Smoldering Issue in Cipollone v. Liggett Group Inc. Process Concerns in Determining Whether Cigarettes Are a Defectively Designed Product

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NOTES

THE SMOLDERING ISSUE IN CIPOLLONE v. LIGGETT GROUP, INC.: PROCESS CONCERNS IN DETERMINING WHETHER CIGARETTES ARE A DEFECTIVELY DESIGNED PRODUCT

Cigarette smoking is the most significant, preventable, environmental factor contributing to illness, disability, and death in the United States.1 Smokers' suits against tobacco manufacturers for losses allegedly caused by smoking tobacco products, however, have been largely unsuccessful.2 In the recent case of Cipollone v. Liggett Group, Inc.,3 the plaintiff sought damages from the companies that manufactured and sold the cigarettes that allegedly caused the plaintiff's wife to develop cancer and die. Cipollone's claims spawned numerous court opinions4 and drew media attention,5


2 See, e.g., Hudson v. R.J. Reynolds Tobacco Co., 427 F.2d 541 (5th Cir. 1970) (per curiam) (granting summary judgment to manufacturer; plaintiff's claim failed under Louisiana implied warranty law for absence of scientific foreseeability, peculiar defects in cigarettes, and cancer consequences to substantial segment of the public); Green v. American Tobacco Co., 409 F.2d 1166 (5th Cir. 1969) (per curiam) (en banc) (reversing decision that manufacturer could be held absolutely liable for consumer's death caused by cancer from smoking cigarettes), cert. denied, 397 U.S. 911 (1970); Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964) (refusing to find absolute liability in manufacturer, because during time of plaintiff's habit, from early 1930s to 1952, manufacturer could not reasonably have anticipated harm); Lartigue v. R.J. Reynolds Co., 317 F.2d 19 (5th Cir.) (refusing to find strict liability on manufacturer's warranty of wholesomeness without foreseeability of harm), cert. denied, 375 U.S. 865 (1964); Albright v. R.J. Reynolds Tobacco Co., 350 F. Supp. 341 (W.D. Pa. 1972), aff'd, 485 F.2d 678 (3d Cir. 1973), cert. denied, 416 U.S. 951 (1974).

3 644 F. Supp. 283 (D.N.J. 1986). In the June 13, 1988 verdict on the merits, the jury awarded Antonio Cipollone $400,000 based on breach of express warranties by Liggett Group, Inc. 16 Prod. Safety & Liab. Rep. (BNA) 25 (June 17, 1988). This was the first time in history that a smoker had recovered damages in court. Id. The jury found Liggett liable for failure to warn and breach of express warranty. Id. Earlier in the litigation, the court dismissed the plaintiff's design defect claims that are the subject of this Note. See infra notes 11 and 100.

4 The defendants in the action were Liggett Group Inc., Philip Morris, Inc., and Loews, Inc. Id. at 284.

5 See, e.g., Cipollone v. Liggett Group, Inc., 106 F.R.D. 573 (D.N.J. 1985), rev'd,
most of which focused on the validity of Cipollone's state common
law claims in light of the Federal Cigarette Labeling and Advertising
Act. For the purpose of this Note, however, Cipollone is significant
because of the process concerns raised in determining whether cig-
arettes are a defectively designed product.

In Cipollone, the plaintiff argued that cigarettes are so dangerous
and of such little utility that under the risk-utility analysis prescribed
by New Jersey law the court should find cigarettes defective and im-
pose liability on the manufacturer. Generally, a court engaging in
risk-utility analysis determines whether a product is defective by
comparing the utility of the product with the risk of injury it poses to
the public. In Cipollone, however, the implementation of risk-utility
analysis posed particular difficulty. Unlike most cases of design de-
fect, the Cipollone plaintiff claimed that the defendants were liable
even without proof of a technologically feasible, alternative design
with which the court could compare the cigarette design at issue.

785 F.2d 1108 (1986) (addressing whether discovering party in civil litigation could
publicly disclose discovered materials deemed confidential by producing party); Cipollone v.
1340 (1982), only preempted state law damage actions challenging either adequacy of
warning on cigarette packages or a party's actions in advertising and promoting ciga-
664 (D.N.J. 1986) (clarifying effect of Third Circuit's preemption decision on Cipol-
lone's claim).

6 See, e.g., Mauro, High Court Rejects Cigarette Suit: Anti Smoking Forces Say Ruling Just
Minor Setback, USA Today, Jan. 13, 1987, at 3A, col. 5 (discussing Supreme Court's de-
nial of certiorari from Third Circuit's holding on preemption issue).

7 The courts addressed whether the Federal Cigarette Labeling and Advertising
the defendants provided inadequate warnings of the dangers of cigarettes. The Third
Circuit held that the Act preempts those state law claims that challenge either the warnings
on cigarette packages or promotion of cigarettes and the Supreme Court denied

8 "Process concerns" refers to an awareness of the capabilities and potential diffi-
culties arising from each of the decisionmaking processes, including those of courts,
legislatures, administrative agencies, and private agreement. It also includes concern
for how these various processes of decision interrelate. H. Hart & A. Sacks, THE LEGAL
PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW iii (tentative ed.,
1958).

9 Cipollone, 644 F. Supp. at 286.

10 Id. 644 F. Supp. at 287 (citing O'Brien v. Muskin Corp., 94 N.J. 169, 181, 463
A.2d 298, 304 (1983)); see also Keeton, Product Liability and the Meaning of Defect, 5 St.
Mary's L.J. 30, 38 (1973) (product unreasonably dangerous if "a reasonable person
would conclude that the magnitude of the scientifically perceivable danger as it is proved
to be at the time of trial outweighed the benefits of the way the product was so designed and
marketed"); Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 835
(1973).

11 Traditionally, plaintiffs needed to present evidence of a viable design alternative
in design defect cases. See infra text accompanying note 15. In the trial on the merits
that began Feb. 1, 1988, the plaintiff introduced claims of an allegedly safer alternative
The plaintiff implicitly asked the court to weigh the benefits and risks of cigarettes against the alternative of a world without the product. Such a comparison presents difficulties for courts that must weigh interrelated social value choices and gather the information necessary to reach a correct decision.

Section I of this Note argues that the Cipollone court correctly excluded the tobacco companies’ evidence of the production benefits of taxes, jobs, and profits from the risk-utility analysis. Section II contends that courts face significant process concerns in design defect cases when the proposed alternative is a world without the product. The final section asserts that because of these process concerns and the legislature’s superior ability to address the cigarette controversy, courts adjudicating cases of the type represented by Cipollone should admit evidence of the production effects solely to decide whether the court could legitimately undertake the risk-utility analysis.

I

BACKGROUND

Courts agree that to recover for injuries from product use, a plaintiff must show a defect in the product.\textsuperscript{12} Traditionally, New Jersey courts required a plaintiff to present evidence of a viable alternative product design before it would submit a design defect case to a jury.\textsuperscript{13} The New Jersey Supreme Court extended the scope of traditional products liability law in \textit{O’Brien v. Muskin Corp.},\textsuperscript{14} holding that in the absence of an alternative design, a jury may find a prod-

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\textsuperscript{13} E.g., Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 191, 406 A.2d 140, 150 (1979) (“Did the manufacturer act as a reasonably prudent person by designing the item as he did and by placing it on the market in that condition, or should he have designed it to incorporate certain safety features or some other modifications?”).

\textsuperscript{14} 94 N.J. 169, 463 A.2d 298 (1983).
A. Finding a Design Defect Under New Jersey Law

Under New Jersey products liability law, the plaintiff has the burden of proving a product defective as part of the prima facie case for the imposition of liability against the manufacturer. The elements of a prima facie case for design defect are evidence that (1) the product design was defective, (2) the defect existed when the defendant distributed the product, and (3) the defect caused injury to a reasonably foreseeable user.

Implicitly, in order to label a product "defective," courts must compare the product with a standard of evaluation. The product in design defect cases must conform to the intended design and meet the design standard set by the manufacturer. When a product is in the condition that the manufacturer intended, a court will label the product "defective" if it concludes that the manufacturer should bear liability for harm that the product causes. In reaching that conclusion, and thus establishing product safety standards, a court must balance competing value choices implicit in the design.

To determine whether a product has a design defect, New

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15 See, e.g., Dawson v. Chrysler Corp., 630 F.2d 950, 963 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981) (court questioned whether jury balancing of risk-utility factors is "fair or efficient"); Turner v. General Motors Corp., 584 S.W.2d 844, 849 (Tex. 1979) ("The difficulty of formulating a series of specific factors which the fact finders will be instructed to balance is obvious.").


17 Id. at 179-80, 463 A.2d at 304.

18 Id. at 180, 463 A.2d at 304; Henderson, Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication, 73 COLUM. L. REV. 1531, 1547 (1973).


20 O'Brien, 94 N.J. at 181, 463 A.2d at 304; Henderson, Renewed Judicial Controversy
Jersey courts use either the consumer expectations test or risk-utility analysis. Courts applying the consumer expectations test will find a product design defective if it fails to meet the reasonable expectations of the consumer. In the alternative, a court applying risk-utility analysis engages in a far-reaching balancing test, considering such factors as the desirability of the product, the safety of the product, and the availability of substitutes in determining whether a product's utility outweighs its risks. If a court finds that reasonable people could not differ on whether the risks posed by a product outweigh its utility, the court will decide the case as a matter of law rather than send it to the jury. Otherwise, most courts give the jury a general instruction to determine whether the product is unreasonably dangerous rather than instruct a jury to balance risk against utility.

*Over Defective Product Design: Toward the Preservation of an Emerging Consensus, 63 Minn. L. Rev. 773, 774 (1979) (court must develop objective standard of product adequacy).*


23 New Jersey courts recognize seven factors as relevant to the determination of whether a product's utility outweighs its risk:

1. The usefulness and desirability of the product—it's utility to the user and to the public as a whole.
2. The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
3. The availability of a substitute product which would meet the same need and not be as unsafe.
4. The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
5. The user's ability to avoid danger by the exercise of care in the use of the product.
6. The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
7. The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.


24 *O'Brien*, 94 N.J. at 185, 463 A.2d at 306. A case in which plaintiff sued a butcher knife manufacturer solely because the "knife was so sharp that it was likely to cut human flesh" would not get to the jury. *Wade*, supra note 10, at 838.

25 New Jersey courts have instructed the jury in terms of reasonable fitness, suitabili-
B. O'Brien v. Muskin Corp. Extends the Scope of Risk-Utility Analysis to Products With No Feasible Alternative

A majority of jurisdictions require a plaintiff alleging a defective product to present evidence of a viable, safer alternative design as part of the plaintiff's prima facie case. In O'Brien v. Muskin Corp. the New Jersey Supreme Court broke with this majority, holding that a plaintiff could recover under risk-utility analysis for a design defect without producing evidence of a feasible alternative design.

The plaintiff in O'Brien sued the manufacturer and the distributor of an above-ground swimming pool to recover damages for personal injuries. When the plaintiff dove into the pool, his outstretched hands slid on the vinyl pool lining and his head struck the pool bottom. The plaintiff alleged that the pool was defectively designed because the manufacturer should have made the liner less slippery. The trial court removed the defective design issue from the jury because the plaintiff failed to show the feasibility of an alternative design.

The New Jersey Supreme Court reversed the trial court's decision, holding that the jury might have found the manufacturer liable because the risk posed by the pool outweighed its utility. The O'Brien court acknowledged that there are products without technologically feasible alternatives that "are so dangerous and of such little use that under the risk-utility analysis, a manufacturer would bear the cost of liability of harm to others." The court further reasoned that the imposition of liability "might dissuade a manufacturer from placing the product on the market, even if the product has been made as safely as possible."

C. Previous Attempts to Measure Utility in Design Defect Cases

In prior applications of the risk-utility standard, courts have focused on the product's utility to the consumer in determining the utility of the product. They have not, however, considered in their...
calculus the collateral economic benefits from the manufacture and sale of the product. For example, in *Moore v. R.G. Industries* the Ninth Circuit weighed the utility of small, relatively inexpensive handguns known as “Saturday Night Specials” against their risk of causing injury. In analyzing the utility of the handguns the court considered only the utility of such handguns to the consumer for recreational use or protection, and not production benefits resulting from handgun manufacture or sale.

Similarly, in *O'Brien* the court discussed the utility of the product in terms of the consumer need it fulfilled; the court did not consider production benefits in its opinion. Indeed, prior to *Cipollone*, no New Jersey court and no court in any other jurisdiction had discussed whether collateral economic benefits are relevant to risk-utility analysis.

II

*Cipollone v. Liggett Group, Inc.*

In *Cipollone v. Liggett Group, Inc.* plaintiff Antonio Cipollone sought damages in a products liability action against tobacco companies that manufactured and sold cigarettes. He alleged that the defendants’ cigarettes caused his wife’s fatal lung cancer. In his
complaint, the plaintiff argued that the court should apply risk-utility analysis and that the health risks of cigarettes outweighed their social utility. In response to the plaintiff's interrogatories, the defendants gave this description of the social utility of cigarettes:

The chief component of the social utility of cigarettes is the enjoyment that they provide the millions of individuals in this country who have chosen to smoke.

[In addition, t]he cigarette industry is a major contributor to the nation's economy. The industry provides thousands of jobs in manufacturing and sales. Moreover, thousands of farm families derive their livelihood from their tobacco crop. Cigarettes are an important export and as such have a favorable impact upon the nation's balance of trade. And, of course, the industry contributes substantially to the public fisc by way of its payment of federal, state and local taxes.40

The plaintiff brought a motion in limine to exclude evidence of the social benefits of cigarette production from the risk-utility analysis.41 The defendants opposed the motion on the grounds that evidence of every kind of social benefit stemming from the product is admissible for use in risk-utility analysis.42 The court granted the plaintiffs' motion in limine, holding that the manufacturer's reasonableness in placing the product on the market depends only upon the social benefits of cigarettes to the cigarette smoker, and not upon the collateral social benefits of cigarette production.43

The Cipollone court, applying New Jersey law, refused to extend the scope of risk-utility analysis beyond the usefulness and dangers

Chesterfield, L & M, Virginia Slims, Parliament, and True brands. Margolick, Antismoking Climate Inspires Suits by the Dying, N.Y. Times, Mar. 15, 1985, at B1, col. 3. Before her death Cipollone commented, "I thought that it was cool to smoke, and grown up, and I was going to be glamorous or beautiful. . . . I thought I would be Joan Crawford or Bette Davis." Id. 40 Cipollone, 644 F. Supp. at 285.
41 Id. at 285-86.
42 Id. at 286.
43 Id. at 290. The court decided two subsidiary issues in the Cipollone case. The court rejected the defendants' argument that the motion in limine was premature. The court also briefly addressed the defendants' contention that the plaintiff's state common law claim would potentially price cigarettes out of the market, and thus would contradict Congressional intent expressed in the Cigarette Labeling and Advertising Act. Id. at 289. See Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340 (1982). The court, referring to the Third Circuit cigarette labeling preemption decision, Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), cert. denied, 107 S. Ct. 917 (1987), held that the Act did not preempt the plaintiff's state common law claims. Cipollone, 644 F. Supp. at 289. The Cipollone court noted that from a practical perspective, although it was entirely possible that a finding of manufacturer liability would result in a price increase in cigarettes to reflect the costs of compensating those harmed, it was unclear that cigarette sales would end. Id.
inherent in the product itself. The court drew support for this conclusion from New Jersey precedent, finding that despite the breadth of New Jersey risk-utility analysis, courts had not included production benefits in such analyses.

The court further reasoned that the introduction of evidence of production benefits would run counter to the goals of “strict liability” theory. First, the court explained, strict liability law aims to temper the profit motive by making a manufacturer aware that marketing a safer product or not marketing a product at all could cost less in the long run than marketing a product under its present de-

44 Cipollone, 644 F. Supp. at 288.
45 See supra note 23 and accompanying text.
46 Cipollone, 644 F. Supp. at 288 (“the New Jersey Supreme Court’s decisions have never said that a product’s utility may be established by looking to whether the defendant ‘reasonably’ believed that its profits would be sufficient to maintain a livelihood, hire employees, or pay taxes by operating the company that placed a product on the market”).

New Jersey and many other jurisdictions use “strict liability” language when discussing design defects. See O’Brien v. Muskin Corp., 94 N.J. 169, 179, 463 A.2d 298, 303 (1983); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 168-69, 406 A.2d 140, 149 (1979); Cepeda v. Cumberland Eng’g Co., 76 N.J. 152, 386 A.2d 816 (1978); Barker v. Lull Eng’g Co., 20 Cal. 3d 413, 432, 573 P.2d 443, 453, 143 Cal. Rptr. 225, 235 (1978); Turner v. General Motors Corp., 584 S.W.2d 844, 846 (Tex. 1979). However, an emerging consensus describes risk-utility analysis as fundamentally a fault-based negligence test. See, e.g., Birnbaum, Unmasking the Test for Design Defect: From Negligence to Warranty to Strict Liability to Negligence, 33 Vand. L. Rev. 593 (1980) (risk-utility analysis is a negligence test); Henderson, supra note 20, at 777-79; Heonig, Product Designs and Strict Tort Liability: Is There a Better Approach?, 8 Sw. U. L. Rev. 109 (1976); see also Wade, supra note 19, at 748-49 (risk-utility analysis essentially a negligence test but because courts will reach same result under either theory, there is little need to change from strict liability approach). The decision of the drafters of the Model Uniform Product Liability Act to reject the language of strict liability and place design cases on a fault basis reflects this trend. MODEL UNIFORM PRODUCT LIABILITY ACT § 104 comments, 44 Fed. Reg. 62,722 (1979). A court using a negligence approach focuses upon the reasonableness of the manufacturer’s conduct in choosing between alternative designs. Henderson, supra note 20, at 777. The strict liability approach focuses solely upon the reasonableness of the design. Id. Risk-utility analysis, however, combines the approaches: the manufacturer’s design reflects the reasonableness of the manufacturer’s decision in choosing the design. Id.; Wade, supra note 19, at 748. The ultimate question in both a negligence case and in a risk-utility case is whether a reasonable person, recognizing the risk she was creating, would have acted differently. See J. Henderson & A. Twerski, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 512-13 (1987). Judge Learned Hand’s formulation of the negligence test is actually the same as risk-utility analysis. Id. The great similarity of the risk-utility and negligence standards leads to the conclusion that “[i]n the context of determining whether the defendant should have adopted a proposed alternative design, the words ‘strict liability’ have almost no meaning.” Id. at 509. It is important to note that strict liability and negligence grounds for imposing liability might produce different outcomes if the defendant could prove that he could not have known of the risk of the design choice at the time the choice was made. The defendant would be liable under strict liability, but not under negligence theory. Henderson, supra note 20, at 777. Despite this difference, negligence and strict liability analyses will reach the same result in practically all improper design cases. Wade, supra note 19, at 748.
Second, strict liability requires that a product "pay its way" by compensating for the harm it causes. If courts impose liability upon the manufacturer, the product's true costs to society are reflected in its price; failure to impose liability, however, leads manufacturers to sell a product when its true costs to society outweigh its social benefits. Thus the court found irrelevant to its analysis the defendants' attempt to establish that selling cigarettes is profitable, that these profits are distributed to others in society, and that imposing liability would reduce or eliminate these profits. The court concluded that to permit a manufacturer to introduce evidence of a product's profitability would undermine the goals of greater overall economic efficiency and product safety.

III
Analysis

An initial examination of the traditional application of risk-utility analysis and the O'Brien extension of this analysis suggests that a plaintiff can prove a design defect in two ways: (1) prove that the manufacturer was unreasonable because it marketed the product as designed instead of using a technologically feasible alternative design; or (2) when no technologically feasible alternative is available, prove that the manufacturer was unreasonable in selling the product at all. This second application essentially requires a court to compare the world with the product to a world without it. Analysis of the Cipollone decision reveals that these two alternatives both compare a defendant's alternative courses of conduct, but that a court applying the second alternative will face more difficulties.

Section III(A) of the following analysis argues that the Cipollone court correctly refused to allow evidence of taxes paid, jobs created, and profits made by the tobacco manufacturers into the risk-utility analysis because these represent societal benefits already measured by consumer benefits. Section III(B) contends that comparing a product with the product's absence strains judicial decision making to its limits. The final subsection concludes that a judge should admit evidence of the economic impact of cigarette production, not for use in risk-utility analysis, but to determine whether serious process concerns prevent the judge or jury from legitimately undertaking the risk-utility analysis. When plaintiffs are unable to present a tech-

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48 Cipollone, 644 F. Supp. at 288.
49 Id. at 289.
50 Id.
51 Id. at 288.
52 Id. at 289.
53 See supra note 13 and accompanying text.
54 See supra notes 28-32 and accompanying text.
nologically feasible alternative design, the court should perform a screening function before it sends the case to the jury. If the court finds that process difficulties preclude a legitimate risk-utility analysis, the court should either dismiss the case on the pleadings or direct the verdict, thus preventing the case from reaching the risk-utility, reasonableness test.

A. The Cipollone Court Correctly Excluded Evidence of Cigarette Production Effects From Risk-Utility Analysis

In defense of their products, the cigarette manufacturers in Cipollone attempted to introduce evidence of the utility of cigarettes: the consumer enjoyment of cigarettes as well as the production benefits of the product, including taxes paid by the industry, employees hired by the industry, profits made by the manufacturer, and the favorable impact of distributed cigarette profits. The Cipollone court allowed the defendant manufacturers to submit evidence of the consumer enjoyment of smoking, but prohibited evidence of the economic effects of cigarette production. In disallowing the defendants’ introduction of the production effects of cigarettes, the court explained that risk-utility analysis “was never meant to balance the risk to the consumer against the general benefit to society. . . . It is the benefit and utility to the cigarette smoker which is here in issue, and not the benefit to the cigarette industry or those in turn, who benefit from its existence.”

The Cipollone court correctly determined that consumer enjoyment of smoking is a benefit of cigarettes relevant to the utility side of the risk-utility analysis. Although the court indicated that it would allow the parties to introduce evidence of the benefits of cigarettes, it did not discuss how the parties should measure such benefits. Generally, economists measure the value or benefit of consumption of a good by the amount an individual is willing to pay for it. In the market, the price of a good represents its minimum value to any person who actually purchases it. Thus, the difference

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55 A 1985 study found that the tobacco industry employed approximately 0.46% of the U.S. labor force, generated total expenditures of $31.5 billion directly and through upstream and downstream economic linkages (roughly 1% of the U.S. GNP), and paid $13.46 billion in federal, state, and local taxes. Gray & Walter, The Economic Contribution of the Tobacco Industry, in SMOKING AND SOCIETY 243, 252-53 (R. Tollison ed. 1986).

56 The plaintiff did not challenge the defendants’ introduction of proof that “[t]he chief component of the social utility of cigarettes is the enjoyment they provide millions of individuals in this country who have chosen to smoke.” Cipollone, 644 F. Supp. at 295. Id. at 290.

57 See R. Posner, ECONOMIC ANALYSIS OF LAW § 1.2, at 11 (3d ed. 1986) [hereinafter R. Posner, ANALYSIS]; see also R. Posner, THE ECONOMICS OF JUSTICE 50 (1981) (“Since Adam Smith, the term ‘value’ in economics has generally referred to value in exchange, value as measured or at least measurable in a market, whether explicit or implicit. From
between what a person would willingly pay for the good and what he or she actually pays for it in the market represents the consumer's net benefit derived from the good.\textsuperscript{59}

The *Cippolone* court correctly excluded economic production effects from the utility side of the risk-utility analysis. Even if the court had chosen to look at all societal costs and benefits of cigarettes, most production effects should be excluded.\textsuperscript{60} Under a risk-utility analysis based upon consumer benefits, the court properly would ignore the societal effects of taxes, jobs, and profits.\textsuperscript{61} First, the tobacco companies had urged the court, in effect, to “double-count” the benefits of cigarettes by including both the profits from the manufacture and sale of cigarettes and the dissemination of a portion of those profits to others in society as benefits of cigarette production.\textsuperscript{62} “Double-counting” is the error of counting real benefits more than once.\textsuperscript{63} The payment of a portion of tobacco company profits to intermediate sellers and farmers would not in and of itself create any additional benefits but instead constitutes only a transfer of an existing benefit. Thus, asking the court to consider as the concept of value derives the concept of the wealth of society as the sum of all goods and services in the society weighted by their values.”). Some smokers take intense pleasure from smoking cigarettes. Mark Twain wrote, “Why, my old boy, when they used to tell me I would shorten my life ten years by smoking, they little knew the devotee they were wasting their puerile word upon—they little knew how trivial and valueless I would regard a decade that had no smoking in it!” Twain, *Letter to Rev. Twitchell*, in *The Pleasures of Smoking* 167, 167-68 (S. Watkins comp. 1948). The price of cigarettes, however, may be an overly generous measure of cigarette’s benefits. There is evidence that consumers are buying more cigarettes than they would if the risks were fully known and responded to rationally. One argument is that smokers do not have sufficient knowledge of the specific health risks of smoking, that smokers lack information or warning as to the magnitude of smoking’s risks, that almost half of all smokers may be unaware that smoking is addictive, and that manufacturers’ promotional activities directed at consumers undermine the effectiveness of health warnings. Note, *Plaintiff’s Conduct as a Defense to Claims Against Cigarette Manufacturers*, 99 Harv. L. Rev. 204-06 (1986). Cigarettes are a peculiar product in that 87% of cigarette consumers want to quit smoking. Friedrich, *Where There’s Smoke*, Time, Feb. 23, 1987, at 22, 23 (citing statistic reported by Dr. C. Everett Koop, U.S. Surgeon General).

\textsuperscript{59} This net benefit is called consumer surplus. J. HIRSCHLEIFER, *Price Theory and Applications* 204-06 (4th ed. 1988). This estimate of net benefits may overstate the benefits of cigarettes if consumers do not properly evaluate the risks of smoking. See *supra* note 58.

\textsuperscript{60} Arguably, had the court decided to include all societal benefits of production it might properly have considered producer surplus as a net benefit to society. Producer surplus represents the difference between the payments producers actually receive in the market and the amount they would willingly accept to supply their products in the market. For a further discussion of producer surplus, see J. HIRSCHLEIFER, *supra* note 58, at 204-06.

\textsuperscript{61} This Note assumes that tobacco producers earn a normal rate of return on their invested assets and thus earn zero economic profits.

\textsuperscript{62} *Cippolone*, 644 F. Supp. at 289-90.

\textsuperscript{63} E. MISHAN, *Cost-Benefit Analysis* 78 (2d ed. 1976).
A benefit both the profits of the tobacco companies and the distribution of those profits to others would constitute double-counting. This double-counting of benefits would overestimate the value of cigarettes to society and thereby wreak havoc on attempts to weigh the risk against the utility of the product.

Second, economists treat the labor used to produce a good as an "opportunity cost" rather than as a benefit of that good. An opportunity cost is what one gives up in order to have something else, regardless of whether this lost opportunity results from an outlay or a forbearance. The opportunity cost of a tobacco worker's services equals that worker's best alternative employment. Rather than being an economic benefit of cigarette production, labor employed by the tobacco industry represents a societal cost because those workers forbear other types of employment.

Third, the taxes paid by the tobacco industry are transfer payments; they diminish the tobacco companies' purchasing power and increase the recipients' collective purchasing power by the same amount. Transfer of money by taxation is neither a social cost nor a social benefit because gains to one sector are offset by costs in another.

The defendant's position favoring inclusion of economic production effects in the utility side of the risk-utility analysis incorrectly assumes that the taxes, jobs, and profits resulting from cigarette production reflect societal benefits in addition to the bene-

64 See id. at 80.
65 See Harberger, On Measuring the Social Opportunity Cost of Labour, 103 INT'L LABOUR REV. 559, 559 (1971) (examining "the commonly held notion that the opportunity cost of labour is represented by the products that is forgone from other activities as a consequence of its being labour for a given activity").
66 C. GOETZ, CASES AND MATERIALS ON LAW AND ECONOMICS 52 (1984) (relevant lost opportunity is highest-valued alternative that is given up).
67 R. POSNER, ANALYSIS, supra note 58, § 1.1, at 6.
68 Even if the tobacco farmers or other employees of the tobacco industry would be involuntarily unemployed absent the jobs created by the tobacco industry, these jobs are still not a societal benefit of cigarettes. In an economic analysis such as risk-utility, tobacco industry jobs that employ workers who would otherwise be unemployed are neither a societal cost nor a societal benefit of cigarettes. In this case the market price of these workers exceeds their opportunity cost because the opportunity cost equals a lower sum just large enough to compensate these workers for their nonmarket activities or "idleness." Whether these workers would otherwise be unemployed is relevant to how large the opportunity cost of their labor truly is, but does not make the opportunity cost become a benefit. Thus, a court should not enter the market price of labor into either the benefit or the cost side of the risk-utility calculation. See E. MISHAN, supra note 63, at 68-69.
69 A transfer payment is a transfer of benefits from one sector of the economy to another without any increase in aggregate welfare; the benefits to one sector offset costs to another. T. KLEIN, SOCIAL COSTS AND BENEFITS OF BUSINESS 113 (1977).
70 See R. POSNER, ANALYSIS, supra note 58, § 1.1, at 7; E. MISHAN, supra note 63, at 62.
fits of consumer enjoyment. Instead, these economic production effects are either not true societal benefits, or have already been counted through the court’s use of consumer benefits. The Cipollone court thus correctly excluded evidence of the taxes, jobs, and profits from the risk-utility analysis.

B. Process Concerns Raised By the Alternative of Not Selling the Product at All

The judicial resolution of design defect cases becomes increasingly difficult as the alternative designs become increasingly dissimilar. In most design cases, courts compare two technologically feasible alternative designs, engaging in a marginal comparison of the increases and decreases in utility and risk incurred should the alternative design replace the original. Even if the plaintiff alleges liability in absence of a technologically feasible alternative design, as in O’Brien or Cipollone, a court still must make a marginal comparison of alternative courses of conduct by the defendant. For example, implicit in the plaintiff’s allegation of a product defect in O’Brien is a comparison of two alternatives: the alternative of above-ground swimming pools as designed by the manufacturer and the alternative of no above-ground pools at all.

Comparisons between two technologically feasible designs and between the product and “a world without the product” are not different in kind; both are marginal comparisons of a manufacturer’s alternative courses of conduct. The difference is one of degree. A court comparing an existing product against a world without the product is comparing alternatives that are more dissimilar than two

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71 The plaintiff might, for example, offer proof of the feasibility of manufacturing cigarettes with a filter on the tip that would reduce the health hazards associated with smoking below the dangers of the design currently used by the manufacturer. A court must make a marginal comparison of two technologically feasible alternatives: the alternative of the current design of cigarettes without the filter, and the alternative of the proposed design of cigarettes with the filter. The comparison is marginal because the court evaluates the comparative rather than the total utility and risk. A court will choose a safer alternative design if its additional utility outweighs its additional risks even when the total utility of the original design exceeds the original’s total risks. Henderson, supra note 20, at 775 n.11.

72 This implicit comparison of alternatives is inevitable: Concededly, proof of a feasible alternative is not often imposed explicitly as a formal requirement at common law. As a practical matter, however, plaintiffs in most design cases find themselves forced by the circumstances to attack the defendants’ designs by pointing to a safer, less unreasonably dangerous alternative. Certainly under a negligence approach, the feasible alternative requirement is implied in the necessity for the plaintiff to show that a reasonable person would have acted differently from (and more safely than) the defendant.

technologically feasible designs. As the present design and the pro-
polated alternative become more and more dissimilar, courts face
special problems in weighing interrelated value choices and gathering
sufficient data. These process concerns become a threat to prin-
ciplled judicial decisionmaking.73

The judicial response to a design defect case should vary in rel-
tion to the nature of the problem. Certain cases “involve the de-
sign of a small, insignificant part whose alteration will affect little
but the part itself. Others involve the court in virtually redesigning
an automobile or an airplane. Litigation of the first type may be
quite judicially manageable; litigation of the second type may com-
promise the judicial process.”74 In cases involving comparisons of
technologically feasible designs, a court can narrow the range of
competing societal values when applying risk-utility analysis and
thus render the litigation judicially manageable. For example, the
plaintiff might offer proof that a certain filter tip would significantly
reduce the health risks of smoking with an acceptable level of in-
creased cost. The defendant might counter with evidence that some
smokers will experience a bitter aftertaste because of the proposed
filter. Although the problem presents a choice among competing
societal values, the litigants and the court can focus on the tradeoff
between only two variables.

Comparisons of technologically feasible designs involving more
radical changes in the original product present a court with many
interrelated competing value choices. In such cases the plaintiff
posits not the alteration of a small, independent component of the
product, but implicitly asks the court to compare the original with a
redesigned, fundamentally changed product. In extreme cases, a
comparison of the present design with a radically altered design de-
nies litigants meaningful participation in the court’s decisionmaking
process. A litigant’s initial argument in a case depends upon how
the court chooses to evaluate every other aspect of the design rele-
vant to the final product.75 The litigants cannot address the societal
value choices embodied in any one aspect of the design apart from a
consideration of all other aspects of the design to logically reach a
certain result. Thus, comparisons of technologically feasible but

73 For an economic analysis arguing that courts should not adopt the O’Brien exten-
sion of products liability law, see Note, Strict Products Liability and the Risk-Utility Test for
Kim Larsen).
74 Twerski, Seizing the Middle Ground Between Rules and Standards in Design Defect Litiga-
tion: Advancing Directed Verdict Practice in the Law of Torts, 57 N.Y.U. L. REV. 521, 553
(1982). Professor Twerski asserts that courts should vary their responses based on the
“polycentricity quotient” of the facts of each case. Id.
75 Henderson, supra note 18, at 1536.
highly dissimilar alternatives may present litigants with a hopeless task and leave judges without guidance to choose among the competing social values.\textsuperscript{76}

\textit{Dawson v. Chrysler Corp.}\textsuperscript{77} epitomizes the dilemma of a court facing highly dissimilar design choices. The plaintiffs alleged that a patrol car was defective because it lacked a continuous steel frame through the door panels or a cross-member running through the floor board between the posts separating the front and back doors of the car.\textsuperscript{78} These design alternatives, the plaintiffs argued, would have lessened the injury that one plaintiff received when the car collided sideways with a steel pole.\textsuperscript{79} Chrysler, however, maintained that the patrol car's design was more socially beneficial than the proposed substitute. Under cross-examination, the plaintiffs' experts admitted the value of the patrol car's actual design: (1) it absorbed impact in a majority of automobile crashes, and thus was safer than the proposed alternative; (2) it weighed 200 to 250 pounds less than the proposed alternative; and (3) it cost the consumer $300 less than the proposed alternative.\textsuperscript{80} The Third Circuit concluded that it was bound by New Jersey law to affirm the jury verdict for the plaintiff, but expressed grave doubts as to the legitimacy of a court choosing among these conflicting product attributes.\textsuperscript{81}

The \textit{Cipollone} comparison of the defendants' cigarettes and the alternative of no cigarettes presents a task exponentially more difficult than redesigning an automobile. The comparison of a product with the no product alternative involves an overwhelming number of competing value choices. When the plaintiff posits the removal of

\textsuperscript{76} Professor Fuller described these nonjusticiable problems as "polycentric." Fuller, \textit{Collective Bargaining, and the Arbitrator}, 1963 Wis. L. Rev. 1, 33. Fuller's classic example of polycentricity involves a wealthy lady who dies, leaving a collection of paintings to the National Gallery and the Metropolitan Museum "in equal shares" but without specifying an apportionment. According to Fuller, the polycentricity of dividing the paintings among the two museums

lies in the fact that the disposition of any single painting has implications for the proper disposition of every other painting. If it gets the Renoir, the Gallery may be less eager for the Cezanne, but all the more eager for the Bellows, \textit{et cetera}. If the proper apportionment were set for argument, there would be no clear issue to which either side could direct its proofs and contentions.


Other examples of problems presenting varying degrees of polycentricity include: setting wages and prices in a managed economy, assigning players of a football team to their positions, redrawing the boundaries of election districts, allocating limited funds to various scientific research projects, \textit{id.}, and evaluating a doctor's performance in a medical malpractice case, Henderson, \textit{supra} note 18, at 1542.

\textsuperscript{77} 630 F.2d 950 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981).
\textsuperscript{78} \textit{Id.} at 954.
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.} at 958-59.
\textsuperscript{81} \textit{Id.} at 962-63.
an entire product line from the market, the court cannot focus on one small, incremental change at a time. The court can no longer, for example, hold constant the price and relaxation benefits of cigarettes and focus solely on the tradeoff between a bitter aftertaste and reduced health risks. The “should not have sold any cigarettes at all” alternative brings all the defendants’ design choices into the fray at once.

Even absent the difficulty of isolating competing social values inherent in design choices, the added problem of lack of information deters judicial resolution. When a court compares the existing design with a slightly altered product, it can safely assume that most prior users will replace the old product with the proposed alternative. In contrast, a court using risk-utility analysis to compare the product with no product compares the existing product with a completely unknown future situation. Prior smokers may “replace” cigarettes with chewing tobacco, gum chewing, overeating, or knitting. Other smokers will seek no replacement for cigarettes at all. The proposed alternative becomes a moving target, with each individual defining the alternative of “no cigarettes” differently. If smokers, suddenly cut off from access to cigarettes, turn to chewing tobacco or overeating, both activities associated with health risks of their own, then the alternative of “no cigarettes” would probably not fare well in the court’s risk-utility analysis. If ex-smokers occupy their hands with knitting, however, the alternative of “no cigarettes” compares more favorably to the current design of cigarettes. Lack of data leads the court to different results depending upon the assumptions that the court makes.

C. The Screening Function of the Courts in Design Defect Litigation

Thus far, this Note has analyzed Cipollone in two distinct strands. First, it has shown that the evidence of taxes, jobs, and profits offered by the tobacco companies is not a legitimate part of the risk-utility analysis. Second, it has established that courts face significant process difficulties in design defect cases when the proposed alternative is a world without the product. These two strands interrelate. Although it is inappropriate for a court to use production-effects evidence at the risk-utility stage, a court faced with overwhelming process concerns should use production-effects evidence to perform a screening function at an earlier stage in the proceedings. Because of process concerns, a court faced with facts of the type present in Cipollone should perform a screening function at the pleading or directed verdict stages to determine whether it is capable of deciding the case on the merits. At this stage, the court should examine the
process concerns of the case, the results of its decision if it is wrong, and the ability of the legislature to solve the problem. If, after examining these factors, the court thinks that the factors counsel against deciding the case, the court should either dismiss the case or direct a verdict for the defendant.

A court performing a screening function at either the directed verdict or pleadings stage focuses largely upon broad policy considerations. Abnormally-dangerous-activity law provides the precedent for courts to remove cases from jury consideration as a matter of policy. The decision to classify activities as abnormally dangerous, and to hold actors engaging in such activities liable regardless of fault, centers on highly visible policy determinations rather than factfinding. Classifying an activity as abnormally dangerous is solely a decision for the judge, and these categorizations, once established, have precedential value.

The broad impact of judicial design defect decisions has led many observers to compare such cases to those involving abnormally-dangerous-activity law. A court finding a design defect can affect the safety practices of an entire industry, rendering manufacturers vulnerable to future suits and sometimes classifying whole product lines as unsafe. Thus, these cases differ from fact-sensitive negligence cases. In both abnormally-dangerous-activity cases and in design defect cases that lack evidence of a technologically feasible alternative design, courts should remove these policy determinations from the jury.

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82 The Restatement (Second) of Torts section 520 lists the following factors as relevant to whether a class of conduct is abnormally dangerous:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement (Second) of Torts § 520 (1977).

83 Twerski, supra note 74, at 543-44.
84 Id. at 543.
85 Justice Schreiber, concurring and dissenting in O'Brien, argued that the court should have designated which products should be subject to absolute liability. O'Brien v. Muskin Corp., 94 N.J. 169, 192, 463 A.2d 298, 310 (1983) (Schreiber, J., concurring and dissenting). To support his view, Schreiber looked to abnormally dangerous activity law, in which the court designates which categories of activity are abnormally dangerous. Id. at 196, 463 A.2d at 312.

For further comparisons between design defect and abnormally dangerous activity law, see Twerski, supra note 74, at 544; Wade, supra note 10, at 835.

86 Twerski, supra note 74, at 544-45.
87 Id. at 546.
In determining whether it is capable of reaching a decision on the merits, a court should first make an assessment of the probability of a wrong decision resulting from process concerns. As the present design and the proposed alternative design become more and more dissimilar, courts face growing problems in weighing interrelated value choices and gathering sufficient data. On facts such as those in Cipollone, these process concerns threaten principled judicial decisionmaking and weigh against deciding the case on the merits.

A second important aspect of the screening stage for design defect cases is the potential effect of a wrong decision by the court. Courts should ascertain what is at stake if the judge or jury reaches the wrong result under the risk-utility analysis. To do so, a court needs evidence of the overall social and economic impact of a wrong result. In Cipollone-type cases, evidence of the number of tobacco farmers employed by the tobacco industry or the taxes paid by the tobacco manufacturers, although not an appropriate part of the jury's risk-utility analysis of cigarettes, may become relevant to determine the effect of a wrong judicial decision. If these effects are substantial, then this factor weighs in favor of a court removing the case from the jury.

Before deciding whether it can decide the case on the merits, a court must consider the third factor of whether the legislature is likely to address the issue and whether the legislature is better suited than the court to do so. Legislatures theoretically represent the will of the people in deciding which social objectives are priorities. They mix managerial authority and negotiation among persons or groups in order to address competing value choices. Unlike the judiciary, legislatures need not isolate factors relevant to a decision and address each apart from the rest in order to function properly. In addition, a legislature gathers data much better than a court, which cannot hold committee hearings or authorize detailed studies. Legislative bodies are better suited to answer the question of how much of society's limited resources should be spent on safety, leaving less resources to devote to other competing social objectives.

Although no legislation presently bans cigarettes, this is not an

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88 "A court that perceives it is making an important policy decision by letting a design defect case go to the jury will transcend the simple counting or balancing of the elements of a risk-utility analysis in order to consider the overall social and economic impact of a possible jury finding of defect." Twerski, supra note 74, at 549-50.
89 See supra notes 55-70 and accompanying text.
90 Henderson, supra note 18, at 1555 & n.105.
91 Cf. supra notes 75-76 and accompanying text (separation of factors relevant to a judicial decision).
92 See Henderson, supra note 18, at 1540.
area that needs judicial intervention as a political catalyst to draw
attention to the cigarette problem. The general public and the
nation's legislatures are vigorously debating the cigarette contro-
versy. Forty states presently restrict smoking in public places and
approximately eight hundred local ordinances affect tobacco use.
Federal bills are currently pending to increase the federal excise tax
on cigarettes from 16 cents to 32 cents per pack, and to ban all
print advertising of cigarettes.

Courts can screen design defect cases that pose process con-
cerns at either the pleading stage or the directed verdict stage. Pro-
fessor Twerski advocates the use of directed verdicts in design
litigation when significant process concerns limit a court's ability
to fairly decide a case and alternative decisionmakers exist to better
evaluate product safety. The directed verdict is often the ap-
propriate procedural device, according to Twerski, because courts frequently need considerable factual background in order to focus on
the specific policy concerns implicated by a particular case. Although
the presence of policy concerns is obvious at the outset of
design defect litigation, use of the directed verdict rather than dis-
missal of the claim at the pleading stage enables a court to base its
decision on a more fully developed factual background.

Dismissal of the plaintiff's claim at the pleading stage does have
countervailing procedural advantages. If the court fails to dismiss at
the pleading stage, the jury hears all the evidence of societal pro-
duction effects. If the court then decides not to direct a verdict for

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93 If forces exist to frame the issue clearly, courts should defer to legislative action
if the legislature is better able to decide the issue. See Zacharias, The Politics of Torts, 95
(1986) (smoking prohibited in elevators, theaters, libraries, art museums, lecture or concert
halls, buses, school buildings, and certain areas of health care institutions); Ind. Code Ann. §§ 16-1-22-21, 16 6-4-23 (Burns 1983) (smoking prohibited where food is
stored); Iowa Code Ann. § 170.19 (West 1969 & Supp. 1988) (smoking prohibited
where food is prepared or served); Miss. Code Ann. § 97-35-1(4) (1972) (smoking cigar
or pipe prohibited on passenger buses); Utah Code Ann. § 76-10-106 (Supp. 1987)
(restricts smoking in a public place or public meeting except in designated smoking ar-
reas); Ft. Lauderdale, Fla., Code of Ordinances § 28-80 (1975) (restricting smoking in
cafeteria lines). See generally A. Brody & B. Brody, The Legal Rights of Nonsmokers
102-07 (1977) (discusses state laws prohibiting smoking in specific places proposed or
enacted during 1981). See generally, U.S. Dep't of Health and Human Servs., State
97 Twerski, supra note 74, at 551. He includes in such process concerns polycentric-
ity, close risk-utility proof, state of the art and tenuous causation. Id. at 551 n.105.
98 Id. at 551. Twerski describes “alternative decisionmaking mechanisms” as in-
cluding consumer choice, cost, shifting duty, the design safety review process and legis-
lation. Id. at 551 n.106.
99 Id. at 529-30.
the defendant, the judge must instruct the jury to ignore this evidence in the risk-utility evaluation of the reasonableness of the manufacturer's conduct. A bifurcated trial, preventing the misapplication of production evidence by the jury in the risk-utility analysis, might solve this problem. However, such problems do not arise at all when the court dismisses the claim at the pleading stage.

When a plaintiff asks a court to compare the risks and benefits of a product with the risks and benefits of a world without the product, a judge must assume a more active role. The court should consider the process concerns that make risk-utility analysis especially difficult in this type of case, the potential effects of a wrong decision, and whether the legislature is better suited to address the question. On facts similar to Cipollone a court should prevent the case from reaching the risk-utility analysis, either through dismissal at the pleading stage or a directed verdict for the manufacturer.100

CONCLUSION

Courts and commentators have struggled to find ways to maintain judicial oversight in determining which design defect cases a jury should decide.101 Products liability law has drawn increasing criticism, and many states have adopted statutes designed to curb its scope.102 These difficulties, however, do not suggest that the

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100 In another development in the Cipollone litigation, the district court granted the defendants' motion for judgment on the pleadings and dismissed the plaintiff's unreasonably unsafe product risk-utility claims. Cipollone v. Liggett Group, Inc., No. 83-2864 (D.N.J. Oct. 27, 1987) (LEXIS, Genfed library, Dist file). The district court held that recently enacted section 3(a)(2) of the Product Liability Act, 1987 N.J. Sess. Law Serv. 188-95 (Vol. 6 1987), was applicable to the Cipollone case and barred the plaintiff's risk-utility claims as a matter of New Jersey law. Cipollone, No. 83-2864 (D.N.J. Oct. 27, 1987). The court granted the defendant's motion for partial judgment on the pleadings with respect to the plaintiff's claim that cigarettes are an unreasonably unsafe product under risk-utility analysis. Id.

101 See, e.g., Wade, supra note 10, at 838-39 (more judicial supervision needed because important policy issues arise when whole class of products allegedly unsafe); Note, Products Liability—Strict Liability in Tort—State-of-the-Art Evidence Relevant to Risk-Utility Analysis in Design Defect Cases—O'Brien v. Muskin Corp., 15 SETON HALL L. REV. 120, 141 (1984) (authored by Stephen Foley) (policy questions implicated in alleging classes of products defective necessitate increased judicial control); Wilson v. Piper Aircraft Corp., 282 Or. 61, 68, 577 P.2d 1322, 1326 (1978) (court reversed jury verdict for plaintiff despite evidence of alternative feasible design, explaining that “the court is to determine, and to weigh in the balance, whether the proposed alternative design has been shown to be practicable”).

102 See, e.g., ARIZ. REV. STAT. ANN. § 12-683(1) (1982) (manufacturer can present defense that product conformed to state of the art at time product was first sold by the defendant); COLO. REV. STAT. § 13-21-403(1)(a) (1987) (rebuttable presumption of no defect in product if design conformed to state of the art at time product was first designed or sold); KY. REV. STAT. ANN. § 411.3200(1)(2) (Baldwin 1987) (manufacturer can raise defense that someone other than defendant altered or modified product in manner not reasonably foreseeable to defendant); N.C. GEN. STAT. § 99B-4 (1979) (de-
problems facing products liability law in general and risk-utility analysis in particular are insurmountable. Risk-utility analysis is a tool that works well when applied to most situations where a court compares two technologically feasible alternative designs. As the existing product design and the proposed alternative design become more dissimilar, process concerns and data-gathering difficulties increase. When the comparison is between a current product design and a world without the product, the court should consider whether the problem is best addressed by the legislature. Evidence of the production effects of the product not relevant to risk-utility analysis may become relevant to a court deciding whether it is competent to undertake the risk-utility analysis. In the case of cigarettes, when there are significant process concerns and widespread public debate, legislative action is preferable.

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