A Choice of Restatements

Federal courts confused by status of strict products liability doctrine, experts say

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ANALYSIS

The state Supreme Court's dismissal of an appeal in which it was poised to determine whether sections of the Third Restatement of Torts fit into Pennsylvania products liability law has spawned disagreement between federal trial judges on whether a 3rd U.S. Circuit Court of Appeals decision predicting the outcome is still valid.

Products liability experts say the conflict between opinions issued in two diversity jurisdiction cases in the U.S. District Court for the Eastern District of Pennsylvania marks the beginning of a period of uncertainty regarding the state of the law in similar cases.

"The two opposing opinions certainly highlight the confusion within the 3rd Circuit," said John A. Lord, of Saltz Mongeluzzi Barrett & Bendesky, who represented the plaintiff in one of the cases.

Charles L. Becker, at Kline & Specter in Philadelphia, said federal courts applying substantive Pennsylvania law in products liability cases will be able to chose between the strict liability and negligence concepts provided in Sections 1 and 2 of the Third Restatement of Torts or the intended user doctrine in Section 402A of the Second Restatement of Torts until either the 3rd Circuit or the state Supreme Court provide clarification. Becker noted that the Eastern District cases at issue are a long way from being ripe for appeal.

"There doesn't appear to be any immediate prospect for these issues to be resolved by the Pennsylvania Supreme Court, so we're all going to have to live with this," he said.

In its decision earlier this year, the 3rd Circuit concluded in Berrier v. Simplicity Manufacturing, 563 F.3d 38, 55 (3d Cir. 2009), that the Second Restatement's failure to incorporate negligence concepts makes it "difficult (if not impossible) in practice to determine if a product is safe for its intended use by an intended user without any consideration of forseeability."

Berrier involved a products liability claim by the parents of a child injured when her grandfather inadvertently reversed a riding lawnmower over the girl's legs. The defendant argued and the

district court agreed that under the Second Restatement, Pennsylvania strict products liability law does not permit recovery for injuries to anyone other than the intended user.

The court vacated a summary judgment by the district court, holding that a concurring opinion by state Supreme Court Justice Thomas G. Saylor in Phillips v. Cricket Lighters, 841 A.2d 1000 (Pa. 2003), foreshadowed Pennsylvania's adoption of Sections 1 and 2 of the Third Restatement's definition of a strict products liability cause of action.

The state Supreme Court appeared ready to answer the 3rd Circuit's prediction before it dismissed as improvidently granted the appeal in Bugosh v. I.U. North America, PICS Case No. 09-1010 (Pa. June 17, 2009) Saylor, J., dissenting statement (40 pages). In Bugosh, a jury awarded a verdict in favor of the plaintiff's decedent who died as a result of malignant mesothelioma. The Supreme Court granted allocatur to consider whether the trial court had correctly applied the Second Restatement of Torts rather than the Third Restatement to assess the defendant's liability as a supplier rather than a manufacturer of asbestos products.

The court issued a one-page order without explaining its reasoning, but during oral arguments Justice Max Baer indicated he was unconvinced the case was the appropriate vehicle for determining the issue because it appeared the outcome would not be affected if the trial court had applied the Third Restatement.

In an unusual move, Saylor issued a 39-page dissenting statement expressing concern about conflict between the state's strict liability doctrine and the current landscape of products liability law, in which Chief Justice Ronald D. Castille joined.

"[T]he court should no longer say negligence concepts have no place in 'strict-liability' doctrine in Pennsylvania, when this simply is not accurate in our tort scheme, or in any scheme purporting to recognize that manufacturers and distributors are not outright insurers for all harm involving their products," Saylor wrote. "To the degree a distinct category of 'strict' product liability doctrine is necessary, at most, it always has been, and rationally should be, one of quasi-strict liability, tempered, in design and warning cases, with the legitimate involvement of notions of foreseeability and reasonableness within the purview of the fact finder."

In the wake of that decision, which surprised practitioners, two Eastern District judges have reached opposite conclusions on the continued applicability of Berrier.

In Richetta v. Stanley Fastening Systems, PICS Case No. 09-1561 (E.D. Pa. Aug. 21, 2009), memorandum (20 pages), Judge Thomas M. Golden denied a summary judgment motion by the defendant manufacturer of a pneumatic nail gun challenging the plaintiff's claim for strict liability damages, finding that the Third Restatement of Torts should apply. The plaintiff Bruce Richetta filed suit after he was struck in the chest by a nail fired from a falling nail gun, alleging the design of the defendant's nail gun was defective.

Golden first rejected the defendant's assertion that Berrier is inapplicable because the case at hand does not involve injuries to a bystander.

"If the 3rd Circuit wished to limit the application of the Third Restatement solely to bystander cases, the 3rd Circuit would have done so clearly and explicitly," Golden wrote. "Thus, it appears that the 'bystander' facts in Berrier merely provided an appropriate vehicle for the 3rd Circuit to predict that the Third Restatement applies under Pennsylvania law."

He then added that the Supreme Court's dismissal of the Bugosh appeal has no impact on Berrier because it is neither a decision on the merits nor an explicit rejection of Berrier.

"As Bugosh was a procedural decision on the appropriateness of the appeal, the Court cannot infer that Berrier's prediction that a majority of the Justices of the Pennsylvania Supreme Court would adopt the Third Restatement is now invalid," Golden wrote. "The true reasoning behind the Pennsylvania Supreme Court's decision in Bugosh cannot be known, and this court will not engage in speculation. The Pennsylvania Supreme Court may ultimately embrace the Third Restatement and, in the absence of such a definitive holding, the 3rd Circuit's adoption of the Third Restatement in Berrier applies to this case."

The second case, Durkot v. Tesco Equipment, (E.D. Pa. Sept. 9, 2009) memorandum (11 pages), involves an employee of US Airways named Marcia Durkot whose toes were amputated after they were crushed between the body and chassis of a scissor-lift truck used to load catering supplies aboard aircraft at Philadelphia International Airport.

Ruling on the defendant Tesco Equipment's application to apply the Third Restatement, Magistrate Judge Jacob P. Hart wrote that the Third Circuit has provided little guidance on when its predictions are binding upon a district court.

"However, it is clear that the district court is no longer bound by a court of appeals' prediction of state law once 'later state court decisions indicate that the Court of Appeals' earlier prediction was in error,'" Hart wrote, citing Sepanuk v. State Farm Mutual Auto Insurance Co., 1995 WL 553010 (E.D. Pa. 1995).

Although Hart agreed with the plaintiff that the facts of the case distinguish it from the "bystander" facts present in Berrier, he noted and agreed with Golden's interpretation that the 3rd Circuit viewed the case as a vehicle for examining the Third Restatement in its entirety.

"Furthermore, we note that by applying the Restatement (Third) in this case even after the Pennsylvania Supreme Court has declined to change the law as the 3rd Circuit predicted, we would be applying a different standard than would be applied in state court," Hart wrote.

Hart quoted the plaintiff's argument that adopting the defendant's position regarding application of the Third Restatement '" ... will lead to citizens of Pennsylvania receiving disparate treatment of their Pennsylvania product liability actions depending on whether they are in state or federal court.'"

Hart refuted Golden's conclusion that the dismissal in Bugosh was not equivalent to a decision on the merits or an explicit rejection of Berrier.

"By dismissing the appeal in Bugosh the Pennsylvania Supreme Court obviously decided not to throw out the Restatement (Second) and Azzarello [v. Black Brothers Co., 391 A.2d 1020 (Pa. 1978)]," Hart said. "Justice Saylor's lengthy dissent makes this obvious. The Court's dismissal of the appeal as improvidently granted did not include any reasoning as to why the Pennsylvania Supreme Court did not either adopt the Restatement (Third) or specifically reaffirm the existing Pennsylvania law. However, the law was not changed, as the 3rd Circuit predicted it would be."

Becker, who wrote the plaintiffs' brief in Berrier, said the opportunities for the courts to resolve the ambiguity presented by the conflict between Richetta and Durkot are distant. The state Supreme Court does not have any pending appeals that involve the issues at play, and both cases would have to proceed to a trial and verdict before the 3rd Circuit would consider hearing an appeal of the pretrial motions.

Thomas R. Kline, of Kline & Specter, said uncertainty over the Supreme Court's position is only likely to increase, as -- after the November election -- 01

the court adds a fourth new member since its decision in Phillips, upon which the 3rd Circuit's prediction was based.

"The ambiguity will not be resolved unless and until the 3rd Circuit speaks on the issue, if it cares to speak on the issue," Kline said.

Jeffrey A. Krawitz, of Spector Gadon & Rosen in Philadelphia, represents Tesco Equipment and said his client has not made a decision as to whether we will seek an interlocutory appeal.

Lord, who represents Durkot, said he's not certain how the 3rd Circuit might handle the issue. He said a firm ruling that the district courts must follow the appeals court's predictions would conflict with the U.S. Supreme Court's decision in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), which requires federal courts to apply the law of the state in which a claim arose.

"If you give the district court discretion to decide these cases on a case-by-case basis, then you're going to wind up with this kind of conflict," Lord said. "By the same token, the 3rd Circuit may not want to have an opportunity to comment on this, which may explain why they've left the situation somewhat muddled all these years." •