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DEVELOPMENTS IN THE LAW

Rosado v. Proctor & Schwartz, Inc.: An erosion of the manufacturer's non-delegable duty in products liability?

The doctrine of strict products liability[1] provides that a manufacturer who places a defective product into the stream of commerce shall be liable for injuries sustained as a result of the product's defect.[2] Implicit in this body of law is the realization that the manufacturer has an unparalleled opportunity to ascertain whether a product is free from defects and safe for its in-

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[1] *See* Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973). In *Codling*, the Court of Appeals first enunciated the doctrine of strict products liability in New York:

> [T]he manufacturer of a defective product is liable to any person injured or damaged if the defect [in the product] was a substantial factor in bringing about his injury or damages; provided: (1) that at the time of the occurrence the product is being used (whether by the person injured or damaged or by a third person) for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages.

Id. at 342, 298 N.E.2d at 628-29, 345 N.Y.S.2d at 469-70. *See generally* R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 3-8 (1980) (history and development of strict products liability); R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 2d § 1:1 (1974) (scope of coverage of strict products liability); Howard & Watkins, *Strict Products Liability in New York and the Merging of Contract and Tort*, 42 ALB. L. REV. 603, 603-09 (1978) (judicial development of strict products liability in New York); Wade, *On the Nature of Strict Tort Liability For Products*, 44 MISS. L.J. 825, 828-38 (1973) (tests for applying strict products liability).

The doctrine of strict products liability has subsequently been extended to render liable anyone placing a defective product into the stream of commerce that causes injury, including distributors and retailers. *See* Mead v. Warner Pruyn Div., Finch Pruyn Sales, 57 App. Div. 2d 340, 344, 394 N.Y.S.2d 483, 485 (3d Dep't 1977); Kirby v. Rouselle Corp., 108 Misc. 2d 291, 295 n.1, 437 N.Y.S.2d 512, 515 n.1 (Sup. Ct. Monroe County 1981); *see also* RESTATEMENT (SECOND) OF TORTS § 402 A (1965) (strict products liability extends to anyone selling defective product that is unreasonably dangerous).

[2] *See* Robinson v. Reed-Prentice Div. of Package Mach., 49 N.Y.2d 471, 478, 403 N.E.2d 440, 443, 426 N.Y.S.2d 717, 720 (1980); Opera v. Hyva, Inc., 86 App. Div. 2d 373, 376, 450 N.Y.S.2d 615, 617 (4th Dep't 1982); Ribley v. Harsco Corp., 57 App. Div. 2d 228, 230, 394 N.Y.S.2d 740, 741 (3d Dep't 1977). A product can be defective due to the way it was manufactured, or designed, or because of inadequate warnings from the manufacturer regarding use. *See* Voss v. Black and Decker Mfg., 59 N.Y.2d 102, 106-07, 450 N.E.2d 204, 207, 463 N.Y.S.2d 398, 401 (1983); *see also* Caprara v. Chrysler Corp., 52 N.Y.2d 114, 125, 417 N.E.2d 545, 551, 436 N.Y.S.2d 251, 256 (1981) (defect in manufacturing process); *Robinson*, 49 N.Y.2d at 480, 403 N.E.2d at 444, 426 N.Y.S.2d at 721 (design defect); Torrogrossa v. Towmotor Co., 44 N.Y.2d 709, 710, 376 N.E.2d 920, 921, 405 N.Y.S.2d 448, 449 (1978) (defect due to failure to warn); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 18 (1965) (defective product is one not reasonably safe).

tended use.[3] When non-manufacturer defendants are adjudged liable in strict products liability actions,[4] they often successfully shift the loss to the manufacturer of the product under the theory of indemnification.[5] This theory seeks to place the burden of loss on

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[3] *See* Robinson v. Reed-Prentice Div. of Package Mach., 49 N.Y.2d 471, 480, 403 N.E.2d 440, 444, 426 N.Y.S.2d 717, 721 (1980); Codling v. Paglia, 32 N.Y.2d 330, 340, 298 N.E.2d 622, 627, 345 N.Y.S.2d 461, 468 (1973); W. KIMBLE & R. LESHER, PRODUCTS LIABILITY 13 (1979); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 799 (1966) [hereinafter *Fall of Citadel*]. The economic realities of commercial enterprise also justify imposition of the risk on the manufacturer. *See* Milau Assoc. v. North Avenue Div. Corp., 42 N.Y.2d 482, 489, 368 N.E.2d 1247, 1251, 398 N.Y.S.2d 882, 886 (1977); Codling v. Paglia, 32 N.Y.2d 330, 341, 298 N.E.2d 622, 627-28, 345 N.Y.S.2d 461, 468-69 (1973); Held v. 7-Eleven Food Store, 108 Misc. 2d 754, 757, 438 N.Y.S.2d 976, 978 (Sup. Ct. Erie County 1981); W. KIMBLE & R. LESHER, *supra*, at 13; Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1120 (1960) [hereinafter *Assault on Citadel*]; Comment, *Torts — Strict Liability — Under Pennsylvania Law a Manufacturer May be Held Strictly Liable for Injuries Caused by the Absence of a Safety Device Even When That Device Was Removed at the Request of a Knowledgeable Purchaser:* Hammond v. International Harvester Co., 28 VILL. L. REV. 851, 855 (1982-83).

[4] *See* Szrama v. Alumo Prod., 118 Misc. 2d 1008, 1012, 462 N.Y.S.2d 156, 159 (Sup. Ct. Erie County 1983) (retailer held liable); Nickel v. Hyster Co., 97 Misc. 2d 770, 771, 412 N.Y.S.2d 273, 274 (Sup. Ct. Suffolk County 1978) (manufacturers, distributors, retailers, processors and makers of component parts may be liable); Queensbury Union Free School Dist. v. Jim Walter Corp., 91 Misc. 2d 804, 807, 398 N.Y.S.2d 832, 834 (Sup. Ct. Warren County 1977) (liability extends to suppliers and vendors of defective product); *see also supra* note 1 (extension of strict products liability beyond manufacturers). Despite the broadened scope of strict products liability, transactions consisting primarily of services are not within its purview. *See* Sears, Roebuck & Co. v. Enco Assoc., 43 N.Y.2d 389, 398, 372 N.E.2d 555, 559, 401 N.Y.S.2d 767, 772 (1977); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 104, 123 N.E.2d 792, 794 (1954).

[5] *See, e.g.*, McDermott v. City of New York, 50 N.Y.2d 211, 215-16, 406 N.E.2d 460, 462-63, 428 N.Y.S.2d 643, 644-45 (1980) (employer may seek indemnification from manufacturer where employee injured by defective truck); Rogers v. Dorchester Assoc., 32 N.Y.2d 553, 562-63, 300 N.E.2d 403, 408, 347 N.Y.S.2d 22, 28-29 (1973) (building owner indemnified by manufacturer where tenant injured due to defective elevator).

Indemnity fundamentally differs from contribution; indemnity seeks to shift the entire responsibility for the loss while contribution distributes the loss among joint tortfeasors according to their pro-rata share. *See* D'Ambrosio v. City of New York, 55 N.Y.2d 454, 460-61, 435 N.E.2d 366, 368-69, 450 N.Y.S.2d 149, 151-52 (1982); McFall v. Compagnie Maritime Belge (Lloyd Royal), 304 N.Y. 314, 327-28, 107 N.E.2d 463, 471 (1952); SIEGEL, NEW YORK PRACTICE § 169 (1978); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 130-31 (1932); Woods, *Some Observations on Contribution and Indemnity*, 38 ARK. L. REV. 44, 44 (1985).

Indemnity between parties can be pursuant to express agreement, *see* Vey v. Port Auth., 54 N.Y.2d 221, 226-27, 429 N.E.2d 762, 764, 445 N.Y.S.2d 84, 86 (1981); Hogeland v. Sibley, Lindsay & Curr Co., 42 N.Y.2d 153, 159, 366 N.E.2d 263, 266, 397 N.Y.S.2d 602, 606 (1977); Margolin v. New York Life Ins. Co., 32 N.Y.2d 149, 153, 297 N.E.2d 80, 82, 344 N.Y.S.2d 336, 338-39 (1973), however, it is often implied by law to prevent unjust results. *See McDermott*, 50 N.Y.2d at 216-17, 406 N.E.2d at 462, 428 N.Y.S.2d at 646; Rock v. Reed-Prentice Div. of Package Mach., 39 N.Y.2d 34, 39, 346 N.E.2d 520, 522, 382 N.Y.S.2d 720, 722 (1976); Kelly v. Diesel Div. of Carl A. Morse, Inc., 35 N.Y.2d 1, 7, 315 N.E.2d 751, 754,

the party primarily responsible for the product's defect.[6] Recently, in *Rosado v. Proctor & Schwartz, Inc.*,[7] the Court of Appeals refused to recognize a converse right to indemnification for manufacturers.[8] In this strict products liability action brought by an injured employee of the purchaser against the manufacturer, the court held that the manufacturer of a defective product could not obtain indemnification from the purchaser where the purchaser had contractually agreed to install necessary safety devices.[9]

In *Rosado*, the plaintiff was employed by Comet Fibers (Comet) as a garnett operator.[10] Comet had purchased the garnett in 1970 from Proctor & Schwartz, the manufacturer, and, pursuant to the sales contract, agreed to install all necessary safety guards for the machine's exposed moving parts.[11] Comet installed a mesh fence around the gear and pulley area of the garnett but failed to install the safety guards.[12] On September 9, 1976, the plaintiff's

358 N.Y.S.2d 685, 689-90 (1974).

[6] *See* State v. Stewart's Ice Cream Co., 64 N.Y.2d 83, 88, 473 N.E.2d 1184, 1186, 484 N.Y.S.2d 810, 812 (1984); Rogers v. Dorchester Assoc., 32 N.Y.2d 553, 562-63, 300 N.E.2d 403, 408, 347 N.Y.S.2d 22, 28-29 (1973); Garrett v. Holiday Inns, Inc., 86 App. Div. 2d 469, 470-71, 450 N.Y.S.2d 619, 621 (4th Dep't 1982). Indemnity often provides a basis of relief for a party found liable to a plaintiff due to imputed or vicarious liability rather than personal fault. *See* Johnson Controls, Inc. v. Rowland Tomkins Corp., 585 F. Supp. 969, 973 (S.D.N.Y. 1984); Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp., 465 F. Supp. 790, 794 (S.D.N.Y. 1978); *see also* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 341 (5th ed. 1984) (indemnity operates in favor of one held responsible by imputation of law because of relation to wrongdoer). *See generally The Quarterly Survey,* Dole v. Dow Chemical Co: *A Revolution in New York Law,* 47 ST. JOHN'S L. REV. 185, 194-200 (1972) (discussing development of indemnity doctrine in New York).

It is well settled in New York, however, that indemnity is precluded where the party seeking it has actually engaged in wrongful conduct. *See* County of Westchester v. Welton Becket Assoc., 102 App. Div. 2d 34, 47, 478 N.Y.S.2d 305, 314 (2d Dep't 1984); Hanley v. Fox, 97 App. Div. 2d 606, 607, 468 N.Y.S.2d 193, 194 (3d Dep't 1983); *see also* RESTATEMENT OF RESTITUTION § 76 (1937) (wrongful conduct bars indemnity).

[7] 66 N.Y.2d 21, 484 N.E.2d 1354, 494 N.Y.S.2d 851 (1985).

[8] *See id.* at 22, 484 N.E.2d at 1355, 494 N.Y.S.2d at 852.

[9] *See id.*

[10] *See id.* A garnett is a machine containing massive chains and pulleys commonly used in the textile industry to convert clumped fibers into matting. *See id.*

[11] *Id.* at 23, 484 N.E.2d at 1355, 494 N.Y.S.2d at 852. The sales contract stated that Comet would install all "necessary guards for the exposed moving parts of the machine in accordance with the laws of the district in which the machine is to be located," and "supply disconnect switches as required." *Id.* The garnett was delivered to Comet without the safety guards. *Id.*

[12] *See id.* The mesh fence had a gate, secured by a simple latch, approximately three feet from the machine which was fully operable with the gate open. *Id.* Apparently, it was customary for the workers to operate the garnett with the gate open and all the pulleys, chains and gears exposed. *Id.*

thumb and fingers on his right hand were severed when they accidentally came in contact with the exposed chain and gears.[13]

The plaintiff brought suit against the manufacturer, Proctor, who in turn brought a third party action against Comet for indemnification and contribution.[14] The Supreme Court, Trial Term, New York County, dismissed the defendant Proctor's indemnification claim.[15] Comet thereafter arranged a settlement with the plaintiff thus foreclosing Proctor's contribution claim.[16] The defendant appealed the dismissal of the indemnification claim and the Appellate Division, First Department, affirmed by a divided court.[17]

The Court of Appeals, in a unanimous opinion, affirmed the dismissal of the indemnification claim.[18] The court, in an opinion by Judge Titone, summarily rejected the applicability of implied

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[13] *Id.* The plaintiff was raking debris from under the machine while it was in operation when, hearing a terrible noise, he backed away from the machine. *Id.* As he did so, he hit his back on the mesh fence and was thrust forward causing his hand to come into contact with the exposed chain and gears. *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*, 484 N.E.2d at 1355-56, 494 N.Y.S.2d at 852-53. In New York, a joint tortfeasor is relieved from contribution when he agrees to a settlement with the injured party. *See* N.Y. GEN. OBLIG. LAW. § 15-108(b) (McKinney 1978). This section provides that a "release given in good faith by the injured person to one tortfeasor . . . relieves [the tortfeasor] from liability to any other person for contribution." *Id.*; *see, e.g.*, Mitchell v. New York Hosp., 61 N.Y.2d 208, 215-16, 461 N.E.2d 285, 289, 473 N.Y.S.2d 148, 152 (1984); Kelly v. New York Tel. Co., 100 App. Div. 2d 537, 537, 473 N.Y.S.2d 480, 481 (2d Dep't 1984).

Section 15-108(b) represents a legislative desire to encourage settlement in tort cases following the problems resulting from *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). *See* 1974 N.Y. LEGIS. ANN. 15-16; N.Y. GEN. OBLIG. LAW § 15-108, commentary at 717-18 (McKinney 1978); *see also The Quarterly Survey, supra* note 6, at 203-09 ("revolutionary nature of the *Dole* decision is much greater than the court indicated"). *Dole* established the right of equitable contribution among joint tortfeasors. *See Dole*, 30 N.Y.2d at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391-92. The decision was subsequently interpreted to allow contribution among joint tortfeasors notwithstanding a tortfeasor's prior settlement with the injured plaintiff. *See* Blass v. Hennessey, 44 App. Div. 2d 405, 406, 355 N.Y.S.2d 506, 507 (4th Dep't 1974). This interpretation eliminated a defendant's incentive to settle a tort case and paved the way for legislative response. *See* N.Y. GEN. OBLIG. LAW § 15-108, commentary at 718 (McKinney 1978).

Indemnification is not within the ambit of section 15-108 and therefore the defendant's claim for indemnification in *Rosado* was not precluded by Comet's settlement with the plaintiff. *See Rosado*, 66 N.Y.2d at 24-25, 484 N.E.2d at 1356, 494 N.Y.S.2d at 853.

[17] 106 App. Div. 2d 27, 40, 483 N.Y.S.2d 271, 281 (1st Dep't 1984). Proctor conceded that any contribution claim was barred by General Obligations Law section 15-108, and that no basis for express contractual indemnity existed since Comet had not agreed to indemnify or hold it harmless from products liability claims. *Rosada*, 66 N.Y.2d at 25, 484 N.E.2d at 1357, 494 N.Y.S.2d at 854.

[18] *Rosado*, 66 N.Y.2d at 22, 484 N.E.2d at 1355, 494 N.Y.S.2d at 852.

indemnity pursuant to the sales contract as a theory of recovery for the manufacturer.[19] An action in strict products liability against a manufacturer is stated, the court reasoned, where it is shown that a defective product, not reasonably safe for its intended use, is placed into the stream of commerce by the manufacturer.[20] The court further reasoned that since a manufacturer is in the best position to know the dangers inherent in its machine, and such dangers are common to all jobsites, the manufacturer is also best suited to know what safety devices are necessary.[21] Noting that prevention of injuries is the cornerstone of strict products liability law,[22] the court concluded that to allow a manufacturer to shift the ultimate duty of care for a machine lacking essential safety features through "boilerplate language in a sales contract, would erode the economic incentive manufacturers have to maintain safety and give sanction to the marketing of dangerous, stripped down, machines."[23]

By denying a manufacturer of an unsafe machine the right to

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[19] *Id.* at 26, 484 N.E.2d at 1357-58, 494 N.Y.S.2d at 854-55. In rejecting Proctor's argument of implied indemnity, the court acknowledged that there was contrary authority in another jurisdiction. *Id.*; Proctor & Schwartz, Inc. v. United States Equip. Co., 624 F.2d 771, 775 (6th Cir. 1980). In *Proctor*, the court held, on facts similar to *Rosado*, that Michigan "recognizes an implied contract, arising from the promise to perform an act or furnish a product, as a basis for indemnity." *Id.* at 776; *see* Skinner v. D-M-E Corp., 124 Mich. App. 580, 584-85, 335 N.W.2d 90, 92 (1983). The *Rosado* court concluded, however, that the weight of authority, *see* Hammond v. International Harvester, 691 F.2d 646, 652 (3d Cir. 1982); Roy v. Star Chopper Co., 442 F. Supp. 1010, 1021 (D.R.I. 1977); Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 410, 290 A.2d 281, 285 (1972), was consonant with their holding. *See Rosado*, 66 N.Y.2d at 26, 484 N.E.2d at 1357-58, 494 N.Y.S.2d at 854-55.

[20] *See Rosado*, 66 N.Y.2d at 25-26, 484 N.E.2d at 1357, 494 N.Y.S.2d at 854; Robinson v. Reed-Prentice Div. of Package Mach., 49 N.Y.2d at 479, 403 N.E.2d at 443, 426 N.Y.S.2d at 720; Codling v. Paglia, 32 N.Y.2d at 340-41, 298 N.E.2d at 627, 345 N.Y.S.2d at 468-69; *supra* note 2 and accompanying text.

[21] *See Rosado*, 66 N.Y.2d at 26, 484 N.E.2d at 1358, 494 N.Y.S.2d at 855; *see supra* note 3 and accompanying text. *See generally* W. KIMBLE & R. LESHER, *supra* note 3, at 13 ("manufacturer could anticipate some hazards and guard against recurrence of others, as public could not"); *Fall of Citadel*, *supra* note 3, at 799 (manufacturer best able to provide maximum protection for user of product).

[22] *See Rosado*, 66 N.Y.2d at 26-27, 484 N.E.2d at 1358, 494 N.Y.S.2d at 855; *see also Fall of Citadel*, *supra* note 3, at 799 (public interest requires maximum protection of consumer).

[23] *See Rosado*, 66 N.Y.2d at 26-27, 484 N.E.2d at 1358, 494 N.Y.S.2d at 855. The defendant, Proctor, vigorously disagreed with the characterization of the contract language as "boilerplate." *See* Reply Brief for Defendant and Third Party Plaintiff-Appellant at 7. *See also supra* note 3 (cases discussing economic underpinnings of strict products liability). *See generally* Spacone, *A Practical Guide To Controlling Products Liability Costs*, 7 J. PROD. LIAB. 365 (1984) (prudent manufacturer can do much to reduce products liability costs).

implied indemnity from a purchaser who agreed to make such machine safe, it is submitted that the *Rosado* decision properly reaffirmed the fundamental principles of strict products liability first enunciated in *Codling v. Paglia.*[24] Every manufacturer shoulders a non-delegable duty to place products into the stream of commerce that are free from defects and safe for their intended use.[25] In a strict products liability action, the critical temporal element necessary for liability to attach to a manufacturer is that the defect must exist when the product leaves the manufacturer's hands.[26] It is submitted that the manufacture and sale of an industrial machine lacking essential safety devices, notwithstanding an agreement that the purchaser will install such devices, clearly fails to discharge the manufacturer's non-delegable duty, thereby placing it within the scope of liability.[27]

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[24] 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

[25] *See* Robinson v. Reed-Prentice Div. of Package Mach., 49 N.Y.2d 471, 479, 403 N.E.2d 440, 443, 426 N.Y.S.2d 717, 720 (1980); Blackburn v. Johnson Chem. Co., 128 Misc. 2d 623, 624, 490 N.Y.S.2d 452, 453 (Sup. Ct. Kings County 1985); *see also supra* note 2 and accompanying text (manufacturer's liability for defective product).

[26] *See* Cover v. Cohen, 61 N.Y.2d 261, 267, 461 N.E.2d 864, 866, 473 N.Y.S.2d 378, 380 (1984); Steckal v. Haughton Elevator Co., 59 N.Y.2d 628, 629, 449 N.E.2d 1264, 1265, 463 N.Y.S.2d 186, 187 (1983); Voss v. Black & Decker Mfg., 59 N.Y.2d 102, 107, 450 N.E.2d 204, 207, 463 N.Y.S.2d 398, 401 (1983); *see also* W. KIMBLE & R. LESHER, *supra* note 3, at 85 (defect must exist at time product leaves defendant's control whether defendant is manufacturer, retailer, or other party); Keeton, *The Meaning of Defect In Products Liability Law - A Review of Basic Principles,* 45 MO. L. REV. 579, 585 (1980) (liability attaches if product "defective and unreasonably dangerous at the time possession was surrendered").

[27] *See supra* notes 2, 25-26 and accompanying text. *But see* Biss v. Tenneco, Inc., 64 App. Div. 2d 204, 207, 409 N.Y.S.2d 874, 876-77 (4th Dep't 1978). In *Biss,* the defendant sold the plaintiff a vehicle which had an available roll over protective system that the plaintiff chose not to purchase. *See id.* at 207, 409 N.Y.S.2d at 876. When an employee of the plaintiff died due to injuries sustained in an accident involving the vehicle, suit was brought alleging that the absence of a roll over protective system constituted a design defect. *Id.* at 205, 409 N.Y.S.2d at 875. The Appellate Division, Fourth Department, held, as a matter of law, that the vehicle was not defectively designed, reasoning that the manufacturer's notice to the purchaser of an available safety structure effectively discharged their duty to exercise reasonable care in designing the loader. *Id.* at 207, 409 N.Y.S.2d at 876. The court stated that where the likelihood of roll over varied by job and site, the purchaser was best suited to determine whether optional safety equipment was necessary to avoid unreasonable risk. *Id.* *Biss* involved optional safety equipment and therefore is factually distinguishable from *Rosado* where the safety devices were essential. *Compare Rosado,* 66 N.Y.2d at 23, 484 N.E.2d at 1355, 494 N.Y.S.2d at 852 *with Biss,* 64 App. Div. 2d at 207, 409 N.Y.S.2d at 876. Irrespective of their factual distinctions, *Rosado* and *Biss* both seemingly adhere to the substantive principle that the party best suited to determine whether the safety device is needed, whether manufacturer or purchaser, should bear the responsibility for resulting injuries. *See Rosado,* 66 N.Y.2d at 26, 484 N.E.2d at 1358, 494 N.Y.S.2d at 855; *Biss,* 64 App Div. 2d at 207-08, 409 N.Y.S.2d at 876-77.

Though properly precluding recovery based on implied indemnity in *Rosado,* the court left the door ajar for recovery based on express contractual indemnity in these same situations.[28] Although no basis for recovery pursuant to express contractual indemnity existed,[29] the court seemingly implied that recovery would have been possible had the purchaser specifically undertaken that responsibility in the sales agreement.[30] It is submitted that should the court adopt a judicially permissive attitude toward recovery pursuant to express contractual indemnity in future situations similar to *Rosado,* it will allow manufacturers to delegate a duty that has heretofore been found non-delegable.[31] Such a view will hasten the "erosion" of safety in manufacturing that the court specifically sought to prevent in *Rosado.*[32] It is further submitted that the principles underlying the denial of implied indemnity to the manufacturer in *Rosado* — the protection of the public from unsafe machinery and the imposition of liability on the entity most responsible and best suited to make the machine safe — are equally cogent where the purchaser signs an express indemnification agreement.

In *Rosado,* the Court of Appeals, by refusing to allow the manufacturer to recover from the purchaser pursuant to implied indemnity, effectuated the theoretical underpinnings of the strict products liability doctrine. In order to assure safety in manufacturing and to prevent manufacturers from insulating themselves from liability to users and purchasers, the court must be equally resistant to permitting recovery based on express contractual indemnity clauses in future cases factually similar to *Rosado.*

Robert E. Rice

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[28] *See Rosado,* 66 N.Y.2d at 25, 484 N.E.2d at 1357, 494 N.Y.S.2d at 854; *infra* notes 29-30 and accompanying text. It is submitted that the court's failure to underscore the manufacturer's non-delegable duty in its analysis, *see Rosado,* 66 N.Y.2d at 25-27, 484 N.E.2d at 1357-58, 494 N.Y.S.2d at 854-55, as it has in previous strict products liability actions, *see supra* note 26 and accompanying text, further supports the possibility of recovery pursuant to express contractual indemnification in future situations factually similar to *Rosado.*

[29] *See Rosado,* 66 N.Y.2d at 25, 484 N.E.2d at 1357, 494 N.Y.S.2d at 854. Comet did not specifically agree to indemnify the manufacturer or hold it harmless for products liability claims in the sales contract. *Id.*

[30] *See id.* The court did not foreclose the possibility of recovery pursuant to express contractual indemnity in situations factually similar to *Rosado,* but merely stated that no basis existed in this case inasmuch as Comet had not specifically agreed to indemnify the manufacturer or hold it harmless for products liability claims. *See id.*

[31] *See supra* note 25 and accompanying text.

[32] *See Rosado,* 66 N.Y.2d at 27, 484 N.E.2d at 1358, 494 N.Y.S.2d at 855.