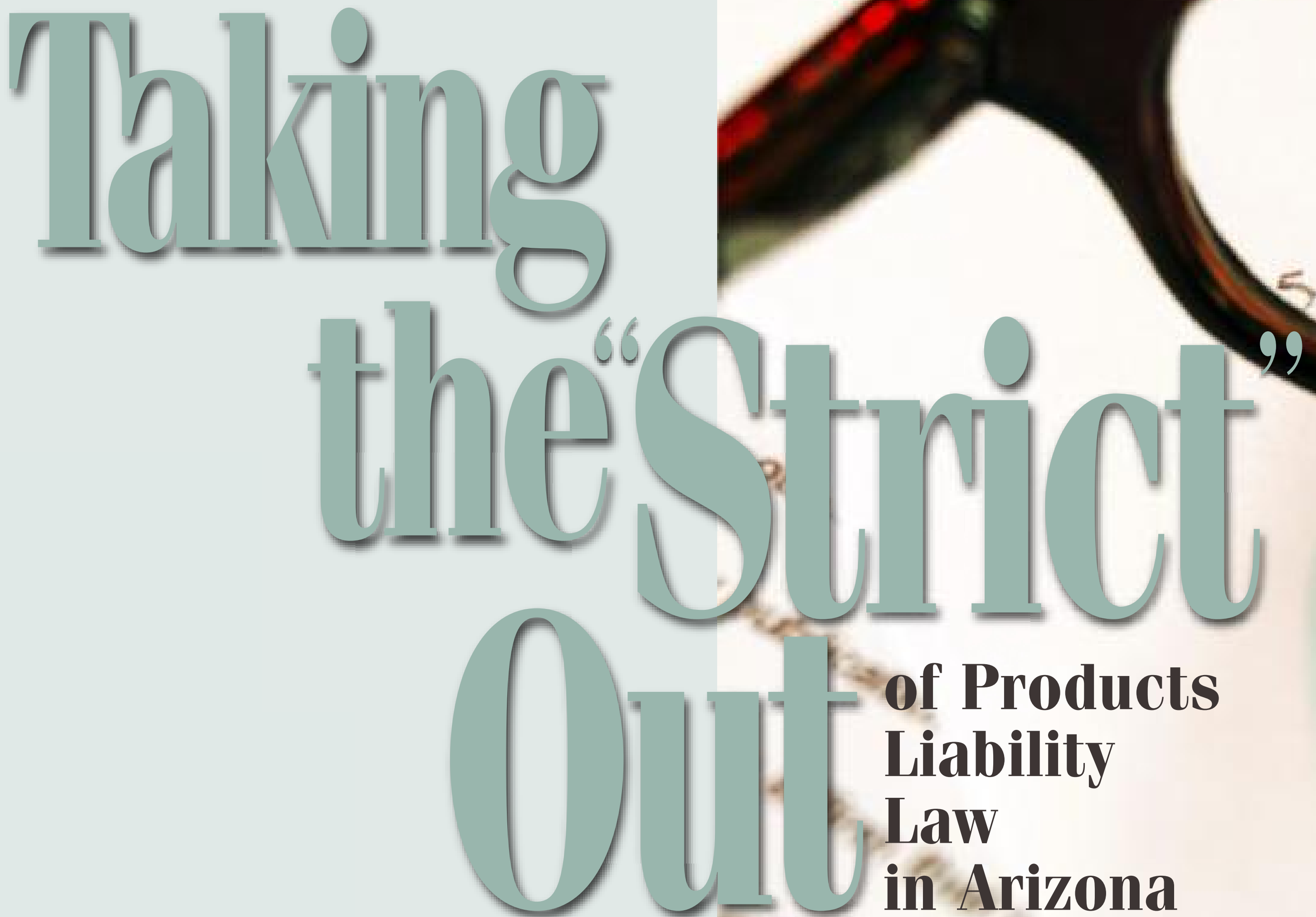

Taking the "Strict" Out of Products Liability Law in Arizona

BY TED A. SCHMIDT & MATTHEW SCHMIDT

The smoke was just clearing as the ambulance pulled away, rushing Carl to Mercy General. He would survive, but with third-degree burns on 90 percent of his body—all for simply trying to help his neighbor cut the grass on that fateful August afternoon.

Three days earlier Carl was the proud new owner of an "All-American Riding Mower Pro," which he had purchased at the local All-American store in Glendale, Arizona. Next to the ignition, the mower's manufacturer had placed a warning that read, "Do not operate mower for more than 4 consecutive hours or overheating could cause permanent damage to the Riding Mower Pro engine."

Carl read and understood the warning. In his exuberance to show off his new "toy," he mowed the grass on his 10-acre parcel and then volunteered to cut the neighbor's yard, as well. He needed only another 20 minutes to finish the last parcel when he hit the four-hour mark. He knew he would exceed the limit, but he figured the mower, being brand new, could certainly handle another 20 minutes. And he deduced from the warning that the worst-case scenario was that the engine would quit running. He was not about to embarrass himself by leaving the last acre of his neighbor's property uncut.

At the 4 hour and 15 minute mark, the mower engine exploded, covering Carl in burning fuel.

Four months later Carl's wife, Connie, decided it was time to visit an attorney. Friends and family recommended Perry Matlock. Now in his 50s, Perry had made quite a reputation for himself only two years out of law school when he obtained an $8 million verdict, coincidentally on a products liability lawsuit involving a lawnmower. Perry agreed to investigate.

The lawyer tried to gently break the bad news to Connie when she came in to hear what he had learned: She had no case.

Perry had found that the exploding mower was designed, and its parts manufactured, by Nu Kin Su, Ltd., a North Korean company that had sold the parts, warning and instructions for assembly to BGON, Corp., a Chinese company. Per All-American's instructions, BGON created and installed decals on the machine

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identifying it as an "All-American Riding Mower Pro" before shipping the final product to All-American in the United States. Networking with other plaintiffs' attorneys led Perry to the following critical conclusions:

1. There would be no jurisdiction over Nu Kin Su, Ltd., due to the lack of treaties between the United States and North Korea and a U.S. ban on trade.
2. There was no evidence that any of the entities involved had any knowledge the mower could literally explode if operated for more than four hours.
3. BGON, Corp. had gone out of business a year earlier, was uninsured and there was no successor corporation.
4. Although All-American enjoyed a 400 percent markup (grossing more than $20 million in profits in the last year alone) on the mower due to the absence of labor laws, safety regulations and quality control in Korea and China, All-American had nothing to do with the design or manufacture of the product and no knowledge of any defect or unreasonably dangerous condition of the product.

Perry told Connie, "If this had happened 25 years ago, Arizona's strict products liability law would have provided you with a solid case. Today, there may very well be nothing I can do for you."

The development of products liability law over the last 40 years has swung from a place more favorable to business interests to one more favorable to the consumers—and now back again. This article traces the path of this pendulum and suggests a solution that would bring the conflicting sides to a middle ground: a reconciliation of the incompatibility of product quality vs. conduct.

Consumer's Golden Age

Strict products liability law has not always been around. Originally, for Carl and Connie to recover for their damages, they had to prove that the manufacturer, assembler and seller were negligent in the design, construction and/or distribution of the product. Regardless of how defective and dangerous the product turned out to be, without proof of carelessness there was no claim. Defendants like BGON and All-American who had no part in the design of

the product or its warning simply could not be liable.

The philosophy of products liability, however, began to change with increased industrialization, more mass-produced products and competition. A market booming with new and "improved" products and increasing profits also meant an increased risk of injury to consumers interacting with these products. Eventually, in response to this phenomenon, legal scholars and commentators began to explore ways to protect the consumer and motivate manufacturers and sellers to distribute safer products.

In the 1960s, the American Law Institute created the theory of strict products liability,[1] which was formally adopted by the Arizona Supreme Court as early as 1964.[2] With the advent of strict products liability, it was no longer necessary for Carl to prove that the manufacture or sale of the product was performed negligently; public policy favored the idea that those who benefit from the sale of products should be strictly liable if the product was unreasonably dangerous and defective, regardless of whether there was evidence of negligence. Furthermore, any party involved in the chain of distribution of the product was responsible for the dangerous and defective consequences of putting the product into the stream of commerce.[3]

Combining strict products liability with joint and several liability eliminated the need for Carl to sue or obtain a judgment against all culpable entities involved in designing, manufacturing or selling the product. He could sue and collect his full judgment against any one defendant in the chain. It was the paying defendant's responsibility to go after the other liable parties for contribution to even the score. From the late 1960s to late 1980s, Carl would have had a pretty good case against Glendale's All-American Hardware Store.

But in the last two decades Arizona has erased the "strict" from products liability law and replaced it with something that is starting to look a lot more like the old negligence standard.

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The demise began in 1987 when the Arizona Legislature abolished joint and several liability, requiring consumers to sue all liable parties for the purpose of apportioning fault and damages.[4] In 2007 the Arizona Supreme Court ruled that consumers must prove that manufacturers had knowledge of a defect or danger in the product before selling the product in order for a duty to warn to arise.[5] Furthermore, the Arizona appellate court recently upheld a trial court's decision to dismiss the seller from a products liability claim because the consumer had not shown that the seller was independently at fault for the alleged design defect.[6]

To appreciate where products liability law in Arizona is today and where it appears to be going, it is important to understand what strict liability is and why it was created with a focus on the quality of the product and not the conduct of the manufacturer or seller. From this starting point we can watch as the pendulum swings back toward economic and business concerns by virtue of the Legislature and courts' new focus on the conduct of those involved rather than the quality of the product. This new direction has created hurdles for consumers to overcome that didn't exist in the decades of consumer protection.

Why Be So Strict?

There is one overriding difference between a products liability claim based on negligence and a products liability claim based on strict liability: Whereas the former focuses on the quality *of the conduct of the maker or seller* of the product, the latter focuses on the *quality of the product* itself.[7] For that reason, strict liability does not require the claimant to prove carelessness—or "fault" in the traditional sense of the word—on the part of the defendant. What is required in a strict liability action is that the defendant put the *product* in the stream of distribution, that the *product* was defective and unreasonably dangerous, and that the *product* was a cause of the injury to the consumer.[8]

Instead of focusing on whether the distributor acted reasonably and prudently in view of the foreseeable risk of injury—or breached its duty—the issue becomes whether the *product* was defective and contained an unreasonable danger that exceeded consumer expectations (the consumer expectation test) or whether the utility of the *product* was outweighed by its risk (the risk/benefit test).[9] Neither test for establishing strict products liability requires that the defendant had knowledge of the defect prior to distributing it or that the risk of injury was foreseeable at that time; to the contrary, strict products liability imposes liability on the defendant based on the information available to the distributor at the time of trial and *subsequent to distribution*.[10]

In a strict products liability claim, the focus of the inquiry follows the consequences of the product, not the original actions of the distributor.

So why the departure from the traditional fault-based conduct analysis applicable to other tort theories?

First, public policy favors strict liability because it protects Carl by encouraging the development of safer products and gives Carl the benefit of the doubt as the consumer uneducated in the nuances of product design and manufacture. Second, it puts the burden of compensating an injured consumer on the parties who profit from the sale of the product and are best able to spread that cost out with price adjustments and adequate insurance. The goal of strict liability is to discourage poor product designs, sloppy manufacturing and misleading sales practices. Once the product has entered the stream of distribution,

strict liability also encourages distributors to keep careful track of their product and modify or recall it if it is unsafe.

Furthermore, the old Arizona rule of joint and several liability complimented the goals of strict liability by guaranteeing full compensation to Carl for his injuries regardless of how many entities might have been responsible for the product, regardless of their relative degrees of culpability and regardless of Carl's inability to sue or collect against all involved. This is not to say that there was no protection for the one distributor paying all or the lion's share of damages to a consumer. In such a circumstance, the paying defendant had a right to seek contribution against others in the chain of distribution based on their relative degrees of fault.

Who Bears the Risk of Uncollectiblity?

If Carl had been injured before 1987, he did not have to sue Nu Kin Su, BGON and All-American. The old Arizona rule of joint and several liability dovetailed with the public policy favoring strict products liability because it rendered each entity in the chain of distribution independently responsible for the quality of the product regardless of each entities' degree of fault; any one entity in the chain of distribution could be made to pay all of the plaintiff's damages. When this occurred the paying entity had a right to seek contribution from the other entities in the chain of distribution based on degrees of fault. In essence, the burden of recovering against entities difficult or impossible to obtain jurisdiction over, entities that were impecunious or entities that were uninsured fell on the distributor of the product and not on the injured consumer. Of course, consumers would say this is just as it should be: Jurisdiction and collectibility ought to be for those that profited from the sale of the product and not the unknowing consumer injured by a defect in the product.

In 1987 a pro-business Arizona Legislature disagreed with that reasoning. It felt that it was unfair to require full payment of damages from one party in situations where more than one party was at fault.[11] The Legislature especially disfavored the idea that one defendant would have to bear the burden of unrecoverable costs in the event that a non-party at fault was unable to pay during contribution.[12] This was believed to be harmful to local business interests and to the economy. As a consequence, in 1987 the Arizona Legislature amended A.R.S. § 12-2506, the Uniform Contribution Among Tortfeasors Act (UCATA).

Under UCATA, "Each defendant is liable *only* for the amount of damages allocated to that defendant in direct proportion to that defendant's *percentage of fault*, and a separate judgment shall be entered against the defendant for that amount."[13] There are only a few exceptions to this rule.[14] The Arizona Supreme Court has consistently held that UCATA does not unconstitutionally limit a consumer's right to recovery or abrogate his right to bring a claim, because it still allows him to receive full recovery as long as he sues all liable parties.[15] It also has held, however, that the statute is constitutional even though it allows juries to apportion fault to non-parties at fault whether they can be brought into court or not.[16] In addition, the Arizona Supreme Court recently affirmed that UCATA applies to cases involving strict liability.[17]

The Supreme Court is correct in finding that the Arizona Legislature is allowed to make substantive changes to the law as long as it does not impose a limitation on the damages recoverable, and UCATA contains no such limitations. If Carl has suffered an injury as a result of buying a defectively designed lawnmower, he theoretically still can sue every potential party at fault and obtain a judgment for the full value of his claim; UCATA does not limit that constitutional right. Carl has no constitutional right to jurisdiction over Nu Kim Su or collecting upon a judgment against BGON.

The statute, though constitutional, has brought many new problems for Carl and his consumer friends.

First and foremost, Carl now bears the risk of uncollectible recovery. In other words, if a jury decided that BGON was 80 percent at fault for an assembly defect and All-American was 20 percent at fault for distributing a faulty product, but BGON went out of business and couldn't pay, All-American is no longer responsible for paying the difference, as it would have been in the decades of consumer protection. Instead, Carl comes away with only 20 percent of his recovery without ifs, ands, or buts.[18]

This also increases the litigation expenses and the time spent in court for Carl, because he must now sue every potential party that was at fault for his injury. He can no longer—for his own jurisdictional convenience—bring All-American into court to bear the responsibility for everyone that was involved. This not only includes manufacturers and sellers, but entities that advertised the product, shipped the product, trained consumers on how to use the product and made installations on the product. If Carl does not sue everyone he thinks is responsible, then defendants can claim those entities to be non-parties at fault, convince a jury to apportion fault to parties that haven't been brought to court, and divert recovery accordingly.

Finally, in addition to having to worry about apportionment of fault to non-parties at fault or to parties that are insolvent, Carl also must worry about apportionment to non-parties at fault that he cannot bring into court even if he wanted to. For example, Carl will have a difficult if not impossible task in trying to bring an entity like Nu Kin Su or BGON—who are the parties most responsible for his injury—into an American court due to the extremely difficult jurisdictional issues involved in suing a foreign entity.

The Magic Word

Fault. It's the *only* thing that distinguishes strict liability from negligence, that separates the philosophy requiring a focus on the quality of the product from the philosophy of focusing on conduct. Yet UCATA now asks the court and the jury to merge these two incongruous philosophies by applying fault to a cause of action that by its very definition excludes from consideration concepts of negligence by the defendant or plaintiff. In fact, the entire point of strict liability law is to eliminate consideration of fault. UCATA now requires the judge to instruct the jury to the effect that, "The

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focus of today's case is to inquire whether or not the design of the product was unreasonably dangerous and defective" (quality of product). "To make this determination, you must determine what the relative degrees of fault or negligence are vis-à-vis the defendants, non-parties and plaintiff" (conduct of defendants and plaintiff).

The language in UCATA essentially asks fire to be mixed with water. But it is intellectually dishonest to posit that the two concepts can be mixed. Because UCATA is a legislative enactment and strict liability theory arises from the common law, the result is a confusing but inevitable extinguishment of strict liability.

I Plead Ignorance, Your Honor

Between 1964 and 1987, Nu Kin Su's defense that it had no knowledge that the mower might actually explode and could not have foreseen Carl's injury as a result most likely would have failed. In 1985, in the defective design case of *Dart v. Wiebe Manufacturing,*[19] the Arizona Supreme court drew a substantial distinction between negligence and strict liability in products liability cases involving manufacturing and design defects:

> The difference is significant, for it shifts the central focus of the inquiry from the conduct of the manufacturer (negligence) to the quality of the product (strict liability). Negligence theory concerns itself with determining whether the conduct of the defendant was reasonable in view of the foreseeable risk of the injury; strict liability is concerned with whether the product itself was unreasonably dangerous.[20]

Because the product is the focus of strict liability, the Court ruled that information available to the manufacturer at the time of the design of the product *and* information available to the jury at the time of trial—the hindsight test—are both relevant. What the Court did not determine, however, was whether the hindsight test applied to warning defect cases.[21]

Today, Nu Kin Su's foreseeability defense likely would succeed. In 2007 the Arizona Court of Appeals, in *Powers v. Taser International, Inc.*,[22] shifted the focus of inquiry in products liability cases to negligence when it ruled that a manufacturer could not be liable for failing to warn a consumer of a defect it had no knowledge of prior to distribution, and that a product's design should be measured in terms of the technology available at the time of manufacture:"[E]mploying the hindsight test in warning defect cases would be tantamount to imposing a duty on manufacturers to warn of unknowable dangers."[23]

It's important to note that the Arizona Supreme Court in *Dart* would not disagree that the hindsight test can, in some situations, impose a liability on a manufacturer for unknowable dangers. In fact, the court in *Dart* stated that the manufacturer is liable for releasing an unsafe product even if it did not have prior knowledge of the danger, didn't intend for the danger to occur, and put utmost care into the manufacture of the product. Where the opinions of the Court diverge, however, is once again based on the focus of the inquiry. Where the *Dart* Court's analysis followed the product to its end result, the modern *Powers* Court's analysis ended with the manufacturer's conduct. As an unfortunate result, Arizona now applies two different rules to the same basic concept of products liability depending on the sole distinction of whether the case is based on the failure to warn of a design defect or the defect itself.

The obvious fallout from the extinguishment of strict liability law in Arizona is the consequential elimination of the underlying policy goals intended when the theory was first adopted in Arizona.

Product manufacturers are now motivated to plead ignorance of any product defects, especially as they pertain to product warnings. In fact, this new focus of inquiry discourages manufacturers from extensive testing of products to see if defects exist or improving them to make them safer—the less a defendant knows about what the product can do, the less likely it can be held responsible for failing to warn. Similarly, Nu Kin Su has no incentive to add warnings to products that are distributed and later found to be defective, because under *Powers* it is only responsible for what it knew based on technology available at the time of distribution.

Equally important to consumers like Carl, the idea that those who profit from the sale of defective products ought to bear the cost of injury is often eliminated under this new scheme. In fact, arguably the only party *at fault* in Carl's case is Nu Kin Su, which cannot even be brought into a U.S. court to answer for the quality of its product or the nature of its conduct.

Here as with uninsured and impecunious manufacturers there is no spreading the cost of injuries among all consumers reflected in the pricing of the product. The entire risk in Carl's case rests in the lap of the injured consumer. Here Carl has no recourse for buying what he thought was an American product from an American company that turned out to be defective. In fact, in Carl's case the likely result is that all entities involved in the manufacture and sale of the dangerous and defective mower escape any liability and consequently any motivation to change their ways.

I Also Plead Ignorance, Your Honor

In the "golden" age of consumer protection, All-American would not have been able to argue that it was not liable because it did not participate in decisions involving the design or manufacturer of the mower. Under traditional strict liability, any party

involved in the chain of distribution was liable for simply distributing a dangerous and defective product, because carelessness was not a part of the analysis.

With the new emphasis on the conduct of the parties, All-American has a new weapon. It can argue that it is not liable because it played no role in the design, manufacture or warning on the mower; the defect was solely the result of Nu Kin Su's and BGON's carelessness, because All-American merely had its name put on the product and sold it in the United States. Recently, this argument was successfully made in *Adams v. Pacific Cycle, L.L.C* when the Arizona Court of Appeals, in a memorandum decision, upheld a trial court's decision to dismiss the seller in a design defect case because the consumer could not prove that the seller had any involvement in the design—it had no fault.[24]

How are judges and juries to apportion fault to a seller who has no part in the design, manufacture or warning of a product in causes of action for product design, manufacturing and warning defects? Is the act of distributing a dangerous and defective product enough to establish liability on the part of the seller if they did not contribute to the dangerous and defective aspects of the product? These are the difficult and confusing questions that modern courts have started to tackle.

Unfortunately for Carl, the answers to these questions have leaned in favor of encouraging All-American to plead ignorance, as well. Like Nu Kin Su, All-American has even less motivation to examine products for dangers or to add warnings; the less it knows about what it's distributing, the better. Where a total lack of care in the design, testing and quality control might render a manufacturer liable for negligence, the seller is rarely going to be reasonably expected to have any involvement in these areas. In fact, the safest course will be for sellers to stay as far away from the design, manufacture, testing and quality control as possible. In addition, court decisions like *Adams* suggest that All-American will no longer be held responsible for simply distributing dangerous products, which potentially eliminates the chain-of-distribution element of strict products liability theory altogether.

Usually when the law moves to an extreme we lose the sense of balance and fairness that we expect to see in all aspects of our legal system. There is a solution, which would bring the pendulum down to dead center.

The complementary pairing of strict liability with joint and several liability once discouraged All-American from working with or ordering from inferior manufacturers like Nu Kin Su and impecunious suppliers like BGON, due to the possibility that it would bear the full burden of both their errors. In return, this encouraged manufacturers like Nu Kin Su to offer better products, not only for the protection of consumers but also for the pecuniary benefit of expanding its customer base among sellers.

Now in Carl's case the contrary result follows: All involved in the sale of the product walk away unscathed. Worst of all, All-American reaps large profits from cheaply made products not subject to quality control, safety requirements or labor laws and escapes any accountability for the tragic results of putting this dangerous and defective product in the Arizona market. The pendulum has swung about as far right as it can swing.

Your Honor, It's Carl's Fault Too

Before UCATA was amended in 1987, the defendants could not argue that Carl failed to discover a defect in the product that the plaintiff should, with reasonable diligence, have discovered (contributory negligence); the only acceptable absolute defenses at that time were that (1) the plaintiff knew of the defect and used the product anyway (assumption of risk); or (2) the plaintiff used the product in a way that was unforeseeable to the defendant (misuse).[25] If the defense was one of misuse, the defendant also had to prove that the misuse of the product was the sole cause of the injury.[26] The reason behind rejecting contributory negligence as a valid defense in a strict products liability action was that "no duty rests upon the ultimate consumer or user to search for or guard against the possibility of product defects"[27] because it was the duty of the distributor to guard the consumer against such defects.

In 1995, however, the Arizona Supreme Court changed this rationale by ruling that the plaintiff's conduct did not have to be the sole cause of injury to establish a misuse defense, because the language in UCATA applies comparative fault to misuse cases.[28] In other words, though contributory negligence still doesn't technically exist as a valid defense in strict products liability actions, defendants have a lot more room to work with in blaming the plaintiff.

In many ways, applying comparative fault principles to the misuse defense is as effective as applying contributory negligence. After all, what is the difference between arguing that (1) Carl failed to discover a defect in the product because he wasn't diligent enough and (2) Carl failed to discover a defect in the product because he didn't use it properly? Instead of having to prove that Carl was fully aware that using his lawn mower for more than four hours would create an explosion or that Carl's misuse of the product was the sole cause of his injury, Nu Kin Su, BGON and All-American can now divert apportionment to Carl at least in part by arguing that he assumed some if not all of the risk and misused the product to some if not to all its extent.

A Proposal

Usually when the law moves to an extreme we lose the sense of balance and fairness that we expect to see in all aspects of our legal system. Such is the case with products liability law in the 2000s. Changes to benefit

business and the economy have succeeded to a fault (pun intended).

There is a solution, which would bring the pendulum down to dead center.

The solution would in fact mostly reconcile the incompatibility of product quality vs. conduct. It would in most cases further the original goals of strict products liability law while at the same time ultimately hold parties accountable for their relative degrees of fault.

The solution: Reinstate joint and several liability and the chain of distribution theory while preserving the fault analysis for apportionment of fault among parties and nonparties. Such a change in the law would in most cases result in each party ultimately paying only its fair share of the loss according to its percentage of fault. At the same time, injured consumers would not be left holding the bag when a culpable party could not be sued, or was judgment-proof.

Injured consumers would be permitted to sue and collect all of their judgment against any entity in the chain of distribution. At the same time, more culpable entities could be brought to the party in a contribution action. Consumers would still have to prove fault by some entity in the chain, but any one entity could be found liable vicariously for the fault of others. Ultimately, however, the liability would be divided among those responsible according to their proportionate share of fault.

Yes, there will be situations where a defendant will have to pay more than its fair share. However, between the individual unsuspecting consumer who has paid for the product expecting it to be safe, and those entities establishing business relationships with manufacturers and sellers so that they all can profit from the sale of the product, who is best suited to bear this risk? In fairness, who ought to bear it?

Conclusion

Twenty-five years ago our courts recognized that along with the profits to be made by mass-produced products in an industrialized society came risks to those least able to bear them—individual consumers. The courts saw strict products liability law as the answer.

Since that time, in the name of protecting business and promoting the economy, our Legislature has virtually extinguished the "strict" from products liability law in Arizona. Particularly in our current economic crisis it is not hard to find supporters for this swing of the pendulum. By the same token, the argument that it has swung too far and that there is a more reasonable middle ground is compelling. Amendment of UCATA to allow for joint and several liability and a revival of chain-of-distribution liability would bring the pendulum to rest right in the middle. AZ AT

endnotes

1. Restatement (Second) of Torts § 402A (1965).
2. *Colvin v. Superior Equip. Co.*, 392 P.2d 778 (Ariz. 1964); *See Nalbandian v. Byron Jackson Pumps, Inc.*, 399 P.2d 681 (Ariz. 1965) (Lockwood, J., concurring) (interpreting *Colvin* as adopting the legal concept of a manufacturer's strict liability in tort with regard to its manufactured products); *O.S. Stapley Co. v. Miller*, 447 P.2d 248 (Ariz. 1968) (adopting Restatement (Second) of Torts § 402A).
3. Restatement (Second) of Torts § 402A (1965); *See Bailey v. Montgomery Ward & Co.*, 431 P.2d 108 (Ariz. Ct. App. 1967).
4. *See* A.R.S. § 12-2506 (1987).
5. *See Powers v. Taser Int'l, Inc.*, 174 P.3d 777 (Ariz. Ct. App. 2007).
6. *See Adams v. Pacific Cycle, L.L.C.,* 2009 WL 532629 (Ariz. App. Div. 1 2009).
7. *Dart v. Wiebe Mf'g, Inc.*, 709 P.2d 876, 880 (Ariz. 1985).
8. RAJI (Civil) PLI 1 (4th ed.).
9. For further discussion regarding the consumer expectation test and the risk/utility test, *see Dart*, 709 P.2d at 876.
10. *Id.* at 881.
11. *Natseway v. City of Tempe*, 909 P.2d 441, 444 (Ariz. Ct. App. 1995) (holding that cases "reflect a recognition of the legislature's strong desire to ensure that comparative fault principles are applied in most cases where the actions of more than one party combine to cause harm").
12. *See State Farm Ins. Co. v. Premier Manufactured Sys., Inc.*, 172 P.3d 410, 413 (Ariz. 2007).
13. A.R.S. § 12-2506(A) (1987) (emphasis added).
14. Joint and several liability will be allowed if (1) the party and the other person were acting in concert; (2) the other person was acting as an agent or servant of the party; or (3) the party's liability for the fault of another person arises out of a duty created by the federal employers liability act. *Id.* § 12-2506(D).
15. *Premier Manufactured Sys.*, 172 P.3d at 410; *Jimenez v. Sears, Roebuck and Co.*, 904 P.2d 861 (Ariz. 1995).
16. *Dietz v. General Elec. Co.*, 821 P.2d 166 (Ariz. 1991); *See Jimenez,* 904 P.2d at 869 ("Moreover, the comparative fault statute apportions fault, even at the expense of the plaintiff); *see, e.g., Rosner v. Denim & Diamonds, Inc.*, 937 P.2d 353 (Ariz. 1997) (holding that jury was allowed to apportion fault to assailants in a bar fight that could not be identified or found); *Thomas v. First Interstate Bank*, 930 P.2d 1002 (Ariz. Ct. App. 1996) (allowing apportionment of fault to an the unidentified murderer of a guard in wrongful death suit); *Smith v. Johnson*, 899 P.2d 199, 206 (Ariz. Ct. App. 1995) (allowing apportionment of fault to an unidentified driver of a Mercedes Benz who might have been the cause of a car accident); *Ocotillo West Joint Venture v. Superior Court*, 844 P.2d 653 (Ariz. Ct. App. 1992) (allowing apportionment of fault to an identified, but not civilly liable, good Samaritan).
17. *Premier Manufactured Sys.*, 172 P.3d at 410.
18. *See, e.g., id.*
19. 709 P.2d 876 (Ariz. 1985).
20. *Id.* at 880.
21. *Id.* at 881 n.2 ("We do not reach the issue of whether a 'hindsight test' is to be applied to strict liability cases involving failure to warn or those involving unavoidably unsafe product.").
22. 174 P.3d 777 (Ariz. Ct. App. 2007).
23. *Id.* at 783.
24. *See Pacific Cycle,* 2009 WL 532629.
25. *O.S. Stapley,* 447 P.2d at 253; Restatement (Second) of Torts § 402A, cmt. n (1965); A.R.S. § 12-2505.
26. *Gosewisch v. American Honda Motor Co.*, 737 P.2d 376, 383 (Ariz. 1987) (interpreting A.R.S. § 12-2505 to apply only if plaintiff's misuse of product was the sole cause of injury).
27. *O.S. Stapley,* 447 P.2d at 253.
28. *Jimenez,* 904 P.2d at 861.