

## **Third Circuit Reaffirms Berrier - Third Restatement Applies in Pennsylvania Federal Court**

**Tuesday, July 12, 2011**

We've discussed the so-called "Berrier question" - whether the Third Circuit's prediction that Pennsylvania law would switch to the Third Restatement from the old Azzarello form of super-strict liability should continue to apply - before. Our [position](#) is that *stare decisis* required application of Berrier, until the Pennsylvania Supreme Court said otherwise, and that for federal district courts to take it upon themselves to decide whether or not to follow the Third Circuit risked judicial chaos.

Anyway, we're pleased to announce that the question has been put to rest, at least on the Third Circuit end. Today, in Covel v. Bell Sports, Inc., No. 10-3860, [slip op.](#) (3d Cir. July 12, 2011), holding that Berrier remained good law and that all federal district courts have to follow it. The issue arose in Covell in the context of industry standards evidence, previously inadmissible under Azzarello super-strict liability. Under the Berrier/Third Restatement regime, however, this evidence is properly admitted. Covell, [slip op.](#) at 14-15.

The same result should apply with all the other looniness of Azzarello-based Pennsylvania strict liability, from the "any element" charge, to regulatory compliance, to (dare we say it?) comparative fault. Under the Third Restatement, the playing field becomes leveled.

The chief argument that the plaintiff raised was that the dismissal of the appeal in Bugosh v. I.U. North America, Inc., 971 A.2d 1228 (Pa. 2009), somehow invalidated Berrier, since Berrier made its prediction with the expectation that Bugosh would soon settle the issue. However, under Pennsylvania law, a dismissal of an appeal has no precedential value whatever. Commonwealth v. Tilghman, 673 A.2d 898, 904 (Pa. 1996). The court refused to engage in what it called "[r]eading the tea leaves of a certiorari dismissal." [Slip op.](#) at 14.

"Given that Bugosh is of no consequence, we conclude that the state of the law in Pennsylvania is exactly as it was when we decided Berrier. Absent a change in Pennsylvania's law, we see no reason to upset our precedent. Applying Berrier, we hold that the District Court did not err in using the Restatement (Third) of Torts to guide its decisions to admit evidence, and to frame its jury instructions."

Covell, [slip op.](#) at 14-15.

So there you have it. Until the Supreme Court of Pennsylvania rules otherwise the Third Restatement "reasonableness"-based form of strict liability is considered Pennsylvania law in federal courts applying Pennsylvania law. As defense lawyers (who argued for the Third Restatement in both Bugosh and Berrier), this makes us happy. On the whole, the Third Restatement is much more friendly to defendants than Azzarello super-strict liability.

Now, if we can just get the Pennsylvania Supreme Court to address the issue.