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Restatement Wars – Florida Upholds Second Restatement Consumer Expectations Test for Design Defects

In its October 29 decision in *Aubin v. Union Carbide Corp*., No. SC12-2075, 2015 WL 6513924 (Fla. 2015), the Supreme Court of Florida made clear that the Third Restatement of Torts, which uses a "risk utility test" that requires plaintiffs to show a reasonable alternative design for a product is not the law in Florida for product liability claims based on a design defect. Rather, the court held that the Second Restatement test known as the "consumer expectation test" is the law in Florida.

Conflicting Tests for Design Defect Cases in Florida

Florida law generally permits plaintiffs injured by a product to bring a strict products liability cause of action against a product's manufacturer based on a design defect. In *West v. Caterpillar Tractor Co*., 336 So. 2d 80 (Fla. 1976), the case most heaving relied on by the court in *Aubin*, the Florida Supreme Court utilized the consumer expectation test in the Second Restatement to determine whether a product was defectively designed. The consumer expectation test asks whether the product fails to perform as safely as an ordinary consumer would expect when being used as intended or in a reasonably foreseeable manner. *See* Restatement (Second) of Torts § 402a (1965). If the product fails this test, a fact-finder may infer that the product was defectively designed. There is no requirement under this test that a plaintiff submit a reasonable alternative design for the product in order to prove the case.

In *Aubin*, the Supreme Court noted that consumer expectation test has generally been followed by four of Florida's five District Courts of Appeal. The exception and source of recent confusion in Florida has been the Third District Court of Appeal, which elected to adopt the risk utility test and the Third Restatement approach in design defect cases. *See,* e.g., *Kohler Co. v. Marcotte*, 907 So. 2d 596 (Fla. 3d DCA 2005); *Agrofollajes, S.A. v. E.I. Du Pont de Nemours & Co*., 48 So. 3d 976 (Fla. 3d DCA 2010). Under the risk utility test, the plaintiff must show that the foreseeable risks of harm posed by the product could have been reduced or avoided by the use of another *reasonable alternative design* by the seller or manufacturer and the failure to use the other design would render the product unsafe. *See* Restatement (Third) of Torts § 2 (1998) (emphasis added). For plaintiffs, the risk utility test really comes down to whether they can meet the burden to prove that a reasonable alternative design existed.

The Opinion in *Aubin* – Consumer Expectations Control

The question of whether Florida courts should follow the Second Restatement Test (consumer expectations) or the Third Restatement test (risk utility) was clearly answered by the court in *Aubin*. The court expressly rejected the risk utility test in the Third Restatement and its added element requiring the plaintiff to prove a reasonable alternative design exists. More importantly, the court confirmed that the Second Restatement and its consumer expectation test control in Florida for design defect cases. In doing so, the court reasoned that the consumer expectation test better conforms to the public policy concerns surrounding products liability in Florida. The court highlighted (1) that the "critical difference" between the Second Restatement and the Third Restatement is that the latter requires plaintiffs to provide the existence of a reasonable alternative design in a design defect case, and (2) that using the Third Restatement can "insulate a manufacturer from all liability" when an alternative design may not be available. The latter reasoning shows the court was clearly focused on eliminating the onus on the plaintiff to show other designs.

The court also explained that the manufacturer is in a better position to establish an alternative design than the plaintiff, which is further support for the proposition that the court intended to eliminate the requirement for a plaintiff to make this showing. While a manufacturer is still permitted to raise a defense that there was no reasonable alternative design possible and the plaintiff can still

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make the showing if it wishes, the *Aubin* decision eliminates the plaintiff's burden to prove the alternative design as a required element of a design defect case.

Conclusion

Based on this holding, the Supreme Court of Florida eliminated any necessary requirement for plaintiffs to show a reasonable alternative design in order to maintain a design defect case, which will have immediate and far-reaching implications for subrogation claims. A large bulk of recovery cases involve product failures, some premised on design defects, and the removal of the added burden of establishing an alternative design makes pursuing a design defect case somewhat less challenging. It also eliminates the possibility for costly expenses in small dollar value products cases where one would have had to establish an alternative design. While a plaintiff is still free to show a reasonable alternative design, the elimination of this requirement in every case is favorable for subrogating insurers in Florida.

If you would like to read the entire opinion in *Aubin*, it can be found here.

Cozen O'Connor stands ready to assist with any questions you may have regarding this decision.