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Optional Safety Devices: Delegating Design Responsibility to the Market

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OPTIONAL SAFETY DEVICES: Delegating Product Design Responsibility to the Market

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I. INTRODUCTION: THE DELEGATION ISSUE IN A NUTSHELL

Early in the development of a robust system of products liability law, American courts delegated most of the responsibility for assuring the safety of product designs to the market. Except for designs that failed to perform their intended functions and thus could be said to be dangerously self-defeating,[1] most courts rejected claims that products were legally defective because they could have been designed more safely.[2] As long as the relevant risks were obvious or product sellers supplied adequate warnings of hidden risks, product purchasers, not courts, determined how much design safety was appropriate. The so-called "patent danger rule," a no-duty rule barring design claims when risks of harm are obvious, ruled the roost.[3] And then came the products liability revolution. Spurred by the adoption of strict liability under § 402A of the Restatement (Second) of Torts,[4] courts began in the 1970s to question, and then to reject, the idea that adequately-informed consumers always make sensible decisions regarding product design safety.[5] Thus arrived a new era in American products liability in which courts began independently to review the reasonableness of

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1. For a discussion of the early case law responding to self-defeating designs, which the author refers to as "inadvertent design errors," see James A. Henderson, Jr., *Judicial Reviews of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1550–52 (1973).

2. For a discussion of the early case law responding to what the author describes as "manufacturers' conscious design choices," see Henderson, Jr., *supra* note 1, at 1552–53, 1565–73. "In the great majority of [late 1960s, early 1970s] cases, courts have refused to allow juries to pass independent judgment upon the adequacy of defendants' conscious design choices." *Id.* at 1565.

3. *See generally* JAMES A. HENDERSON, JR. & AARON D. TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 183 (7th ed. 2011) ("Referred to as the 'patent danger rule,' this single-factor barrier to [design-based] liability reigned in many jurisdictions.").

4. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

5. For an early recognition that courts were beginning to review the reasonableness of product designs and that commentators were predicting expansion of what they saw as the beginnings of a trend, see Henderson, Jr., *supra* note 1, at 1552 n.92 and text accompanying. For an assessment of more recent trends, see James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 905–919 (1998).

manufacturers' product design choices, thereby second-guessing decisions reached in the market. In fairly short order courts abolished the patent danger rule[6] and opened their doors to a broad range of fault-based design defect claims.[7]

The changes over the past four decades have been dramatic, so much so that one might be tempted to conclude that purchasers' decisions regarding product design safety are no longer of serious moment. Three important exceptions render such an assessment unwarranted. First, courts continue steadfastly to refuse to review the reasonableness of market decisions regarding the generic, unavoidable risks of broad product categories such as motor vehicles, productive machinery, alcoholic beverages, and tobacco products.[8] Particular designs within these categories are deemed defective when they could have been made marginally safer at acceptable cost. But courts will not review market choices regarding the reasonableness of the broad product categories themselves.[9] Second, even when courts second-guess market decisions regarding the design safety of particular products within the broader categories, an important factor in these judicial assessments is the social value of maintaining a reasonable range of consumer choice.[10]

The third significant exception to the general pattern of courts overriding markets by engaging in broad product design review—a controversial subject upon which this article focuses—concerns optional safety devices with respect to which purchasers, not courts, often make the controlling decisions.[11] Optional safety devices are ubiquitous in the sale of both consumer goods and industrial machinery. All sorts of products are routinely marketed with a wide range of optional devices and features, many of which have significant safety implications. Courts in recent years have struggled with the question of when to include a given safety device as part of the court-imposed responsibilities of commercial product sellers and

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6. *See* James A. Henderson, Jr., *The Demise of the Patent Danger Rule*, 3 CORP. L. REV. 78 (1980). *See generally* HENDERSON, JR. & TWERSKI, *supra* note 3, at 184.

7. *See generally* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991); Aaron D. Twerski & James A. Henderson, Jr. *Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 BROOK. L. REV. 1061 (2009).

8. *See generally* HENDERSON, JR. & TWERSKI, *supra* note 3, at 247.

9. *See generally Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, *supra* note 7.

10. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. f (1998).

11. *See generally* Richard C. Ausness, *Risky Business: Liability of Product Sellers Who Offer Safety Devices as Optional Equipment*, 39 HOFSTRA L. REV. 807 (2011); James A. Henderson, Jr., *The Constitutive Dimensions of Tort: Promoting Private Solutions to Risk-Management Problems*, 40 FLA. ST. U. L. REV. 221 (2013).

when to delegate responsibility to private decision-makers in the marketplace. Delegation occurs when sellers offer arguably cost-effective safety devices as options and courts subsequently refuse to hold product sellers liable for failing to include such safety devices as standard equipment.

Deciding when to mandate that safety features be included in product designs and when to allow purchasers to make those decisions requires courts to pit the paternalistic tilt of modern American products liability law—that government knows best—against the strong desire of product users and consumers to tailor products to their own personal needs and preferences. This clash of perspectives is especially problematic when a purchaser's decision to omit a given safety feature puts third parties at risk of harm. For example, an employer's decision not to incorporate a safety device into a piece of industrial equipment may benefit the employer and its customers by increasing productivity, and thus may benefit employees generally by justifying higher wages. But omitting the safety feature may have disastrous consequences for individual employees who suffer harm while working with such marginally more dangerous equipment. Given these considerations, judicial mandates requiring inclusion of safety features under such circumstances are understandable.

Regardless of how one answers the question of when delegation of responsibility for product design safety is appropriate, the applicable legal rule must afford the commercial product seller a measure of predictability of outcome. In the current American products liability system, a plaintiff attacks a product design by proving that the manufacturer could have adopted a reasonable alternative design ("RAD") that would have prevented the plaintiff's injury.[12] By offering a safety device as an option, a commercial seller runs the risk of providing a built-in RAD with which a victim, subsequently injured by the omission of the device, may condemn the seller's design as legally defective.[13] Absent some measure of assurance flowing from a no-duty rule on which sellers who offer optional safety features may reasonably rely, sellers may tend to refuse to make such offers, in which case the social benefits of delegating safety decisions to the parties are lost.[14]

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12. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (1998).

13. By offering the option, the seller, in the absence of a no-duty rule, may be deemed to have admitted that the safety device should have been included to begin with. A similar risk arises whenever product sellers improve their designs to make them safer. *See* HENDERSON, JR. & TWERSKI, *supra* note 3, at 220–24.

14. The benefits may be gauged from either of the two normative perspectives suggested in subsection II.A., *infra*. Thus, if product purchasers are in a better position than are courts to make the relevant choices, delegating responsibility to the market will increase allocative

This Essay offers and defends such a no-duty rule. Rather than be satisfied with vague references to an appropriate solution, the analysis is specific in its recommendations. Thus, as former co-Reporters for the Products Liability Restatement,[15] the authors offer a black-letter rule, together with comments, for the reader's consideration. The proposal does not carry the imprimatur of the American Law Institute. Rather, it represents the authors' views on how to structure a no-duty rule that reflects the case law and balances the competing social interests. Part II provides an appropriate theoretical framework, including normative perspectives, process considerations, and illustrative factual paradigms. Part III then examines the case law addressing the issues surrounding optional safety devices, demonstrating how the decisions are largely consistent with the theoretical analysis in Part II. And Part IV offers a specific proposal in traditional Restatement format.

II. AN APPROPRIATE THEORETICAL FRAMEWORK: NORMS, PROCESSES, PARADIGMS

A. Normative Perspectives: When Is Delegation Justified?

This is not the place to determine, once and for all, the normative objectives of products liability law, or tort law more generally. Most of what follows reflects an instrumental perspective: How should courts approach the question of delegating design responsibility to product purchasers so as to enhance allocative efficiency? One could replace the last part of this question with "so as to promote consumer sovereignty?" without diminishing the usefulness of the analysis. Even if, on the final day of reckoning, the noninstrumental perspective of enhancing consumer sovereignty—the right of individuals to participate meaningfully in defining their own personhood—trumps the achievement of collective welfare,[16] an instrumental approach based on assessments of who will likely make better

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efficiency. And assuming consumer-purchasers can be expected to make informed, rational choices, delegation will enhance consumer sovereignty.

15. The authors served from 1992-1998, from the outset through completion of the project. The American Law Institute named them R. Ammi Cutter Distinguished Reporters in 1997.

16. The test would be whether, whenever the enhancement of consumer sovereignty demanded a ruling or an outcome that decreased allocative efficiency, courts would be bound to enhance sovereignty. The two objectives might (and almost certainly would) support the same outcomes in most instances. But whenever push came to shove, consumer sovereignty would prevail.

choices is useful. Even if the enhancement of individual personhood is the ultimate objective, courts must be concerned with adopting the most effective means of achieving that objective.[17]

Viewed instrumentally, the important question presented in connection with optional safety devices is whether and under what circumstances product sellers may reasonably expect purchasers to make reasonable decisions regarding whether or not to include such devices in product designs. If purchasers cannot be expected to make sensible choices, courts should not encourage sellers to give them opportunities to choose. Two conditions necessary for product purchasers to make good choices regarding optional safety devices have traditionally been articulated by courts and commentators seeking to identify which classes of actors are efficient cost minimizers.[18] First, to be a competent risk manager an actor must have access to accurate information regarding the relevant risks and risk-minimizing strategies.[19] And second, the actor must have the capacity to act effectively based on the relevant information.[20]

Regarding product purchasers, the first of the foregoing characteristics—access to risk information—is largely a function of the purchaser's previous experience and expertise. The product seller owes a duty to warn and instruct purchasers regarding nonobvious risks and risk-avoidance measures.[21] But to be able to exercise design safety options competently, the purchaser must contribute a measure of product-related expertise. Children and inexperienced, unsophisticated lay persons occupy one end of the spectrum of relative knowledgeability, and professional experts occupy the other. The second above-identified characteristic of an effective risk manager—the capacity to act reasonably and effectively—is itself comprised of two components: first, the actor must possess the cognitive

17. Another way of saying it is that, in the overwhelming majority of instances, increasing allocative efficiency will serve to enhance consumer sovereignty. *See generally* Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621, 629–30 (2002) (noting that the instrumental goal of deterring wrongful conduct is compatible with a noninstrumental goal such as corrective justice as long as the two are conceptually sequenced so that the former gives way to the latter when they come into conflict).

18. *See generally* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 135 (1977); Ausness, *supra* note 11, at 818 n.79.

19. From an efficiency perspective the goal is to minimize the sum of accident costs and avoidance costs. *See generally* CALABRESI, *supra* note 18, at 28. Thus, to be an efficient risk minimizer, an actor must have good information regarding both variables.

20. *Id.* To act effectively, the actor must have the cognitive capacity to devise a sensible plan of action and the practical means to implement such a plan.

21. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(c) (1998). The authors describe the shortcomings of the failure-to-warn doctrine in James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 292–311 (1990).

capacity to work out a sensible plan of action based on available information; and second, the actor must have access to the practical means to implement the plan, once arrived at.[22] Cognitive capacity, the first of these components, is of primary importance here. More specifically, the focus in connection with optional safety devices is on cognitive biases and faulty heuristics that may cause some purchasers—e.g., unsophisticated consumer-purchasers—to respond inappropriately to the question of whether or not safety devices are called for. Chief among the cognitive biases that are apt to lead to inappropriate responses are ones that cause decision makers, especially unsophisticated, nonexpert decision-makers, to overestimate their own intelligence, skill, and capacity as risk managers—variations on what has been termed the "self-serving bias."[23] In the present context of optional safety devices, such a cognitive bias is likely to cause purchasers who in actual fact require the protection provided by safety devices to conclude, in error, that they do not.[24]

Faulty heuristics, or mental shortcuts, produce a similar negative effect on judgment.[25] Thus, if a nonexpert purchaser erroneously believes that he is a competent risk manager simply because he never uses a dangerous product while intoxicated, he may refuse an optional safety device when, for reasons having nothing to do with his not imbibing alcohol, he very much needs the protection that the device affords.[26] In similar fashion to the self-serving bias, this faulty heuristic—that sobriety is the only variable affecting risk-management skills—tends to prevent the purchaser from reaching rational decisions even when possessed of accurate information concerning the relevant external facts. Thus, in connection with dangerous biases and faulty heuristics, while the purchaser may have access to good information, he lacks the cognitive capacity to react sensibly to that information. It should be observed that the single concept of "expertise" embraces both access to good information and absence of cognitive impediments. Thus, someone trained as an expert not only knows a great deal about his field, but also has achieved a higher level of detachment from the personal implications of his choices. In the analysis that follows, such an actor is often referred as a "sophisticated" actor.

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22. *Cf. supra* notes 19–20 and accompanying text.

23. *See generally* Ward Farnsworth, *The Legal Regulation of Self-Serving Bias*, 37 U.C. DAVIS L. REV. 567 (2003). For a broader treatment of cognitive biases and faulty heuristics in the context of optional safety devices, see Ausness, *supra* note 11, at 815–18.

24. *See* Ausness, *supra* note 11, at 816.

25. *See* Ausness, *supra* note 11, at 816–17.

26. *See* Farnsworth, *supra* note 23, at 569–70, 599.

To these traditionally-recognized characteristics of knowledgeability and cognitive capacity this analysis adds a third characteristic, as yet unrecognized in the literature or judicial decisions, that must be satisfied for a purchaser to reach reasonable, socially optimal decisions regarding optional safety devices—adequate motivation to weigh the relevant social costs and benefits without unduly favoring the purchaser's own selfish interests. In this connection one may assume that the purchaser has access to accurate information and is free of cognitive impediments that might interfere with good judgment. The selfishness here referenced is rational; indeed, for purposes of analysis, the purchaser may be presumed to appreciate which choice regarding an optional safety device will increase collective welfare. In contrast to the biases and faulty heuristics that lead individual purchasers to make irrational choices that place the purchasers themselves at unreasonable risks of harm, here the lack of motivation leads even highly sophisticated, rational purchasers to make socially wasteful choices that place third parties at excessive risk in order to reduce the purchasers' own costs of investing in care.[27]

Lack of motivation to act reasonably has not been part of the traditional formula for identifying efficient accident cost minimizers because the analysis in that traditional context assumes that the actor identified as an efficient minimizer will be held strictly liable in tort for the negative consequences of his choices.[28] By internalizing to the actor the costs of accidents, the liability rule can assume that the actor engaged in cost-minimization will behave in a socially responsible manner. By contrast, in the context of optional safety devices, no threats of liability are aimed at the product purchasers to whom safety options are given.[29] Thus, before condoning the delegation of responsibility to a particular class of purchasers, a court must require some measure of assurance that the presumably liability-free purchasers who exercise safety options are motivated to make socially responsible decisions that adequately weigh risks of harm to others. Paramount among the sources of such assurances is the circumstance that the purchaser, himself, is among those at risk of suffering harm from product use. Functionally, such exposure to risk of harm provides the same sort of incentives, if not at the same levels of

27. This is one possible juncture where the individual sovereignty notion, which would see to ignore third-party effects, would be at odds with the efficiency objective of collective welfare, which would most certainly be concerned with third-party externalities.

28. *See supra* note 18.

29. Rather than threaten purchasers, the no-duty rule here under consideration eliminates threats of sellers' liability, thereby encouraging sellers to offer options to which purchasers' self interest will cause them to respond.

intensity, as does presumed exposure to strict tort liability in the more traditional context of searching for efficient accident cost minimizers.[30] The analysis in subsection C of this Part II addresses the question of how courts should respond to the delegation issue when product purchasers—typically commercial entities purchasing products for use by employees—are not themselves at risk of harm.[31]

By way of a brief summary, to delegate responsibility to product purchasers to decide whether to include optional safety devices in product designs, courts aiming to enhance allocative efficiency must receive assurances that those purchasers (1) have adequate access to good information about the relevant risks and risk-avoidance measures, (2) are cognitively capable of reaching rational conclusions regarding the choices to make, and (3) are motivated to make reasonable choices that increase, rather than diminish, collective welfare.

B. Process Perspectives: What Form of Liability Rule Is Appropriate?

1. Why a Specifically-Defined No-Duty Rule, Based on Time-of-Sale Circumstances, Is Required

If it is reasonable to assume that product purchasers naturally prefer opportunities to tailor products to their own needs and preferences, they will presumably take advantage of such opportunities when offered. Thus, what is required is a liability rule that reasonably encourages commercial product sellers to give purchasers opportunities to choose among a variety of options, including optional safety devices. Three conditions primarily relating to process rather than substance must be satisfied for such a liability rule to achieve its objective. First, the liability rule must provide sellers with a formal barrier—a safe harbor, if you will—against subsequent claims of design defect based on the seller's failure to include the safety device as standard equipment. Unless product sellers receive a fairly reliable assurance in the form of a no-duty rule, they will tend not to offer safety options even when it would be efficient to do so. Open-textured liability rules calling for assessments of reasonableness under all the circumstances may lead to judgments for defendants as a matter of law ("JMOLs") in a

30. The intensity of the incentive may be less because the purchaser may consider only the value of the purchaser's own interests, whereas sellers held strictly liable will presumably consider the value of all interests foreseeably placed at risk.

31. *See infra* pp. 12–16.

scattering of instances, but courts are significantly more likely to enter JMOLs when applying a no-duty rule.[32]

Second, the no-duty rule governing optional safety devices must be based on circumstances as they appear to, or may be assumed by, a reasonable seller at time of sale. To encourage product sellers to offer safety devices as options, the liability rule cannot require them to wait to find out whether the underlying realities—often not discernible by sellers at time of sale—support a legal defense against design-based liability. In this respect, the no-duty rule covering optional safety devices must function as does the rule governing apparent consent; it must allow the actor—here the product seller—to rely on reasonable appearances at the time action is taken.[33] Thus, rather than bar a seller's liability only when it is later revealed at trial that the purchaser was capable of making sensible choices, the liability rule must depend on reasonable appearances and expectations at time of sale.

And finally, for a no-duty rule to succeed in encouraging product sellers to offer safety options, the rule must describe the factual circumstances upon which the safe harbor is based with sufficient specificity to support JMOLs in favor of defendant product sellers. For this to occur, the no-duty rule must not rely exclusively on whether, based on appearances, a reasonable seller would expect a particular purchaser to be knowledgeable, capable, and motivated. Instead, the applicable standard must be bolstered by presumptions, developed judicially over time, regarding which specifically-defined classes of purchasers—e.g., unsophisticated consumers, commercial risk managers, experienced experts—the seller may assume possess which characteristics relevant to the court's decision regarding the appropriateness of delegating responsibility to such purchasers. In this respect, the courts will be required to identify specific subcategories of purchasers in a manner similar to their development of subcategories of dangerous activities to which common law strict liability applies.[34]

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32. *See generally* JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 42–43 (8th ed. 2012). The best-known example of how centering a negligence analysis on the concept of duty can affect the likelihood of a JNOV for defendant is *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. Ct. App. 1928).

33. The American origins of the apparent consent rule may be traced to *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266 (Mass. 1891). Not only does allowing reliance on objective appearances provide actors with assurances that they will not be "second-guessed" using hindsight, but it reduces the complexity of the issues courts must decide. *See generally* James A. Henderson, Jr., *The Constitutive Dimensions of Tort: Promoting Private Solutions to Risk-Management Problems*, 40 FLA. ST. U. L. REV. 221 (2013).

34. For a judicial plea that product category liability be handled in the same fashion see *O'Brien v. Muskin Corp.*, 463 A.2d 298, 310–15 (N.J. 1983) (Schreiber, J., concurring and dissenting).

2. Limits on the Risk-Management Capabilities of Courts

The focus thus far has been on the capabilities of product purchasers to make sensible design choices. Bearing in mind that the alternative to allowing purchasers to make the relevant design choices is for courts to make the choices and impose them on the market, it is useful briefly to consider limits on the judicial capacity to perform that design-review function. The authors have explored this issue at length elsewhere.[35] Suffice it to say that the open-textured question of "How much product design safety is enough?" presents courts with issues that are many-centered, or polycentric;[36] that polycentricity is a matter of degree and increases with increases in the number and interconnectedness of the relevant variables;[37] that highly polycentric problems require the exercise of discretion for their solution and thus do not lend themselves to being solved by means of adjudication;[38] and that polycentric problems do lend themselves to being solved by individuals (e.g., product purchasers) who are free (as courts are not) to exercise broad discretion in accepting or rejecting optional safety devices.[39] It follows that, in connection with deciding whether to recognize a no-duty rule to encourage product sellers to offer optional safety devices, courts should consider not only the capacities of purchasers but their own institutional shortcomings as decision-makers.

C. Illustrative Factual Paradigms: How Courts Should Respond in Actual Cases

What follow are sketches of how, in theory, courts should react to a variety of factual paradigms, chosen to better explain the no-duty rule advanced in this analysis. Part III, infra, discusses the relevant case law; Part IV contains the proposed Restatement provision.

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35. *See, e.g.*, Henderson, Jr., *supra* note 1; James A. Henderson, Jr. & Aaron D. Twerski, *Intuition and Technology in Product Design Litigation: An Essay on Proximate Causation*, 88 GEO. L.J. 659 (2000); Henderson, Jr., *supra* note 33.

36. *See* Henderson, Jr., *supra* note 33, at 221.

37. *Id.*

38. *Id.*

39. *Id.*

1. When Courts *Should Not* Delegate Safety Decisions to Purchasers in the Market: The Default Position Favoring Independent Judicial Design Review

Subject to exceptional circumstances described in subsection 2, below, when product purchasers are unsophisticated consumers, courts should not provide sellers with a safe harbor from liability when they offer cost-effective safety devices on an optional basis. If the tort-plaintiff harmed by the omission of a safety device can prove that the omitted device constitutes a RAD, the commercial sellers should be held liable for defective design. The characteristic that unsophisticated purchasers typically lack is not motivation. One may assume that in most of these cases the products will be consumer goods—e.g., motor vehicles and household products. Thus, sellers can expect that a high percentage of consumer-purchasers (or their loved ones) will use such products and thus be placed at risk of harm. Of course, when third-party effects are likely to be the *only* negative effects flowing from product use, lack of motivation on the part of purchasers helps to justify the court's imposing RAD-based liability on the seller for giving the purchaser the option of omitting the safety feature. But as long as the individual purchaser or a loved one can be expected to be exposed to the relevant risk of harm from product use, even if third parties are also at risk, the purchaser may be assumed to possess adequate motivation to make a sensible choice when given the opportunity.[40]

The characteristics that justify a judicial refusal to delegate important safety decisions to unsophisticated consumer-purchasers, then, are the first two identified earlier: As a general rule, that class of purchasers can be expected to lack adequate information regarding the relevant risks and risk-avoidance measures; and they can be expected to lack the cognitive capacity to reach sensible conclusions regarding whether they (or their loved ones) need the protection of optional safety devices. Quite simply, sellers of most consumer products cannot reasonably expect their unsophisticated purchasers to have access to the information necessary to make sensible choices among safety options, nor can sellers reasonably expect such purchasers to be sufficiently free from dangerous cognitive biases—"It can't happen to me"—and faulty heuristics—"I'm sober, therefore I'm careful"—to manage product-related risks adequately.

It should be borne in mind that this and subsequent discussions relate only to classes of purchasers, not to idiosyncratic individuals within those classes. As explained earlier, to provide product sellers with meaningful

40. When the purchaser or her loved ones are not the only ones at risk, the intensity (and thus the adequacy) of the incentive may vary somewhat. *Cf. supra* note 30.

safe harbors, sellers must be able to rely on reasonable expectations regarding classes of purchasers without being exposed to subsequent arguments that a particular purchaser/accident victim did not actually conform to the characteristics of the relevant class.[41] It must also be remembered that this and subsequent discussions of different classes of product purchasers assume that plausible claims could be made that, except for the no-duty rule, the safety devices offered as options constitute RADs that the defendant sellers should have included as standard equipment. If such is not the case—if the design feature in question could not plausibly serve as a RAD—then the product design is not defective quite apart from the no-duty rule. However, the no-duty rule does increase the defendant's chances of winning a JMOL.

By contrast to the noncommercial, unsophisticated purchasers, sophisticated, presumably-expert purchasers can be expected not only to have access to adequate information but also to be free of significant cognitive impediments. Unlike consumer-purchasers, sophisticated commercial purchasers, like successful poker players, have adequate information and the steely-eyed, dispassionate mind-sets that are necessary to make optimal decisions when the physical well-being—even the lives—of putative victims are at stake. However, again in contrast to consumer-purchasers, sophisticated commercial purchasers may be assumed to lack adequate motivation to make socially responsible safety decisions. In the great majority of instances, the individual risk-managers who act on behalf of their commercial employers are not themselves (nor are their loved ones) at risk of suffering harm from subsequent product use. Instead, almost always the products are industrial machines and those in harm's way are employees who operate the machines for the mutual benefit of themselves and their employers. Moreover, the employers almost invariably enjoy, under worker compensation statutes, immunities from tort liability to their employees.[42] Consequently, the injuries to employees that flow from their employers' decisions to omit optional safety devices are classic examples of the sorts of negative third-party effects that arise less often in their pure forms in the context of noncommercial purchasers of consumer goods.[43]

It follows that courts should not as a general rule delegate to commercial purchasers of industrial machinery responsibility for making product design safety choices any more readily than they should delegate such responsibility to noncommercial purchasers of consumer goods—but for

41. *See supra* note 33 and accompanying text.

42. HENDERSON, JR., *supra* note 32, at 691.

43. Once again, purchasers of consumer goods typically use the products and thus are motivated to take care. *See supra* notes 30, 40 and accompanying text.

quite different reasons. Commercial purchasers can be expected to possess both the information and the cognitive capacity to make reasonable choices, but they may be expected to lack adequate motivation to do so. Conversely, noncommercial consumer-purchasers may be expected to be adequately motivated but to lack the necessary information and cognitive capacity. If the story of optional safety devices were to end here, affirming the obvious truth that sellers are liable for defective designs, it would be a story hardly worth telling. What makes the story very much worth telling is contained in the next subsection, which describes exceptional circumstances in which instrumental considerations of promoting allocative efficiency—or consumer sovereignty, if one prefers—very much support application of a no-duty rule that gives product sellers a safe harbor from design-based liability when they offer cost-effective safety devices as options rather than including such devices as standard equipment.

2. When Courts *Should* Delegate Safety Decisions to Purchasers in the Market: The No-Duty Rule in Action

The objective in the discussion that follows is to consider important exceptions to the earlier-identified default position that courts should not use a no-duty rule to encourage product sellers to delegate responsibility for deciding whether or not to adopt optional safety devices. The first exception involves delegations of responsibility for choosing among broad product categories. Although product categories do not, strictly speaking, fit within the narrower concept of safety devices, choices among such categories often have important safety implications and thus warrant inclusion in this analysis. Even if unsophisticated purchasers are presumably incapable of choosing sensibly among optional safety devices that offer only marginal, often obscure, differences in product safety—e.g., choosing between ordinary automotive brakes and anti-lock brakes—those same purchasers are presumably capable of choosing among broad product categories—e.g., choosing between subcompact and standard-size automobiles. Thus, given that purchasers may choose rationally among different-size vehicles,[44] when a purchaser opts for a subcompact and later an injured tort plaintiff attacks the subcompact's design because it lacks the crashworthiness of a full-size vehicle, the court should invoke a no-duty rule—whether it be considered

44. In these contexts, speaking of optional "devices" is a bit awkward. Moreover, different sellers may distribute the different design categories among which purchasers may choose. If this awkwardness causes analytical confusion, it may be preferable to treat the no-duty rule appropriate for broad product categories as conceptually distinct from the no-duty rule based on optional safety devices. *See infra* Part IV, cmt. h.

an "optional safety device" or a "no category liability" rule—and enter JMOL for the defendant seller based on the proper delegation to the market of responsibility for determining the vehicle's size.[45] Once again, the unsophisticated automobile purchaser presumably lacks the cognitive acumen of a skillful poker player. But when it comes to choosing the size of her vehicle based mainly on aggregative considerations such as initial capital investment, operating costs, and aesthetics, her lack of information and cognitive limitations relating to safety are less likely, compared with trying to choose marginally what type of brakes to include, to cause her to make an irrational choice.[46] Indeed, when aesthetics dominate in making such categorical choices, the consumer may meaningfully be treated as a "sovereign" who presumptively knows best what pleases her.[47]

If to these considerations one adds the reality that courts are not institutionally competent, in light of all the factors involved, to adjudicate solutions to the polycentric problem of whether or not subcompact automobiles are categorically defective, the response suggested by this article's analysis is clear.[48] Even if courts should not delegate to unsophisticated purchasers the responsibility for making choices relating to marginal, often obscure differences in product design safety, they should most certainly delegate to those same purchasers, by means of a no-duty rule, responsibility for choosing among broad categories of consumer products.[49]

A second exception to the default position that product sellers should not be encouraged to delegate responsibility for design safety to unsophisticated purchasers arises in the unusual situation in which such purchasers may be expected to be assisted in their decision making by highly expert advisers. When product purchasers are commercial entities, one may expect this condition to be satisfied routinely. But in the case of unsophisticated consumer-purchasers when, because of special circumstances, sellers may

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45. It will be observed that even if the tort plaintiff is not the purchaser, recovery should be denied because the product is not defective, given delegation of responsibility to the consenting purchaser. *See generally* Henderson, Jr., *supra* note 33 (Such a bar to recover is akin to a consent-based defense, but it does not rest on the *plaintiff's* consent).

46. One could attempt to justify this distinction in terms of enhancing consumer sovereignty, but with the constraint that the law should be concerned with her reaching "sensible"—i.e. reasonable—decisions, it would seem that allocative efficiency is in the normative driver's seat.

47. *See generally* James A. Henderson, Jr., *Contract's Constitutive Core: Solving Problems by Making Deals,* 2012 U. ILL. L. REV. 89, 104 nn.64–65 (2012).

48. *See generally* Henderson, Jr. & Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect, supra* note 7.

49. Whether or not to make this part of a no-duty rule based on optional safety devices, rather than a separate rule, is a separate issue. *See supra* text accompanying note 44.

expect such purchasers to be assisted by expert advisers, courts should recognize the no-duty rule here being considered and refuse independently to review the reasonableness of the purchaser's design safety choices.

A third exception to the general default position relating to unsophisticated product purchasers becomes relevant when such purchasers may be expected to possess expertise in connection with a relatively narrow subset of product-related activity—e.g., amateur downhill ski racing. When in that context a product seller offers choices among optional safety devices—e.g., which type of bindings to install on which type of racing skis—courts would be justified in applying a no-duty rule that bars the seller's liability for failing to impose a particular safety device as standard equipment. Of course, when adverse third-party effects are expected to be significant in these circumstances, a court might properly refuse to recognize such a rule for the reason that the purchaser lacks adequate motivation; but that should occur only rarely.[50] The fourth and final exception to the default rule denying delegation involves optional safety devices that make it possible for risk averse purchasers to invest in care to an extent above, rather than below, that required by consideration(s) of collective welfare. These are circumstances in which product sellers should be free to provide their abnormally risk-averse purchasers with opportunities to reduce the relevant risks of harm to a greater extent than is reasonable for normally risk-tolerant purchasers.[51] In such circumstances the seller should, in theory, not be liable because the design would not be defective under a RAD approach.[52] But a no-duty rule increases the incidence of JMOLs and thus helps to encourage sellers to cater, by way of optional safety devices, to their especially risk-averse clientele.[53]

It remains to consider appropriate judicial responses when choices among optional safety devices are made by sophisticated (almost always commercial) product purchasers, typically in connection with industrial machinery. It will be recalled from an earlier discussion that when attention shifts to commercial purchasers, primary concerns over delegation shift from the purchasers' informational, cognitive limitations to the likelihood that commercial purchasers lack adequate motivation to weigh the interests

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50. *See supra* text accompanying notes 40, 44.

51. *Cf.* James A. Henderson, Jr. & Jeff Rachlinski, *Product-Related Risk and Cognitive Biases: The Shortcomings of Enterprise Liability*, 6 ROGER WILLIAMS U. L. REV. 213 (2000) (explaining that over-investment in care is inefficient, but is not tortious).

52. Failure to adopt the alternative design would not, under that circumstance, render the defendant's design "not reasonably safe."

53. *See supra* note 32 and accompanying text. From a broader perspective, the risk of exposing sellers to liability based on what amount to attempt to rescue purchasers is widespread in American products liability. *See generally* HENDERSON, JR., *supra* note 3.

of third-party victims—typically employees.[54] Of course, when the persons making the decisions are, themselves, among the expected users of the machinery, concerns over lack of motivation largely disappear.[55] The same sort of motivation to consider the welfare of third parties could be expected when the purchaser is likely to be liable in tort to the parties at risk.[56] But in most instances commercial purchasers will be employers who enjoy immunities from tort liability to their employees.[57]

Thus, the question is presented: Are circumstances likely to arise in which a product seller can determine at time of sale that a commercial purchaser of industrial machinery is adequately motivated to weigh socially relevant costs and benefits when deciding whether or not to adopt an optional safety device? One important circumstance presents such a possibility. Some commercial machines may be expected to be used in several different work environments, in at least one of which the use of a given safety device may not be feasible at acceptable costs. If one were to refer to such a product as multifunctional and the safety device as incompatible with one or more of the expected work environments, then a product seller who offers optional safety devices for multifunctional products would be reasonable in expecting the commercial purchasers of such products to accept or reject the optional devices primarily on the basis of whether the expected environments of use are compatible with those safety devices. Because in such a circumstance the product seller could reasonably trust the purchaser's motivations, delegation of responsibility to the purchaser by means of a no-duty rule would be justified.

III. DECISIONAL PERSPECTIVES: HOW COURTS HAVE RESPONDED TO OPTIONAL SAFETY DEVICES

The reported decisions dealing with the question of whether manufacturers may delegate responsibility for deciding whether to install optional safety devices do not articulate a coherent structure for resolving the problem. Judged on the basis of the analysis in Part II, courts tend to reach sound results, but provide scant guidance regarding the principles that support their decisions. In denying RAD-based claims when sellers offer optional safety devices, courts often observe that the purchaser was

54. *See supra* text accompanying note 40.
55. *See supra* notes 43, 46, 52, and accompanying text.
56. *See supra* notes 11, 18, and accompanying text.
57. *See supra* note 44 and accompanying text.

sophisticated,[58] that the danger against which a safety device was to protect was obvious;[59] that the safety device was inappropriate for a multifunctional product;[60] and that industry custom allowed purchasers to make choices regarding optional safety devices.[61] But these same courts fail to provide a rationale for how to analyze the delegation issue. Part II developed an analytical framework for deciding when delegation is justified, and why. It is now time in this Part III to test the case law against that framework. The reader should not expect a perfect fit. This area of the law is complex and the elements identified earlier as necessary to justify delegation to the market must be flexible if they are to work in deciding actual cases. Nonetheless, if the decided cases were seriously out of line with the analytical structure proposed in Part II, the authors would have cause for concern.

A. Consumer Products: Rejecting Delegation

The case law with regard to consumer products generally supports the position set forth earlier. For the most part, courts do not delegate to unsophisticated, noncommercial consumers responsibility for deciding whether to include optional safety devices. Thus, when a manufacturer sold a radial saw without a blade guard, resulting in the amputation of the user's fingers, the issue of whether the guard was a RAD was for the jury.[62] The availability of the guard as an option did not insulate the manufacturer from

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58. *See* Scallan v. Duriron Co., 11 F.3d 1249, 1254 (5th Cir. 1994) (finding that a chemical company that was world leader in chemical production was in the best position to evaluate the various safety devices to meter chlorine leaks); Rainbow v. Alberta Elia Bldg. Co. Inc., 436 N.Y.S.2d 480, 483 (App. Div. 1981) (finding that an experienced motorcyclist was in best position to exercise an intelligent judgment in a making trade-off between cost and function regarding whether crash bars were necessary on his motorcycle); Banzhaf v. ADT Security Systems Southwest, Inc., 28 S.W.3d 180 (Tex. App. 2000) (explaining that whether an alarm system should have a duress code was a decision for the purchaser because of its superior knowledge as to how best to secure its employees against criminals).

59. Price v. Niagra Machine & Tool Works, 136 Cal. Rptr. 535 (Ct. App. 1997) (explaining that the need for safeguards for a press were obvious to user); Miller v. Dvornik, 501 N.E.2d 160 (Ill. App. Ct. 1986) (explaining that the risk of injury in a motorcycle crash is obvious).

60. Tannebaum v. Yale Materials Handling Corp., 38 F.Supp.2d 425, 432–33 (D. Md. 1999) (finding that a rear door to a forklift would reduce its functional utility in a narrow environment); Turney v. Ford Motor Co., 418 N.E.2d 1079, 1083 (Ill. App. Ct. 1981) (explaining that a roll bar is inconsistent with multifunctional use of a tractor).

61. Verge v. Ford Motor Co., 581 F.2d 384 (3d Cir. 1978) (discussing whether a manufacturer of a cab and chassis had duty to install back-up safety devices depended in part on trade custom of the injury).

62. Sears Roebuck & Co. v. Kunze, 996 S.W.2d 416 (Tex. App. Ct. 1999).

liability. Similarly, when Volkswagen sold an automobile without a three-point lap/shoulder belt for the rear seats, the fact that the manufacturer offered such belts as options did not prevent the appellate court from affirming a multi-million dollar verdict in favor of two plaintiffs.[63] The court held that the three-point belt was a RAD that should have been installed by the manufacturer as standard equipment.[64]

To be sure, in several well-known contexts courts leave important safety decisions to the market. Most significantly, courts have steadfastly refused to decide whether broad categories of products are reasonably safe.[65] For example, when products such as SUVs,[66] guns,[67] or trampolines[68] cause harm the courts have delegated to consumers the question of whether these categories of products are adequately safe. Although consumers do not have perfect information regarding all the risks attendant to the use of such products, they are well enough informed so as to make intelligent decisions. Moreover, when consumers have access to experts who can guide their decisions, courts leave decisions to the market. Thus, until recently, courts did not review prescription drug designs; they instead delegated responsibility to physicians—learned intermediaries who would make the decision as to the risk/benefit trade-offs.[69] Although the Products Liability

63. Trull v. Volkswagen of America, Inc., 320 F.3d 1 (1st Cir. 2002).

64. *Id.* at 8–9.

65. *See generally* Harvey M. Grossman, *Categorical Liability: Why the Gates Should be Kept Closed*, 36 S. TEX. L. REV. 385 (1996); Henderson, Jr. & Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, *supra* note 7. *But see* Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 TENN. L. REV. 1429 (1994). RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmts. d–e (1998) (rejecting category liability but leaving open the possibility of category liability in the case of manifestly unreasonably designed products).

66. Although on occasion courts may appear to talk in terms of category liability, see, for example, Browserfield v. Suzuki Motor Corp., 11 F.Supp. 612, 619 (E.D. Pa. 2000) (assessing the SUV's overall social utility), the vast majority of SUV cases are premised on the ability of auto manufacturers to adopt alternative designs allowing for enhanced stability and for reduced rollover tendencies. *See, e.g.*, Clay v. Ford Motor Co., 215 F.3d 663 (6th Cir. 2000) (applying Ohio law); Watkins v. Ford Motor Co., 190 F.3d 1213 (11th Cir. 1999) (applying Georgia law); Ford Motor Co. v. Ammerman, 705 N.E.2d 539 (Ind. Ct. App. 1999).

67. *See, e.g.*, Shipman v. Jennings Firearms, Inc., 791 F.2d 1532, 1533–34 (11th Cir. 1986) (applying Florida law); Perkins v. F.I.E. Corp., 762 F.2d 1250, 1273 (5th Cir. 1985), *reh'g denied*, 768 F.2d 1350 (1985) (applying Louisiana law).

68. Parish v. Jumpking Inc., 719 N.W.2d 540 (Iowa 2006).

69. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6 cmt. b (1998); James A. Henderson, Jr. & Aaron D. Twerski, *Drug Designs Are Different*, 111 YALE L.J. 151 (2001). More recent cases have indicated a willingness to review prescription drug designs. *See, e.g.*, Adams v. G.D. Searle & Co., 576 So. 2d 728, 732–33 (Fla. Dist. Ct. App. 1991); Tansy v. Dacomed Corp., 890 P.2d 881, 886 (Okla. 1994).

Restatement recognizes a narrow exception allowing for judicial design review of prescription[70] drugs, delegation to learned intermediaries remains the default rule.

Several cases involving optional safety devices for motorcycles appear at first glance to also be exceptions to the rule of non-delegation to consumers.[71] In each instance the plaintiff injured his legs after a collision with an automobile. Evidence showed that, had the motorcycles been equipped with crash bars, the injuries would have been reduced or avoided. The sellers had offered the crash bars as optional equipment, but the buyers declined to purchase them. Post-injury, the purchasers claimed that the manufacturers should have included the bars as standard equipment. In all of these cases the courts denied liability, allowing delegation of responsibility to the buyer. Although motorcycles are consumer products, these decisions are consistent with the theoretical approach set forth in Part II. Cyclists are, in general, sophisticated with regard to the equipment they buy. Like the amateur ski racers mentioned earlier,[72] motorcycle buffs possess expertise beyond that of users and consumers of other products. Because motorcyclists encounter risks that are generally self-regarding,[73] presumably they have sufficient motivation to make reasonable cost-benefit analyses. Moreover, there are downsides attached to safety crash bars—some cyclists find them to be dangerous for their needs.[74] Motorcycles, in this sense, are somewhat multifunctional. Which safety feature is appropriate for which type of bike may depend on the kind of cycling done by the buyer. The willingness of courts to delegate responsibility, utilizing a no-duty rule, is consistent with this Essay's analysis.

Perhaps the most telling aspect regarding optional safety devices for consumer goods is the dearth of reported decisions in which the issue has been litigated. The overwhelming majority of decisions raising the issue of optional safety devices have involved the purchase and use of industrial

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70. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6(c) (1998).

71. Williams v. Yamaha Motor Corp., 780 F.Supp. 251, 260–61 (D.N.J. 1991) (finding that the danger of injury without a crash bar is obvious to cyclists); Miller v. Dvornik, 501 N.E.2d 160, 165 (Ill. App. Ct. 1986) (explaining that failure to recommend a crash bar does not constitute a breach of duty of care); Rainbow v. Albert Building Co., 436 N.Y.S.2d 480, 482–83 (App. Div. 1981).

72. *See* discussion *supra* p. 18.

73. Unlike auto accidents in which there are often third party victims, motorcycle accidents usually subject only the cyclist to injury. Crash bars are designed to protect the cyclist from leg injuries.

74. *See Rainbow*, 436 N.Y.S.2d at 483. *See also* HARRY HURT, U.S. DEPT. OF TRANSP., MOTORCYCLE ACCIDENT CAUSE FACTORS AND IDENTIFICATION OF COUNTERMEASURES, VOL. 1: TECHNICAL REPORT, 101–08, 418 (suggesting that reductions of injury to the ankle-foot by use of crash bars is balanced by injury to the thigh-upper leg, knee and lower leg).

equipment. Manufacturers of consumer goods generally understand that they cannot delegate significant safety decisions to unsophisticated consumers. Design litigation for consumer products focuses almost entirely on whether there was a reasonable alternative design that would have been safer. In today's legal environment, it appears that manufacturers rarely consider delegation to ordinary consumers a viable option.

B. Industrial Machinery: Making Sense of the Case Law

By contrast to reported decisions involving consumer products, where delegation to the market is rarely encountered, delegation to the market in connection with industrial machinery cases is more prevalent. Two much-cited early decisions set the stage for the debate that continues to this day. The first case, *Bexiga v. Havir Manufacturing*,[75] involved a punch press that did not prevent the employee from putting his hand at the point of operation while inadvertently engaging the press with a foot pedal. As a result, the ram of the press came down and crushed the plaintiff's hand. A simple two-button device that would engage the ram only when plaintiff's hands were away from the point of operation could have been installed in the punch press and a jury could have found that it would have prevented the plaintiff's injury. Plaintiff argued that it was industry custom for the purchaser to choose which safety devices to install on punch presses.[76] The court concluded that the manufacturer could not escape liability based on its belief that the punch press purchaser would take responsibility.[77] Consistent with the analysis in Part II, delegation was not warranted. Although the employer-purchaser of the equipment clearly had knowledge of the dangers associated with a press with a safety device and presumably had no cognitive biases that would interfere with rational judgment, it lacked adequate motivation to weigh the cost and benefits with regard to the installation of the two-button safety device. Neither the corporate employer nor its purchasing agent was at risk of personal harm. As explained in Part II, the protection from tort liability that the employer enjoys under worker compensation prevents the employer from facing the true costs of the injury to its employees. Although the court in *Bexiga* refused to protect the manufacturer with a no-duty rule, it recognized that the manufacturer's duty to install a safety device was premised on whether it was feasible to do so.[78] Furthermore, if incorporation of the safety device "would render the

75. Bexiga v. Havir Mfg., 290 A.2d 281 (N.J. 1972).
76. *Id.* at 283.
77. *Id.* at 285.
78. *Id.*

machine unusable for its intended purpose, then one might not infer defect from the omission of the safety device."[79] Thus, notwithstanding the court's strong stand against delegation, it recognized in dictum that cases might arise where delegation would be proper.

The second early industrial machinery decision, *Biss v. Tenneco*,[80] held that if a purchaser declined to purchase an optional safety device the manufacturer had no duty to include the device as standard equipment. Plaintiff's decedent died violently when the loader he was operating collided with a telephone pole. Plaintiff sued the loader manufacturer, contending that it should have included as standard equipment a roll-over protection structure ("ROPS") that would have protected him from injury in the case of collision. The commercial seller offered a ROPS to the employer who declined to buy it. The court observed that one of the dangers in the use of construction equipment is injury from roll-over.[81] However, since "that danger increases or lessens according to the job and site for which the equipment is purchased and used" it is the purchaser-employer who is "the party in the best position to exercise and intelligent judgment to make the trade-off between cost and function, and it is he who should bear the responsibility if the decision on optional safety equipment presents an unreasonable risk to users."[82]

Biss's willingness to delegate responsibility for adopting the ROPS to the employer is questionable under the analysis in Part II. There appears to have been no evidence that a ROPS would have been incompatible with other uses of the loader. As noted earlier an indifferent employer, insulated from tort liability, may rationally (though unreasonably) sacrifice the employees' welfare and spare itself the cost of the optional safety device.[83] Of course, the manufacturer will not be liable automatically if it cannot invoke a no-duty rule. A jury might well determine that the safety device was not a reasonable alternative design. However, to avail itself of a no-duty rule the fact that the employer has knowledge of the relevant danger and the availability of a safety device is not sufficient. A reasonable seller must be able to expect that the employer will be motivated to weigh the costs and benefits in a responsible manner. Thus, the expected environment of a product's use is a significant consideration in deciding whether to delegate industrial safety devices to an employer. If a safety device is incompatible with one or more expected work environments, a court has good reason to

79. *Id.*
80. Biss v. Tenneco, 409 N.Y.S.2d 874 (App. Div. 1978).
81. *Id.* at 876.
82. *Id.*
83. *See supra* text accompanying nn. 42–43.

believe that the employer is not simply selfishly disregarding employee safety.[84] That is why so many decisions regarding the appropriateness of delegation base their conclusions on whether the product is unifunctional[85] or multifunctional.[86]

Not all courts apply a no-duty rule when the plaintiff argues that the optional safety device was incompatible with one or more environments in which the product could be expected to be used. Instead, courts indulge in risk-utility balancing and consider the multifunctional nature of the product as a factor to be considered by the trier of fact.[87] Many of these cases seem wrongly decided; when manufacturers satisfy the conditions set forth for the application of a no-duty rule, they deserve predictability that allows them to

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84. *See* discussion *supra* p. 20.

85. *See, e.g.*, Caterpillar Tractor Co. v. Ford, 406 So.2d 854 (Ala. 1981) (holding a tractor manufacturer liable for failing to install a ROPS as standard equipment on a tractor even though the ROPS was offered as an option to the buyer since the normal use of the tractor in strip mining created a serious risk of roll over on steep hillsides); Bilotta v. Kelley Co., Inc., 346 N.W.2d 616, 624 (Minn. 1984) (finding that a dockboard manufacturer that did not incorporate a panic stop as a standard feature could not delegate the decision to purchase the panic stop as a safety device when the dockboards were unifunctional and would have prevented serious injury to an employee); Passante v. Agway Consumer Products, Inc., 909 N.E.2d 563, 568 (N.Y. 2009) (finding that a manufacturer and seller of a tractor trailer loading dock system that did not include as a standard equipment a "Doc-lok" device, that secures the tractor trailer to the loading dock, could not delegate to the purchaser the decision to purchase the safety device that would have prevented injury to an employee since there was no showing that in normal use the product was not unreasonably dangerous without the optional equipment).

86. *See, e.g.*, Pahuta v. Massey-Ferguson, Inc., 170 F.3d 125, 133, 135 (2d Cir. 1999) (explaining that a manufacturer of a multi-use tractor loader that was not equipped with overhead protection would be entitled to judgment if jury found that defendant met the *Biss* factors); Austin v. Clark Equipment Co., 48 F.3d 833, 837 (4th Cir. 1994) (finding that a manufacturer of a forklift was not liable for failing to include audible alarms, rear view mirrors and strobe lights since the need for these safety options depended upon the environment in which the lift was used); Gordon v. Niagara Machine & Tool Works, 574 F.2d 1182, 1190 (5th Cir. 1978) (explaining that the punch press, "having been designed for many kinds of operation, it was incumbent upon the machine purchaser to select safety devices appropriate for his particular function."); Davis v. Caterpillar Tractor Co., 719 P.2d 324, (Colo. App. 1985) (finding that a manufacturer and a used equipment dealer who offered a safety option to purchaser of tractor who declined to purchase overhead protective device were not liable since the manufacturer offered ninety different safety options designed to enhance safety within the special context of the purchaser's needs); Westbrock v. Marshalltown Mfg., 473 N.W.2d 352, 357–58 (Minn. Ct. App. 1991) (explaining that a manufacturer of a multi-functional punch press that could not protect point of operation dangers by a single safety feature was granted summary judgment since delegation to the purchaser to choose the safety guards for the particular use was a practical necessity); *see also* cases cited *supra* note 60.

87. *See, e.g.*, Ogletree v. Navistar Co., 511 S.E.2d 204 (Ga. Ct. App. 1999), *rev'd on other grounds*, 522 S.E.2d 467 (Ga. 1999) (undertaking a risk/utility balancing rather than finding the manufacturer was jusitifed in delegating the choice of safety devices to the purchaser since the product was multifunctional, the court granted J.N.O.V.).

offer optional safety devices without waiting for after-the-fact adjudication(s) of whether they have acted reasonably.

C. *The* Scarangella *Test for Delegation*

Scarangella v. Thomas Built Buses, Inc.[88] represents something of a landmark in that it attempts to identify with some precision the elements that must be met in order for a manufacturer to reduce or eliminate its design liability by offering an optional safety device. The plaintiff in that case was injured when a school bus backed up and ran over her in a bus parking lot. She sued the manufacturer of the bus for not having installed a back-up alarm as standard equipment, arguing that such an alarm would have alerted her to the fact that the bus was backing up. Her employer, the Town of Huntington, had purchased ten school buses from the defendant manufacturer and operated a fleet of 190 buses altogether. Huntington's chief operating officer testified that he was aware that the manufacturer offered back-up alarms but that he opted against them because whenever a bus was put in reverse gear it would emit a screaming alarm signal. The bus parking lot was in a residential neighborhood and neighbors had complained about noise pollution.[89] Purporting to take direction from earlier New York case law, the court said that a manufacturer would not be liable for selling a product without a safety device "when reasonable inferences show that: (1) the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of the buyer's use of the product."[90] The New York Court of Appeals concluded that all the conditions had been satisfied and upheld the trial judge's entry of directed verdict for the defendant.[91]

For the rule in *Scarangella* to function as a meaningful safe haven for product sellers the factors set forth by the court will require considerable revision. The first requirement—"that reasonable inferences show that the buyer is thoroughly knowledgeable and is actually aware that the safety

88. 717 N.E.2d 679 (N.Y. 1999).
89. *Id.* at 681.
90. *Id.* at 683.
91. *Id.* at 684.

feature is available"[92]—will not, in most cases, provide adequate protection. Unless a seller is in direct contact with its purchaser, it cannot know whether that purchaser is thoroughly knowledgeable or is actually aware that a safety feature is available.[93] For a no-duty rule to act as a safe haven, the seller must be in a position to know at time of sale whether it has complied with the demands of the law. As set forth in the *Scarangella* opinion, the determination of the knowledge of the purchasers will depend on underlying realities of which the seller may not be aware until after the fact. Instead, an appropriate no-duty rule should focus on the reasonable expectations of the product seller at time of sale. Can the seller reasonably expect that, in general, the purchasers of its product are knowledgeable about the product and aware of the availability of the safety feature? The same point is relevant with regard to the third *Scarangella*[94] requirement—that the buyer be able to balance benefits and risks. The manufacturer cannot know in advance, at the time of sale, whether a given purchaser is in a position to balance the risks and benefits of the optional safety device. Once again, a no-duty rule must rely on the reasonable expectations of the seller at time of sale regarding whether buyers of its product, in general, are in a position to properly weigh the risks and benefits of the safety device. To be sure, when a seller is in direct contact with the buyer the seller may have the sort of actual knowledge referred to in the first and third *Scarangella* factors. However, given that such direct contact is often not practicable, and that the underlying realities are often unavoidably ambiguous, the rule must rely on the reasonable expectations of the seller.

The second factor set forth in *Scarangella* is also troubling. It purports to provide a safe haven to a seller if there exist "normal circumstances of use"[95] in which the product is not unreasonably dangerous without the optional equipment. Several problems attend this formulation. First, the question for the product seller should not be whether normal circumstances of use exist in which the safety option is not needed, but rather whether

92. *Id.* at 683. The reference by the court to "reasonable inferences" might be read to mean that the court will decide whether the seller has reasonable expectations that buyers will, in general, be knowledgeable of the risks and the availability of the safety options. However, the requirement that the seller must show that the buyer "is thoroughly knowledgeable and is actually aware that the safety feature is available" makes such a reading implausible. The court seems to be saying that in each individual case there are reasonable factual inferences that can be drawn as to the particular buyer's knowledge and actual awareness of the availability of the optional safety feature. The test proffered by the authors looks to the reasonable expectations of the seller that the class of buyers to whom the product is sold are knowledgeable of the risk and are aware of the availability of the optional safety devices.

93. *See supra* text accompanying note 33.

94. *See supra* note 90.

95. *Id.*

purchasers will be motivated, in light of expected circumstances of use, reasonably to weigh the costs and benefits of adopting an optional safety device. The focus should not be on the normality of the expected use but on whether the purchaser can be expected to be a socially responsible decision-maker. Second, the requirement that the "product not be unreasonably dangerous"[96] without the optional safety device requires a court to engage in risk/utility balancing regarding the safety of the product with and without the optional safety device. However, the purpose of a no-duty rule is to allow a court to decide the delegation issue without engaging in such risk-utility analysis. The goal is to decide whether the purchaser is likely to engage in rational, reasonable risk/utility balancing and not to decide, after the fact, whether the purchaser actually made a reasonable risk/utility choice. If the burden is placed on the seller to decide whether a good risk/utility choice has been made, the seller has no safe haven. Simply stated, a no-duty rule anticipates that on occasion a purchaser will, in fact, make a bad risk/utility trade-off in deciding not to adopt an optional safety device. As with other no-duty rules in the law of torts[97] a no–duty rule governing optional safety devices cannot guarantee that the actor will, in fact, act reasonably. If it did, the rule would simply be given over to a negligence analysis in all cases.

In short, most of the reported decisions reach results consistent with the analysis in Part II. That this area of the law has not yet been the subject of rigorous analysis may have contributed to unnecessary confusion. In any event, the time has come for this Essay to put its money where its mouth is. It is time to consider how a Restatement might deal with optional safety devices.

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96. *Id.*

97. *See, e.g.*, Stockberger v. United States, 332 F.3d 479 (7th Cir. 2003) (holding that rescuers have no duty); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 (1998) (setting forth elements for the imposition of a duty for post-sale failure to warn); DAN B. DOBBS, THE LAW OF TORTS §§ 232–36 (vol. 2 2001) (setting forth limited-duty rule for owners of land to trespassers and invitees).

IV. A PROPOSED RESTATEMENT TREATMENT OF OPTIONAL SAFETY DEVICES

§ 00. OMISSION OF SAFETY DEVICE OFFERED AS DESIGN OPTION AT TIME OF SALE

(a) A product is not defective in design based on the omission of a safety device when the product seller offers the device as an option at the time of sale and a reasonable seller would expect those who purchase for use and consumption to make reasonable decisions regarding whether or not to include the safety device in the design.

(b) A reasonable seller would expect those who purchase for use and consumption to make reasonable decisions under subsection (a) if it can reasonably be expected that such purchasers are:

(1) knowledgeable regarding the product and its uses, including both increased costs associated with inclusion of the safety device and increased benefits in the form of accident costs avoided by such inclusion;

(2) capable of reaching rational conclusions regarding whether or not to include the safety device; and

(3) motivated, in light of expected circumstances of use, to consider both the costs and the benefits associated with inclusion of the safety device.

COMMENTS

a. This section applies only to claims for defective design.

Under §§ 1 and 2 of the Restatement, Third, products can be defective because of manufacturing defects, design defects, or failures to instruct and warn. This section relates only to design defects. Under § 2(b), a product design is defective when plaintiff proves that a reasonable alternative design (RAD) was available to the seller or a predecessor that would have reduced the plaintiff's harm, and that failure to adopt the RAD rendered the product not reasonably safe. This section provides that an omitted safety device will not subsequently serve as a RAD for a plaintiff injured as a result of its

omission when the defendant seller demonstrates that the conditions set forth in subsections (a) and (b) are satisfied. The need for courts to be able to rule for defendants as a matter of law (rather than give the issues to triers of fact) is considered in Comment *g*, below.

b. Devices include a broader range of design features.

This section refers to "safety devices" because that is the phrase most often used by courts and commentators. The somewhat broader phrase "safety features" would also serve nicely, so long as the devices/features in question are integrated into the product design. See Comment *h*.

c. The conditions set forth in subsection (a) are not exclusive.

As with Restatements generally, the connector "when" in subsection (a) signals that the conditions set forth in that subsection are not exclusive. Thus, while offering a safety device as an option at time of sale provides the product seller with a reasonably reliable shelter from subsequent claims that the optional safety device constitutes a RAD that should have been included as standard equipment in the product design, other circumstances exist in which the seller's omission of a safety device does not render a product design defective. Foremost among these other circumstances are instances in which, while the omission of the device renders a design less safe, it does not render the design "not reasonably safe" under § 2(b) of the Restatement, Third, of Torts: Products Liability (1998).

d. The terms "sale" and "seller" include other modes of commercial product distribution.

The Restatement, Third, of Torts: Products Liability (1998) is careful to refer more expansively in § 1 and throughout to those "engaged in the business of selling or otherwise distributing products." The references in the instant section to product sales and sellers is intended to include the broader range of commercial distributors embraced by the Restatement, Third. The instant section uses more focused language merely for the sake of convenience.

e. The "purchasers" that a seller might expect to make reasonable decisions under subsections (a) and (b) are those who purchase for use and consumption.

When a manufacturer distributes a product with a safety device as an option, the purchasers referred to here are not the wholesalers and retailers in the commercial claim to whom the manufacturer directly sells, but those

who purchase from the wholesalers and retailers for the purpose of using or consuming the product. In the normal course, the manufacturer who offers an optional safety device can and does expect the wholesalers and retailers to do likewise. But when the last seller in the commercial chain does not offer its customers the option offered by the manufacturer, may the manufacturer take advantage of the shelter provided by the instant section? The answer depends on whether, under such circumstances, a reasonable manufacturer/seller would expect end-purchasers to make reasonable decisions. Such a reasonable seller would not harbor such an expectation when the seller knows or should know that retailers are not giving the end-purchasers an opportunity to decide. In that case, the injured plaintiff who establishes a RAD-based design claim would recover against the manufacturer, who would likely have rights of indemnity against the wholesalers/retailers.

f. The optional safety feature must be offered in good faith.

Because this section provides a no-duty rule that shelters product sellers from liability that would otherwise follow from the omission of a safety device, sellers might be tempted to offer safety devices as so-called "options" under terms, such as unjustifiably high pricing, that are aimed at discouraging purchasers from including them in their purchases. Courts should be able to identify and ignore such bad faith offers when they constitute little more than empty gestures.

g. When a reasonable seller would expect purchasers to make reasonable decisions.

Grounding the availability of this section's shelter from liability on what a reasonable seller would expect is centrally important to achieving this section's objective of providing a no-duty rule by which sellers can, with a reasonable measure of confidence, avoid design-based liability. Thus, for sellers to be able to rely on the expectation that by offering optional safety devices they are not providing rope by which tort plaintiffs will later hang them under a RAD-based design-liability regime, they must be able to rely on reasonable expectations based on appearances at time of sale. Of course, as explained in Comment *k*, below, the applicable law must also supply them with fairly firm assurances that specifically-described sets of circumstances will lead to predictable outcomes when the question of what a reasonable seller would expect arises later in the context of claims of defective design.

h. When the safety device offered at time of sale is a separate product.

If the safety device offered as an option is a separate product—safety goggles that may be worn while using a grinder sold by the defendant, for example—then this section does not apply because an injured user's subsequent claim that the seller of the grinder should have required that such goggles be purchased would not be a claim that the grinder, itself, was defectively designed. Were a grinder seller to offer the goggles as an option at time of sale, or urge the purchaser to obtain and use such goggles, these circumstances would presumably be relevant in connection with a plaintiff's subsequent claim that the grinder was defective in design because it lacked a built-in shield to prevent eye injuries; but because in that instance the seller never offered the built-in guard as an option, this section would not apply. In similar fashion, different categories of products do not serve as optional devices for one another. Product categories are subject to a separate no-duty rule of their own.

i. The optional safety device need not be identical to the RAD proffered by the plaintiff making a claim of design defect.

If a product seller offers an optional safety feature that is different from, but the functional equivalent of, the plaintiff's subsequently-proffered RAD, this section applies if its conditions are satisfied. The safety device earlier offered as an option need not be identical to the subsequent RAD for the seller to be allowed to invoke the rule in this section as a shelter from liability for defective design.

j. All of the conditions in subsections (b)(1) through (b)(3) must be satisfied for the seller to take the advantage of the rule in subsection (a).

In keeping with traditional Restatement usage and in contrast to the "when" terminology in subsection (a) (see Comment *a*, above), the connector "if" in subsection (b) must be read as "if, but only if." Thus, the conditions in subsections *(b)(1)* through *(b)(3)* are the exclusive criteria that determine whether the shelter from design defect liability provided in subsection (a) is available. A defendant seller's failure to prove any one (or more) of the conditions will prevent defendant's reliance on this section.

k. Over time, courts must define more specifically the necessary conditions set forth in subsections (b)(1) through (b)(3).

For the rule in this section meaningfully to provide product sellers a shelter from liability upon which they may reasonably rely at time of sale, courts must elaborate upon the conditions generally described in subsection

(*b*). By way of examples, courts will likely conclude that purchasers who are business entities with substantial experience gained from using certain types of equipment satisfy, as a matter of law, the knowledgeability condition set forth in subsection (*b*)(*1*); that as a matter of law individual noncommercial purchasers placed at risk of serious physical injury lack the capability, due to cognitive biases and faulty heuristics, of reaching rational conclusions under subsection *(b)(2)*; and that commercial employers who purchase productive machinery for use by employee-users with respect to whom the employers are immune from tort liability are not, as a matter of law, adequately motivated under subsection *(b)(3)* to consider the increased risks to those employees stemming from omission of an optional safety device. The Comments to the relevant subsections explain why these particular sub-rules make sense substantively. The point here is that, from a formal standpoint, the sub-rules must be sufficiently specific to support rulings as a matter of law in many frequently-recurring fact patterns. In this respect, the courts' rule-making responsibility over time is similar to their responsibility in developing specifically-defined categories of ultrahazardous activities to which common law strict liability may apply.

l. The requirement in subsection (b)(1) that purchasers be expected to be knowledgeable regarding the relevant costs and benefits relating to the safety device.

Students of tort law will recognize this requirement as the first of two characteristics that identify what efficiency theorists sometimes refer to as the "most efficient cost minimizer," or "MECM." As subsection *(b)(1)* indicates, the necessary knowledge relates to the costs and benefits associated with inclusion of the safety feature. Courts generally assume that an expert commercial purchaser possesses such knowledge as a matter of law and that a nonexpert noncommercial purchaser does not—at least regarding complex technology. It must be borne in mind that the defendant must also prove the conditions in subsections *(b)(2)* and *(b)(3)*

m. The requirement in subsection (b)(2) that purchasers be expected to be capable of responding rationally to the knowledge referenced in subsection (b)(1).

This is the second characteristic classically expected of MECMs—the capacity to act effectively on risk-utility information. If knowledgeability under subsection *(b)(1)* relates to an actor's access to and grasp of empirical data, the capability referenced in subsection *(b)(2)* relates to the actor's cognitive capacity to use that information rationally. The major challenges

to this capacity are a variety of cognitive biases. Thus, when an individual purchaser is the person threatened with serious personal injury if the safety device is omitted, the optimism bias—"It can't/won't happen to me"—may interfere with the purchaser's capacity to reach a rational conclusion regarding the need for the safeguard. Rather than decide these issues on a case-by-case basis, courts will presumably develop sub-rules based on presumptions, over time. The fact that the purchaser is the one threatened with injury may assure sufficient motivation under subsection *(b)(3)* (see Comment *n,* below); but that same circumstance may prevent the purchaser from reaching a rational conclusion regarding whether the risk is great enough to justify incurring the up-front cost of the safety device.

n. The requirement in subsection (b)(3) that the purchaser be expected to be motivated to consider not only the costs of the safety device but also the benefits in the form of reduced accident costs.

It will be observed that subsection *(b)(3)* adds a third criterion—motivation—missing from the concept of most efficient cost minimizer, or MECM, relied on by efficiency analysts of tort law. The reason why the MECM concept need not concern itself with the actor's motives is that in those contexts the problem is to identify which actor, among several possibilities, should be held strictly liable for a particular set of accidental harms. In that context, the proposed imposition of strict liability supports an assumption of adequate motivation—the self-interest of a strictly liable actor will presumably motivate the actor to reach reasonable decisions. In the contexts covered by this optional safety device provision, the problem is to determine whether the seller may reasonably expect that a purchaser is not only sufficiently knowledgeable and capable of making reasonable, efficient decisions but also whether, in the absence of the threat of tort liability, he may be trusted to do so.

On the merits, when the purchaser is an individual who is placed at increased risk of harm by omission of the safety device, it may be presumed that the purchaser is motivated to consider the benefits of reducing the risks of injury. And the same thing may be said regarding situations where the purchaser's family or, more generally, the purchaser's loved ones, are the beneficiaries of investments in design safety. By contrast, courts have reason to be suspicious of motivations when the purchasers are employers asked to decide whether to incur added costs to protect members of an employee workforce for whom the employer is not concerned personally and against whom the employer is immune, under worker compensation, from liability in tort.

o. When an optional safety device is incompatible with one or more expected environments of product use.

The phrase, "in light of expected circumstances of use," in subsection *(b)(3)* refers to special situations in which a safety device, offered as an option at time of sale and later proposed as a RAD by an injured plaintiff, would be so costly to employ in connection with one or more expected environments of use as to be incompatible with those environments. These include what are referred to as "multifunctional product" situations in which courts have ruled as a matter of law for defendant product sellers on the ground that one or more expected environments of use render inclusion of the safety device highly impracticable. Such examples of what courts and commentators have deemed "incompatibility" serve to allay concerns that the purchaser omitted an otherwise cost-effective safety device for the selfish (and socially wasteful) reason that the purchaser would bear the upfront costs of the added safety while others (e.g., employee-workers) would enjoy the downstream benefits. When inclusion of a safety device would significantly interfere with an expected mode of product use, a seller the court may reasonably assume that, in significant measure, the purchaser omitted the device for that efficiency-enhancing reason rather than for the inefficiency-promoting reason of reducing the purchaser's costs irrespective of significant negative effects on third-party victims.

p. High-end design options that, while they add to product safety, are not cost-justified.

In most cases to which the rule in this section applies, the safety device offered as options are arguably cost-justified in the sense that finders of fact would, but for the shelter from liability offered by this section, be warranted in finding a product design defective were the device omitted from the designs. In those contexts, this section gives knowledgeable, competent purchasers the opportunity to "opt out" of arguably necessary safeguards. Situations also arise where sellers offer especially risk-averse purchasers the opportunity to "opt into" safety devices that, for most other purchasers, cost more than they are worth. When a seller offers such high-end options, subsequent claims that the optional devices should have been included as standard equipment should fail, irrespective of the instant section, because the plaintiffs will be unable to prove that the safety devices constitute legitimate RADs.

V. CONCLUSION

Clear answers to the question of when to delegate responsibility for product design safety remain elusive. It is no easy matter for courts to decide when to intervene and when to allow purchasers to decide how much safety to incorporate into the products they buy. Optional safety devices play an important role in that context. What has been lacking to date is a structured approach to the issue. This Essay pulls together the various strands of rationale offered by the courts into a coherent approach, and offers a draft of a black-letter rule and comments in traditional restatement format. Work remains to be done in applying the suggested approach to future cases. The authors believe that this Essay provides an important starting point for further development.

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