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A PREDICTION IS WORTH FOUR THOUSAND WORDS: THE THIRD CIRCUIT BOLDLY HOLDS THAT THE SUPREME COURT OF PENNSYLVANIA WILL APPLY THE RESTATEMENT (THIRD) IN COVELL v. BELL SPORTS, INC.

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I. Introduction

Charlie, an employee of Paddy’s Pub, buys a new “Speedster” tandem bicycle from Co-Motion Cycles (“Co-Motion”). I He is ecstatic to show his best friend Mac and rides to the pub. II On the way, the front tire comes loose and he crashes into Ryan McPoyle’s new Mercedes. III Charlie sues in Pennsylvania state court alleging a defect in the product, but Co-Motion removes the case to federal court under diversity jurisdiction. IV Co-Motion introduces evidence that the bicycle is in conformity with the United States Consumer Product Safety Commission Bicycle Standard (“UPSC Bicycle Standard”) and Charlie objects that this evidence is not admissible. V Will the federal judge overrule Charlie’s objection? VI

Following the Third Circuit’s decision in Covell v. Bell Sports, Inc., VII the judge will apply the Restatement (Third) of Torts and overrule the objection. VIII Charlie will unsuccessfully argue that the judge should apply section 402A of the Restatement (Second) of Torts and sustain the objection. IX The difference is significant. X The Restatement (Second) makes the seller liable even if “the seller has exercised all possible care.” XI The Restatement (Third) allows inquiry into the amount of care the seller exercised. XII Accordingly, in the above hypothetical, evidence that Co-Motion was in conformity with the UPSC Bicycle Standard is inadmissible under the Restatement (Second) as irrelevant and admissible under the Restatement (Third) as evidence tending to show care. XIII

Recently, the Third Circuit has struggled with which Restatement to apply when sitting in diversity jurisdiction in Pennsylvania. XIV This began in Berrier v. Simplicity Manufacturing, Inc., XV when the Third Circuit predicted that the Supreme Court of Pennsylvania would reject the Restatement (Second) and adopt the Restatement (Third). XVI The Supreme Court of Pennsylvania was set to decide the issue in Bugosh v.
II. Background

A. An Overview of the Restatement (Second) and Restatement (Third) Throughout History

1. The Rise and Fall of the Restatement (Second)

Section 402 A of the Restatement (Second) was published in 1965 and quickly adopted throughout the United States. It was inspired by earlier concepts of strict products liability articulated by Justice Traynor of the California Supreme Court in 1963.
Justice Traynor held manufacturers liable when their defective product was placed on the market and caused injury, regardless of the care the manufacturer exercised.\textsuperscript{xxxii} Similarly, the Restatement (Second) imposes liability on “[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer” even if “the seller has exercised all possible care in the preparation and sale of this product.”\textsuperscript{xxxii}

Courts differed on how to define “defective condition.”\textsuperscript{xxxiii} First, many adopted the “consumer expectations test,” based, in part, on the comments to the restatement.\textsuperscript{xxxiv} Under this test, a product is defective if it “perform[ed] less safely than an ordinary consumer would expect.”\textsuperscript{xxxv} Courts disregarded the amount of care exercised by manufacturers.\textsuperscript{xxxvi} The test, however, had many shortcomings, prompting a shift to the “risk utility test.”\textsuperscript{xxxvii} This test required courts to balance “the danger of the product . . . with [the] utility of the product.”\textsuperscript{xxxvii} An article by Dean John Wade was influential in indentifying seven factors to balance.\textsuperscript{xxxix} However, the test had its own problems, and despite their influence, the Wade factors were often criticized.\textsuperscript{xl}

2. An Introduction to the Restatement (Third)

The Restatement (Third) of Torts, published in 1998, can be seen as a response to the difficulty surrounding the definition of a “defective product.”\textsuperscript{xli} It clearly divides product defects into (1) manufacturing defects, (2) failure to warn, and (3) design defects.\textsuperscript{xlii} Manufacturing defects mirror the Restatement (Second), imposing liability regardless of care.\textsuperscript{xliii} In contrast, failure to warn and design defect analysis incorporates negligence concepts.\textsuperscript{xliv} Phrases such as “foreseeable risks of harm,” and “reasonable alternative” appear to shift products liability analysis from strict liability to negligence.\textsuperscript{xlv} Thus, unlike the Restatement (Second), the manufacturer’s conduct can form the basis for liability.\textsuperscript{xlvi}

3. A Foreseeable Tension Between the Two Restatements
Plaintiffs generally prefer the Restatement (Second) while defendants prefer the Restatement (Third). Indeed, after the Restatement (Third) was published, plaintiffs were concerned that it did not protect consumers and was created by manufacturer lobby groups. Defendants often rebutted by arguing that the Restatement (Second) was impractical and confusing.

B. The Era of Products Liability Law in Pennsylvania

1. Pennsylvania Adopts the Restatement (Second)

Pennsylvania adopted the Restatement (Second) in 1966. Prior to 1966, plaintiffs could bring a product defect claim under either a breach of warranty or negligence theory, limiting the plaintiff’s ability to directly sue a manufacturer if the customer bought the product from an intermediate seller. Concerned with this limitation, the Supreme Court of Pennsylvania adopted the Restatement (Second) in Webb v. Zern.

Although the Webb opinion had little analysis, it relied upon the dissenting opinions of Justices Jones and Roberts in Miller v. Preitz. In Miller, a baby died when a vaporizer-humidifier shot boiling water on the child. In a dissenting opinion, Justice Jones advocated strict liability for manufacturers because the public expects that manufacturers stand behind their products and be accountable for defects. Justice Roberts advocated the adoption because it reflected “the inability of the consumer to protect himself; the seller's implied assurance of the safety of a product on the open market[, and] the superior ability of the manufacturer or seller to distribute the risk of loss.”

After the Webb opinion, the Supreme Court of Pennsylvania attempted to affirm strict liability analysis. In Azzarello v. Black Brothers Co., Inc., a coating machine made by the defendant manufacturer pinched the plaintiff’s hand. The trial court’s jury instructions required a finding of an “unreasonably dangerous” condition, language directly from the Restatement (Second). After a verdict for the defendant, the plaintiff moved for a new trial, claiming that the use of “unreasonably dangerous” condition incorporated negligence theories prohibited under the Restatement (Second). The
Supreme Court of Pennsylvania agreed, explaining that the use of “unreasonably dangerous” in the Restatement (Second) has “no independent significance and merely represent[s] a label to be used where it is determined that the risk of loss should be placed upon the supplier.” Furthermore, “the phrases ‘defective condition’ and ‘unreasonably dangerous’ are terms of art invoked when strict liability is appropriate.”

Although Pennsylvania courts have continuously stated that negligence theories are not applicable under the Restatement (Second), they struggled with the separation. Notably, in Phillips v. Cricket Lighters, the court admitted that while “negligence concepts should not be imported into strict liability law, we have muddied the waters at times with the careless use of negligence terms in the strict liability arena.” The court went on to state that “negligence concepts have no place in strict liability law” and applied the Restatement (Second). Justice Saylor wrote a strong concurring opinion in Phillips, believing that the state of Pennsylvania law “demonstrates a compelling need for consideration of reasoned alternatives, such as are reflected in the position of the Third Restatement.” In particular, Justice Saylor criticized the “ambiguities and inconsistencies” under the Restatement (Second).


Pennsylvania courts rarely considered the Restatement (Third) until 2008, after Bugosh v. I.U. North America, Inc. In Bugosh, the Supreme Court of Pennsylvania granted allocatur to decide whether it should adopt the Restatement (Third) over the Restatement (Second). In June 2009, the court dismissed the appeal “as having been improvidently granted” and never decided which Restatement to apply. Again, Justice Saylor wrote a strong dissent, advocating for the adoption of the Restatement (Third).

C. The Third Circuit’s Prediction: Pennsylvania Will Adopt the Restatement (Third)

When sitting in diversity Jurisdiction, federal courts apply state law unless there is no state
precedent, in which case the court predicts what the state Supreme Court would do if presented with the same case.\textsuperscript{lxxiv} Prediction has inherent risks because, if wrong, state and federal courts may apply different laws, leading to forum shopping.\textsuperscript{lxxv} This, unfortunately, was the state of the law in Pennsylvania.\textsuperscript{lxxvi} State courts applied the Restatement (Second) and, after the Berrier decision explained below, federal courts applied the Restatement (Third).\textsuperscript{lxxvii}


In 2008, the Third Circuit predicted that the Supreme Court of Pennsylvania would apply the Restatement (Third) and not the Restatement (Second).\textsuperscript{lxxviii} In Berrier, a girl’s grandfather backed a lawnmower over her foot, requiring amputation.\textsuperscript{lxxix} The parents sued under the Restatement (Second), arguing that the defendant, the manufacturer of the lawnmower, was strictly liable because it did not have a “no mow in reverse” device.\textsuperscript{lxxx} The Third Circuit predicted Pennsylvania law because the Supreme Court of Pennsylvania had not ruled on whether a bystander could recover in a products liability suit.\textsuperscript{lx} The court analyzed the history of Pennsylvania tort law and concluded that “Justice Saylor’s concurring opinion in Phillips foreshadowed the Pennsylvania Supreme Court’s adoption of §§1 and 2 of the Third Restatement.”\textsuperscript{lxxxi} Interestingly, while the Third Circuit’s ruling centered on how the Supreme Court of Pennsylvania would apply tort law to a bystander, the holding applied to all products liability claims.\textsuperscript{lxxxii}

2. Post Berrier and Bugosh

The combination of the Berrier prediction and the Bugosh dismissal created confusion among district courts.\textsuperscript{lxxxiii} Some applied the Restatement (Third), reasoning that the Berrier opinion remained binding precedent.\textsuperscript{lxxxiv} Others applied the Restatement (Second), reasoning that the Bugosh dismissal overruled the Berrier prediction.\textsuperscript{lxxxv} Further complicating matters, the Pennsylvania Supreme Court heard another products liability suit in October 2009
and applied the Restatement (Second) without citing the Bugosh or Berrier decisions.\textsuperscript{lxxvii}

In Covell, the Third Circuit reaffirmed Berrier and applied the Restatement (Third).\textsuperscript{lxxxviii} Practitioners should understand the Third Circuit’s analysis, but should also recognize that this is a prediction of Pennsylvania law and may be overturned by the Supreme Court of Pennsylvania.\textsuperscript{lxxxix} Since Pennsylvania state law is in disarray, practitioners should prepare under both when arguing in the Third Circuit.\textsuperscript{xc}

III. The Third Circuit Reaffirms the Berrier Prediction in Covell v. Bell Sports, Inc.

A. Factual Background and Procedural Posture

Sadly, a car hit David Covell while he was riding his bicycle to work.\textsuperscript{xcI} He sustained serious brain injuries despite wearing a “Giro Monza” helmet.\textsuperscript{xcII} His parents (the “Covells”) were appointed as his legal guardians and filed a products liability suit in the Pennsylvania Court of Common Pleas against East-Bell Sports (“Bell”), the manufacturer of the “Giro Monza” helmet.\textsuperscript{xcIII} Bell removed the case to the United States District Court for the Eastern District of Pennsylvania under diversity jurisdiction.\textsuperscript{xcIV}

The Covells alleged that the helmet’s design was defective and that the helmet lacked adequate safety warnings.\textsuperscript{xcV} To combat these allegations, Bell introduced expert testimony, over the Covells’ objection, regarding the United States Consumer Product Safety Commission’s Safety Standard for Bicycle Helmets (the “CPSC Standard”).\textsuperscript{xcVI} The CPSC Standard is an administrative regulation that provides guidelines for all aspects of helmet safety.\textsuperscript{xcVII} The Covells responded with their own expert testimony; however, both sides ultimately agreed that the helmet’s design conformed to the standard.\textsuperscript{xcVIII} The District Court instructed the jury pursuant to sections 1 and 2 of the Restatement (Third) and allowed the jury to consider the CPSC standard when determining whether the helmet was defective.\textsuperscript{xcIX} The Covells appealed, arguing that the District Court erred by instructing the jury pursuant to the Restatement (Third), not the Restatement (Second), and by admitting the CPSC Standard evidence.\textsuperscript{c}
B. The Third Circuit’s Analysis

The Third Circuit began its brief analysis in Covell by synopsizing the history of products liability law in Pennsylvania. The court discussed the evolution of the Restatement (Second), focusing on confusion surrounding strict liability and negligence analysis. The court noted that the Restatement (Third) evolved in response to this “core conflict” in the Restatement (Second). In affirming the District Court’s decision, the court relied upon the Berrier precedent. Further, it dismissed the Plaintiff’s two arguments that the Berrier opinion was decided incorrectly and that interim state opinions required the court to reevaluate the Berrier precedent.

1. The Berrier Opinion was Decided Correctly

The Covells first argued that the District Court erred by applying the Restatement (Third) because Pennsylvania adopted the Restatement (Second) in 1966 and no decision has overruled this precedent. They believed that the Berrier opinion was incorrect because applying the Restatement (Third) violated the Erie Doctrine, “which requires federal courts sitting in diversity to apply state substantive law.” By applying the Restatement (Third), the district court allowed Bell to forum shop, achieving different results in federal and state court. The court refused to repeat the Berrier opinion, and instead, dismissed these arguments, stating that these issues were “resolved only two years ago.” Indeed, as stated in the Berrier opinion, when sitting in diversity jurisdiction, federal predictions are admissible absent controlling precedent from the state’s highest court.

2. The Third Circuit Will Not Reevaluate in Light of Recent Pennsylvania Cases

The court recognized that while it is required to follow prior panel precedent, it “may reevaluate a precedent in light of intervening authority.” The Covells argued that the dismissal of the Bugosh decision, after Berrier, indicated that the Supreme Court of Pennsylvania will not adopt the Restatement
(Third). The Third Circuit, however, dismissed the argument, stating that “[r]ead the tea leaves of a certiorari or allocatur dismissal is risky business.” Further, the Supreme Court of Pennsylvania warned against this, stating that “a dismissal as being improvidently granted has the exact same effect as if this court had denied the petition for allowance of appeal (allocatur) in the first place.” The court reasoned that, in light of this, “Bugosh is of no consequence” to their original prediction and the Berrier precedent binds them.

IV. Looking Forward: The Implications of Berrier and Covell

The Berrier and Covell opinions strongly suggest that the Third Circuit will apply the Restatement (Third) absent Pennsylvania precedent requiring otherwise. First, in Covell, the Third Circuit had the opportunity to retract the prediction “in light of intervening authority,” but declined. The Third Circuit could have interpreted the Bugosh dismissal as an intervening event, signaling that the Supreme Court of Pennsylvania is not considering adopting the Restatement (Third). Indeed, after the Bugosh dismissal, district court judges reasoned that “by failing to take action [in Bugosh], contrary to the Third Circuit’s prediction, Section 402A of the Restatement (Second) remains the law in Pennsylvania.” However, the court dismissed the implication completely, instead requiring an actual “change in Pennsylvania’s law” to overrule the prediction. Interestingly, if there is a change in Pennsylvania law, the Third Circuit will be required to overrule the prediction because it is sitting in diversity jurisdiction. For this reason, the court seems to imply that they will only overrule Berrier if required by law.

Second, the court in Covell quickly rejected a persuasive Erie Doctrine argument. The Erie Doctrine requires federal courts to apply state precedent when sitting in diversity jurisdiction. The doctrine promotes consistency among federal and state courts and discourages practitioners from picking a jurisdiction based upon which law they will apply. The Berrier prediction undermines this policy. A practitioner can now choose to sit in
federal court, which applies the Third (Restatement), or state court, which applies the Second (Restatement). Although the Third Circuit acknowledged this argument, they refused to reexamine the Berrier decision. Instead, the court continued to rely upon the concurring opinion in Phillips as indication that the Supreme Court of Pennsylvania will adopt the Restatement (Third). Again, this implies that, absent binding state precedent, the Third Circuit will apply the Restatement (Third).

Finally, the Third Circuit exhibited a clear preference for the Restatement (Third). In Berrier, the court was presented with the narrow issue of whether a bystander could sue a manufacturer for a product defect. The court acknowledged that the Webb opinion, which first introduced the Restatement (Second), “can be read as standing for the proposition that, under [the Restatement (Second)], there is a distinct cause of action for bystanders.” Thus, the court had the option to allow the bystander to sue within the Restatement (Second). Instead, the court not only predicted that Pennsylvania would apply the Restatement (Third) to bystanders, but also used the opportunity to predict that Pennsylvania will apply the Restatement (Third) to all products liability suits. The court justified this broad holding because “the Third Restatement takes a ‘more progressive view’ and far more realistic approach to strict liability.”

Accordingly, Berrier and Covell help practitioners understand the state of products liability law in the Third Circuit. However, practitioners should be cautious to rely solely on the Third Circuit’s prediction. Indeed, the Third Circuit may be required to apply the Restatement (Second) in the future.

V. Guidance for Third Circuit Practitioners in Light of Berrier and Covell

Practitioners arguing a products liability suit before the Third Circuit cannot be sure whether the court will apply the Restatement (Second) or (Third). The Berrier and Covell decisions provide meaningful guidance for practitioners when persuading the court to apply one of the restatements.
opinions suggest that the Third Circuit will apply the Restatement (Third), absent intervening state authority.\textsuperscript{cxlii} However, practitioners should also recognize that these two opinions express a prediction of Pennsylvania state law, and as such, can be overruled by the Supreme Court of Pennsylvania.\textsuperscript{cxliii} In light of this, practitioners should prepare under both restatements.\textsuperscript{cxliv}

Recall the bicycle accident hypothetical presented in the introduction.\textsuperscript{cxlv} Charlie sues Co-Motion, the bicycle manufacture, alleging a product defect after a car hit him.\textsuperscript{cxlvi} Co-motion would like to introduce evidence that the bike is in conformity with the USPC Bicycle Standard.\textsuperscript{cxlvii} Assume that the District Court applied the Restatement (Second) and did not admit the evidence.\textsuperscript{cxlviii} Co-Motion appeals to the Third Circuit.\textsuperscript{cxlix} The following guidelines, cognizant of Berrier, Covell, and the current state of products liability law, should help practitioners articulate the best arguments on appeal.\textsuperscript{cl}

A. Arguments for Defense’s Counsel

Defense counsel must persuade the court to apply the Restatement (Third) and not the Restatement (Second).\textsuperscript{cli} This decision is critical in determining whether the USPC Bicycle Standard will be admitted because it is relevant as evidence tending to show care under the Restatement (Third) and irrelevant under the Restatement (Second).\textsuperscript{clii} Following the Third Circuit in Covell, defense counsel should cite Berrier as binding precedent, requiring the court to apply the Restatement (Third).\textsuperscript{cliii} The court in Covell stated that, “[a]bsent a change in Pennsylvania’s law, we see no reason to upset our precedent.”\textsuperscript{cliv} Indeed, it is the tradition of the Third Circuit “that the holding of a panel in a precedential opinion is binding on subsequent panels.”\textsuperscript{clv} Moreover, defense counsel need not elaborate further because, as the court in Covell noted, policy considerations surrounding which restatement to adopt were discussed in Berrier, and do not need to be reargued.\textsuperscript{clvi} Thus, defense counsel’s best argument is that the Third Circuit must follow the Berrier precedential prediction and apply the Restatement (Third).\textsuperscript{clvii} This argument is very likely to succeed absent a binding Supreme Court of Pennsylvania opinion adopting the Restatement
Accordingly, in the above hypothetical, defense counsel can persuade the Third Circuit to apply the Restatement (Third) and admit the USPC Bicycle Standard.

B. Arguments for Plaintiff’s Counsel

Plaintiff’s counsel must convince the court to affirm the District Court and apply the Restatement (Second). After Covell, plaintiff’s counsel can likely achieve this in one of two ways. Counsel can either (1) require the court to apply the Restatement (Third) if the Supreme Court of Pennsylvania issues a binding opinion, or (2) persuade to the court to reexamine its prediction if Justice Saylor changes his stance.

First, per Covell, the Third Circuit will apply the Restatement (Second), if plaintiff’s counsel finds “intervening authority” that changes Pennsylvania law. As discussed above, this will likely require binding state precedent from the Supreme Court of Pennsylvania. Indeed, the Third Circuit will not “read[] the tea leaves” of a Pennsylvania opinion. Plaintiff’s counsel should follow Lance v. Wyeth, because the Supreme Court of Pennsylvania may issue such “intervening authority.” In Lance, the Supreme Court of Pennsylvania granted an appeal on March 15, 2011, to decide, in part, whether to apply the Restatement (Second) or Restatement (Third). Plaintiff’s (and defense) counsel should follow this because the Third Circuit will be required to follow the opinion if the court decides the issue.

Second, even without binding precedent, plaintiff’s counsel may be able to persuade the Third Circuit if Justice Saylor changes his opinion. In Berrier, the court “believe[d] that Justice Saylor’s concurring opinion in Phillips foreshadow[ed] the Pennsylvania Supreme Court’s adoption of . . . the Third Restatement[].” Justice Saylor preferred the Restatement (Third) because it “provid[es] essential clarification and remediation,” “accommodate[s] the wider range of [products liability] scenarios,” and recognizes the reality that negligence is a part of products liability analysis. Implicit in the Third Circuit’s reliance on Justice Saylor’s opinion, is the continuance of that opinion. Plaintiff’s counsel should follow changes in Justice Saylor’s
opinion, but also recognize that this is an unlikely situation. Thus, in the above hypothetical, plaintiff’s counsel may be able to require or persuade the Third Circuit to apply the Restatement (Second) and not allow evidence of the USPC Bicycle Standard.

VI. Conclusion: Light at the End of the Tunnel

The current state of products liability law in Pennsylvania is complicated; however, the solution is simple. If the Supreme Court of Pennsylvania rules on which Restatement it will apply, both state and federal courts will be bound by that decision. The court may issue such a statement in Lance; or may wait for a different opportunity. Ultimately, the Supreme Court of Pennsylvania must affirmatively choose a restatement because the Erie Doctrine implications are too strong.

This Casebrief does not promote one Restatement over the other, but rather recognizes serious issues for practitioners when state and federal courts apply different restatements. The Berrier and Covell decisions help practitioners because they show the Third Circuit’s tendency to apply the Restatement (Third). Unfortunately, they are merely predictions, and practitioners should prepare under both restatements until the Supreme Court of Pennsylvania rules on the issue.
The characters and pub name used in this hypothetical are derived from the FX television show “It’s Always Sunny in Philadelphia.” For information regarding the characters on “It’s Always Sunny in Philadelphia,” see http://www.fxnetworks.com/shows/originals/sunny/ (last visited Jan. 19, 2012). For more information about Co-Motion, an online bike manufacturer based in Oregon, see http://co-motion.com/ (last visited Jan. 19, 2012).


See 28 U.S.C. § 1332 (codifying diversity jurisdiction requirements). Co-Motion can remove to federal court if (1) the controversy exceeds 75,000 dollars and (2) is between citizens of different States. See id. (requiring both prongs). For the purposes of this hypothetical, assume Charlie sues Co-Motion for 100,000 dollars. See id. (exceeding 75,000 dollars). Also, Charlie is a resident of Pennsylvania and Co-Motion’s principle place of business is Oregon. See id. (stating second requirement). Thus, Co-Motion has met the statutory requirement for diversity jurisdiction. See id. (listing different ways to fulfill requirements).

vi See 28 U.S.C. § 1652 (codifying Erie Doctrine); Erie Railroad Co. v. Tompkins, 304 U.S. 64, 80 (mandating that federal court sitting in diversity jurisdiction apply state substantive law). The “Erie Doctrine,” developed in Erie Railroad v. Tompkins, will require the Third Circuit to apply state law, if there is binding state law, when deciding whether to sustain or overrule Charlie’s objection. See Erie, 304 U.S at 80 (overruling circuit court).

vii 651 F.3d 357 (3d Cir. 2011).

viii See id. (applying Restatement (Third) and admitting evidence relating to UPSC standard).

ix See id. at 363 (upholding past Third Circuit precedent).

x For a discussion of the differences between the Restatement (Second) and Restatement (Third), see infra notes 29-49 and accompanying text.

xi See Restatement (Second) of Torts § 402A (1965) (incorporating strict liability). Section 402A of the Restatement (Second) states that:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

See id.

See Restatement (Third) of Torts §§ 1-2 (1998) (incorporating negligence concepts). Sections §1 and §2 of the Restatement (Third) state that:

§ 1: Liability of Commercial Seller or Distributor for Harm Caused by Defective Products

One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.

§ 2: Categories of Product Defect

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

(a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;

(b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or
other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

(c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

See id.

xiii For a description of the bicycle hypothetic, see supra notes 1-6 and accompanying text.


xv 563 F.3d 38 (3d Cir. 2009).

xvi See id. at 53-54 (relying upon Justice Saylor’s concurring opinions favoring Restatement (Third)).

xvii 971 A.2d 1228 (Pa. 2009).

xviii See id. at 1229 (dismissing appeal “as having been improvidently granted”).

xix See Ginsberg, supra note 14, at 144-45 (addressing split in state and federal courts after Berrier and Bugosh decisions).

xx See id. at 144 (discussing district court’s justifications for applying Restatement (Second) or Restatement (Third)).
xxi See Covell v. Bell Sports, Inc., 651 F.3d 357, 365 (3d Cir. 2011) ("Absent a change in Pennsylvania’s law, we see no reason to upset our precedent.").

xxii For a discussion of why the Covell opinion suggests that the Third Circuit will apply the Restatement (Third), see infra notes 116-139 and accompanying text.

xxiii For a discussion of the Third Circuit’s application of the Restatement (Third), see infra notes 91-115 and accompanying text. For suggestions on how practitioners should argue a products liability suit before the Third Circuit, see infra notes 140-175 and accompanying text.

xxiv For a discussion of the history of the Restatement (Second) and (Third) in the United States, see infra notes 29-49 and accompanying text. For a discussion of the history of the Restatements in Pennsylvania, see infra notes 50-73 and accompanying text. For a discussion of a history of the Restatement (Second) and (Third) in the Third Circuit, see infra notes 74-90 and accompanying text.

xxv For a discussion of the Covell opinion, see infra notes 91-115 and accompanying text.

xxvi For a discussion of the effect of Berrier and Covell in the Third Circuit, see infra notes 116-139 and accompanying text.

xxvii For helpful guidance to practitioners, see infra notes 140-175 and accompanying text.

xxviii For a discussion of solutions to the current predicament, see infra notes 176-182 and accompanying text.

Law, 43 U. Rich. L. Rev. 1373, 1374 (2009) ("No single doctrinal common law principal was ever adopted so widely and quickly in the United States as strict products liability.").

See Meade, supra note 29, at 159 (noting Justice Traynor’s influence on modern strict products liability concepts).

See e.g., Escola v. Coca Cola Bottling Co., 150 P.2d 436, 461 (Cal. 1944) (Traynor, J. Concurring) ("In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."); Greenman v. Yuba Powers Products, Inc., 377 P.2d 897, 901-02 (Cal. 1963) (holding manufacturers strictly liable when place defective articles on market).

Restatement (Second) of Torts § 402A (1965).

reasonable care in design); Thibault v. Seas, Roebuck & Co., 395 A.2d 843, 845 (N.H. 1978) (claiming defective lawn mower because no rear trailing guard); Owen, supra, at 293-94 (discussing “frequent” claims).

\[\text{xxxiv} \] See Owen, supra note 33, at 300 (“In searching for a test for design defectiveness, courts first turned to the definitions of liability standard . . . provided in the Restatement itself.”). Comment “G” and “I” gauge product safety by “consumer expectation.” See id. Comment G defines a “defective condition” as a “product [that], at the time it leaves the seller's hands, [is] in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.” See Restatement (Second) of Torts §402A cmt. G (1965) (emphasis added) (defining defective condition). Comment I defines an “unreasonably dangerous” condition, stating that “[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.” See Restatement (Second) of Torts §402A cmt. I (1965) (emphasis added) (defining unreasonable dangerous condition).

\[\text{xxxv} \] See Vetri, supra note 29, at 1387 (defining “consumer expectations test”).

\[\text{xxxvi} \] See Meade, supra note 29, at 160 (explaining that when analyzing consumer expectations courts disregarded conduct of manufacturers). Instead, courts consider “proof of marketing, advertising, presentation, promotional materials, product manuals, instruction booklets, warnings, and customary uses of a product.” See Vetri, supra note 29, at 1377 (listing factors courts consider).

\[\text{xxxvii} \] See Meade, supra note 29, at 161 (articulating reasons behind switch from consumer expectations test to risk-utility test); see also Vetri, supra note 29, at 1387-88 (discussing shortcomings of consumer expectations test). The consumer expectations test is impractical when the plaintiff is a bystander, the danger is obvious, the consumer is a child, and when “the users do not have measurable safety expectations,
but the technology is readily available to make the products safer at a reasonable cost.” See Vetri, supra note 29, at 1387-88 (explaining consumer expectation test shortcomings). For example, a manufacture will not be held liable for obvious dangers even if reducing the danger is inexpensive because consumers should expect obvious risks. See id. at 1388 (discussing obvious safety guard hypothetical); see also Owen, supra, note 33, at 304 (“The utility of the consumer expectations test is severely compromised when design dangers are obvious.”).

See Meade, supra note 29, at 161 (articulating balancing test); see also Owen, supra note 33, at 307-08 (defining risk utility test). The risk utility test utilizes a cost-benefit analysis. See Owen, supra note 29, at 308 (defining test as cost-benefit). Thus, the more dangerous the product the more benefit it must provide to pass the test. See id. (explaining cost-benefit analysis formula).

See John W. Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 837-38 (1973) (creating factors); see also Meade, supra note 29, at 162 (noting influence of Wade factors). The factors include:

(1) The usefulness and desirability of the product--its utility to the user and to the public as a whole; (2) The safety aspects of the product--the likelihood that it will cause injury, and the probable seriousness of the injury; (3) The availability of a substitute product which would meet the same need and not be as unsafe; (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; (5) The user's ability to avoid danger by the exercise of care in the use of the product; (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the
product, or of the existence of suitable warnings or instructions; and (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance."

Wade, supra, at 837-38.

See Meade, supra note 29, at 162 (discussing criticism); see also Owen, supra note 33, at 318-19 (noting trend away from Wade factors). Owen discussed problems with the majority of the Wade factors. See Owen, supra note 33, at 319 (listing problems). The first factor, utility, is criticized because it tends to give more weight to essential products and less to luxury products. See id. (explaining problem with court "second-guess[ing] the market as to the desirability of different kinds of products"). Owen does not criticize factor two, safety, because it is essential to the analysis. See id. (describing factor as "vital"). Factor three, substitutes, is problematic if read broadly because it allows courts to "engage is social engineering" and predict customer substitutes. See id. (criticizing prediction). Owen does not criticize factor four, risk elimination, as it is also essential to cost-benefit analysis. See id. (praising factors two and four as "the heart of proper cost-benefit analysis"). Factor five, user’s risk avoidance, while important, allows the jury to decide the improper issue of whether the particular plaintiff could have avoided the injury. See id. (emphasizing application of "general" user in analysis). The sixth factor, user’s awareness of danger, also incorrectly introduces subjective awareness. See id. at 319-20 (preferring general user’s awareness). Finally, factor seven, cost-spreading, is viewed as unfair and an inefficient way to spread losses. See id. at 320 (criticizing factor as "especially problematic").

See Meade, supra note 29, at 163 ("The varying interpretations of the Restatement (Second) paved the way for the Restatement (Third)’s attempt to codify and update thirty years of products liability law."); see also Larry S. Stewart, Strict Liability for
Defective Product Design: The Quest for a Well-Ordered Regime, 74 Brook L. Rev. 1039, 1039 (2009) (noting Restatement (Third)’s attempt to provide “well ordered” set of rules and update last thirty years of products liability law).

See Restatement (Third) of Torts § 2 (1998) (articulating three product defects); see also Meade, supra note 29, at 163 (discussing three types of product defects).


See id. (incorporating negligence concepts into failure to warn and design defects).

See id. (shifting analysis); see also Covell v. Bell Sports, Inc., 651 F.3d 357, 362 (3d Cir. 2011) (praising Restatement (Third)’s “express rejection” of separation between strict liability and negligence concepts); Ginsberg, supra note 14, at 142 (“In contrast to . . . the Second Restatement, §2(b) of the Third Restatement provides that a product is defective when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of reasonable alternative design and the omission of the alternative design renders the product not reasonably safe.”); Meade, supra note 29, at 164 (“The foreseeable risks and reasonable alternative design requirements essentially reset the standard of liability for defective product designs from strict liability to negligence.”).


See Meade, supra note 29, at 166 (noting that defendants “praised” Restatement (Third)); see also Stewart, supra note 29, at 1040 (discussing plaintiff’s “anti-consumer” sediments after publication).

See Arthur L. Bugay, Pennsylvania Products Liability at the Crossroads: Bugosh, Berrier and the Restatement (Third) of Torts., 81 Pa. B.A. Q. 1, 1
(2010) (“The Restatement (Third) has been heavily criticized as a political doctrine created at the behest of powerful lobby groups”). In addition, plaintiffs criticize the Restatement (Third) for defeating “decades of progress and returning [products liability law] to an era of defendant protectionism.” See Stewart, supra note 29, at 1059 (arguing Restatement (Third) “missed the mark”).

See Meade, supra note 29, at 166 (articulating arguments for Restatement (Third)).


See Miller v. Preitz, 221 A.2d 320, 331 (Pa. 1966) (Jones, J., concurring in part and dissenting in part) (“Generally, in Pennsylvania the right to sue the manufacturer of a product in assumpsit on the basis of a breach of warranty for damages for injuries resulting from a defect in such product lies only in the immediate buyer of the product.”); see also Bugay, supra note 48, at 5-6 (“Before this, Pennsylvanians injured by defective products were forced to bring their claims through either a breach of warranty claim (assmspsit) that imposed formal restrictions for recovery, or a products negligence claim (trespass).”). A consumer could sue the manufacturer despite not being the immediate buyer under two exceptions. See Miller, 221 A.2d at 331 (Jones, J., concurring in part and dissenting in part) (explaining exceptions). A plaintiff could always sue the manufacturer where (1) the plaintiff sued for a food related injuries or (2) “‘the representation of quality or fitness for particular use was conveyed or intended to be conveyed by the manufacturer or original vendor to the dealer’s customer (subpurchaser) by catalogue, manual, tags affixed to shipment, legend upon container, or by negotiation with the subpurchaser.’” See id. (Jones, J., concurring in part and dissenting in part) (citing Silverman v. Samuel Mallinger Co., 100 A.2d 715, 718 (Pa. 1952)) (discussing two exceptions).
See 220 A.2d 853, 854 (Pa. 1966) (adopting Restatement (Second) because reflected strict liability in products liability law). In Webb, a keg exploded, injuring the plaintiff. See id. (discussing facts). The plaintiff sued the distributor, brewer, and manufacturer under a negligence theory of exclusive control. See id. (noting initial theory). The trial court dismissed the case, holding that the plaintiff had failed to include all defendants in the chain of possession of the keg, a requirement of an exclusive control claim. See id. (dismissing claim). The Pennsylvania Supreme Court reversed, allowing the plaintiff to amend his complaint, and applied the Restatement (Second). See id. (reversing lower court).

See 221 A.2d 320 (Pa. 1966) (relying upon dissenting opinions); see also Bugay, supra note 48, at 5-6 (noting incorporation of Miller dissents in Webb opinion).

See Miller, 221 A.2d at 321-22 (discussing facts leading to suit).

See id. at 334 (Jones, J., concurring in part and dissenting in part) (embracing Restatement (Second)).

See id. at 338-339 (Robert, J., concurring) (justifying strict liability).

See Azzarello v. Black Bros. Co., Inc., 391 A.2d 1020, 1026-27 (Pa. 1978) (analyzing and reaffirming Restatement (Second)); see also Ginsberg, supra note 14, at 141 (“In Practice, however, the courts’ application of strict liability has wandered from its stated purpose and negligence principles have permeated the analysis.”); Meade, supra note 29, at 169 (noting that “[m]odern Pennsylvania products liability law is based on the Azzarello decision”).


See id. at 1022 (discussing facts of case)

See id. (explaining jury instructions).
See id. (noting plaintiff’s argument on appeal).

See id. at 1024-25 (acknowledging “fact that the term, ‘unreasonably dangerous’ tends to suggest considerations which are usually identified with the law of negligence”).

See id. at 1026. Ultimately, the court reversed because the phrase unreasonable dangerous was “misleading.” See id. at 1027 (reversing lower court). The court also stated that the judge should decide the issue of “unreasonably dangerous” and the jury should decide the issue of “defective condition.” See id. (separating judge and jury analysis).

See e.g., Davis v. Berwind Corp., 690 A.2d 186, 190 (Pa. 1997) (applying “reasonable expectation test to a strict liability products suit”); Schmidt v. Boardman Co., 11 A.3d 924, 940 (Pa. 2011) (“This no-negligence-in-strict-liability rubric has resulted in material ambiguities and inconsistency in Pennsylvania’s procedure.”); Ginsberg, supra note 14, at 142 (explaining that Supreme Court of Pennsylvania has struggled with separation). In Davis v. Berwind Corporation, a blender manufactured by the defendant severed the plaintiff’s fingers. See Davis, 690 A.2d at 188 (discussing facts). She sued claiming a design defect under the Restatement (Second). See id. at 189 (noting plaintiff’s claim). Third parties changed the blender after it was manufactured. See id. at 189-90 (outlining steps between manufacturer and client). The court, applying strict liability, stated that “[w]here the product has reached the user or consumer with substantial change, the question becomes ‘whether the manufacturer could have reasonably expected or foreseen such an alteration’ of its product.” See id. at 190 (citing Eck v. Powermatic Houdaille, 527 A.2d 1012, 1018 (Pa. 1987)). Thus, the court applied negligence concepts to strict liability analysis. See id. at 190 (incorporating negligence theories into Restatement (Second) analysis).

841 A.2d 1000 (Pa. 2003).

See id. at 1006-07; see also Ginsberg, supra note 14, at 141 (discussing Phillips’ opinion). In
Phillips, a two year old found a cigarette lighter, manufactured by the defendant, in his mother’s purse. See Phillips, 841 A.2d at 1002-03 (discussing facts). He lit some linens which caused a fire that burnt down the apartment. See id., at 1003 (explaining facts leading to suit). The lighter did not have a “child-resistance feature.” See id. (noting lack of child-resistance feature). Tragically, four children died. See id. (listing children’s names). The plaintiffs filed suit against the manufacturer of the lighter claiming design defect. See id. (explaining claim). The Superior Court held the defendant strictly liable for “failure to incorporate a child safety feature.” See id. 1004 (discussing procedural posture).

lxxvii See id., at 1007 (separating negligence and strict liability analysis).

lxxviii See id., at 1019. (Saylor, J., concurring) (advocating for Restatement (Third)).

lxxix See id., at 1012. (Saylor, J., concurring) (criticizing Restatement (Second)).

lxx 942 A.2d 897 (Pa. 2008); see also Bugay, supra note 48, at 2 (noticing that courts rarely cited Restatement (Third) until Bugosh).

lxxi See Bugosh v. I.U. North America, Inc., 942 A.2d 897, 897 (Pa. 2008) (granting Petition for Allowance of Appeal). In Bugosh, Edward, the plaintiff’s husband, was a construction worker. See Bugosh v. I.U. North American, Inc., 932 A.2d 901, 905-06 (Sup. Ct. Pa. 2007) (discussing facts leading to suit). At work, he cut a pipe containing asbestos. See id., at 906 (same). Tragically, he was diagnosed with mesothelioma and died. See id. (discussing cause of death). His wife sued the pipe manufacturer and the jury awarded her 1.4 million dollars. See id., at 906 (stating jury award). The defendant appealed to the Superior Court, stating that the trial court should have applied the Restatement (Third). See id., at 910 (articulating defendant’s first claim). The Superior Court disagreed and affirmed the trial courts decision. See id., at 911 (refusing to overrule “established authority”).

See id. at 1241 (Saylor, J., dissenting) (criticizing Supreme Court of Pennsylvania for stating that negligence concepts are distinct from strict liability).


See Ginsberg, supra note 14, at 140 (addressing conflict between state and federal court).

See id. at 144 (condemning “consequence[s] of the Bugosh and Berrier decision”).

See id. (explaining state of Pennsylvania products liability law).

See Berrier, 563 F.3d at 68 (predicting that Supreme Court of Pennsylvania would adopt Restatement (Third)).

See id. at 41. (discussing facts of case). The mower used a “Regent 12 HP hydrostatic lawn tractor” and had a “36-inch steel mower deck”. See id. (detailing type of lawn mower). The operator could mow forward or in reverse with or without the blades on. See id. (noting mower’s movement abilities). The mower had “three electrical safety systems to prevent the engine from starting unless the transmission and blade controls are in ‘stopped’ positions.” See id. (explaining system). This safety stopped the blades when the operator was not seated. See id. (discussing safely feature).

See id. at 41 (noting plaintiff’s claim). A “no mow in reverse” device is a “general category of devices that are broadly defined as mechanisms that would either: (a) prevent a mower's blades from remaining on if the mower is shifted into reverse; (b) stop the engine and/or blade(s) when the mower is
changed to reverse; or (c) prevent reverse motion when the mower blade is engaged.” See id. at 41 n.2. Due to some issues, the “no mow in reverse” device is suggested and not mandatory. See id. 42-43 (detailing several issues).

lxxx See id. at 46 (noting lack of Supreme Court of Pennsylvania precedent).

lxxxii See id. at 53 (agreeing with Justice Saylor’s concurring opinion in Phillips).

lxxxiii See id. at 60-61 (applying prediction to all products liability cases); see also Meade, supra note 29, at 171 (“Despite having an independent basis within the Restatement (Second) to extend liability to manufacturers for bystander injuries, the court predicted the Pennsylvania Supreme Court would abandon the Restatement (Second) in its entirety.”).

lxxxiv See Ginsberg, supra note 14, at 144-45 (noting consequences of Bugosh and Berrier decision).


lxxxvi See e.g., Durkot v. Tesco Equip., 654 F. Supp. 2d 295, 299 (E.D. Pa. 2009) (“While it is true that the reasoning behind the Pennsylvania Supreme Court’s decision in Bugosh cannot be known, it is evident that the justices were not in agreement to adopt the Third Restatement in that case.”); Milesco v. Norfolk Southern Corp., 2010 WL 55331, 3 (M.D. Pa. 2010) (“[D]ismissal of Bugosh was a clear indication that [the Supreme Court of Pennsylvania] intend[ed] for the Second [Restatement] to apply in the Commonwealth for the time being.”).

lxxxvii See Barnish v. KWI Bldg. Co., 980 A.2d 535 (Pa. 2009) (applying Restatement (Second)). In Barnish, the plaintiff bought a spark detection system from the defendant manufacturer. See id. at 439 (explaining
An alarm was suppose to sound if the system detected a spark. See id. (noting machines capabilities). The factory exploded after a spark entered the building, killing two people. See id. at 540 (discussing accident). The sensor did not go off. See id. (noting defect). The plaintiffs sued, alleging a defect in the sensor. See id. (explaining plaintiff’s claim).


See Lance v. Wyeth, 15 A.3d 429, 430 (Pa. 2011) (granting appeal to decide whether to apply Restatement (Third) or Restatement (Second)). In Lance, the plaintiff filed a products liability suit, alleging that the defendant manufacturer’s drug “was defective in design and chemical composition.” See Lance v. Wyeth, 4 A.3d 160, 164 (Pa. Super. Ct. 2010) (discussing plaintiff’s claim). The Pennsylvania Court of Common Pleas granted summary judgment for the defendant because the plaintiff fail to state a cognizable claim. See id. at 161 (noting procedural posture). On appeal to the Superior Court of Pennsylvania, the plaintiff stated that she “averred an actionable claim under the Restatement (Third).” See id. at 169 (noting plaintiff’s Restatement (Third) argument). The court dismissed this argument and applied the Restatement (Second). See id. (holding that “this [c]ourt is obligated to follow the precedent set down by our Supreme Court”). The plaintiff appealed this decision to the Supreme Court of Pennsylvania. See Lance, 15 A.3d at 430 (noting appeal).


See Covell, 651 F.3d at 359 (detailing accident).
See id. at 359 (discussing pertinent facts of suit).

See id. (noting that David Covell’s disabled condition required appointment of legal guardian).

See id. (discussing procedural posture).

See id. (detailing plaintiff’s products liability claims).

See id. (discussing the USPC Standard).

See id. (stating that guidelines include “impact resistance, head covering, labels on helmets and helmet boxes, helmet resistance to temperature and moisture, manufacturer recordkeeping, and much more”).

See id. (explaining agreement at trial).

See id. at 360 (articulating district court’s instructions).

See id. (noting reasons for appeal). In the alternative, the Covells argued that, even under the Restatement (Third), the CPSC Standard was inadmissible. See id. (discussing Covells’ second claim).

See id. at 360-61 (analyzing cases between 1966 and 2003).

See id. at 361 (arising from confusion in wording). The confusion related to the fact that the Restatement (Second) requires courts to ignore evidence that the seller “exercised all possible care in the preparation and sale of his product” but also limits liability to “unreasonably dangerous” products. See id. (criticizing Restatement (Second)). However, it is impossible to determine if a product is “unreasonably dangerous” without considering if the seller exercised “care in the preparation” of the product. See id. (citing Schmidt v. Boardman Co., 11 A.3d 924, 940 (Pa. 2011)) (noting problem with Restatement (Second)). For this reason, the Supreme Court of Pennsylvania has
struggled to separate strict liability and negligence concepts. See id. (explaining struggle).

See id. (stating that American Law Institute drafted Restatement (Third) in response to core conflict). The court preferred the Restatement (Third) over the Restatement (Second), because the Restatement (Third) allows inquiry into negligence concepts. See id. at 362 (acknowledging that concepts of “foreseeable risk” and “care,” import negligence into Restatement (Third)).

See id. (applying Berrier precedent).

See id. (affirming District Court’s holding).

See id. at 363 (discussing Covells’ first argument).

See id. (articulating Erie Doctrine concerns).

See id. (explaining Covells’ policy argument).

See id. (reasoning that issue has already been decided in Berrier).


See Covell, 651 F.3d at 363-64 (acknowledging “Internal Operating Procedures” and exception to this rule).

See id. at 364 (discussing Covells’ reliance upon Bugosh dismissal).

See id. at 364 (dismissing Bugosh as irrelevant).

See id. at 363 (citing Commonwealth v. Tilghman, 673 A.2d 898, 904 (Pa. 1996)) (noting Supreme Court of Pennsylvania’s directive).

See id. at 364 (affirming District Court’s ruling). In the alternative, the Covells’ argued that under the Restatement (Third) the CPSC Standard is inadmissible;
however, the Third Circuit dismissed this argument. See id. at 367 (affirming District Court).

cxvi For a further discussion of why Berrier and Covell suggest that the Third Circuit will apply the Restatement (Third), see infra notes 117-139 and accompanying text.

cxvii See Covell, 651 F.3d at 364 (disregarding Bugosh dismissal as inconsequential to analysis).

cxviii See Covell, 651 F.3d at 364 (recognizing plaintiff’s argument that “dismissal of Bugosh indicate[d] the Supreme Court of Pennsylvania’s contentment with the Restatement (Second)”).


cxx See Covell, 651 F.3d at 364 (dismissing argument). Similarly, the Third Circuit rejected the Covells’ argument that the Berrier prediction was incorrect because no decision has overruled Pennsylvania’s application of the Restatement (Second). See id. at 363 (acknowledging but dismissing argument). Indeed, the Supreme Court of Pennsylvania adopted the Restatement (Second) in 1966 and no decision has changed that; however, the court based its prediction in Berrier on the fact that the Supreme Court of Pennsylvania did not have precedent addressing a bystander suit. See Berrier, 563 F.3d at 45-46 (justifying prediction).

cxxi See Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (requiring federal courts sitting in diversity jurisdiction to apply state law). Moreover, the court did not mention Barnish v. KWI Building Co., a Supreme Court of Pennsylvania opinion written after Bugosh and Berrier. See generally Covell, 651 F.3d at 360-64. (applying Restatement (Second)). In Barnish, the court applied the Restatement (Second) to a products liability suit without discussing Bugosh, Berrier, or the Restatement (Third). See Barnish v. KWI Bldg. Co., 980 A.2d 535 (Pa. 2009). Again, the court could have interpreted this as “intervening authority,”
signally that Pennsylvania is not considering the Restatement (Third), but declined. See Ginsberg, supra note 14, at 144 (advocating importance of absence of Restatement (Third) in Barnish).

cxxii For a discussion of why Covell implied that the Third Circuit will apply the Restatement (Third), see supra note 117-121 and accompanying text.

cxxiii See Covell, 651 F.3d at 363 (rejecting argument that Berrier violates Erie Doctrine).

cxxiv See Erie, 304 U.S. at 78 (1938) (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.”).

cxxv See Jay Tidmarsh, Procedure, Substance, and Erie, 64 Vand. L. Rev. 877, 898 (2011) (noting that “twin” aims of Erie are to “discourag[e] forum shopping and avoid inequities in outcome between state and federal courts”).

cxxvi For a discussion of how the Berrier prediction undermines this policy, see infra notes 127-129 and accompanying text.

cxxvii For a discussion of the current state of Pennsylvania products liability law, see supra notes 70-90 and accompanying text.

cxxviii See Covell, 651 F.3d at 363 (acknowledging argument but upholding Berrier precedent).

cxxix See id. (upholding but declining to restate Berrier policy justifications).

cxxx For a further discussion of why the Third Circuit will likely apply the Restatement (Third), see infra notes 131-136 and accompanying text.

cxxxi For a discussion of how the Third Circuit exhibited a preference toward the Restatement (Third), see infra notes 132-136 and accompanying text.
See Berrier v. Simplicity, 565 F.3d 38, 45-46 (3d. Cir. 2009) (recognizing that there is no “controlling decision by the Pennsylvania Supreme Court” for bystander suits).

See id. at 47 (discussing history of products liability law in Pennsylvania).

See generally id.; see also Meade, supra note 29, at 171 (noting that Third Circuit had “an independent basis within the Restatement (Second) to extend liability to manufacturers for bystander injuries”).

See Berrier, 565 F.3d at 60 (predicting Justice Saylor’s concurring opinion will be law in Pennsylvania).

See id. (praising Restatement (Third)).

For a further discussion of how Berrier and Covell will help practitioners, see infra notes 140-175 and accompanying text.

See Ginsberg, supra note 14, at 146 (recommending practitioners prepare under both until split is resolved).

See id. (warning practitioners to be “cognizant” of split).

See Bugay, supra note 48, at 3-4 (suggesting that practitioners become familiar with Restatement (Third) while recognizing that Restatement (Second) is binding precedent in Commonwealth of Pennsylvania).

For tips on how practitioners should argue before the Third Circuit, see infra notes 151-175 and accompanying text.

For a discussion of why Berrier and Covell suggest that the Third Circuit will continue to apply the Restatement (Third), see infra notes 116-139 and accompanying text.
See Ginsberg, supra note 14, at 146 (suggesting that practitioners recognize split until Supreme Court of Pennsylvania rejects or accepts one restatement).

See id. (reasoning that practitioners should prepare under both until Supreme Court of Pennsylvania rules on issue or Third Circuit readdresses issue).

For a further discussion of the bicycle hypothetical, see supra notes 1-6 and accompanying text.

See id. (discussing facts leading to suit).

See id. (explaining evidence in question).

See id. (assuming restatement that district court applied).

See id. (fulfilling diversity jurisdictional requirements).

For a further discussion of how to persuade the court to adopt a restatement, see infra notes 151-175 and accompanying text.

See Covell v. Bell Sports, Inc., 651 F.3d 357, 363 (3d Cir. 2001) (noting defendant’s argument that court must apply Restatement (Third)).

For a further discussion of why the distinction between the Restatement (Second) and (Third) is critical, see supra notes 10-13 and accompanying text.

See Covell, 651 F.3d at 363-64 (noting Third Circuit’s policy and upholding Berrier).

See id. at 364 (applying Restatement (Third)).

See id. at 363-64 (citing 3d Cir. I.O.P. 9.1 (2010)) (articulating tradition).

See Covell, 651 F.3d at 363 (reasoning that they “waded through and resolved [these issues] only two years ago when [they] decided Berrier”).
For a discussion of why this is the best argument, see supra notes 116-139 and accompanying text.

For a further discussion of why this argument is likely to win, see supra notes 151-157 and accompanying text.

For a discussion of the bicycle hypothetical, see supra notes 1-6 and accompanying text.

See Covell, 651 F.3d at 360 (addressing plaintiff’s appeal).

For a discussion of each argument, see infra notes 163-175 and accompanying text.

For a discussion of how plaintiff’s counsel can require the Third Circuit to apply the Restatement (Second), see infra notes 163-169 and accompanying text. For a discussion of how plaintiff’s counsel can persuade the Third Circuit to apply the Restatement (Second), see infra notes 170-175 and accompanying text.

See Covell, 651 F.3d at 365 (citing Reich v. D.M. Sabia Co., 90 F.3d 854, 858 (3d Cir. 1996) (“Although a panel of this court is bound by, and lack authority to overrule, a published decision of a prior panel, a panel may reevaluate a precedent in light of intervening authority’ including intervening decisions of state law.”).

For a discussion of why it is likely that only binding state precedent will constitute an “intervening event,” see supra notes 116-139 and accompanying text.

See Covell, 651 F.3d at 364 (disregarding Bugosh dismissal).


See id. at 430 (considering whether to apply Restatement (Second) or (Third)).
See id. (granting appeal). For a discussion of the facts and procedural history of Lance, see supra note 89 and accompanying text.

See Erie Railroad Co. v. Tompkins, 304 U.S. 64, 80 (requiring federal courts apply state substantive law).

See Berrier v. Simplicity Manufacturing, Inc., 563 F.3d 38, 53-60 (3d Cir. 2009) (relying heavily upon Justice Saylor’s support of Restatement (Third) to justify their prediction).

Id. at 53 (reasoning that Justice Saylor’s opinion foreshadows Pennsylvania law).

See Phillips v. Cricket Lighters, 841 A.2d 1000, 1012 (Pa. 2003) (Saylor, J., concurring) (advocating adoption of Restatement (Third)).

For a discussion of Justice Saylor’s concurring opinion, see infra notes 68-69 and accompanying text.

For a discussion of why counsel should follow changes in Justice Saylor’s opinions, see supra notes 170-173 and accompanying text.

For a discussion of the bicycle hypothetical, see supra notes 1-6 and accompanying text.

For a discussion of the history and current state of products liability law in Pennsylvania, see supra notes 50-73 and accompanying text.

See Erie Railroad Co. v. Tompkins, 304 U.S. 64, 80 (requiring federal courts apply law of highest court in state).

For a discussion of the Lance opinion, see supra note 69 and accompanying text.

See Meade, supra notes 29, at 173-74 (noting that split will not last because of Erie Doctrine).

For a discussion of the issues for practitioners, see supra notes 88-89 and accompanying text.
For a discussion of how Berrier and Covell show that the Third Circuit will apply the Restatement (Third), see supra notes 116-139 and accompanying text.

For a discussion of why practitioners should prepare under both the Restatement (Second) and (Third), see supra notes 116-175 and accompanying text.