

Pennsylvania Supreme Court Dismisses Appeal in *Bugosh*, Postpones Addressing Whether to Adopt Restatement (Third) of Torts Standard

June 19, 2009

Those who had awaited the Pennsylvania Supreme Court's ruling in *Bugosh v. I.U. North America Inc.*, No. 7 WAP 2008, to answer whether the court would adopt Section 2 of the Restatement (Third) of Torts in place of Section 402A of the Restatement (Second) of Torts, will have to wait a while longer.

On June 16, the court dismissed the *Bugosh* appeal as improvidently granted, thus declining to rule on the issue. As recently as April 2009, the U.S. Court of Appeals for the Third Circuit had predicted in *Berrier v. Simplicity Manufacturing, Inc.*, 563 F.3d 38 (3d Cir. 2009), that the state Supreme Court would adopt Sections 1 and 2 of the Restatement (Third) of Torts, resulting in the application of negligence concepts to strict liability doctrine. The order of dismissal does not provide a reason for the action.

The *Bugosh* dismissal leaves in place two starkly different standards in Pennsylvania state and federal courts. State courts in Pennsylvania will continue to apply *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978), which applies Section 402A of the Restatement (Second) of Torts to strict liability claims. Under Section 402A, the seller of a product is liable for harm caused by such product when it is sold in a "defective condition unreasonably dangerous to the user." The imposition of strict liability for a product defect is not affected by the fact that the manufacturer or other supplier has exercised all possible care.

Federal courts in the Third Circuit, however, are bound by *Berrier* and will apply Section 2 of the Restatement (Third) in diversity cases involving Pennsylvania law. In *Berrier*, the Third Circuit predicted that Pennsylvania would adopt the Restatement (Third)'s approach that, among other things, "expressly recognize[s] the essential role of risk-utility balancing" in design defect litigation.

Further, Section 2 establishes that even a dangerous product is not defective unless there is proof of a reasonable alternative design. Comments to the section also specify that the risk/benefit balancing done to judge product design must be done in light of knowledge attainable at the time the product was distributed, and suggest that industry practice and the state of the art, although not dispositive, are relevant to the balancing analysis.

Justice Saylor and Chief Justice Castille dissented from the *Bugosh* dismissal, explaining that there is a “serious misalignment” between the descriptions of the state’s strict liability doctrine and its actual operation. In particular, although Pennsylvania case law states that negligence concepts have no place in strict liability law doctrine, the dissenting justices noted that “functionally, the law of ‘strict’ products liability is infused with negligence concepts.” Asserting that “*Azzarello* simply was not well reasoned in its own time,” the dissenters stated that, moreover, “it certainly has not withstood the test of time.” Adopting the Restatement (Third)’s provisions would represent “a substantial advancement” in Pennsylvania law.

For now, that adoption will have to wait for a different case to make its way to the Pennsylvania Supreme Court.

The dismissal of the *Bugosh* appeal means that, in Pennsylvania products liability cases:

- The state and federal courts in Pennsylvania will apply different substantive law to product liability cases before them. In federal courts in Pennsylvania, Section 2 of the Restatement (Third) will control, while in state courts, *Azzarello* and Section 402A of the Restatement (Second) will continue to apply.
- Whether to remove a case from state to federal court will be an important strategic question that will involve consideration of the risk-utility balancing factors at the outset of a case.

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