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Practice Groups:

Product Liability

Commercial Disputes

## Third Circuit Confirms Use of Restatement (Third) of Torts in Federal Cases Applying Pennsylvania Product Liability Law

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In recent years, Pennsylvania state and federal courts have described Pennsylvania product liability law as being in a state of “profound uncertainty,” because it provides little clarity to consumers and product manufacturers and sellers as to their rights and obligations under the laws of the Commonwealth.<sup>1</sup> Much of this uncertainty stems from a divergence between state and federal courts relating to the controlling analysis—specifically, § 402A of the Restatement (Second) of Torts, which is based on historic product liability concepts, or sections 1 and 2 of the Restatement (Third) of Torts, which incorporates negligence-based foreseeability principles into the analysis—for product liability claims governed by Pennsylvania law.

In its October 17, 2012 Order in *Sikkelee v. Precision Airmotive Corporation*, Case No. 12-8081, the Third Circuit Court of Appeals confirmed its previous holdings that a Pennsylvania federal court sitting in diversity should apply sections 1 and 2 of the Third Restatement to product liability cases, absent a contrary holding from the Pennsylvania Supreme Court. While the Pennsylvania Supreme Court has not yet addressed the issue in a clear fashion, Pennsylvania product liability litigants appear to be subject to differing legal standards based solely on the court (state or federal) in which the cases are pending.

### Background

A federal court exercising diversity jurisdiction over product liability claims governed by Pennsylvania state law is bound by the decisions of the Pennsylvania Supreme Court. When the Pennsylvania Supreme Court is silent regarding a state law issue, a federal court must predict how the state’s highest court would resolve the issue by considering, *inter alia*, the holdings of the state’s lower courts. The prediction as to how a state supreme court would rule on the issue, when rendered by a Court of Appeals, is binding on all district courts in the Circuit unless the state supreme court issues a contrary decision.

The Third Circuit first endorsed the application of the Third Restatement in its 2009 decision in *Berrier v. Simplicity Mfg., Inc.*, a case brought on behalf of a minor child who suffered injuries when her leg was caught under a riding lawn mower.<sup>2</sup> Significantly, based on its review of Pennsylvania appellate decisions, the Third Circuit predicted that the Pennsylvania Supreme Court would adopt Sections 1 and 2 of the Third Restatement (which recognize recovery by unintended consumers injured by a product) and directed district courts in the Circuit to apply the Third Restatement to

<sup>1</sup> See, e.g., *Lynn v. Yamaha Golf-Car Co.*, Case No. 2:10-cv-01059, 2012 WL 3544774, at \*11 (W.D. Pa. Aug. 16, 2012); see also *Schmidt v. Boardman Co.*, 11 A.3d 924, 940 (Pa. 2011) (describing Pennsylvania’s product liability schema as “almost unfathomable”) (citation omitted); *Beard v. Johnson and Johnson, Inc.*, 41 A.3d 823, 836 (Pa. 2012) (recognizing the “continuing state of disrepair in the arena of Pennsylvania strict-liability design defect law”).

<sup>2</sup> *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38 (3d Cir. 2009), cert. denied, 130 S.Ct. 553 (2009).

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product liability claims governed by Pennsylvania law.<sup>3</sup> Two years later, the Third Circuit reaffirmed its decision in *Berrier* in *Covell v. Bell Sports, Inc.*, an action involving the alleged defective design of a bicycle helmet.<sup>4</sup> In *Covell*, the Third Circuit again predicted that the Pennsylvania Supreme Court would adopt the Third Restatement, and, again, instructed federal courts exercising diversity jurisdiction to apply the Third Restatement to product liability claims brought under Pennsylvania law.<sup>5</sup>

Since the Third Circuit's decisions in *Berrier* and *Covell*, the Pennsylvania Supreme Court has both noted the inconsistencies and uncertainties in the product liability arena and had opportunities to settle those inconsistencies and uncertainties by definitively addressing whether the Second or Third Restatement governs product liability claims in Pennsylvania.<sup>6</sup> At the same time, the Pennsylvania Supreme Court has declined to rule on the issue.<sup>7</sup>

Likewise, despite the Third Circuit's pronouncements in *Berrier* and *Covell*, federal district courts have applied *Berrier* and *Covell* inconsistently, some following the Third Circuit's direction and applying the Third Restatement to product liability claims governed by Pennsylvania law,<sup>8</sup> and others declining to follow the Third Circuit's direction, and continuing to apply the Second Restatement to such claims.<sup>9</sup>

### The Decision in *Sikkelee*

The Middle District of Pennsylvania took the latter approach in *Sikkelee v. Precision Airmotive Corp.*, a product liability case arising from the death of David Sikkelee. Mr. Sikkelee died in 2005 when the plane he was piloting crashed, allegedly as a result of an engine malfunction. In July 2012, the district court, ruling on the motions for summary judgment filed by defendant AVCO Corporation, the engine manufacturer, declined to follow the Third Circuit's precedent in *Berrier* and *Covell*. According to the district court, the Third Circuit's prediction in *Berrier* and *Covell* was "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."<sup>10</sup> In the district court's 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 Pennsylvania strict-liability' law and nonetheless declined to take the opportunity to replace the Restatement (Second) with the Restatement (Third)."<sup>11</sup>

AVCO petitioned the Third Circuit to accept interlocutory appeal on the "issue of whether the Pennsylvania Supreme Court would adopt the Restatement[] (Third) of Torts or continue its application of the Restatement (Second) of Torts," which the Third Circuit denied. AVCO

<sup>3</sup> *Id.* at 40.

<sup>4</sup> *Covell v. Bell Sports, Inc.*, 651 F.3d 357 (3d Cir. 2011), *cert. denied*, 132 S.Ct. 1541 (2012).

<sup>5</sup> *Id.* at 360.

<sup>6</sup> *See, e.g., Schmidt*, 11 A.3d at 940; *Beard*, 41 A.3d at 836.

<sup>7</sup> *Id.*

<sup>8</sup> *See, e.g., Lynn*, 2012 WL 3544774, at \*11 (applying the Third Restatement); *Hoffman v. Paper Converting Mach. Co.*, 694 F.Supp.2d 359, 365 (E.D. Pa. 2010) (same); *Richetta v. Stanley Fastening Sys., L.P.*, 661 F.Supp.2d 500, 507 (E.D. Pa. 2009) (same).

<sup>9</sup> *See, e.g., Carpenter v. Shu-Bee's, Inc.*, Case No. 10-0734, 2012 WL 2740896, at \*3 (E.D. Pa. July 9, 2012) (applying the Second Restatement); *Durkot v. Tesco Equipment, LLC*, 654 F.Supp.2d 295, 300-301 (E.D. Pa. 2009) (same).

<sup>10</sup> *Sikkelee v. Precision Airmotive Corp.*, Case No. 4:07-cv-00886, 2012 WL 2552243, at \*9 (M.D. Pa. July 3, 2012).

<sup>11</sup> *Id.*

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subsequently filed a petition for clarification or, alternatively, rehearing *en banc*, of the denial. Although the Third Circuit denied AVCO's request for rehearing, the full court nevertheless took the opportunity to affirm its prior rulings and its direction to federal district courts within the Circuit to apply the Third Restatement in product liability lawsuits governed by Pennsylvania law. Specifically, in a two-page order signed by Circuit Judge Joseph F. Weis, Jr., the court explained:

we held [in *Berrier*] that federal courts sitting in diversity and applying Pennsylvania law to products liability cases should look to sections 1 and 2 of the Restatement (Third) of Torts. The precedential holding in *Berrier*, as set forth above, represents the Court's view of Pennsylvania's product liability law. The Pennsylvania Supreme Court has not issued a definitive opinion on whether the Restatement (Third) of Torts or the Restatement[] (Second) of Torts applies to strict liability and product defect cases.<sup>12</sup>

Thus, according to the Third Circuit, "we will follow the precedent set out in *Covell* and *Berrier*."<sup>13</sup>

### Implications

After *Sikkelee*, the Third Circuit's direction to federal district courts in the Circuit to apply the Third Restatement to product liability claims governed by Pennsylvania law appears to be clear. What remains unclear, however, is how—and when—the Pennsylvania Supreme Court will decide which iteration of the Restatement applies to such claims. Until then, the applicable legal standards, rights, and obligations of consumers and product manufacturers and sellers may well depend on, to a large degree, whether the case is pending in state court or federal district court in Pennsylvania.

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<sup>12</sup> *Sikkelee v. Precision Airmotive Corp.*, No. 12-8081 (3d Cir. Oct. 17, 2012).

<sup>13</sup> *Id.*