Legal Opinion Letter

WLF Washington Legal Foundation

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2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

Vol. 18 No. 23 September 19, 2008

STATE HIGH COURT SHOULD ADOPT 3RD RESTATEMENT ON PRODUCTS LIABILITY

by
Stephen A. Fogdall

In the eleven years since the American Law Institute promulgated the Restatement (Third) of Torts: Products Liability, the Pennsylvania Supreme Court has twice had the opportunity to adopt the new Restatement's carefully-balanced marriage of strict liability and negligence concepts and to abandon once and for all the ill-designed, and now outmoded, Section 402A of the Restatement (Second). Both times the Court has sent decidedly mixed signals about its willingness to make this change. In *Phillips v. Cricket Lighters*, 841 A.2d 1000 (Pa. 2003), three justices, noting inconsistencies in Pennsylvania's 402A jurisprudence, exhorted their colleagues to adopt the Restatement (Third) as "the clearest path to reconciling the difficulties persisting in Pennsylvania law, while enhancing fairness and efficacy in the liability scheme." 841 A.2d at 1021 (Saylor, J., concurring). But a plurality of justices opted to retain Section 402A. Three years later, in *Department of General Services v. United States Mineral Products Co.*, 898 A.2d 590 (Pa. 2006), the justices seemed to reach a compromise position, declaring that strict product liability doctrine in Pennsylvania would be "closely limited pending an overhaul by the Court." 898 A.2d at 601 (Saylor, J.). Yet the Court still declined to adopt the Restatement (Third), leaving any "overhaul" for another day.

Now the Court has another chance to finally take this step. Earlier this year it agreed to hear the appeal of I.U. North America, Inc., (IUNA) in *Bugosh v. I.U. North America*, a failure-to-warn case based on asbestos exposure. IUNA is a distributor of products, not a manufacturer. Its presence as a defendant in *Bugosh* was based solely on the fact that its predecessor had sold a small percentage of asbestos-containing products, including products purchased by the plaintiff's employer during the late 1950s and early 60s. IUNA sought to defend on the theory that its predecessor could not have known of the danger of asbestos exposure at that time because the manufacturer of the few asbestos-products it supplied had deliberately concealed the danger. The trial court refused to allow IUNA to make such arguments, holding that under existing Pennsylvania products liability law (founded on 402A), *every* entity in the distribution chain – the manufacturer, the distributor, the retailer – is strictly liable for *any* product defect, be it a manufacturing defect, a design defect, or a failure to warn, regardless of the particular entity's ability (or lack thereof) to learn of or prevent the defect.

IUNA argued to no avail that the trial court should apply Section 2 of the Restatement (Third) to a distributor in its position. While Section 2 retains 402A's rule of strict liability for manufacturing defects, it opts for a negligence-type rule for alleged design defects and failures to warn. Specifically, Section 2 provides that an entity can be liable for a failure to warn only where "the *foreseeable* risks of

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Stephen A. Fogdall is an attorney in the Philadelphia office of the law firm Schnader Harrison Segal & Lewis LLP. Along with colleagues Nancy Winkelman and Samuel W. Silver, Mr. Fogdall represented Washington Legal Foundation *pro bono* in its *amicus* brief filed in *Bugosh*.

harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings . . . and the omission of the instructions or warnings renders the product not reasonably safe." Restatement (Third) of Torts § 2(c) (emphasis added). The trial court refused to apply Section 2, the jury found in favor of the plaintiff, and Pennsylvania's Superior Court affirmed that verdict. The Supreme Court then granted review.

The core question the Pennsylvania Supreme Court will have to resolve in *Bugosh* is whether there is any justification for applying a rule of strict liability to a middleman in the distribution chain such as IUNA. Courts have typically tried to justify a strict products liability regime by invoking the loss-spreading rationale famously advocated by California Supreme Court Justice Traynor in his seminal opinions. This rationale holds that the *manufacturer* is in the best position to internalize losses from product defects because "the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (Traynor, J. concurring). On its face, this rationale does not apply to a distributor such as IUNA. Yet courts applying Section 402A have assumed with minimal analysis that a distributor or retailer should be subject to strict liability as well, because such entities "are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products." *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 262-63, 391 P.2d 168, 171-72 (1964) (Traynor, J.).

This reasoning cannot withstand scrutiny. By definition, strict-liability is not needed to induce a *distributor* to "bear the costs of injuries resulting from defective products" because, if the loss-spreading theory when applied to *manufacturers* had any legitimacy at all, the prices a manufacturer charges its distributors would *already* include a component to cover losses from product defects and therefore distributors would *already* bear these costs as a result of paying the manufacturer's higher prices. Extending strict liability to distributors adds nothing. Indeed, any argument that distributors must be strictly liable to ensure adequate loss spreading could only be persuasive if, in fact, strict liability *fails* to induce loss spreading by manufacturers. But, if that is the case, the entire rationale for strict liability falls to pieces.

Moreover, careful analysis shows that, contrary to the oft-repeated truisms of courts and commentators, strict liability cannot in fact induce manufacturers to internalize losses from product defects effectively, at least when applied to design-defect and failure-to-warn claims. The loss-spreading rationale can only work if losses are predictable, *i.e.*, *foreseeable*. Unlike manufacturing defects, which tend to be more predictable and manageable, a manufacturer cannot design products to eliminate unforeseeable risks and cannot develop a warning scheme when it has no way of knowing what to warn against. For the same reason, a manufacturer has no way of accurately setting its prices to internalize losses from such unknowable risks. Section 2 of the Restatement (Third) solves this problem by striking exactly the right balance, applying strict liability to manufacturing defects but negligence-based liability to design defects and failures to warn. Section 402A, by contrast, fails to draw this needed distinction and thus holds both manufacturers and distributors such as IUNA to a standard they cannot possibly satisfy.

If the Pennsylvania Supreme Court has been waiting for the right moment finally to abandon 402A and adopt Section 2's manifestly more sensible approach that moment has arrived with *Bugosh.* Hopefully, the Court will seize it.

ISBN 1056 3059