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THIRD CIRCUIT OPINION SPLITS PENNSYLVANIA PRODUCT LIABILITY LAW

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INTRODUCTION

Federal Courts in diversity jurisdiction cases should apply existing state law to make consistent rulings. Unfortunately, the U.S. Court of Appeals for the 3rd Circuit in *Covell v. Bell Sports, Inc.*, No. 10-3860 (3rd Cir. June 21, 2011 Slip Op.) did not, introducing negligence concepts into a strict product liability case.

COVELL DECISION

A recent decision by the U.S. Court of Appeals for the 3rd Circuit has re-affirmed that there are different standards in certain product liability cases in federal court than in state court – at least, until the Pennsylvania Supreme Court addresses the issues squarely. In *Covell v. Bell Sports, Inc.*, No. 10-3860 (3rd Cir. June 21, 2011 Slip Op.), the panel re-affirmed its holding in *Berrier v. Simplicity Mfg., Inc.*, 563 F.3rd 38 (3rd Cir. 2009) *cert. denied*, 130 S.Ct. 553 (2009), that federal district courts applying Pennsylvania law to products liability cases should look to Sections I and II of the Restatement (Third) of Torts.

Covell involved a product liability action by a seriously injured biker wearing a bicycle helmet manufactured by Bell Sports, Inc. The action was filed in state court and removed to federal court. At trial, the district court, following *Berrier*, admitted evidence and instructed a jury pursuant to the Third Restatement. Section I makes sellers liable only for the sale of products that are "defective," and Section II provides that a product may qualify as "defective" if it meets one of three sets of criteria. The criteria incorporate negligence concepts such as "foreseeable risks" and "care" directly into the definition of "defective." Essentially, the definitions in the Third Restatement amount to a rejection of the "no negligence in products liability" mantra that the Supreme Court of Pennsylvania has endorsed in cases since *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978) (charging courts to avoid negligence concepts when instructing a jury pursuant 402A). The Pennsylvania Supreme Court has remained steadfast in its proclamation that negligence concepts should not be imported into strict product liability law.

In 2009, the 3rd Circuit predicted that, if confronted with the issue, the Supreme Court of Pennsylvania would apply Sections I and II of the Restatement (Third) and not Section 402A of the Restatement (Second) of Torts. Such predictions by a federal court sitting in diversity are permissible absent a controlling decision by a state's highest court. *Nationwide Mut. Ins. Co. v. Buffetta*, 230 F.3rd 634, 637 (3rd Cir. 2000). The American Law Institute published the Third Statement in 1998 and the Pennsylvania Supreme Court has not yet directly addressed which version should be the law in Pennsylvania.

CONCLUSION

The federal courts have long recognized the potential for problems in diversity cases when federal courts apply state law. The Supreme Court of the United States recognized as much and attempted to prevent problems by requiring federal courts sitting in diversity to apply state substantive law. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938); *see also VanDusen v. Barrack*, 376 U.S. 612 (1964). The heart of the policy that underlies the *Erie* doctrine is that a suit by a nonresident litigant in a federal court instead of in a state court a block away should not lead to a substantially different result. Unfortunately, in Pennsylvania for the foreseeable future and until the Pennsylvania Supreme Court addresses the issue — that is exactly what we have.