whose distant predecessor, Pittsburgh Gage & Supply Company, distributed a minimal amount of products containing asbestos, had no knowledge at that time of the extent of the risks associated with asbestos, and could not have acquired this knowledge because the manufacturer deliberately concealed it. The traditional policy justifications for strict liability simply do not apply to such a defendant as IUNA. Thus, this Court, consistent with its declaration in *Department of General Services,* should refuse to apply strict liability doctrine in this case.

But, in addition to declaring that strict liability doctrine should be closely limited, a plurality of this Court has plainly and correctly stated that inconsistencies and mixed messages in Pennsylvania's 402A jurisprudence mandate that that jurisprudence be discarded in favor of Section 2 of the Restatement Third. The full Court should now adopt this approach. The Restatement Third strikes a perfect balance, retaining strict liability for manufacturing defects, but applying a negligence regime for claims based on defective design and failures to warn, where strict liability has no theoretical support. Such a regime ensures that a distributor such as IUNA, which played no role in the design or manufacture of asbestos-containing products, and had no knowledge of their risks, will not be unfairly left holding the bag for harms it did not create, simply because the manufacturer is unavailable to pay damages.

ARGUMENT

I. There Is No Valid Policy Reason For Continuing To Apply Section 402A To Downstream Entities In The Distribution Chain Such As IUNA.

In their efforts to justify a regime of strict products liability under Section 402A, courts and commentators inevitably return to the loss-spreading rationale advocated by California Supreme Court Justice Traynor in his seminal opinions:

> Even if there is no negligence [on the part of a manufacturer] . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health 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.

Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (Traynor, J. conurring); *see also Greenman v. Yuba Power Prods., Inc.,* 59 Cal. 2d 57, 63, 377 P.2d 897, 901 (1963) (Traynor, J.) ("The purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than the injured persons who are powerless to protect themselves.").[1]

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[1] The Restatement itself invoked this justification for Section 402A: "[P]ublic policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained." Restatement (Second) of Torts § 402A cmt. c.

This Court likewise has grounded its product liability jurisprudence in this loss-spreading rationale. In *Azzarello v. Black Brothers Co.,* 480 Pa. 547, 391 A.2d 1020 (1978), this Court said:

> The development of a sophisticated and complex industrial society with its proliferation of new products and vast changes in the private enterprise system has inspired a change in legal philosophy from the principle of caveat emptor which prevailed in the early nineteenth century market place to the view that a supplier of products should be deemed to be the guarantor of his products' safety. The realities of our economic society as it exists today forces the conclusion that the risk of loss for injury resulting from defective products should be borne by the suppliers, principally because they are in a position to absorb the loss by distributing it as a cost of doing business.

Azzarello, 480 Pa. at 553, 391 A.2d at 1023 (citations and internal quotation marks omitted).[2]

It bears emphasis that this loss-spreading theory was always intended to be "more sophisticated than simply identifying a 'deep pocket' to reimburse anyone who is injured." *Parker v. St. Vincent Hosp.,* 122 N.M. 39, 43, 919 P.2d 1104, 1108 (N.M. Ct. App. 1996). Indeed, as this Court has well noted, if "cost-shifting" were "the only factor to be considered in whether a given party should be subject to liability," we would have a regime of "absolute rather than strict liability." *Coyle,* 526 Pa. at 217, 584 A.2d at 1387; *see also Cafazzo v. Central Med. Pavillion, Inc.,* 542 Pa. 526, 535, 668 A.2d 521, 526 (1995) ("To assign liability for no reason other than the ability to pay damages is inconsistent with our jurisprudence."). Instead, the

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[2] As the Product Liability Advisory Council demonstrates in its *amicus* brief in this case, Pennsylvania has taken this loss-spreading rationale to justify an even more stringent strict liability regime than the authors of the Restatement Second envisioned. *See* Brief of *Amicus Curiae* Product Liability Advisory Council, Inc. at 6-9.

imagined loss-spreading of strict liability was meant to "internalize the product's true costs." *Jones & Laughlin Steel Corp.,* 626 F.2d 280, 288 (3d Cir. 1980). The theory is "that injuries caused by product defects are a true cost of the product. The price should reflect that cost, just as it reflects the cost of manufacturing and marketing the product." *Parker,* 122 N.M. at 43, 919 P.2d at 1108. In this way, the argument goes, consumers make a fully-informed decision whether to purchase the product (and in what quantities) and a socially-optimal supply of the product is achieved.

On its face, the loss-spreading theory contemplates that strict liability induces *manufacturers* of products to internalize the costs of injuries.[3] As Justice Traynor reasoned, "the *manufacturer* can anticipate some hazards and guard against the recurrence of others, as the public cannot." *Escola,* 24 Cal. 2d at 462, 150 P.2d at 440-41 (emphasis added). Hence, according to the theory, the *manufacturer*, not the consumer, is in the best position to spread losses and internalize costs.

However, there is no reason to suppose that this loss-spreading argument should extend to downstream entities in the chain of distribution -- retailers, distributors, jobbers, and so on -- who have no role in the design or manufacture of the product. Nevertheless, courts have assumed with minimal analysis that the loss-spreading rationale equally applies to such entities. As with other aspects of strict products liability doctrine, Justice Traynor gave the seminal articulation of this argument:

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[3] In fact, as we discuss in Part II below, strict liability fails to do this successfully in design-defect and failure-to-warn cases.

> Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety. Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship.

Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 262-63, 391 P.2d 168, 171-72 (1964) (Traynor, J.).

This Court too has said that "[t]he language of § 402A [*and*] *its rationale* . . . indicate that" manufacturers "as well as all successive sellers of the defective product are [strictly] liable" for defects. *Bialek v. Pittsburgh Brewing Co.,* 430 Pa. 176, 187-88, 242 A.2d 231, 236 (1968) (emphasis added).

In contrast to the holdings of cases like *Vandermark* and *Bialek*, the few courts and commentators who actually have scrutinized the purported justifications for extending strict liability to retailers, distributors and other downstream entities have seen that there is no valid basis for applying strict liability to these entities.[4]

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[4] *See, e.g., Hudgens v. Interstate Battery Sys. of Am.,* 393 So. 2d 940, 945 (1981) ("It is settled in Louisiana that the non-manufacturer seller of a defective product is not responsible for damages in tort, absent a showing that he knew or should have known that the product sold was defective."); *Walker v. Decora, Inc.,* 225 Tenn. 504, 515, 471

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First, consider the argument that subjecting retailers and distributors to 402A liability is appropriate because they are "an integral part of the overall producing and marketing enterprise" and therefore "should bear the cost of injuries resulting from defective products." *Vandermark,* 61 Cal. 2d at 262, 391 P.2d at 171. This argument overlooks that if the strict liability regime truly is able to perform the cost-internalizing and loss-spreading function its advocates envision, then a manufacturer subject to strict liability already has internalized the cost of injuries and passed it downstream to the distributor, retailer and consumer. Thus, a middleman in the supply chain is *already* "bear[ing] the cost of injuries resulting from defective products" in the form of higher prices that it pays to the manufacturer. In that case, subjecting the middleman to strict liability accomplishes nothing -- unless, of course, a strict liability regime is *not*, contrary to what was supposed, sufficient to induce the manufacturer to internalize costs. But, if that is so, then the loss-spreading rationale of strict product liability collapses, and the regime has no theoretical foundation after all.

Likewise, there is no basis to the notion that strict liability as applied to a distributor or retailer is necessary as "an added incentive to safety." *Id.* Again, if the loss-spreading rationale has any validity, then the manufacturer will internalize costs without "pressure" from a middleman. The argument that the manufacturer needs an "added incentive" to do this simply is a tacit admission that strict liability applied to the manufacturer by itself is

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S.W.2d 778, 783 (1971) ("In [no Tennessee case] has the doctrine of strict liability been applied to a merchant who sells the product in a sealed container and who is afforded no reasonable opportunity to inspect."); *see generally* Frank J. Cavico, Jr., *The Strict Tort Liability of Reliability, Wholesalers, and Distributors of Defective Products*, 12 Nova L. Rev. 213 (1987); Burt A. Leete, *Product Liability for Nonmanufacturer Product Sellers: is it Time to Draw the Line?*, 17 Forum 1250 (1982).

insufficient to achieve this result. But if strict liability applied to a manufacturer is insufficient to achieve cost-internalization without "added incentives," then it is difficult to see how distributors and retailers could achieve this internalization without "pressure" being applied from purchasers downstream from *them* -- *i.e.,* consumers. Thus, the upshot of this "pressure" argument is that strict liability ceases to play any role in inducing loss-spreading and cost-internalization. Instead, this is achieved by "pressure" from purchasers. But if "pressure" can achieve this result, then there no reason why strict liability would be needed in the first place.

Lastly, there is no merit to the argument that "the retailer [or distributor] may be the only member of [the] enterprise reasonably available to the injured plaintiff." *Id.* To begin with, this argument has nothing to do with cost-internalization or loss-spreading. Its focus is purely on compensation, ensuring the availability of a party to pay for the plaintiff's injuries. But, as noted above, this rationale, when taken to its logical conclusion, "result[s] in absolute liability not strict liability," and should be rejected. *Coyle,* 526 Pa. 217, 584 A.2d at 1387.

Moreover, as one court has aptly noted, this "availability" rationale effectively turns retailers and distributors into insurers against the manufacturer's *un*availability. The result is that middlemen in the distribution chain are forced to pass on to consumers -- *over and above* the cost of injuries which the strict liability regime supposedly has induced the manufacturer to internalize -- the *added* cost of providing "availability" insurance. *Parker,* 122 N.M. at 43, 919 P.2d at 1108. This added cost, of course, is a cost purely attributable to the compensation

scheme itself. It is not a cost attributable to the product and therefore undermines rather than furthers the cost-internalization goal of strict liability.[5]

In light of these palpable defects in the theoretical justifications courts and commentators have offered for applying Section 402A to downstream entities, this Court should, at a minimum, adhere to the dictates of *Department of General Services* and "closely limit" strict liability doctrine, 587 Pa. at 254, 898 A.2d at 601, by refusing to apply it to distributors such as IUNA. This Court already has "refused to extend the rule [of Section 402A] to suppliers where to do so would not advance the purposes of the rule." *Coyle,* 526 Pa. at 213, 584 A.2d at 1385 (refusing to apply 402A to pharmacists). The foregoing demonstrates that "extend[ing] the rule [of Section 402A]" to downstream entities in the distribution chain *never* "advance[s] the purposes of the rule" and therefore always should be rejected.

In short, this Court should abandon Section 402A for non-manufacturers such as IUNA.

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[5] As the *Parker* court correctly explained:

> [T]he distributor will not . . . adjust its markup on individual products to reflect the risk that the particular manufacturer will be unable to pay a products-liability claim. Hence, one could expect that the cost of liability arising from defects in a particular product would be shared by those purchasing any product sold by the distributor . . . To the extent that the cost of injury caused by a defective product is borne by persons who have no occasion to use the product, [the cost-internalization rationale] is not advanced.

122 N.M. at 43, 919 P.2d at 1108.

II. There Is No Valid Policy Reason For Continuing To Apply Section 402A To *Any* Defendant In A Design-Defect Or Failure-To-Warn Case, Let Alone A Downstream Entity Such As IUNA.

As discussed in the preceding section, there is no basis in logic or policy for subjecting retailers, manufacturers and other downstream entities in the chain of distribution to strict liability under Section 402A. But the flaws in the strict liability regime do not stop there. As a plurality of this Court already has noted, there is no basis in logic or policy for subjecting *any* defendant to strict liability in design-defect or failure-to-warn cases. The full Court should now embrace this conclusion.

This Court, like many others, has said that strict liability was never meant to turn manufacturers into insurers against damage caused by their products. *See, e.g., Davis v. Berwind Corp.*, 547 Pa. 260, 267, 690 A.2d 186, 190 (1997) ("A manufacturer is a guarantor of its product, *not an insurer.*"). Yet this is precisely the result of applying a strict liability rule in defective-design and failure-to-warn cases. Such a regime requires a seller to pay damages "regardless of whether the seller knew or had reason to know of the risks" associated with its products. *Carrecter v. Colson Equip. Co.,* 346 Pa. Super. 95, 104, 499 A.2d 326, 331 (1985). Because, by definition, a manufacturer has no reliable way of minimizing or preventing unforeseeable risks before they materialize, all a manufacturer subject to liability for such risks can do is try to prepare itself financially to cover their costs. But then, contrary to the oft-repeated refrain, the manufacturer *is* functioning simply as an insurer in the liability scheme.

Moreover, the manufacturer is functioning as an insurer without any of the tools that insurers typically have at their disposal to manage risks.

First, manufacturers have no way of diversifying their "portfolio" of unknown or unforeseeable risks. An insurer against, *e.g.*, flood damage can protect itself by providing coverage to a large number of insureds over many geographic regions. In this way, regions with less-than-expected flood losses can offset regions with greater-than-expected flood losses. But such diversification is only feasible where the risks are "uncorrelated" or statistically independent. This holds in the case of flood insurance because greater than normal flooding in one region will have no effect of the probability of flooding in some other, far removed region. By contrast, if a product creates an unknowable risk that its users will, *e.g.*, develop a particular illness, all users everywhere are subject to that risk, and diversification is impossible. *See generally* Richard C. Ausness, *An Insurance-Based Compensation System for Product-Related Injuries,* 58 U. Pitt. L. Rev. 669, 689 (1997); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521, 1540 (1987).[6]

Second, insurers can segregate their insureds into risk pools and charge a higher premium for pools that pose a greater risk. Without such segregation, insurers are forced to charge a single premium to all insureds -- a pricing strategy that nearly always leads to

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[6] By contrast, manufacturing defects are (or can be) independent and uncorrelated: that a flaw is inadvertently introduced into one unit during the manufacturing process does not (at least not necessarily) increase the probability that other units will be flawed. Indeed, the entire purpose of modern statistical quality control theory is not to eliminate product deviations but to confine them within statistically predictable limits. *See generally* Douglas C. Montgomery, Introduction to Statistical Quality Control (2005). Thus, strict liability for manufacturing defects does not create the same difficulties as strict liability for unknowable risks. This helps to explain why the Restatement Third retains strict liability for manufacturing defects. *See* Restatement (Third) of Torts § 2(a).

undesirable consequences.[7] This is precisely the position that manufacturers are put in when strict liability is applied to unknowable risks. There is no way for manufacturers to identify high risk users and charge them a higher price. The manufacturer must somehow perform the impossible task of setting a single price that anticipates future damages from unknowable risks. *See* Ausness at 690; Priest at 1553-63. The result is either inadequate reserves to cover losses (if the manufacturer sets the price too low) or a socially undesirable undersupply of the product (if the price is set too high).

Third, manufacturers "cannot take advantage of deductibles, co-payments or other devices" available to insurers to help limit losses created by high-risk insureds. Ausness at 690. Indeed, this Court has said that the defenses of assumption of the risk and contributory negligence (strict liability analogs of deductibles and co-payments) are not available under Section 402A. *See, e.g., Kimco Dev. Corp. v. Michael D's Carpet Outlets,* 536 Pa. 1, 8-9, 637

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[7] A one-size-fits-all premium is nearly always too high or too low. If it is too high, the insurance pool tends to "unravel": insureds at the low end of the scale, facing minimal risks and finding coverage too expensive, begin to opt out. *See* Priest at 1550*; see also* Mark Seidenfeld, Microeconomic Predicates to Law and Economics 74-75 (1996). With only higher-risk insureds in the pool, the insurance company raises premiums, in order to ensure that it has sufficient reserves to cover losses. *Id*. This spawns a new wave of insureds opting out of the pool because coverage is too expensive, leaving behind even higher-risk insureds. *Id*. In the end, only extremely high-risk insureds are left in the pool; others simply cannot afford the cost of insurance.

On the other hand, if the premium is too low, the result is not an "unraveling" of the insurance pool, but a shortfall in reserves.

A.2d 603, 606 (1993). Thus, there is no mechanism by which high-risk users of products are made to bear a portion of the losses they seek to recover.[8]

Lastly, fourth, strict tort liability damages awards include idiosyncratic and unpredictable components such as pain and suffering, and even punitive damages, that are not (and, by their nature, could never be) available in private insurance schemes. Ausness at 690-91.

In short, strict liability for design-defect and failure-to-warn claims is a contradiction in terms: it treats manufacturers like insurers and then requires them to do things insurers could never profitably do. Such a scheme has no coherent theoretical justification and should be abandoned.

Moreover, it cannot be argued that manufacturers may escape these difficulties by purchasing insurance against the unknowable risks their products may pose. Such a suggestion merely shifts to insurers the problem of predicting and managing losses from these unknowable risks. But the problems discussed here are no more tractable for insurers than they are for manufacturers. Indeed, some commentators have concluded that the liability insurance crisis of the 1980s was created precisely because insurers could not manage risks under the strict products liability regime that Section 402A inaugurated. *See*, *e.g.,* Priest at 1434-39. These risks only

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[8] The Superior Court of Pennsylvania has acknowledged a "limited exception to this rule," allowing "evidence of a plaintiff's voluntary assumption of the risk, misuse of a product, or highly reckless conduct . . . insofar as it relates to the element of causation." *Charlton v. Toyota Indus. Equip.*, 714 A.2d 1043, 1047 (Pa. Super. 1998). But even under this limited exception, such evidence "may not be used to reduce a strictly liable defendant's responsibility for the entire damage award." *Id.*

became manageable as more and more jurisdictions came to recognize that strict liability for anything other than manufacturing-defect claims is untenable.

The Supreme Court of Michigan started this trend back toward normalcy with its decision in *Prentis v. Yale Manufacturing Co.,* 421 Mich. 670, 365 N.W.2d 176 (1985). The court held that defective-design claims require "a pure negligence, risk-utility test," not a strict liability rule. 421 Mich. at 689, 365 N.W.2d at 185. The court reasoned:

> [T]o the extent that a primary purpose of products liability law is to encourage the design of safer products and thereby reduce the incidence of injuries, a negligence standard that would reward the careful manufacturer and penalize the careless is more likely to achieve that purpose. A greater incentive to design safer products will result from a fault system where resources devoted to careful and safe design will pay dividends in the form fewer claims and lower insurance premiums for the manufacturer with a good design safety record. The incentive will result from the knowledge that a distinction is made between those who are careful and those who are not.

421 Mich. at 689, 365 N.W.2d at 185.

The Supreme Court of California, which had been at the vanguard of strict products liability, followed suit six years later, refusing to extend strict liability to failure-to-warn claims. *See Anderson v. Owens-Corning Fiberglas Corp.,* 53 Cal. 3d 987, 998, 810 P.2d 549, 555 (1991) (concluding that strict liability for failing to warn of unknowable risks would "ha[ve] the effect of turning strict liability into absolute liability").[9]

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[9] Other courts have reached the same conclusion. *See, e.g., Olson v. Prosoco, Inc.,* 522 N.W.2d 284, 289 (Iowa 1994) ("[In a failure-to-warn case, plaintiff must] prove a defendant knew or should have known of potential risks associated with the use of its

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The trend culminated in the promulgation of Section 2 of the Restatement Third in 1998, which distills "the accumulated wisdom from thirty years of experience" into a coherent and workable approach. *Phillips,* 576 Pa. at 679, 841 A.2d at 1021 (Saylor, J., concurring). It retains strict liability where it is theoretically viable -- for manufacturing defects -- and wisely rejects such liability where it would require manufacturers to know the unknowable, namely, design-defect and failure-to-warn claims. *See* Restatement (Third) of Torts § 2(b) & (c). This scheme gives manufacturers the proper incentives to find the socially-optimal balance between the risks and utilities of the products they produce, while allowing them to predict (and thus provide in advance for) potential liability. As we have seen, the supposed cost-internalization and loss-spreading rationale of strict liability cannot accomplish this when risks are unknowable.

In short, it is now beyond dispute that Section 402A is hopelessly flawed as a scheme of liability for design-defect and failure-to-warn claims. This Court should at long last discard Section 402A and instead apply Section 2 of the Restatement Third.

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product, yet failed to provide adequate directions or warnings to users."); *Fibreboard Corp. v. Fenton,* 845 P.2d 1168, 1172 (Colo.1993) (en banc) ("[S]tate-of-the-art evidence is properly admissible to establish that a product is not defective and unreasonably dangerous because of a failure-to-warn. A manufacturer cannot warn of dangers that were not known to it or knowable in light of the generally recognized and prevailing scientific and technical knowledge available at the time of manufacture and distribution."); *Johnson v. American Cyanamid Co.*, 718 P.2d 1318, 1324 (Kan.1986) ("In determining warning issues, the test is reasonableness. To impose liability on a manufacturer, the plaintiff must show negligence on the part of the manufacturer.").

CONCLUSION

For these reasons, *Amicus Curiae* the Washington Legal Foundation respectfully joins Appellant I.U. North America Inc. in urging this Court to reverse the decision of the Superior Court and remand for a new trial. The Court should direct that in the new trial the jury shall be permitted to hear evidence and argument consistent with Section 2 of the Restatement (Third) of Torts.

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