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## Products-liability: Pennsylvania Supreme Court Ponders Changing the Standard for Deciding if a Product Is Defective

The Pennsylvania Supreme Court has before it a case that could dramatically alter Pennsylvania products-liability law in some respects by changing how courts determine whether a product is defective. One possible outcome of *Bugosh v. I.U. North America* would relieve defendants of the often rigid and unfair constraints of strict liability in many types of cases. *Bugosh*, therefore, is particularly important to all those in the stream of commerce – from manufacturers to retailers – who might find themselves sued for injuries allegedly caused by products.

In *Bugosh*, a products-liability action for injuries allegedly associated with asbestos-containing products, the Pennsylvania Supreme Court will consider whether to adopt section 2 of the Restatement (Third) of Torts: Products Liability in place of section 402A of the Restatement (Second) of Torts. Under the proposed standard, plaintiffs may be required to prove that defendants acted unreasonably in designing the product or by providing inadequate warnings and instructions, rather than simply to prove that the product had a defect, the defective product caused the injury and that the defect existed when the product left the manufacturer, the test currently used.

Pennsylvania law – which for decades has followed section 402A – imposes liability on manufacturers, retailers and distributors for injuries caused by products with manufacturing defects, design defects and defects based on inadequate warnings and instructions, regardless of whether the defendants acted reasonably in the preparation and sale of the product. In fact, Pennsylvania courts have repeatedly stated that “negligence concepts have no place in a case based on strict liability.” See, e.g., *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1006 (Pa. 2003) (plurality op.). Thus, using strict-liability principles, Pennsylvania courts place “the product itself . . . on trial, and not the manufacturer’s conduct.” *Id.* (citation omitted).

However, even though Pennsylvania courts have expressly refused to apply “negligence concepts” when deciding products-liability claims based upon strict liability, the courts have used negligence-related terminology, and some commentators have suggested that Pennsylvania actually considers the reasonableness of the defendants’ actions when determining whether a product is “defective.” See John M. Thomas, *Defining “Design Defect” in Pennsylvania: Reconciling Azzarello and the Restatement (Third) of Torts*, 71 *Temp. L. Rev.* 217, 223 (1998). The Pennsylvania Supreme Court has recognized that it has “muddied the waters at times with the careless use of negligence terms in the strict liability arena.” *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1006 (Pa. 2003) (plurality op.). Indeed, products-liability law in Pennsylvania is unclear, and *Bugosh* provides an opportunity for the Supreme Court to clarify whether Pennsylvania courts are to consider the reasonableness of the defendants’ actions.

In his 2003 concurring opinion in *Phillips*, Justice Saylor, joined by Justice Eakin and now-Chief Justice Castille, asserted that the “intent of the Second Restatement was not to render the manufacturer an insurer of his product, responsible for any and all harm caused from the use of its product, regardless of the product’s utility and relative safety.” 841 A.2d at 1013 (Saylor, J., concurring). Justice Saylor went on to describe the need to recognize expressly the role of risk-utility balancing, a method used for determining negligence, in design-defect

litigation and to suggest that the court look to the Restatement (Third) for an alternative to the current law. *Id.* at 1015-16, 1018-19. The fact that the Supreme Court has agreed to hear Bugosh may signal that, with a significantly changed composition, the court is considering adopting section 2 now (notably, now-Chief Justice Castille and Justices Saylor and Eakin remain on the court).

The following question remains: what are the implications of adopting section 2 of the Restatement (Third)? Section 2 provides standards for determining whether a product was “defective” and divides product defects into three categories—manufacturing defects, design defects and defects based on inadequate instructions or warnings (although Pennsylvania jurisprudence already tends to separate defects accordingly). This determination is significant because, once a product is determined to be “defective,” those who sell or distribute defective products may be subject to liability for injuries caused by the defect. See Restatement (Third) of Torts: Products Liability § 1 (1998).

Manufacturing defects occur “when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.” *Id.* § 2(a). Therefore under section 2, courts might continue to apply strict liability to claims concerning products with manufacturing defects, and manufacturers, retailers and distributors might still be responsible for injuries regardless of fault.

However, for allegations of design or warning defects, products will be deemed defective if the risks of harm

were “foreseeable” and the risks of harm could have been reduced by a “reasonable alternative design” or “reasonable instructions or warnings.” *Id.* § 2(a), (b). As one commentator wrote, “Thus, in both design and warning cases, liability is defined functionally in terms of whether the manufacturer reasonably could have provided a safer product.” David Owen, *Products Liability Law Restated*, 49 S.C. L. Rev. 273, 286 (1998).

Accordingly, were the Supreme Court to adopt section 2, Pennsylvania law would no longer follow the same strict-liability regime for products-liability claims for design defects and inadequate warnings and instructions. Plaintiffs would be required to show the defendants were at fault for the defect by establishing the unreasonableness of the defendants’ actions. While such an approach would not benefit defendants in all cases, it would bring helpful balance to many cases.

Bugosh offers an opportunity to remove confusion and to ameliorate the harsh and sometimes unreasonable results of Pennsylvania’s often rigid products-liability jurisprudence. Manufacturers, retailers and distributors have an opportunity still to weigh in with amicus briefs in Bugosh. Since the court is almost certain to receive considerable pressure from those who support the current regime, it may be particularly important for those who are or who may be defendants in products-liability cases to assert themselves in Bugosh. Under the current schedule, amicus briefs are due in mid-April. K&L Gates’s Appellate, Constitutional and Governmental Litigation Practice Group will be following this case closely.

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