

**IN THE SUPREME COURT OF FLORIDA**

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**LIGGETT GROUP, INC.,**

Appellant,

v.

**BEVERLY DAVIS,**

Appellee.

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CASE NO. SC08-541

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ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH  
JUDICIAL CIRCUIT BROWARD COUNTY  
(Lower Tribunal Case No. CACE 02-18944)

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**AMICUS CURIAE BRIEF OF ASSOCIATED INDUSTRIES OF FLORIDA,  
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,  
NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT  
REFORM ASSOCIATION, PROPERTY CASUALTY INSURERS  
ASSOCIATION OF AMERICA, AND NATIONAL ASSOCIATION OF  
MUTUAL INSURANCE COMPANIES IN SUPPORT OF APPELLANT**

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## **QUESTION PRESENTED**

Whether this Court should require proof of a reasonable alternative design in product liability design defect cases.

Suggested Answer: Yes

## **STATEMENT OF INTEREST**

*Amici* are organizations that represent Florida companies that are frequently named as defendants in product liability litigation, and their insurers. *Amici* are well suited to provide a broad perspective to this Court and explain why this Court should require proof of a reasonable alternative design in product liability design defect claims.<sup>1</sup>

## **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

*Amici* file this brief to urge this Court to hold that a reasonable alternative design must be proven before a product can be determined to be defectively designed. We have read the brief filed by Defendant Liggett Group, Inc. in this case and believe the legal support for a reasonable alternative design requirement is fully addressed there. We agree with the law stated in that brief; accordingly, we do not repeat those arguments here other than by way of summary. Rather, we are

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<sup>1</sup> Counsel for the *amici* work at a firm that represents tobacco companies in product liability litigation. This brief, however, was paid for by the *amici*; the views expressed herein are solely those of the *amici* and do not necessarily reflect the views of any other clients of the firm.



filing this brief to provide this Court with a broad public policy perspective that goes beyond the tobacco products at issue.

We appreciate that tobacco products are controversial to many elements of society. If this Court were to allow that controversy to carry the day, however, and eliminate the reasonable alternative design requirement from Florida law, the impacts could be devastating with respect to a broad category of other products and industries. Makers and sellers of all inherently dangerous products – i.e., products with risks that cannot be “designed out” without destroying the product’s utility to those who choose to use them – would face insurer-like liability, contrary to Florida law and sound public policy. Products many Floridians enjoy, such as convertible automobiles, motorcycles, personal watercraft, and a cold beer on a hot day could all be legally condemned. Elected legislators, not courts, are in the best position to make such broad policy decisions.

## **ARGUMENT**

### **I. REASONABLE ALTERNATIVE DESIGN AND THE RESTATEMENT (SECOND) § 402A**

The doctrine of strict liability in tort was first adopted by the California Supreme Court in *Greenman v. Yuba Power Products Inc.*, 377 P.2d 897 (Cal. 1963). Soon thereafter, the American Law Institute (“ALI”) adopted the Restatement (Second) of Torts § 402A in 1964 and published the new section in

1965. See Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability – The American Law Institute’s Process of Democracy and Deliberation*, 26 Hofstra L. Rev. 743, 745-48 (1998) (documenting the development of § 402A). It took twenty years for most courts and the occasional state legislature to adopt § 402A. This Court adopted § 402A in *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80, 87 (Fla. 1976).

The key portion of § 402A stated that a manufacturer or seller could be subject to liability for harms caused by a product sold “in a defective condition unreasonably dangerous to the user or consumer.” Restatement (Second) of Torts § 402A (1965) (“Restatement (Second)”). A plain reading of § 402A demonstrates the fair and common sense principle that before a product manufacturer or seller can be found liable, its product must be proven to be defective. In other words, there must be something wrong with the product. Implicit in that concept is the requirement in design defect claims that there must be “a better way to build the mousetrap.” See *Banks v. ICI Americas*, 450 S.E.2d 671, 674 (Ga. 1994) (“[T]he reasonableness of choosing from among various alternative product designs and adopting the safest one if it is feasible is considered the ‘heart’ of design defect cases.”). If no reasonably alternative design exists, then no liability should be imposed.

The reporters who wrote § 402A, Deans John Wade and William Prosser, made this crystal clear in § 402A's comment i. Comment i to § 402 emphasized that it must be the defective condition of a product that makes it "unreasonably dangerous." Restatement (Second) § 402A cmt. i. The requirement that a defect be "unreasonably dangerous" was added to the section "to foreclose the possibility that makers of products having the inherent potentiality for causing harm, such as drugs, whiskey, sugar, butter, etc., would become automatically responsible for all the harm that such things do in the world." *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1144 (Fla. 1st DCA 1981) (citation omitted). Thus, only "bad" whiskey, butter, tobacco and the like should be subject to the § 402A standard. *See id.* at 1144.

As explained in Liggett Group's brief, the contemporaneous writings of the reporters support the conclusion that category liability was not the reporters' intent. *See* William L. Prosser, *Strict Liability to the Consumer in California*, 18 Hastings L.J. 9, 23 (1966) (to forestall the possibility that makers of "unavoidably dangerous" products would "become automatically responsible for all the harm that such things do in the world," § 402A was limited to products "in a defective condition unreasonably dangerous to the consumer."); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 830 (1973) (§ 402A

requires that “the product must be harmful or unsafe because of something wrong with it.”).

Likewise, in *West*, this Court held, “In order to hold a manufacturer liable on the theory of strict liability in tort, the user must establish the manufacturer’s relationship to the product in question, the *defect and unreasonable dangerous condition* of the product, and the existence of the proximate causal connection between such condition and the user’s injuries or damages.” *West*, 336 So. 2d at 87 (emphasis added). As Liggett Group’s brief correctly explains, the *West* Court did not expressly state that a reasonable alternative design is required for a design defect claim, but the Court’s language and its adoption of the principles set forth in § 402A certainly support the conclusion that such a requirement must be met. *See also Auburn Mach. Works Co. v. Jones*, 336 So. 2d 1167, 1170 (Fla. 1979).

The reasonable alternative design requirement is also embodied in Florida appellate court opinions. For instance, in *Cassisi, supra*, the First District Court of Appeal explained:

[O]ne who is injured while using a perfectly made axe or knife would have no right to a strict liability action against the manufacturer because the product that injured him was not defective. If the user is required to show only that the product was a factual cause in producing his injury, the manufacturer’s liability to the injured party would be, as stated in *West*, [336 So. 2d] at 90, and by Professor Wade, that of an insurer.

*Cassisi*, 396 So. 2d at 1143; *see also Husky Indus., Inc. v. Black*, 434 So. 2d 988 (Fla. 4th DCA 1983) (proof was insufficient to present a jury question that product was defectively designed).

In addition, as explained in Liggett Group's brief, other Florida appellate courts have applied a reasonable alternative design requirement in cases involving guns. *See Coulson v. DeAngelo*, 493 So. 2d 98, 99 (Fla. 4th DCA 1986); *Trespalacios v. Valor Corp. of Fla.*, 486 So. 2d 649, 650 (Fla. 3d DCA 1986).

Other courts applying Florida law have applied the alternative safer design requirement in cases involving beer, *see Bruner v. Anheuser-Busch, Inc.*, 153 F. Supp. 2d 1358, 1360 (S.D. Fla. 2001), *aff'd*, 31 Fed. Appx. 932 (11th Cir. 2002), and pharmaceuticals, *see Cornelius v. Cain*, 2004 WL 48102, at \*5 (Fla. Cir. Ct. Broward County Jan. 5, 2004).

## **II. REASONABLE ALTERNATIVE DESIGN AND THE THIRD RESTATEMENT § 2(b)**

### **A. An Overview of the Third Restatement**

In May 1997, the ALI, led by the co-reporters, Cornell Law Professor James Henderson, Jr. and Brooklyn Law School Professor Aaron Twerski, completed a revised and updated Third Restatement of common-law tort principles concerning product liability. *See Restatement Third, Torts: Products Liability* (1998) ("Third Restatement"). The Third Restatement was published in 1998. The reporters were

not alone in the project. They were assisted by a diverse Advisory Committee consisting of prominent state and federal judges, three former presidents of the Association of Trial Lawyers of America (now the American Association for Justice), consumer-oriented professors, and three defense lawyers. Supplementing the work of the Advisory Committee was a nationwide 297-member “Members Consultative Group.” The ALI Governing Council also reviewed each section with care and made changes they thought were appropriate. The final review process occurred in open meetings of the ALI membership where every member’s voice could be heard. The entire process took five years and culminated in a virtually unanimous vote of the ALI membership in support of the final product. See Victor E. Schwartz, *The Restatement, Third, Torts: Products Liability: A Model of Fairness And Balance*, 10-Fall Kan. J.L. & Pub. Pol’y 41 (2000).

**B. Section 2 of the Third Restatement**

Reflecting the law of a large majority of states, § 2 of the Third Restatement adopts a unitary defect standard for design and warning defect claims based upon “reasonable” designs and warnings and “foreseeable” risks. Section 2 retains “liability without fault” only for manufacturing defects. The rules are stated functionally rather than in terms of traditional labels, such as negligence and strict liability:

## §2. Categories of Product Defect

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

(a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;

(b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design. . . , and the omission of the alternative design renders the product not reasonably safe;

(c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings. . . , and the omission of the instructions or warnings renders the product not reasonably safe.

Third Restatement § 2. With respect to design defect claims, Comment d to § 2 explains:

Subsection (b) adopts a reasonableness (“risk-utility balancing”) test as the standard for judging the defectiveness of product designs. More specifically, *the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product* and, if so, whether the omission of the alternative design. . . rendered the product not reasonably safe. . . .

*Assessment of a product design in most instances requires a comparison between an alternative design and the product design that caused the injury, undertaken from the viewpoint of a reasonable person.* That approach is also used in administering the traditional reasonableness standard in negligence. The policy reasons that support the use of a reasonable-person perspective in connection with

the general negligence standard also support its use in the products liability context.

Third Restatement § 2 cmt. d (emphasis added).<sup>2</sup> The reasonable alternative design requirement in § 2(b) is consistent with the position taken by a majority of courts. See Third Restatement § 2 Rptrs. Note II, at 46-77.<sup>3</sup>

The reasonable alternative design requirement in § 2 has been cited favorably or referred to in a number of Florida appellate opinions. See *Warren ex rel. Brasell v. K-Mart Corp.*, 765 So. 2d 235, 237-238 (Fla. 1st DCA 2000); *Scheman-Gonzalez v. Saber Mfg. Co.*, 816 So. 2d 1133, 1139 (Fla. 4th DCA 2002) (calling the Third Restatement “instructive” in a design defect case and describing § 2’s reasonable alternative design requirement); *Kohler v. Marcotte Co.*, 907 So. 2d 596, 599 (Fla. 3d DCA), *review denied*, 917 So. 2d 194 (Fla. 2005); *Sta-Rite Indus., Inc. v. Levey*, 909 So.2d 901, 904 n.4 (Fla. 3d DCA 2004) (following §2, cmt. d), *review denied*, 919 So. 2d 435 (Fla. 2005).

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<sup>2</sup> See also James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 Cornell L. Rev. 867 (1998); Victor E. Schwartz, *The Reality and Public Policy Behind Sound Design Cases - Section 2(B) of the New Restatement (Third) of Torts: Products Liability*, 8-Fall Kan. J.L. & Pub. Pol’y 70 (1998).

<sup>3</sup> See also Michael J. Toke, Note, *Restatement (Third) of Torts and Design Defectiveness in American Products Liability Law*, 5 Cornell J.L. & Pub. Pol’y 239, 285 (1996) (“the absolute refusal by courts and legislatures to adopt categorical liability suggest that all claims of defective design, in all jurisdictions, must be supported by some evidence of a safer alternative design, whether such evidence is explicitly required or not.”).



### **III. MANUFACTURERS AND SELLERS SHOULD NOT BE SUBJECT TO INSURER-LIKE LIABILITY**

The reasonable alternative design requirement exists to prevent manufacturers and sellers of products from being subject to unfair and extreme insurer-like liability. As this Court explained in *West*, “Generally when the injury is in no way attributable to a defect, there is no basis for imposing product liability upon the manufacturer. It is not contemplated that a manufacturer should be made the insurer for [a]ll physical injuries caused by his products.” *West*, 336 So. 2d at 87 (emphasis added) (quoting *Royal v. Black & Decker Mfg. Co.*, 205 So. 2d 307, 309 (Fla. 3d DCA 1967), *cert. denied*, 211 So. 2d 214 (Fla. 1968)).

It is apparent that this Court in *West* wisely appreciated that when a product has no reasonable alternative design (i.e., there is no way to make it safe), then the focus is no longer on whether the product is “defective,” because it is not. Rather, the issue becomes whether the product is so totally lacking in social utility that it should not be marketed at all. That is a policy determination to be made by legislators; it is not a tort law issue properly decided by courts. *See Warren*, 765 So. 2d at 237 (stating that imposition of liability for sale of carbon dioxide cartridge for a pellet gun “would result in a ban on sales by judicial fiat, a ban ‘within the purview of the Legislature, not the judiciary.’”) (quoting *Holmes v. J.C. Penney Co.*, 133 Cal. App. 3d 216, 219 (1982)); *see also Gunsalus v. Celotex*

*Corp.*, 674 F. Supp. 1149, 1158-59 (E.D. Pa. 1987) (“whether products should be banned or whether absolute liability should be imposed for their use are determinations more appropriately made by the legislative branch of government.”).

Accordingly, most courts have rejected arguments that manufacturers should make their products safer than is technologically feasible; they have refused to impose liability for risks that cannot be eliminated without depriving the consumer of the usefulness or desirability of the product. Courts have supported this principle regardless of whether they believed it was a “good idea” for people to use the products at issue, properly leaving that determination to the legislature. Some examples include:

- **Tobacco:** *Clinton v. Brown & Williamson Holdings, Inc.*, 498 F. Supp. 2d 639 (S.D.N.Y. 2007); *Brown ex rel. Estate of Brown v. Phillip Morris, Inc.*, 228 F. Supp. 2d 506 (N.J. 2002); *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189 (E.D. Tenn. 1985), *aff'd*, 849 F.2d 230 (6th Cir. 1988).
- **Alcohol:** *Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385 (Tex. 1991); *Maguire v. Pabst Brewing Co.*, 387 N.W.2d 565 (Iowa 1986); *Pemberton v. American Distilled Spirits Co.*, 664 S.W.2d 690 (Tenn. 1984); *Dauphin Deposit Bank & Trust Co. v. Toyota Motor Corp.*, 596 A.2d 845 (Pa. Super. Ct. 1991).
- **Motorcycles:** *Toney v. Kawasaki Heavy Indus., Ltd.*, 975 F.2d 162 (5th Cir. 1992); *Kutzler v. AMF Harley-Davidson*, 550 N.E.2d 1236 (Ill. App.), *appeal denied*, 555 N.E.2d 377 (Ill. 1990); *Camacho v. Honda Motor Co.*, 741 P.2d 1240 (Colo. 1987), *cert. denied*, 485 U.S. 901 (1988); *Height v.*

*Kawasaki Heavy Indus., Ltd.*, 461 A.2d 757 (N.J. Super. Ct.), *certification denied*, 468 A.2d 244 (N.J. 2003).

- **Convertible automobiles:** *Delvaux v. Ford Motor Co.*, 764 F.2d 469 (7th Cir. 1985).
- **All-Terrain Vehicles (ATVs):** *Kosmyinka v. Polaris Indus., Inc.*, 462 F.3d 74 (2nd Cir. 2006); *Antley v. Yamaha Motor Corp., U.S.A.*, 539 So. 2d 696 (La. App. 1989).
- **Firearms:** *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir.), *reh'g denied*, 768 F.2d 1350 (1985).<sup>4</sup>
- **Personal Watercraft:** *Krummel v. Bombardier Corp.*, 206 F.3d 548 (5th Cir.), *reh'g denied*, 218 F.3d 745 (2000); *Ford v. Polaris Indus.*, 43 Cal. Rptr.3d 215 (Cal. Ct. App. 2006).
- **Swimming Pools:** *Vincer v. Esther Williams All-Alum. Swim. Pool Co.*, 230 N.W.2d 794 (Wis. 1975).
- **Silicone Breast implants:** *Rosburg v. Minnesota Mining & Mfg. Co.*, 226 Cal. Rptr. 299 (Cal. Ct. App. 1986).
- **Trampolines:** *Parish v. Icon Health & Fitness, Inc.*, 719 N.W.2d 540 (Iowa 2006).

See also James A. Henderson, Jr. & Aaron D. Twerski, *Arriving at Reasonable Alternative Design: The Reporters' Travelogue*, 30 U. Mich. J.L. Reform 563, 585 (1997) (“A few courts who generally impose a requirement of reasonable alternative design do say in dicta (usually in footnotes) that instances might arise

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<sup>4</sup> An exception was *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. 1985) (holding handgun manufacturer strictly liable for injury resulting from properly functioning “Saturday Night Special”). *Kelley* was subsequently overruled by legislation. See Md. Ann. Code art. 27, § 36-I(h).

when a product is so dangerous and has so little utility that it might be defective even without proof of an alternative design. We looked in vain. . . . Three state courts had indeed done so; but those cases were subjected to rather swift legislative reversal.”) (citations omitted); David G. Owen, *Inherent Product Hazards*, 93 Ky. L.J. 377, 382 (2004-05) (“[T]he vast majority of courts have been markedly unreceptive to the call that they displace markets, legislatures, and governmental agencies by decreeing whole categories of products to be outlaws.”); James A. Henderson & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1263, 1299-1300 (1991).

#### **IV. LEAVING POLICYMAKING DECISIONS TO THE LEGISLATURE PROMOTES THE SEPARATION OF POWERS AND IS ROOTED IN THE INHERENT STRENGTHS OF THE LEGISLATIVE PROCESS**

Finally, the separation of powers principle and the inherent strengths of the legislative process support deference to the legislature with respect to whether certain products should be kept off the market. This is particularly true with respect to tort law, because the impact goes far beyond who should win a particular case. The legislature has the unique ability to weigh and balance the many competing societal, economic, and policy considerations involved.

Legislatures are uniquely well equipped to reach fully informed, broad public policy decisions. Through the hearing process, the legislature has the ability to receive comments from persons representing a multiplicity of perspectives and to use the legislative process to obtain new information. The legislature can hear from everybody — plaintiffs’ lawyers, health care professionals, defense lawyers, consumers groups, unions, businesses of all sizes. The legislature also can hear about the loss of tax revenue, the impact that it might have on the state’s budget, and the impact on individual taxpayers that might be called upon to make up the difference. If a point needs further elaboration, an additional witness can be called to testify or a prior witness can be recalled. This process allows legislatures to formulate policy carefully. Ultimately, the legislators make a judgment. If the people who elected the legislators do not like the solution, the voters have a remedy at the ballot box.

Courts, on the other hand, are uniquely and best suited to adjudicate individual disputes concerning discrete issues and parties. This is an essential part of the tripartite structure of our system of government. The Founding Fathers recognized this when they drafted the U.S. Constitution to give the judiciary jurisdiction to decide “cases and controversies.” This advantage also has its limitations: the focus on individual cases does not provide comprehensive access to

broad scale information. That information is critical with respect to products that are inherently unsafe but, nevertheless, valued by certain segments of society.

### CONCLUSION

For these reasons, *amici curiae* ask this Court to require proof of a reasonable alternative design in product liability design defect cases. This Court also should remand this case to the Court of Appeal to enter judgment in favor of Liggett Group based on the finding that plaintiff failed to provide competent proof of a reasonable alternative design.

Respectfully submitted,



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Dated: June 13, 2008

**CERTIFICATE OF SERVICE**

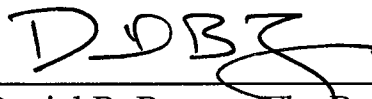
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**CERTIFICATE OF COMPLIANCE WITH RULE 9.210**

I certify that the foregoing Brief is submitted in Times New Roman 14-point font and comply with the requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

A handwritten signature in black ink, appearing to read 'D B R', with a horizontal line underneath it.

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