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Torts Survey: Products Liability

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TORTS SURVEY: PRODUCTS LIABILITY

INTRODUCTION

During the 1994 survey period, the Tenth Circuit Court of Appeals handed down four noteworthy products liability decisions. While virtually every jurisdiction has adopted some form of the *Restatement (Second) of Torts*' provisions on products liability,[1] the application of those provisions varies between jurisdictions and requires an oftentimes challenging application of the *Erie* Doctrine.[2] This survey will focus on the Tenth Circuit's ability to ascertain state law given varying degrees of certainty as to how the respective state's highest court would decide the issue. Part I examines the Tenth Circuit's application of the *Erie* Doctrine given a relatively clear indication of current law from the state's highest court. In *Wagner v. Case Corp.*[3] and *Perlmutter v. United States Gypsum Co.*,[4] the Tenth Circuit, after noting a recent change in Colorado law, held that Colorado's statutory presumptions for products liability actions are only applicable in cases where the plaintiff fails to make out a prima facie case that the product is defective.[5] These cases demonstrate that the Colorado Supreme Court has rendered the statutory presumptions for products liability actions effectively meaningless.

Part II examines the Tenth Circuit's application of the *Erie* Doctrine in a case without any authoritative pronouncement of state law from the state's highest court. In *Allen v. Minnstar, Inc.*,[6] the Tenth Circuit affirmed a Utah

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1. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

2. In products liability cases, the basis for federal court jurisdiction is most often diversity of citizenship. A typical products liability lawsuit involves an injured plaintiff from state A suing a manufacturer from state B. Diversity of citizenship jurisdiction requires: 1) that the plaintiff and defendant are citizens of different states; and 2) that the plaintiff is seeking more than $50,000 in damages from the defendant. *See generally* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.6, at 27 (2d ed. 1993) (discussing the diversity jurisdiction requirements).

In the landmark case Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), the United States Supreme Court announced what has become known as the *Erie* Doctrine. In cases where diversity of citizenship is the basis for federal jurisdiction, federal courts must ascertain and apply the law of the state whose law is controlling, under applicable choice of law principles, such that the result reached in federal court is the same result that would have been reached had the case been tried in state court. *See id.* at 78. Federal courts sitting in diversity must apply a state's law in accordance with the decisions of that state's highest court. *Id.* at 79. If the state's highest court has not decided the issue presently before the federal court, the federal court must make its best attempt to predict how the state's highest court would decide the issue. *Id.* at 78-79.

The *Erie* Doctrine was necessary to prevent forum shopping and to create uniformity in decisions. *See generally* FRIEDENTHAL ET AL., *supra*, §§ 4.1-4.5 (discussing the Court's reasoning in *Erie* and tracing the modern development of the *Erie* Doctrine). If federal courts were not bound to apply state law as the state's highest court would, there would be no uniformity of decisions. *Id.* A plaintiff would sue in state court if the state's laws were more favorable to her case, or in a federal court if its laws were of more help. *Id.* In *Erie*, the Supreme Court decided that, as a matter of public policy, forum shopping would no longer be allowed. *Erie*, 304 U.S. at 76-79.

3. 33 F.3d 1253 (10th Cir. 1994).

4. 4 F.3d 864 (10th Cir. 1993).

5. *Wagner*, 33 F.3d at 1254; *Perlmutter*, 4 F.3d at 874-75.

6. 8 F.3d 1470 (10th Cir. 1993).

District Court's ruling that in order to prevail in a products liability action based on defective design, a plaintiff must prove that an alternative, safer design existed at the time the product was placed into the stream of commerce.[7] Although the Utah Supreme Court had not addressed the issue, the Tenth Circuit's decision is in accord with the modern trend.

Part III examines the Tenth Circuit's application of the *Erie* Doctrine when left with little guidance from the state's highest court as to how it would decide the matter. In *Holt v. Deere & Co.*,[8] the Tenth Circuit affirmed the Oklahoma District Court, holding that the district court did not err in submitting the issue of voluntary assumption of risk to the jury.[9] In reaching this conclusion, the Tenth Circuit relied on various Oklahoma Supreme Court decisions that indicated a willingness, in most cases, to submit the defense of assumption of risk to the jury.

I. STATUTORY PRESUMPTIONS: *WAGNER V. CASE CORP.*[10] AND *PERLMUTTER V. UNITED STATES GYPSUM CO.*[11]

A. *Background*

Colorado Revised Statutes section 13-21-403 establishes two presumptions to be used in products liability actions when applicable. The statute states in relevant part:

> (1) In any product liability action, it shall be rebuttably presumed that the product which caused the injury, death, or property damage was not defective and that the manufacturer or seller thereof was not negligent if the product:
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> > (a) Prior to sale by the manufacturer, conformed to the state of the art, as distinguished from industry standards, applicable to such product in existence at the time of sale . . . .
>
> (3) Ten years after a product is first sold for use or consumption, it shall be rebuttably presumed that the product was not defective and that the manufacturer or seller thereof was not negligent and that all warnings and instructions were proper and adequate.[12]

The Colorado courts, and the Tenth Circuit Court of Appeals, gave this statute varying interpretations. The Colorado Supreme Court initiated the confusion in 1983 when it stated in a footnote to its decision in *Belle Bonfils Memorial Blood Bank v. Hansen*[13] that the state-of-the-art presumption of section 13-21-403(1)(a) "acts as rebuttable evidence of the non-defectiveness

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7. *Id.* at 1477.
8. 24 F.3d 1289 (10th Cir. 1994).
9. *Id.* at 1295.
10. 33 F.3d 1253 (10th Cir. 1994).
11. 4 F.3d 864 (10th Cir. 1993).
12. COLO. REV. STAT. § 13-21-403 (1987). These presumptions are referred to throughout the Survey as the state-of-the-art presumption and the ten-year presumption.
13. 665 P.2d 118 (Colo. 1983).

of any product which may be the subject of a products liability action."[14] Although the state-of-the-art presumption was not at issue in *Belle Bonfils*, later courts cited to that decision when holding that the state-of-the-art and ten-year presumptions were rebuttable evidence.

Three years later, in *Uptain v. Huntington Lab, Inc.*,[15] the Colorado Supreme Court affirmed a trial judge's instruction informing the jury of the ten-year presumption created by section 13-21-403(3). In *Uptain*, the trial court allowed the defendant-manufacturer to introduce evidence that it had marketed the allegedly defective product for twenty-five years, and that during that period of time no claims were filed regarding the product's alleged defectiveness.[16] The Colorado Supreme Court affirmed the lower court, holding that the evidence was admissible because it was relevant to the defendant's request for a jury instruction on the ten-year presumption of section 13-21-403(3).[17]

In 1989, the Tenth Circuit decided *Tafoya v. Sears Roebuck & Co.*[18] In *Tafoya*, an owner of a riding lawnmower brought action against the seller and manufacturer claiming his injury was a result of the mowers defective design.[19] The Tenth Circuit held that both the ten-year and state-of-the-art presumptions of section 13-21-403 need not be rebutted by clear and convincing evidence; a simple preponderance of the evidence would suffice.[20]

Finally, in *Mile Hi Concrete, Inc. v. Matz*,[21] the Colorado Supreme Court put an end to the confusion regarding the use of the ten-year presumption in products liability actions. The Court held that the trial court should not have instructed the jury on the ten-year presumption because the plaintiff, to make out a prima facie products liability case, must come forward with sufficient evidence of the product's defectiveness to withstand a motion for a directed verdict.[22] The court reasoned that once the plaintiff has presented sufficient evidence to defeat a motion for a directed verdict, the presumption has necessarily been rebutted and no reason exists for an instruction to the jury regarding the presumption.[23] The court did not indicate whether its holding should be expanded to apply to the other products liability presumptions found in section 13-21-403.

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14. *Id.* at 126 n.14 (citation omitted).
15. 723 P.2d 1322 (Colo. 1986).
16. *Id.* at 1331.
17. *Id.*
18. 884 F.2d 1330 (10th Cir. 1989), *overruled by* Wagner v. Case Corp., 33 F.3d 1253 (10th Cir. 1994).
19. *Id.* at 1331.
20. *Id.* at 1335-36.
21. 842 P.2d 198 (Colo. 1992).
22. *Id.* at 205.
23. *Id.*

B. *The Tenth Circuit Applies* Mile Hi Concrete, Inc. v. Matz:[24] Wagner v. Case Corp.[25] *and* Perlmutter v. United States Gypsum Co.[26]

Following the Colorado Supreme Court's decision in *Mile Hi Concrete*, the Tenth Circuit has twice addressed whether Colorado's statutory presumptions are of any import in products liability actions brought in the federal district courts. In *Perlmutter* and *Wagner*, two distinct products liability presumptions were at issue. In *Perlmutter*, developers of a shopping mall brought strict products liability and negligence actions against the manufacturer of a plaster product containing asbestos.[27] The jury returned a verdict in favor of the developers on the negligence and failure to warn claims, and in favor of the manufacturer on the strict liability claim.[28] On appeal, the manufacturer argued that the trial judge erred by failing to give a jury instruction as to the effect of the ten-year presumption.[29] The Tenth Circuit cited *Mile Hi Concrete* and stated that an instruction based on the ten-year presumption "is not necessary if the plaintiff has presented sufficient evidence to survive a motion for directed verdict."[30]

The *Wagner* decision presented a somewhat more difficult problem for the Tenth Circuit. In *Wagner*, the plaintiff had been injured by a loader/backhoe manufactured by Case corporation.[31] The plaintiff alleged that the product was defective because Case had failed to install a lockout mechanism to prevent the inadvertent activation of the backhoe.[32] Over the plaintiff's objections, the trial court instructed the jury as follows:

> [I]f you find that (1) prior to any sale by the Case Corporation, the . . . [b]ackhoe conformed to the state of the art, as distinguished from industry standards, and (2) such state of the art was applicable to such products as the . . . [b]ackhoe at the time of such sale, then the law presumes the . . . [b]ackhoe was not defective.[33]

The jury returned a verdict for the Case Corporation.[34]

On appeal, the Tenth Circuit cited *Mile Hi Concrete*.[35] Although only the ten-year presumption was at issue in *Mile Hi Concrete*, the Colorado Supreme Court's holding seemed equally applicable to the other statutory presumptions of section 13-21-403. The Tenth Circuit reasoned that the logic in *Mile Hi Concrete* should also apply to the state-of-the-art presumption.[36] The Tenth

24. 842 P.2d 198 (Colo. 1992).
25. 33 F.3d 1253 (10th Cir. 1994).
26. 4 F.3d 864 (10th Cir. 1993).
27. *Id.* at 867.
28. *Id.*
29. *Id.* at 874.
30. *Id.* at 875.
31. *Wagner*, 33 F.3d at 1254.
32. *Id.* at 1255.
33. *Id.*
34. *Id.* at 1254.
35. *Id.* at 1257.
36. *Id.*

Circuit stated that, similar to the ten year presumption, the state-of-the-art presumption was merely a rebuttable presumption directed against the plaintiff and was not applicable once the plaintiff presented a prima facie case and withstood the defendant's motion for a directed verdict.[37] The Tenth Circuit held that the trial court's instruction was erroneous, and reversed and remanded the case for a new trial.[38]

C. *Analysis*

The Tenth Circuit correctly ascertained and applied Colorado law in both *Perlmutter* and *Wagner*. The *Perlmutter* decision was fairly simple to decide because the Colorado Supreme Court had ruled on the exact issue the year before in *Mile Hi Concrete*.[39] The *Wagner* case would have been decided in similar fashion if the Tenth Circuit had utilized the principle case cited by the Colorado Supreme Court in *Mile Hi Concrete*: *Sexton v. Bell Helmets, Inc.*[40]

In *Mile Hi Concrete*, the Colorado Supreme Court relied on the Fourth Circuit Court of Appeal's reasoning in *Sexton v. Bell Helmets, Inc.*[41] In *Sexton*, the Fourth Circuit was asked to determine what effect Kentucky's state-of-the-art presumption[42] would have in products liability actions.[43] The Fourth Circuit concluded that Kentucky's state-of-the-art presumption should not be given once a plaintiff has produced sufficient evidence of a product's defectiveness.[44] In *Mile Hi Concrete*, the court cited the *Sexton* decision and stated, "[w]e share the view of the Fourth Circuit that an instruction based on such a statutory presumption is meaningless."[45]

Possibly due to a citation error, the Colorado Supreme Court cited the *Sexton* decision as though it involved Kentucky's time-based presumption rather than its state-of-the-art presumption.[46] Had the Tenth Circuit analyzed

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37. *Id.* at 1256.
38. *Id.* at 1257.
39. 842 P.2d 198 (Colo. 1992).
40. 926 F.2d 331 (4th Cir.), *cert. denied*, 502 U.S. 820 (1991).
41. *See Mile Hi Concrete*, 842 P.2d at 205 n.12 (citing Sexton v. Bell Helmets, Inc., 926 F.2d 331 (4th Cir.), *cert. denied*, 502 U.S. 820 (1991)).
42. Kentucky has a state-of-the-art presumption similar to Colorado's section 13-21-403(1)(a). The Kentucky statute states:

> In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured.

KY. REV. STAT. ANN. § 411.310(2) (Michie/Bobbs-Merrill 1992). Kentucky also has a time-based presumption similar to Colorado's ten-year presumption:

> In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the subject product was not defective if the injury, death or property damage occurred either more than five (5) years after the date of the sale to the first consumer or more than eight (8) years after the date of manufacture.

KY. REV. STAT. ANN. § 411.310(1) (Michie/Bobbs-Merrill 1992).
43. *Sexton*, 926 F.2d at 332-33.
44. *Id.* at 333.
45. *Mile Hi Concrete*, 842 P.2d at 205 n.12 (citation omitted).
46. *Id.* The Colorado Supreme Court cited KY. REV. STAT. ANN. § 411.310(1), as being the

the *Sexton* decision, it could have avoided speculating as to whether the Colorado Supreme Court intended its reasoning in *Mile Hi Concrete* to apply with equal force to the state-of-the-art presumption. The Tenth Circuit could have stated with certainty that the Colorado Supreme Court would have denied Case corporation's request for an instruction on the state-of-the-art presumption because Wagner had produced sufficient evidence that the loader/backhoe was defective.

Mile Hi Concrete and its progeny essentially render Colorado's statutory presumptions meaningless. A careful reading of *Mile Hi Concrete* reveals the Colorado Supreme Court's desire to strip both the ten-year and state-of-the-art presumptions of all effect in future products liability cases. The effect given to the presumptions by the Colorado Supreme Court in *Mile High Concrete* does not alter the burden of production or the burden of persuasion that would exist without the presumptions. A plaintiff still needs to produce sufficient evidence of a product's defectiveness in order to withstand a defendant's motion for a directed verdict.[47]

Mile Hi Concrete was essentially a judicial repeal of state legislation. The Colorado Supreme Court took two state statutes that were obviously intended to have some effect in products liability actions, stripped them of all effect, and left two empty statutory provisions on the books. The Tenth Circuit is basically powerless to do anything about the proper function of the state supreme courts and legislative functions since it is bound by the *Erie* doctrine to apply state law as the state's highest court would.[48]

Perlmutter and *Wagner* do not stand for the proposition that state-of-the-art evidence and evidence that a product has been marketed for many years without any claims of defectiveness are no longer relevant in products liability actions. On the contrary, the fact that a product conformed to the state-of-the-art at the time of its manufacture, or that a product has been on the market for

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statute at issue in *Sexton* rather than § 411.310(2). *Id.* Section 411.310(1) codifies the time-based presumption, while 411.310(2) codifies the state-of-the-art presumption. KY. REV. STAT. ANN. § 411.310 (Michie/Bobbs-Merrill 1992).

47. In any case governed by the Federal Rules of Civil Procedure, the plaintiff must, at a minimum, raise a genuine issue of material fact sufficient to withstand a defendant's motion for summary judgement. FED. R. CIV. P. 56(c). A "directed verdict acts somewhat like a delayed summary judgement motion in that it determines that there are no genuine issues of fact that need to be sent to the jury." FRIEDENTHAL ET AL., *supra* note 2, § 12.3, at 544. A motion for a directed verdict can "be made by either party at the close of their opponent's evidence." *Id.* § 12.3, at 543.

Thus, the *Mile Hi Concrete* holding, followed by the Tenth Circuit in *Perlmutter* and *Wagner*, states no more than what is already stated in the Federal Rules of Civil Procedure. If a plaintiff, in a products liability case, did not introduce sufficient evidence of a product's defectiveness, the Federal Rules of Civil Procedure would compel a trial judge to grant the defendant's motion for a directed verdict, regardless of whether a statutory presumption also compelled her to do so. *See Mile Hi Concrete*, 842 P.2d at 205.

The Colorado Rules of Civil Procedure requirements for summary judgements and directed verdicts are nearly identical to the provisions found in the Federal Rules of Civil Procedure discussed above. *See* COLO. R. CIV. P. 50 (concerning directed verdicts); Safeway Stores, Inc. v. Langdon, 532 P.2d 337, 340 (Colo. 1975) (stating that "[a] motion for a directed verdict can only be granted where the evidence, when so considered, compels the conclusion that the minds of reasonable men could not be in disagreement"); *see also* COLO. R. CIV. P. 56 (concerning summary judgements).

48. *See supra* note 2 and accompanying text.

a substantial period of time without any claims of defectiveness, may be wholly relevant in design defect and failure to warn products liability actions. For example, the Colorado Supreme Court recently decided a case in which it held state-of-the-art evidence relevant in a products liability action based on failure to warn claims in order "to determine whether the product is defective and unreasonably dangerous."[49] *Perlmutter* and *Wagner* simply hold that an instruction based on the state-of-the-art or ten-year presumption should not be given once the plaintiff has introduced evidence from which a reasonable juror could find that the product in question was indeed defective.[50]

II. THE ELEMENTS OF A PRIMA FACIE DESIGN DEFECT CASE IN UTAH: *ALLEN V. MINNSTAR, INC.*[51]

A. *Background*

In the 1979 case *Ernest W. Hahn, Inc. v. Armco Steel Co.*,[52] Utah adopted the doctrine of strict products liability as set forth in section 402A of the *Restatement (Second) of Torts*. Section 402A imposes liability on the manufacturer and/or seller of a product that is in a "defective condition unreasonably dangerous" to the user or consumer.[53] Although the *Restatement* provides comments that help explain section 402A, none of these comments were adopted by the *Hahn* court. Thus, lower courts were provided no help in defining a "defective condition [that is] unreasonably dangerous." The Utah Supreme Court first attempted to define the phrase in the 1982 case *Dowland v. Lyman Products for Shooters*.[54] In *Dowland*, the court applied comment g of section 402A, which defines a defective condition.[55] Comment g defines a defective condition as "a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[56] Although the Utah legislature has since addressed comment g's "consumer-contemplation" test, the essence of the test remains the same.[57]

Finally, in the 1991 case *Grundberg v. Upjohn Co.*,[58] the Utah Supreme Court held that all drugs approved by the Food and Drug Administration

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49. Fibreboard Corp. v. Fenton, 845 P.2d 1168, 1172 (Colo. 1993).
50. *Perlmutter*, 4 F.3d at 875; *Wagner*, 33 F.3d at 1257.
51. 8 F.3d 1470 (10th Cir. 1993).
52. 601 P.2d 152, 158 (Utah 1979).
53. RESTATEMENT (SECOND) OF TORTS § 402A (1965).
54. 642 P.2d 380 (Utah 1982).
55. *Id.* at 381 n.2.
56. RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965). The rule only applies when the "product is in a defective condition when it leaves the seller's hands." *Id.* Comment g's definition of "defective condition" is often referred to as the "consumer-contemplation" test. *See generally* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 99, at 698-99 (5th ed. 1984) (discussing the consumer-contemplation test).
57. UTAH CODE ANN. § 78-15-6(2) (1992). The Utah Product Liability Act defines "unreasonably dangerous" as "dangerous to an extent beyond which would be contemplated by the ordinary and prudent buyer, consumer, or user of that product in that community considering the product's characteristics, propensities, risks, dangers and uses together with any actual knowledge, training, or experience possessed by that particular buyer, user or consumer." *Id.*
58. 813 P.2d 89 (Utah 1991).

(FDA) were unavoidably unsafe products, and that as long as the drugs were properly prepared, marketed, and distributed with appropriate warnings, sellers of such drugs would not be strictly liable for unfortunate consequences attending their use.[59] In *Grundberg*, the court used a "risk-utility" balancing test and held that the utility of FDA approved drugs outweighed the reasons to afford plaintiffs an additional means of recovery.[60] By explicitly adopting the reasoning of comment k of section 402A, the court provided broad immunity from strict liability claims based on design defects to manufacturers and sellers of FDA approved drugs.[61]

B. *The Tenth Circuit Defines a Prima Facie Design Defect Case:* Allen v. Minnstar, Inc.[62]

In *Allen*, the plaintiff, who had been struck and severely injured by a boat propeller, brought a strict product liability action against the manufacturers of the boat and engine.[63] The district court granted summary judgment in favor of the defendant manufactures and Allen appealed.[64] Allen contended that the trial court erred in holding that he was required to prove the existence of a safer alternative design.[65] Allen argued that the Utah Supreme Court, in applying the strict liability principles of section 402A, had previously not required plaintiffs to prove the existence of a safer alternative design.[66] According to Allen, the Tenth Circuit itself had previously held, in *Karns v. Emerson Electric Co.*,[67] that demonstrating the existence of a safer alternative design and the state-of-the-art in the industry was not an essential element of a plaintiff's prima facie case.[68] Unpersuaded by Allen's argument, the Tenth Circuit, relying on *Pree v. Brunswick Corp.*[69] and *Elliot v. Brunswick Corp.*,[70] held in favor of the manufacturer.[71]

In both *Pree* and *Elliot*, plaintiffs injured by unguarded boat propellers sued the manufacturer for defective design.[72] Applying the consumer-contem-

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59. *Id.* at 90.
60. *Id.* at 99.
61. *Id.* Comment k recognizes that some products, like drugs, are "unavoidably unsafe." The comment does not go as far as the Utah Supreme Court to state that all FDA approved drugs should be given the label "unavoidably unsafe" in order to give their manufacturers and sellers immunity from strict liability. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965); *see also* Adam F. Trupp, Comment, *A Step Backwards in Products Liability Law: The Utah Supreme Court and Comment K*, 1992 UTAH L. REV. 101, 122 (discussing how only a minority of jurisdictions, including Utah, apply comment k as a form of broad immunity for all drugs approved by the FDA).
62. 8 F.3d 1470 (10th Cir. 1993).
63. *Id.* at 1472.
64. *Id.*
65. *Id.* at 1477.
66. *Id.*
67. 817 F.2d 1452 (10th Cir. 1987).
68. *Allen*, 8 F.3d at 1477 (citing *Karns*, 817 F.2d at 1457).
69. 983 F.2d 863 (8th Cir.), *cert. denied*, 114 S. Ct. 65 (1993).
70. 903 F.2d 1505 (11th Cir. 1990), *cert. denied*, 498 U.S. 1048 (1991).
71. *Allen*, 8 F.3d at 1477.
72. *Id.* at 1477-78 (citing *Pree*, 983 F.2d at 864; *Elliot*, 903 F.2d at 1506).

plation test embodied in comment i of section 402A,[73] both courts held that the dangers inherent in unguarded propellers should have been apparent to, or within the contemplation of, the ordinary consumer.[74] The courts held, therefore, that the unguarded propellers were not "unreasonably dangerous" within the meaning of section 402A.[75]

The Tenth Circuit noted that comment i of section 402A, relied upon by the *Pree* and *Elliot* courts, had not been adopted in Utah.[76] Nevertheless, the Tenth Circuit found that the trial court did not err in holding that it was incumbent on the plaintiff to prove that an "alternative safer design, practicable under the circumstances, was available at the time the boat and engine were sold."[77]

C. *Analysis*

Based on the majority of courts interpretations in this area, it is clear that the Tenth Circuit correctly held that Allen needed to establish the existence of a safer alternative design to prevail in his products liability claim.[78] Although some courts have erroneously held that such proof is not required, and is merely one factor to be considered in determining whether a product is defective,[79] many other jurisdictions, and the tentative draft of the *Restatement*

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73. *See infra* notes 81-84 and accompanying text.

74. *Allen*, 8 F.3d at 1477-78 (citing *Pree*, 983 F.2d at 867; *Elliot*, 903 F.2d at 1507).

75. *Id.* at 1478.

76. *Id.* at 1479.

77. *Id.* Plaintiffs are required to prove the existence of a safer alternative design because public policy dictates that manufacturers should not be liable for injuries caused by their products when those products could not have been made safer given the technology existing at the time the product was originally manufactured. *See* KEETON ET AL., *supra* note 56, § 99, at 701 (discussing how "[i]t is generally agreed that a product cannot be regarded as defectively designed when sold simply because after the sale and prior to the time of trial or to the time of a claimant's injury, there was a technological breakthrough . . . making it possible to eliminate a risk of harm . . . or reduce the magnitude of the danger from the risk"); *see also* Jefferey N. Diamant, Comment, *Texas Senate Bill 4: Product Liability Legislation Analyzed*, 31 HOUS. L. REV. 921, 941 (1994) (discussing how the defectiveness of a product under the common law of Texas was almost always determined in relation to safer alternatives, and that recent legislation in Texas, which requires plaintiffs to prove the existence of a safer design, does not really change Texas common law on the issue, but merely codifies the standard of proof).

Allowing liability in situations where a product could not be safer would place an enormous burden on manufacturers, which in turn would discourage manufacturing and result in higher consumer prices for manufactured products. Making the plaintiff prove that a safer design existed, or should have existed, essentially injects principles of negligence into the issue of whether a manufacturer of a product should be liable for injuries occasioned by its use. If the manufacturer could have designed a safer product, without excessive costs to itself or to the consumer, then the manufacturer could be considered negligent for failing to do so, and the product sold would be considered in a defective condition unreasonably dangerous because of such failure. *See generally* WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS 741 n.3 (8th ed. 1988) (questioning whether incorporating state of the art evidence in products liability cases would return products liability law to negligence standards). For a discussion of the goals and underlying policies of Section 402A and strict products liability in general, see RESTATEMENT (SECOND) OF TORTS § 402A cmts. a, b, c (1965); Greenman v. Yuba Products, Inc., 377 P.2d 897, 900-01 (Cal. 1963).

78. *Allen*, 8 F.3d at 1479.

79. *See, e.g.*, Kallio v. Ford Motor Co., 407 N.W.2d 92 (Minn. 1987). In *Kallio* the court held that: "[a]lthough normally evidence of a safer alternative design will be presented initially by

(Third) of Torts, are in accord with the Tenth Circuit's holding in *Allen*.[80]

Provided that the Tenth Circuit's decision is not read as adopting the "open and obvious" danger rule, as embodied in the consumer-contemplation test of section 402A comment i,[81] it is probably an accurate application of Utah products liability law. The Tenth Circuit reliance on the *Pree* and *Elliot* holdings, however, does not mean that the court intended to adopt the per se rule of non-defectiveness for certain products embodied in comment i. Comment i's premise undermines the rationale of strict liability and does not promote the purposes behind the doctrine. In fact, comment i has been rejected by the vast majority of states,[82] and by the American Law Institute in its tentative draft of the *Restatement (Third) of Torts*.[83] Additionally, the "open and obvious" danger rule arguably has been rejected in Utah.[84]

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the plaintiff, it is not necessarily required in all cases. Such evidence is relevant to, and certainly may be an important factor in, the determination of whether the product was unreasonably defective." *Id.* at 96-97 (footnote omitted). At least one court has held that state of the art evidence is irrelevant because the focus of the inquiry is the "defective condition of the product . . . not the manufacturer's knowledge." *See, e.g.*, Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434, 438 (Mo. 1984).

80. *See, e.g.*, Glover v. BIC Corp., 987 F.2d 1410, 1421-23 (9th Cir. 1993) (holding that there was insufficient evidence that an alternative design of a cigarette lighter was practicable and feasible); Wilson v. Piper Aircraft Corp., 577 P.2d 1322, 1328 (Or. 1978) (holding that the plaintiff did not produce sufficient evidence that a substitute design was practicable); Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 746 (Tex. 1980) (stating "[w]hether a product was defectively designed must be judged against the technological context existing at the time of its manufacture"); *see also* RESTATEMENT (THIRD) OF TORTS § 2(b) (Tentative Draft No. 1, 1994) ("A product is defective in design when the foreseeable risks of harm posed by the product could have been reduced by the adoption of a reasonable alternative design by the seller . . . and the omission of the alternative design renders the product not reasonably safe . . . .").

81. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965). Comment i is sometimes referred to as the "inherent characteristics" rule. WILLIAM L. PROSSER, CASES AND MATERIALS ON TORTS, 751 n.1 (8th ed. 1988). It essentially "means that liability should not be imposed when harm results because of danger or risk that is inherent in a product." *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965) (stating that "[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics").

Comment i stands for the proposition that certain products are per se not defective. *Id.* The comment uses whiskey, butter, and tobacco as examples of products that are not unreasonably dangerous, provided they are not contaminated. *Id.* According to the drafters of the Restatement, "[g]ood butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks." *Id.*

82. RESTATEMENT (THIRD) OF TORTS § 2 cmt. c, reporters' note, at 49 (Tentative Draft No. 1, 1994) (noting that "[a] strong majority of courts have rejected the 'open and obvious,' or 'patent danger rule' as an absolute defense to a claim of design defect" and instead consider the "obviousness of the danger . . . [as] one factor among many as to whether a product design meets risk-utility norms").

83. *See id.* § 2 cmt. c, at 17 (stating "[t]he fact that a danger is open and obvious is relevant to the issue of defectiveness, but does not preclude a plaintiff from establishing that a reasonable alternative design should have been adopted that would have reduced or prevented injury to the plaintiff").

If this principle is adopted, products such as whiskey, tobacco, and butter could be deemed defective if the plaintiff could show that a reasonable alternative design would have reduced or prevented her injuries. *See id.* at 17-18.

84. *See* House v. Armour of America, Inc., 886 P.2d 542, 548 (Utah Ct. App. 1994) (holding "that the presence of an 'open and obvious danger' is merely one factor for the trier of fact to consider when assessing the liability of the defendant in a strict liability case" based on a failure to warn).

In *House*, the court cited Donahue v. Durfee, 780 P.2d 1275 (Utah Ct. App. 1989), in

The doctrine of strict products liability was adopted in most states for public policy reasons.[85] Supporters of strict liability for manufacturers of defective products argue that strict liability is appropriate because: 1) manufacturers are in a better position to protect against harm; 2) public policy dictates that the costs of injuries resulting from defective products be borne by the manufacturers that placed such products in the market rather than by the persons injured by them; 3) manufacturers can more readily obtain liability insurance for harm, and in turn, pass that added cost on to the consuming public by charging higher prices for the goods; and 4) public policy demands that the costs of accidents be placed on the party best able to determine whether there are means to prevent the harm.[86]

These public policy goals are not served by the per se rule of non-defectiveness embodied in comment i. Manufacturers of dangerous products can more readily insure against injuries occasioning their use and pass that cost along to the consuming public. By making manufacturers bear the costs for injuries caused by their products, manufacturers of dangerous products are forced to consider carefully the relative worth of placing such products on the market. Permitting a manufacturer to avoid liability whenever its product's dangers might be considered open and obvious is simply inconsistent with the entire rationale of strict liability.

This is not to say that a per se rule of non-defectiveness is inappropriate in all circumstances. Comment k, for instance, establishes a per se rule of non-defectiveness for some products, such as drugs, deemed "unavoidably unsafe."[87] This comment was applied by the Utah Supreme Court in *Grunberg v. Upjohn Co.*[88] to grant blanket immunity to manufacturers of FDA approved drugs. Unlike comment i's "open and obvious" immunity, comment k's immunity does not undermine the doctrine and rationale of strict products liability. Good reasons exist for granting blanket immunity for manufacturers of FDA approved drugs. Imposing liability on manufacturers of FDA approved drugs any time a user suffers an unfortunate reaction to those drugs could have a chilling effect on manufacturers, and thereby keep possibly life-saving products from being marketed. Additionally, the requirement of FDA approval ensures that the drugs are safe for consumption by the vast majority of users.

Allen does not, however, adopt explicitly the logic of comment i and the per se rule of non-defectiveness for products whose dangers are "open and obvious." *Allen* only requires the plaintiff to prove the existence of a safer and practicable alternative design when the dangers associated with a product are

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support of its argument for abandoning the open and obvious danger rule as a complete defense. *House*, 886 P.2d at 548. The *Donahue* court only abandoned the rule as a defense in negligence cases. *Donahue*, 780 P.2d at 1279. However, the *House* court expanded the decision and abandoned the rule in strict liability cases as well. *House*, 886 P.2d at 548.

85. *See* KEETON ET AL., *supra* note 56, § 98, at 692-93 (listing some of the public policy justifications that have been the basis for many courts decision to adopt strict liability in tort).

86. RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965) (listing the public policy arguments in favor of strict liability); *see also* KEETON ET AL., *supra* note 56, § 98, at 692-93 (listing the public policy justifications for adopting strict liability in tort).

87. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965).

88. 813 P.2d 89 (Utah 1991).

open and obvious.[89] The tentative draft of the *Restatement (Third) of Torts* actually goes further than the *Allen* court. The tentative draft requires plaintiffs, in all design defect cases, to prove that a safer alternative design existed.[90] Such proof is also required by many states in design defect claims.[91] In contrast, under *Allen* it is possible that plaintiffs will not be required to prove the existence of a safer design in cases where the dangers associated with the product are latent rather than patent.

The Tenth Circuit struck a fair compromise between the needs of manufacturers and the needs of consumers by requiring proof of a safer alternative design. Since plaintiffs can still prevail in design defect actions when manufacturers neglect to adopt reasonable alternative designs, the rule should encourage manufacturers to design safer products.

III. ASSUMPTION OF RISK AS A DEFENSE IN PRODUCTS LIABILITY ACTIONS: *HOLT V. DEERE & CO.*[92]

A. *Background*

The Oklahoma Supreme Court first recognized voluntary assumption of risk as a defense in strict products liability actions in *Kirkland v. General Motors Corp.*[93] In *Kirkland*, the court stated that assumption of the risk in products liability actions should be narrowly defined as "[v]oluntary assumption of the risk of a known defect."[94] The Oklahoma Supreme Court did not discuss the defense again until 1979 in *Jordan v. General Motors Corp.*[95] In *Jordan*, the court held that, because there was evidence that the plaintiff knew his car had a tendency to veer, a question of fact was presented as to whether he had voluntarily assumed the risk of a known defect.[96] The *Jordan* decision clearly states a preference for submitting assumption of risk to the jury. Based on the logic utilized by the court in *Jordan*, a plaintiff's general knowledge of a defect is apparently sufficient evidence upon which to instruct the jury on assumption of risk.[97]

In 1988, the Tenth Circuit decided *McMurray v. Deere & Co.*,[98] a products liability case brought by the wife of a man who was killed when a tractor he was using started in gear.[99] The plaintiff argued on appeal that there was insufficient evidence to warrant the trial court's instructing the jury on the defense of voluntary assumption of the risk.[100] The Tenth Circuit agreed and reiterated a statement it had made six years earlier in *Bingham v.*

89. *Allen*, 8 F.3d at 1479.
90. *See* RESTATEMENT (THIRD) OF TORTS § 2(b) (Tentative Draft No. 1, 1994).
91. *See* cases cited *supra* note 80.
92. 24 F.3d 1289 (10th Cir. 1994).
93. 521 P.2d 1353, 1366 (Okla. 1974).
94. *Id.*
95. 590 P.2d 193 (Okla. 1979).
96. *Id.* at 196.
97. *Id.*
98. 858 F.2d 1436 (10th Cir. 1988).
99. *Id.* at 1441.
100. *Id.* at 1439-40.

Hollingsworth Manufacturing Co.,[101] that Oklahoma trial courts may not grant summary judgments based on a plaintiff's assumption of risk if no proof was introduced that the plaintiff had specific knowledge of the risk.[102] The Tenth Circuit further stated that for a manufacturer to avail itself of the assumption of risk defense, it must prove that the plaintiff had "[s]ubjective awareness of both the defect and consequent risk of injury."[103] The Tenth Circuit stated that it was proper to submit the defense to the jury even where the direct evidence of the plaintiff's knowledge of the risk was unclear.[104]

One month after *McMurray*, the Oklahoma Supreme Court decided *Thomas v. Holliday*,[105] which described instances where assumption of risk would be a valid defense in Oklahoma.[106] Following the 1979 decision in *Jordan*,[107] Oklahoma implemented a comparative negligence scheme, and the *Thomas* decision was intended to clarify and distinguish assumption of the risk from comparative negligence. In *Thomas*, the court noted that comparative negligence was often mislabeled assumption of risk.[108] In attempting to define the two defenses, the court stated, "[t]he touchstone of the assumption-of-risk defense is consent to harm and not heedlessness or indifference."[109] Against this backdrop, the Tenth Circuit decided *Holt v. Deere & Co.*[110]

B. *The Tenth Circuit Applies Oklahoma Assumption of Risk Principles:* Holt v. Deere & Co.[111]

1. The Majority Opinion

In *Holt*, a mechanic was severely injured when the road grader he was working on started in gear.[112] The jury returned a verdict finding that Holt failed to establish the essential elements of his products liability claim, and further, that Holt had voluntarily assumed the risk of a known defect.[113] Holt appealed both issues. Rather than affirm the jury's verdict based on its finding that Holt had not proven the essential elements of his products liability claim, the Tenth Circuit relied on the jury's finding that Holt had voluntarily assumed the risk of a known defect.[114] By affirming the jury's finding on the assumption of risk issue, the majority found it unnecessary to address the jury's conclusion that Holt had not proven the elements of his products liabili-

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101. 695 F.2d 445 (10th Cir. 1982).
102. *McMurray*, 858 F.2d at 1440 (citing *Bingham*, 695 F.2d at 449).
103. *Id.*
104. *Id.* at 1441 n.5 (citing *Bingham*, 695 F.2d at 449).
105. 764 P.2d 165 (Okla. 1988).
106. *Id.* at 169-70.
107. Jordan v. General Motors Corp., 590 P.2d 193, 196 (Okla. 1979); *see supra* text accompanying notes 95-97.
108. *Thomas*, 764 P.2d at 171.
109. *Id.* at 169.
110. 24 F.3d 1289 (10th Cir. 1994).
111. *Id.*
112. *Id.* at 1290.
113. *Id.*
114. *Id.*

ty claim.[115]

Holt argued on appeal that there was insufficient evidence presented at trial to warrant an assumption of the risk instruction to the jury.[116] The trial record indicated that two of Holt's co-workers knew the road-grader could be started in gear.[117] The record also revealed that Holt had explained the incident to his supervisor from his hospital bed, and had stated either "I don't know why I did it," or "I knew better than that."[118]

Holt argued that Deere did not introduce sufficient evidence from which the jury could find that Holt knew the neutral start switch had failed or was prone to failure.[119] Deere, on the other hand, argued that the test of subjective awareness enunciated in *McMurray* only required proof that Holt knew of the road-grader's "defective condition" and that he appreciated the risk of injury this condition presented to him when he tried to start the machine while standing on the ground.[120] Although the evidence of Holt's knowledge of the road-grader's defect did not appear to meet either articulation of assumption of the risk, the Tenth Circuit nevertheless held that the jury could have determined, based on the evidence, that Holt had voluntarily assumed the risk of a known defect.[121]

2. Judge Holloway's concurrence

Judge Holloway disagreed with the majority's holding that there was sufficient evidence to support an instruction on the defense of voluntary assumption of risk.[122] Holloway noted that the two men who knew the machine could be key-started in gear admitted that they had never told anyone of the fact.[123] Holloway also argued that the words spoken by Holt were obviously uttered under the stress of great pain and were not very probative of Holt's knowledge of the defect.[124] Judge Holloway concluded that Holt's statement was insufficient to warrant an instruction on assumption of risk without some form of corroborating evidence.[125] While ultimately concurring in the opinion because he believed sufficient evidence existed to support the jury's finding that Holt had not proven the essential elements of his product's liability claim, Holloway's dissent is a lucid critique of the Tenth Circuit's application of Oklahoma law.[126]

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115. *Id.*
116. *Id.* at 1292.
117. *Id.* at 1294.
118. *Id.* at 1295.
119. *Id.* at 1292-94.
120. *Id.* at 1292.
121. *Id.* at 1293-94.
122. *Id.* at 1296 (Holloway, J., concurring in part and dissenting in part).
123. *Id.* at 1297 & n.1.
124. *Id.*
125. *Id.* at 1297.
126. *Id.*

C. *Analysis*

The *Restatement (Second) of Torts* was instrumental in establishing assumption of risk as a defense in strict products liability action.[127] The *Restatement* defines assumption of risk as "the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger."[128] In expounding on this definition, section 402A comment n provides, "[i]f the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery."[129] Oklahoma has adopted section 402A of the *Restatement*, including comment n, but has yet to define the exact degree of plaintiff's knowledge required to warrant an instruction on assumption of risk.[130] While the modern trend has been to limit the circumstances in which the assumption of risk defense will be allowed to bar a plaintiff's recovery,[131] Oklahoma law is essentially silent on the circumstances surrounding the appropriate use of assumption of risk in strict products liability actions. Oklahoma courts have only stated that the defense can be used in those situations in which the plaintiff has voluntarily and unreasonably assumed the risk of a known defect.[132] This statement provides little more guidance than comment n to section 402A.

Limited precedent existed to guide the Tenth Circuit in deciding *Holt*. The precedent that did exist, most notably the *Jordan* decision, indicated that the Oklahoma Supreme Court preferred submitting the issue of assumption of risk to the jury whenever there was any evidence from which a reasonable juror could conclude that the plaintiff had assumed the risk.[133] Thus, the Tenth Circuit probably decided the issue as the Oklahoma Supreme Court would have if confronted with the issue.

Judge Holloway's concurring opinion, however, is more in accord with the majority of jurisdictions that have either abolished or extremely curtailed the use of the defense.[134] The *Erie* Doctrine mandates that federal courts are to ascertain and apply state law so that the outcome reached in federal court is the same outcome that would have been reached if the case had been tried in state court.[135] From Holt's statement, "I don't know why I did it," or "I knew better than that," an inference can be made that Holt knew the road-

127. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965) (specifically providing for a defense of assumption of risk in products liability actions). *See generally* Ann D. Bray, *Does Old Wine Get Better with Age or Turn to Vinegar? Assumption of Risk in a Comparative Fault Era*—Andren v. White Rodgers, 18 WM. MITCHELL L. REV. 1141, 1161-66 (1992) (discussing the rationale underlying the assumption of risk defense in products liability cases).

128. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965).

129. *Id.*

130. *See* Thomas v. Holliday, 794 P.2d 165 (Okla. 1988).

131. *See* Note, *Assumption of Risk and Strict Products Liability*, 95 HARV. L. REV. 872, 873 (1982).

132. *See* Kirkland v. General Motors Corp., 521 P.2d 135 (Okla. 1974).

133. *Jordan*, 590 P.2d at 196; *see supra* text accompanying notes 95-97.

134. *See* Note, *supra* note 131, at 873.

135. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

grader would key-start in gear and thus knew of its defective condition.[136] This inference, while somewhat tenuous, could nevertheless be made by a reasonable juror. Because a reasonable juror could draw this inference, an instruction on assumption of risk was proper under Oklahoma law.

CONCLUSION

The four cases analyzed in this survey illustrate the different approaches taken by Tenth Circuit when applying the *Erie* Doctrine. The Tenth Circuit's *Erie* jurisprudence varies depending on the amount, nature, and quality of a state court's treatment of a particular issue. In *Perlmutter* and *Wagner*, the Tenth Circuit, given a clear indication from the Colorado Supreme Court as to how it would decide the issue, correctly ascertained and applied Colorado law. *Allen* presented more difficult problems for the Tenth Circuit because the Utah Supreme Court had given no indication as to how it would resolve the issue. Lacking any guidance from the Utah courts, the Tenth Circuit opted to decide the case in accordance with the modern trend. In *Holt*, language from various Oklahoma Supreme Court decisions indicated the court's preference for submitting the issue of assumption of risk to the jury in most instances. The Tenth Circuit recognized this inclination, and, most likely, decided the issue as the Oklahoma Supreme Court would have if the case had been tried before it.[137]

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136. *Holt*, 24 F.3d at 1293-94.

137. Presently, tort law is the subject of debate in the United States Congress. The Republican Party's "Contract with America" could result in dramatic changes. One part of the "contract" concerns legal reform. These reforms would significantly alter existing products liability law in many respects. The reforms would create a uniform products liability law (covering state and federal actions) in three different areas: punitive damages, joint liability, and seller liability. GINGRICH ET AL., CONTRACT WITH AMERICA (Ed Gillespie & Bob Schellhas eds., 1994). While these reforms will be the subject of heated debate, every attorney should become familiar with the proposed legal reforms and keep them in mind when advising clients in the future, at least until the issues are resolved.