

THE “INTENDED USE” LIMITATION ON STRICT PRODUCTS LIABILITY IN PENNSYLVANIA: IN FULL FORCE AND EFFECT AFTER DOUBLE SUPREME COURT VICTORIES FOR MONSANTO COMPANY

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By affirming a defense verdict, the Pennsylvania Supreme Court recently concluded 18 years of litigation that once targeted White and Williams' client, Monsanto Company, with over \$220 million in strict products liability claims. The decision, in *Department of General Services v. U.S. Mineral Products Group*, 956 A.2d 967 (Pa. 2008), marks the second Supreme Court victory in the case for Monsanto under Section 402A of the Restatement (Second) of Torts. It confirms that the plaintiff's right to recover in strict liability is narrowly limited to harm caused by the intended use of a product. The decision comes at a time when the Pennsylvania Supreme Court is considering a complete overhaul of the law of strict products liability in Pennsylvania. It removes any doubt that, until and unless the Pennsylvania Supreme Court replaces Section 402A with a negligence-based scheme, a strict liability plaintiff cannot have its cake and eat it too.

Section 402A – Strict Liability Free of Negligence Concepts

The Pennsylvania Supreme Court first adopted the strict liability theory set forth in Section 402A of the Restatement (Second) of Torts over 40 years ago. See *Webb v. Zern*, 220 A.2d 853 (Pa. 1966). The strict liability theory is founded on the view that the risk of loss from injury caused by a defective product should be borne by the supplier, rather than the consumer, because the supplier is in a better position to absorb the loss. See *Azzarello v. Black Brothers Co., Inc.*, 391 A.2d 1020 (Pa. 1978).

Since its adoption of Section 402A, the Pennsylvania Supreme Court has maintained a rigid division between negligence and strict liability concepts. In negligence, the focus is on the manufacturer's conduct. In strict liability, the focus is not on the manufacturer's conduct, but on the product itself. In contrast to a negligence claim, therefore, the plaintiff in a strict liability action may recover against the manufacturer without regard to fault. In fact, the Supreme Court has unshakably held that negligence concepts, such as foreseeability, have no place in the strict liability doctrine. To establish strict liability against a manufacturer, the plaintiff need only prove that the product, which caused harm, was unsafe for its intended use when it left the manufacturer's control. Because negligence concepts are foreign to the strict liability doctrine, the manufacturer may be held strictly liable even if it exercised all possible care in the preparation and sale of its product.

Department of General Services – “Intended Use” Under Attack

Although strict liability was adopted for the benefit of consumer-plaintiffs by allowing the imposition of liability against manufacturers regardless of fault, the intended use element of Section 402A has become a valuable tool under Pennsylvania law for manufacturers to limit the otherwise potentially ruinous reach of the strict liability doctrine. In fact, the intended use element of Section 402A was front and center in both appeals in *Department of General Services*.

The case originated in 1990 as a claim by the Commonwealth of Pennsylvania against United States Mineral Corporation, the manufacturer of sprayed asbestos insulation found throughout the Transportation & Safety building (T&S building) in Harrisburg, former home of the Pennsylvania Department of Transportation.

In 1994, a fire occurred in the building and post-fire testing revealed the presence of PCBs on every floor. Monsanto, the former domestic manufacturer of PCBs, was joined as a defendant in 1997. The Commonwealth sought over \$220 million in damages against Monsanto, including the cost of demolishing the building and replacing it with a new state-of-the-art office tower. The Commonwealth sought to hold Monsanto strictly liable for the presence of PCBs in the T&S building based on a design defect theory. The Commonwealth originally claimed that PCBs found in the building were spread both by the fire and by off-gassing from building products during the normal operation of the HVAC system. Monsanto responded that PCBs were spread solely by the fire and a fire was not an intended use of building products.

The original trial, which lasted 16 months, resulted in a \$60 million judgment against Monsanto. On Monsanto's appeal, the Pennsylvania Supreme Court reversed the judgment and rendered a landmark decision on the intended use doctrine in *Department of General Services v. U.S. Mineral Products Group*, 898 A.2d 590 (Pa. 2006). The Court held that, while the accidental incineration of a product, as in a building fire, may be foreseeable, it is not an intended use of a product that may subject the manufacturer to strict liability for fire-related harm. As a result, the Court limited the Commonwealth to pursuing a

claim for property damage caused by the alleged off-gassing of PCBs.

On retrial, the jury reached a defense verdict, finding that PCBs, in levels found in the T&S building unrelated to the fire, were not unsafe for their intended uses in the building. The Commonwealth appealed on the basis that the jury's verdict was against the weight of the evidence in light of alleged harmful health effects shown in animal and epidemiological studies of high-dose exposures to PCBs and a Congressional ban on the domestic manufacture and sale of PCBs in 1976. Monsanto responded that the Commonwealth's evidence of harmfulness in the abstract did not establish that PCBs, when used as intended in building products, created health risks and were thus defective.

In the second appeal, the Supreme Court reaffirmed the concept that the question of whether a product is defective is not to be evaluated in the abstract, where any product may be shown to be harmful, but must be evaluated solely in the context of its intended uses. By affirming the jury's verdict, the Court confirmed that, even though a product may be unsafe in certain circumstances, a manufacturer cannot be held strictly liable if the product is safe when used as intended.

The Third Restatement – The Merger of Negligence with Strict Liability

In the meantime, the Pennsylvania Supreme Court granted allowance of appeal in *Bugosh v. I.U. North America, Inc.*, 942 A.2d 897 (Pa. 2008), to decide “[w]hether this Court should apply § 2 of the Restatement (Third) of Torts in place of § 402A of the Restatement (Second) of Torts.” In *Bugosh*, an asbestos exposure case brought under Section 402A, the plaintiffs obtained a \$1.4 million verdict. The defendant-suppliers appealed on the basis that the court erred in refusing to apply the Third Restatement. The Third Restatement reinserts the negligence-based concept of foreseeability into the analysis of design defect and failure to warn cases (but not manufacturing defect claims). Under the Third Restatement, a product is defective only if it produces reasonably foreseeable harm. The plaintiffs, in *Bugosh*, oppose the application of the Third Restatement on the basis that it would effectively eliminate strict liability. Because it places the reasonableness of the manufacturer's conduct at issue, the plaintiffs, in particular, complain that the Third Restatement would allow the introduction of evidence of a manufacturer's compliance with governmental or industry standards, which has previously been precluded in strict liability cases. The Third Restatement would, however, also eliminate the intended use doctrine which has been criticized for producing what has been described as harsh results in certain cases. In its place, the Third Restatement would extend liability to *foreseeable* uses of a product. Thus, for example, a minor child, who is injured playing with a butane lighter, would

be barred from recovery under Section 402A, but could potentially state a viable claim under the Third Restatement. The *Bugosh* case was argued before the Supreme Court on December 2, 2008. An opinion is expected within a year.

Post-Department of General Services – “Intended Use” Strictly Construed

Pending a decision in *Bugosh*, Monsanto's victory in *Department of General Services*, 898 A.2d 590, remains pivotal in Pennsylvania's strict liability law, as recently recognized by Justice Thomas Saylor and Chief Justice Ronald Castille in *Berrier v. Simplicity Manufacturing, Inc.*, No. 13 EM 2008 (Pa. Oct. 17, 2008). In *Berrier*, the United States District Court for the Eastern District of Pennsylvania dismissed a strict products liability claim brought under Pennsylvania law against a lawnmower manufacturer for injuries sustained by a minor child when her grandfather ran the mower in reverse over her foot. *Berrier*, 413 F. Supp. 2d 431 (E.D. Pa. 2005). On appeal, the United States Court of Appeals for the Third Circuit utilized a rarely-used procedural device to request the Pennsylvania Supreme Court to answer whether the strict liability doctrine extends to an injured bystander who is *not* an intended user of the defendant's product. *Berrier*, 2008 WL 538912 (3d Cir. Jan. 17, 2008). The Supreme Court denied the request. Citing *Department of General Services*, 898 A.2d 590, Justice Saylor, joined by the Chief Justice, explained in a concurring statement that “the federal courts are not without guidance as to current law, since, as the district court recognized, this Court has sent a clear signal that the intended use doctrine is to be construed narrowly pending a decision on the foundational matters.” *Berrier*, No. 13 EM 2008.

Conclusion

The legacy of the Commonwealth's protracted suit against Monsanto is that the intended use doctrine endures as a vital tool in the defense of strict products liability actions in Pennsylvania. In other words, *Department of General Services* dictates that a plaintiff cannot have his cake, *i.e.*, liability without fault, and eat it too, *i.e.*, eliminate the intended use doctrine, in strict products liability in Pennsylvania.

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