

Third Circuit Court of Appeals Predicts That Pennsylvania Supreme Court Will Effectively Eliminate Strict Liability in Defective Design and Inadequate Warning Cases

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As the tort bar waits for the Pennsylvania Supreme Court's ruling in *Bugosh v. I.U. North America Inc.* to answer the court's question of whether it should apply Section 2 of the Restatement (Third) of Torts in place of Section 402A of the Restatement (Second) of Torts, the U.S. Court of Appeals for the Third Circuit has weighed in on the issue.

On April 21, the Third Circuit predicted in *Berrier v. Simplicity Manufacturing Inc.* 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 claims. In essence, the Third Circuit decision replaces *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978), which held that strict liability claims in Pennsylvania were controlled by Section 402A of the Restatement (Second) of Torts, with the more updated Restatement (Third).

Berrier concerned a child whose foot was amputated after her grandfather accidentally backed over her leg while operating a riding lawnmower. The child's parents sued the lawnmower manufacturer, asserting that it negligently designed the lawnmower, and was strictly liable for its defective design, because the lawnmower did not have any back-over protection such as a device that prevented mowing in reverse. The district court granted summary judgment to the manufacturer, ruling that Pennsylvania's strict products liability law does not permit recovery for injuries to anyone other than the intended user. Because the child was a bystander rather than an intended user of the mower, she could not recover in a strict liability action against the manufacturer.

On appeal, the Third Circuit reversed the district court's grant of summary judgment, holding that the lower court should not have relied on the "intended user" doctrine. The Court of Appeals anticipated that the state Supreme Court would explicitly recognize aspects of negligence doctrine in design defect cases despite Pennsylvania courts' previous statements that negligence concepts cannot be imported into strict liability law. Specifically, the Court of Appeals held that restricting strict liability claims to "intended users" because of concern about mixing foreseeability, a negligence concept, into a strict liability claim, does not protect bystanders injured by a defective product. Instead, the court predicted that the state court would adopt the Restatement (Third)'s approach that eschews the strict liability constraints on "bystander" recovery in favor of a more "progressive" and "realistic" view to be applied when nonusers are injured.

As the Third Circuit noted, the Restatement (Third) does not limit a strict liability cause of action to a “user or consumer,” and broadly permits any person harmed by a defective product to recover in strict liability. Although the predicted adoption of the Restatement (Third) would, on the one hand, expand the potential plaintiff pool, it would also, as the court stated, “expressly recognize the essential role of risk-utility balancing” in design-defect litigation.

If the Pennsylvania Supreme Court adopts Section 2 of the Restatement (Third) in place of Section 402A as the Court of Appeals predicts, defendants may have greater opportunities to introduce arguments based on a risk/benefit balance, the state of the art, current industry standards, and obviousness of risk. Section 2, published more than 30 years after Section 402A, maintains a traditional strict liability theory of recovery for claims of manufacturing defect, but with respect to claims of design defect and inadequate warnings incorporates risk-utility balancing more akin to a negligence analysis. Indeed, Section 2 provides that even a dangerous product is not defective unless there is proof of a reasonable alternative design. *See* Restatement (Third) of Torts: Products Liability § 2 cmt. d.

Other comments specify that the risk/benefit analysis must occur in light of knowledge attainable at the time the product was distributed. The comments also suggest that industry practice and the state of the art, although not dispositive, are relevant to the balancing analysis. Further, Section 2 refers to separate sections for the standards of liability applicable to special product categories such as prescription drugs.

What the *Berrier* decision means for Pennsylvania products liability law:

- In federal courts in Pennsylvania, *Azzarello* no longer controls.
- Although the Pennsylvania Supreme Court had denied the Third Circuit’s request in October 2008 to address the permissible scope of bystander recovery, the *Berrier* ruling increases the likelihood that the state Supreme Court will address the issue and articulate in *Bugosh* whether and why Pennsylvania will retain Section 402A or adopt the newer Restatement (Third).
- If the Pennsylvania Supreme Court adopts Sections 1 and 2 of the Restatement (Third) of Torts, as the Third Circuit predicts, the potential plaintiff pool for product liability claims would be expanded to include bystanders. However, defense arguments grounded in negligence principles would become available as well.

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