

The Legal Intelligencer

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Restatement Fight Is Making Pa. Products Law Unpredictable

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Editor's note: This article is the first in a series.

While it is a certainty that we live in a manufactured age, in which people are surrounded by products, the state of the law in Pennsylvania governing what happens when people are injured by those products is very much uncertain.

In Pennsylvania, the products liability law under which plaintiffs sue over alleged injuries from products and the law under which manufacturers, distributors and sellers defend those products depends upon whether federal or state courts have jurisdiction over lawsuits. Pennsylvania products liability lawyers say that the law is unpredictable, conflicted and in disharmony between the federal and state courts.

The conflict has arisen because the U.S. Court of Appeals for the Third Circuit has twice opined in the last three years that the state Supreme Court is likely to adopt provisions of the *Restatement (Third) of Torts*. The state Supreme Court has not squarely dealt with the issue, including one case in which the justices said they improvidently granted allocatur to consider whether Section 2 of the *Third Restatement* should replace Section 402A of the *Restatement (Second) of Torts*.

Section 402A of the *Second Restatement* states that liability ensues for any defective product that is unreasonably dangerous to the product's user. Section 2 of the *Third Restatement* brings in concepts of negligence by stating that a product is defective in design or because of inadequate warnings when foreseeable risks of harm could have been reduced.

"If you know anything about Pennsylvania products liability law ... the last thing you know it is, is predictable," said C. Scott Toomey, a defense attorney and the managing partner of Littleton Joyce Ughetta Park & Kelly's office in Radnor, Montgomery County.

There is different governing law whether a case is under state or federal jurisdiction, "which is just crazy," said plaintiffs attorney Alan M. Feldman of Feldman Shepherd Wohlgerlenter Tanner Weinstock & Dodig in Philadelphia.

Feldman was one of the attorneys representing the plaintiffs in the first case in which the Third Circuit suggested that Pennsylvania would adopt the newest restatement, *Berrier v. Simplicity Manufacturing*.

"People have different rights and responsibilities depending upon which forum they select, which court you file in, and that's not the way it's supposed to be," Feldman said.

"You have this bizarre situation where the law can be different in federal and state courts on a major issues," said James M. Beck, a defense attorney who is counsel with Reed Smith and who has written over 50 amicus curiae briefs on behalf of the Products Liability Advisory Committee.

While the Third Circuit reaffirmed last year in *Covell v. Bell Sports* that the *Third Restatement* should apply in Pennsylvania, Toomey said which restatement applies actually depends upon which district court judge the case is pending in front of.

In a July 3 opinion in *Sikkelee v. Precision Airmotive*, U.S. District Judge John E. Jones III of the Middle District of Pennsylvania opined that the "Third Circuit's prediction in *Covell* is binding upon federal district courts sitting in diversity absent an affirmative indication from the Pennsylvania Supreme Court that it intends to retain the *Restatement Second* as the law in Pennsylvania. In our opinion, this indication was provided in *Beard v. Johnson & Johnson*, where the Pennsylvania Supreme Court took notice of 'the continuing state of disrepair in the arena of the Pennsylvania strict-liability' law and nonetheless declined to take the opportunity to replace the *Restatement Second* with the *Restatement Third*."

In contrast, in a July 24 opinion in *Sansom v. Crown Equipment*, U.S. District Judge Mark R. Hornak of the Western District of Pennsylvania said that "since *Covell*, the Pennsylvania Supreme Court had the opportunity to conclude this judicial volleying in *Beard v. Johnson & Johnson* ... However, notably absent in *Beard* is any determination, holding or even persuasive dicta clearly and directly contrary to *Covell* regarding the applicable law governing Pennsylvania products liability cases ... Thus, given that the Pennsylvania Supreme Court in *Beard* did not affirmatively disavow the premise of the *Covell* decision, along with the principle that the Third Circuit's predictions regarding Pennsylvania state law are binding on this court absent a decision of the Pennsylvania Supreme Court expressly to the contrary."

For its part, Justice Thomas G. Saylor, writing for the state Supreme Court majority in *Beard*, said that strict-liability design defect law is in a "state of disrepair" and that "it may be cogently argued that risk-utility balancing is more legitimately assigned to a jury ... Indeed, such is the approach in the *Restatement Third* ."

But the court did not adopt the *Restatement Third*, and Justice Max Baer, writing in a concurring opinion for two other justices, said that Saylor's opinion could be interpreted to favor the adoption of the *Restatement Third* but that "until such time as this court is presented with a case to resolve this difficult issue, I express no opinion on the merits of the adoption of the *Restatement Third* and will continue to apply the current law of the Pennsylvania, which is Section 402A of the *Restatement Second*."

Despite the *Covell* decision, "it means we're going to be fighting the same battles before every judge in every one of the courthouses in Pennsylvania that I fought in *Covell* ," Toomey said. "We're going to be fighting the *Third Restatement* and the *Second Restatement* ... before every judge."

Getting clarity from the state Supreme Court in the near future is unlikely because the court is without a full complement of justices due to Justice Joan Orié Melvin's suspension while her criminal case is pending in Allegheny County.

Beck, along with plaintiffs attorney Clifford A. Rieders of Rieders, Travis, Humphrey, Harris, Waters & Waffenschmidt in Williamsport, Lycoming County and Feldman, said they think the Third Circuit will recognize that there is a dichotomy between the state and federal courts and follow the *Second Restatement*.

Feldman said the current conflict between the federal and state courts on Pennsylvania products liability law is "not how *Erie v. Tompkins* is supposed to work. You're supposed to apply the substantive law of the state you're in."

Which Would Be Better?

Both the old and new restatements have their strong partisans.

Rieders, Shanin Specter of Kline & Specter in Philadelphia, Beck and Toomey said the *Third Restatement* would be better for bystanders who are injured by products.

Under Section 402A of the *Second Restatement* and strict liability, plaintiffs must be the intended users of products to recover, which leaves bystanders out in the legal cold.

But the *Second Restatement* is better for plaintiffs in other ways, lawyers said.

"What upset many people about the *Restatement (Third)* is that it reintroduces negligence principles that are sometimes impossible to prove in design and manufacturing cases," Rieders said.

By requiring that products must be safe for their intended users, the burden is put on those who are in the best position to make sure products are safe, Feldman said.

Some provisions of the *Third Restatement* would tilt the playing field toward defendants by permitting evidence of industry standards and "comparing the reasonableness of the manufacturer to basically other manufacturers" through those industry standards, Feldman said.

Beck said he prefers the *Third Restatement* "because I think that's how a jury thinks." It's better to instruct juries about balancing the risk and utility of the design of products, Beck said.

Defendants would be able to get into the reasonableness and foreseeability of plaintiffs' conduct and introduce government and industry standards, Beck said.

While the *Third Restatement* would make it harder to prove design defect claims because defendants would be permitted to argue the foreseeability, "I personally believe too much is made of these distinctions," Specter said. "In any event having tried a lot of products liability cases ... I have felt the juries haven't drilled down nearly as far as the courts on the precise contours of 'foreseeability' or 'unreasonably dangerous.'"

Instead, Specter said he thinks juries ask in malfunction cases if the products broke, ask in design defect cases if the products were well-designed, and in warning cases if plaintiffs were fairly warned.

Specter said his practice is to maintain both negligence and strict liability claims.

Next week's installment will look at the growing internationalization of mass torts.

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