

## **2008 STATUS REPORT ON REVISIONS TO THE OHIO PRODUCT LIABILITY ACT,**

**Or**

### **OHIO HAS LOST ITS WAY IN THE STRICT PRODUCTS LIABILITY MAZE, AND THE LEGISLATURE IS POINTING THE WAY OUT**

Pity the poor attorney or court (inside Ohio, or elsewhere)<sup>1</sup> who attempts to make sense of the law in Ohio on products liability. It is a jumbled mess. The justices on the Ohio Supreme Court who in the past decided the few cases involving products liability issues often were confused about the applicable fundamental principles. Even today, Ohio courts get it wrong.<sup>2</sup> The federal courts, perhaps due to this state of affairs, have used procedural short-cuts to request that the Ohio Supreme Court cut through the morass and decide issues relevant to the area.<sup>3</sup>

In 1987, the Ohio General Assembly attempted to bring order by codifying the entire area of products law.<sup>4</sup> This codification at the time did little more than embody in statute the case law that had already developed.<sup>5</sup>

But over the years, the Legislature has amended, in fits and starts,<sup>6</sup> the original statute and passed others to address shortcomings inherent in the original statutory scheme. This area, like others (such as the intentional tort exception to the worker's compensation bar to liability on the part of the employer) has been a battleground in the "protracted interbranch tension" between the Ohio Supreme Court and the Ohio General Assembly<sup>7</sup> over which branch controlled the direction of Ohio law. This battle had raged for many years, but recently the Ohio Supreme Court has reaffirmed that the Legislature has the final word (subject to constitutional provisions) about what Ohio law should be, and peace seems to have achieved as the Ohio Supreme Court has become much more careful in its consideration of constitutional infirmity claims in enacted legislation.<sup>8</sup>

However, along the way, much uncertainty has been created. While the Ohio Supreme Court has ruled on some issues involved in tort reform, such as the validity of the statutory damages caps on compensatory and punitive damages,<sup>9</sup> the worker's compensation subrogation statute, the ten year statute of repose for certain products,<sup>10</sup> and the retroactive application of the Asbestos Medical Criteria Statute,<sup>11</sup> other statutory provisions involving products liability are being incorrectly interpreted or applied by the courts in Ohio. Part of this problem may be due to unwillingness on the part of certain lower courts to recognize that the "interbranch tension" has ended. Part may be due to a fundamental misunderstanding of what is now the applicable products liability law in Ohio.

This article will briefly address the general principles of products liability law. It will also address certain important revisions and additions to the 1987 Products Liability Act that are relevant to the area – the statute of repose, comparative fault statutes, the modification of the role of "consumer expectation" in the definition of a design defect, and whether the Act now supersedes all prior common law products claims. Finally, this article will touch on some of the issues that need to be addressed by the Ohio Supreme Court in order to bring additional certainty to this area for those attorneys and judges who find themselves involved in an Ohio products case.

## PRODUCTS LIABILITY PRIMER

The concept of “strict products liability” arose in California in the 1960’s, and slowly spread throughout the rest of the country, aided by the issuance in 1964 of Section 402A of the Restatement of the Law 2d, Torts. The original concept was one which attempted to bridge the inadequacies of the tort and contract law when consumer products were involved. Traditional tort law required that there be negligence on the part of the manufacturer. This was a difficult hurdle when products were often mass produced and plaintiffs could not prove that the manufacturer knew or should have known that the product was incorrectly made and was likely to harm users.

In addition, the law had difficulty finding a duty on the part of manufacturers to people who may have been harmed by the product but who were not the persons who had purchased it. Up until this time, harm due to certain products was addressed by contract law, but where there was a lack of privity between the seller and the buyer, that contract law held that no recovery could be obtained on the part of anyone other than the purchaser.

As a result, the law resorted, as it often does, to a fiction. It determined that there would be an “implied warranty” between the seller and the purchaser, and it determined that since this implied warranty theory arose in tort rather than contract, no privity requirement existed.

California then went the next step and came up with “strict product liability.” This theory held that the manufacturer was in a better position to bear the economic loss suffered by someone who was injured by a “defective” and unreasonably dangerous product than was that individual. The courts reasoned that the cost of compensating for the injury could be spread amongst the price paid by the other purchasers of the products. In order to get around the negligence hurdle, courts then determined that the liability would be “strict,” meaning that if the product was “unreasonably dangerous and defective,” then no knowledge of this on the part of the manufacturer need be shown by the plaintiff. The damage to the plaintiff was simply a cost of doing business that should be passed on to the manufacturer.<sup>12</sup> In effect, it was a type of insurance scheme, spreading the major cost to one individual amongst many individuals (the purchasers of other similar products). While the economics of this scheme might be subject to question in cases where the product was no longer manufactured (there were no other customers among whom the cost could be spread) or where the injury was a result of misuse of the product (why should careful purchasers have to subsidize the loss of negligent users?), these issues were swept away by the enthusiastic acceptance of the doctrine by courts inclined to assist plaintiffs injured by improperly made products.

However, the theory then began to be stretched into areas where it no longer fit. The concept of a “design” defect arose. The situation where a mass produced product not made to specification caused injury to someone is a relatively rare one. But a situation where a product was alleged to be “defective” due to improper design was much more common, and the courts were very willing to entertain this expansion of the doctrine to injuries arising from such claims.

Yet whether a product was properly or improperly designed was not as easily determined as one where there was a “manufacturing” defect. In the latter, the product specifications could be examined and if the product was not made to spec, the specification was an acceptable substitute for a “duty” to manufacture a proper product, and breach of that duty was easily determined. The dividing line between

an acceptable design and a “defective” design is much hazier, often depending on post hoc determinations of expert witnesses. As a result, the California courts in *Barker v. Lull Engineering*<sup>13</sup> came up with the two part “risk vs. utility” and “consumer expectation” test to define what was a defective product. The problem with this test was that “consumer expectation” was still a squishy and very subjective concept. While it was intended to be analogous to the “reasonable man” standard used in ordinary negligence, what expectation, if any, did an average “consumer” have with regard to a giant punch press? Did the test even apply in areas other than consumer products? Similarly, while the risk vs. utility test was couched in terms of being a balancing test, most of the factors involved focused on the knowledge of the manufacturer (what did it know with regard to the risks and benefits of the product?). In essence, it was merely a negligence test couched in “strict products liability” guise. The problem was that most jurors did not have any experience in product design, there were very few objective design standards against which the product’s design could be measured, and everyone was looking at the design with the benefit of hindsight.

Courts throughout the country thus wrestled with this problem. They also were confused by the manufacturing defect cases that proclaimed “the focus is on the product, not the knowledge of the manufacturer.” Oftentimes the courts in design cases would use the same incantation, although they really didn’t reconcile it with the fact the risk vs. benefit test was a negligence test that necessarily had to include knowledge of the manufacturer concerning foreseeable risks and benefits of the design.<sup>14</sup>

The third area where “strict” products liability was applied was in the area of a duty to warn. The “defect” alleged was a failure to include a warning about a foreseeable potential hazard, or less commonly, a warning was given but it was inadequate. Juries had little problem determining that these products were “defective” for failing to warn of the hazard when the hazard was foreseeable. Even those courts that came under the spell of the “focus on the product, not the manufacturer’s knowledge” incantation realized that the manufacturer had to have knowledge of the risk before it could warn of that risk, and that the theory was essentially a negligence claim.<sup>15</sup>

In addition to all of these theories of “strict product liability,” courts and counsel still believed that there was a separate universe of “negligence” claims for manufacture, design or warnings, and every complaint filed alleging injury due to a product contained negligence and “implied warranty” counts in addition to the “strict liability” theories announced in appellate decisions, although at trial these counts were invariably dropped.

## **THE 1987 OHIO PRODUCTS LIABILITY ACT**

The 1987 Ohio Products Liability Act was effective January 5, 1988. Its provisions were expressly made prospective, applying only to claims arising and actions commenced after that date. (1987 H.B. 1, §3). The Act was very modest in its goals. It defined the terms used, including “manufacturer,” “supplier,” “product,” and “product liability claim.” (R.C. §2307.71). It defined the causes of action for products defective in manufacture or construction (R.C. §2307.74); defective in design or formulation (which included both the consumer expectation and the risk/utility tests, setting them out in the alternative) (R.C. §2307.75); defective due to inadequate or absence of warnings (R.C. §2307.76); or defective because the product did not conform to an express warranty (R.C. §2307.77).

The Act gave new protections to suppliers. Previously, classic strict product liability theory provided that everyone in the chain of distribution, from the manufacturer down to the retail seller, could be held liable in strict liability. This liability could be passed back up the chain of distribution through implied indemnity claims between defendants. The Act changed this by providing immunity from strict liability for a supplier (meaning someone in the distribution chain other than the manufacturer) where the supplier was not negligent, did not provide its own warranties, and the manufacturer was amenable to suit and enforcement of the judgment (meaning it was not bankrupt or unable to be served with process). R.C. §2307.78.

The Act also had provisions relating to punitive damages. This portion of the Act provided that the jury would determine whether punitive damages were to be assessed, but the judge would determine the amount. The Ohio Supreme Court determined this to be unconstitutional as a violation of the right to trial by jury in *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552.

The Act also contained language that seemed to indicate it usurped the field of products liability law in Ohio: “Any recovery of compensatory damages based on a product liability claim is subject to [the Act’s statutory provisions].” R.C. §2307.72. This seemingly straightforward language was taken as a direct challenge by the Ohio courts, which had viewed this area as their own, and challenges to the statutory scheme were made, often to receptive courts. Thus, the seeds of confusion were sown.

## **SUBSEQUENT CHANGES TO THE OHIO PRODUCTS LIABILITY ACT: COMPARATIVE AND CONTRIBUTORY FAULT**

The most significant change in Ohio Products Liability law in the past forty years, in this author’s humble opinion, is the enactment of a statute that does not even have as its primary focus the area of products liability law. This change was the statute that substantially restricted joint and several liability and provided for proportionate fault to be applied to many tort cases, including products liability cases, Am. Sub. S.B. 120, 124<sup>th</sup> Assembly (“S.B. 120). This statute, now R.C. §2307.011, became effective April 9, 2003.

The reason this statute was so important is because most of the products cases that were brought involved multiple defendants, and often plaintiff’s conduct was alleged to have contributed to the injury. Nevertheless, because of the Supreme Court’s holding in *Bowling v. Heil Co.*,<sup>16</sup> comparative negligence principles, including contributory negligence by the plaintiff, were off-limits in strict products liability cases. This is one of the reasons no “negligence” products actions ever proceeded to trial. The “negligence” portion of the claim was dropped and only the “strict liability” claim was tried, even though the evidence involved was the same, because if the negligence claim remained in the case at trial, contributory negligence could be argued by defendant. If the negligence claim was dropped and only strict liability counts remained, contributory negligence was viewed by the court to be irrelevant. Therefore once again, form was elevated over substance.

This statute was aimed primarily at eliminating joint and several liability in cases where there were multiple defendants and no one defendant was primarily responsible for the alleged injury. It also had provisions that, while confusing, applied comparative fault and contributory fault to products cases as well as other tort actions.

This statute was confusing because it contained two separate parts. One part dealt with comparative fault principles in cases other than products liability cases, and it specifically indicated the sections “do not apply to tort actions based on a product liability claim.” (Former §2315.32(A)). The second part applied the principles to products cases (former §2315.42), made both express and implied assumption of the risk a total defense in a products case, applied “contributory tortious conduct” by plaintiff to reduce the damages, and applied comparative fault principles to distribute fault among multiple defendants and non-sued entities (former §2315.43 through §2315.46). This last part was particularly significant because R.C. §2307.23 provided that a defendant could, as an affirmative defense (and for this reason it bore the burden of proof), present evidence to the jury that another entity caused the injury, at least in part, and that the jury should allot a percentage of the responsibility for damages to this non-sued entity.

In an employment situation, it appeared that this language allowed the manufacturer to introduce evidence that it was the plaintiff’s employer who was at fault, either totally or in part. Previously, it was common in a products case where the injury arose at work that the employer was never a party. This was because the employer enjoyed immunity from suit by the plaintiff due to the Ohio Worker’s Compensation statute, and the manufacturer of the machine or tool could not cross-claim against the employer, even if the evidence indicated it played a role in the accident, because of that same immunity. While the employer’s immunity within the worker’s compensation statutory scheme had not changed, the language of R.C. §2307.23 allowed the product manufacturer to argue that the employer’s acts were a proximate cause of the injury and the jury should therefore allot a percentage of fault as a result.

Similarly, under this statutory scheme where non-party responsible entities were able to be named and allotted a percentage of liability, where there were other suppliers of the product that was claimed to have been the source of the injury, those entities, even if not present at trial, could be presented to the jury as a partial cause of the injury and a percentage of fault argued. This allowed entities with whom plaintiff may have settled, or entities whom plaintiff never sued (either because of bankruptcy or because they were not amenable to suit) to be presented to the jury as a potential cause of the accident and the ultimate judgment against any trial defendant to be reduced, often dramatically.

In products cases involving asbestos and silica, the potential list of “culpable” entities was often large and this new statute allowed the jury to allocate responsibility among a large number of entities in addition to those at trial. This in turn changed the dynamic of the trial presentation and the strategy of both sides, not only at trial, but in pretrial discovery and preparation as well.

Because there is no statutory history in Ohio, it is unclear why the statute was structured in this way, with separate sections dealing with non-products cases and with products liability cases. It may well have been that the drafters were concerned that the Ohio Supreme Court might find the products sections constitutionally invalid in light of *Bowling*, and thus wanted to limit the damage of such a ruling by preserving the other proportionate liability provisions dealing with non-products cases by arguing that they were severable.

In any event, in Am. Sub. S.B. 80 (125<sup>th</sup> General Assembly), the most recent Tort Reform Act passed in Ohio (effective April 7, 2005), the General Assembly merged the two separate provisions into one. It specifically provided that the proportionate liability and contributory fault provisions of R.C. §2315.32 to §2315.36 applied to products cases, and §2315.41 through §2315.46 were repealed. Thus,

products liability cases today are treated like any other tort case in Ohio for purposes of proportionate liability and contributory fault.

These statutes are not easily understood or applied. An affirmative defense must be included in the answer to the complaint, naming potentially responsible entities, before a verdict form may be used listing those entities and evidence introduced as to their culpability. Therefore, leave to file an amended answer after discovery is closed is required. The Ohio Jury Instructions vary according to which statute (*see discussion above*) applies, and depending on whether there is both contributory fault and apportionment among non-sued entities, or just one of these issues, the language in the proposed instructions must be tailored to your case and (in my experience) modified to clarify the intent of the jury instructions. These are not jury instructions that you may instruct your secretary to copy from OJI ten minutes before the final pretrial when the jury instructions must be filed. They should be reviewed several times during the course of the case so that your evidence in support, and your trial strategy, is consistent with the instructions that you submit to the court, and they must be carefully drafted so that your particular issues are clearly outlined by the court to the jury.

## **STATUTES OF REPOSE**

In late 2004, the General Assembly passed Am. Sub. S.B. 80, a comprehensive tort reform package. This Act became effective (with minor exceptions) on April 7, 2005. Some of its provisions dealt with products liability law. For example, it prohibited suits alleging liability due to cumulative consumption, weight gain or obesity.<sup>17</sup> It reinstated in Ohio a borrowing statute for the statute of limitations where the cause of action arose elsewhere, thus limiting some of the forum shopping that had been going on around the country.<sup>18</sup> It also provided that the lack of seatbelt use could be considered by the jury.<sup>19</sup>

It specifically provided for a two year statute of limitations for products cases, R.C. §2305.10(A). While this was the same limitations period as before, there may have been a concern that since the cause of action was made a statutory one, the more general four year statute of limitations for an action might be applied. The statute also extensively codified the “discovery” rule for latent injury cases. R.C. §2305.10(B).

The Act also incorporated both a products liability statute of repose, and a statute of repose for improvements to real property (sometimes known as an architects’ and engineer’s statute of repose). Both of these were ten years. Both had minor exceptions when the injury occurred close to the running of the ten years, and the products liability statute of repose has an exception for certain latent injuries.<sup>20</sup>

The ten year product liability statute of repose was held to be constitutional by the Ohio Supreme Court recently in *Groch v. Gen. Motors Corp.*<sup>21</sup> It remains to be seen whether the Supreme Court will do likewise with regard to the statute of repose for improvements to real property. In order to do so, it would have to reverse *Brenneman v. RMI Co.* (1994), 70 Ohio St.3d 460, where it held a similar statute of repose for improvements to real property to be unconstitutional. However, the odds of *Brenneman* being reversed are high. *Brenneman* itself reversed a prior Ohio Supreme Court decision in *Sedar v. Knowlton Const. Co.* (1990), 49 Ohio St.3d 193, decided just four years before. While the Court in *Groch* declined

the opportunity to reverse *Brennaman* because the statute of repose for improvements to real property was not involved in the case, it severely limited *Brennaman*'s scope and criticized its reasoning, while favorably commenting on the analysis used in *Sedar*. Moreover, the Second District Court of Appeals has upheld this new statute of repose for improvements to real property as constitutional in *McClure v. Alexander* 2<sup>nd</sup> Dist. C.A. 2008), 2008-Ohio-1313, where it described *Brennaman* as *de facto* reversed by *Groch*, at 19, fn.3.

## **DEMOTION OF THE “CONSUMER EXPECTATION” TEST FOR DEFECTIVE DESIGN**

The 2005 Tort Reform Act also moved the consumer expectation test from a separate stand-alone test for determining whether a product was defectively designed,<sup>22</sup> to one where it is simply one of many risk factors to be considered in the risk versus utility balancing done by the jury to determine whether the product's design was “defective.”<sup>23</sup>

This change highlights one of the problems with codifying the Ohio products liability law, or any common law. Prior to 1988, the products law in Ohio and the vast majority of the other states was common law, developed by the courts as time progressed. Some of the concepts that were originally developed were changed or eliminated over time (such as the “unreasonably dangerous” requirement in addition to “defect”).<sup>24</sup>

Although the “consumer expectation” test was originally one of the fundamental tests used to determine whether the design of a consumer product was defective, the concept was ill-defined. No one knew what an average “consumer expectation” might be, especially in situations where “consumers” had no general experience with a product, or where the design was new. In addition, many jurors and more than a few judges misunderstood the standard to be whether the plaintiff expected to be injured by the product, which of course was nothing but a version of absolute liability. The fact that the test attempted to focus on the expectations of the “reasonable consumer” with regard to the design of the product was often lost in the attempt to explain and apply this test.

As a result, the American Law Institute in 1993 began reexamining and updating its restatement of products liability law, resulting in 1998 with the issuance of the Restatement of the Law, Torts (3<sup>rd</sup>). After much (sometimes heated) discussion and consideration, the “consumer expectation” test was abandoned altogether.<sup>25</sup> Instead, the ALI adopted a formulation where the design is deemed to be defective if the foreseeable risk of harm could have been avoided by the adoption of a reasonable alternative design.<sup>26</sup>

But, while the Restatement and the rest of the products liability world moved on, revising the common law definition of a “defective design” in light of experience and reformation of the standard from other jurisdictions, Ohio had cemented its standard into a statute that required an amendment by the General Assembly for correction. Fortunately, the 2005 Tort Reform Act came along and provided an opportunity to do so. Still, it took seven years after that test had been abandoned by the leading authorities in products law. The concept of codifying the Ohio products law probably arose because the courts that were trying to understand products law and opine on it were doing a poor job of it. The only Ohio case recognized nationally as an important products case was *Rogers v. Toni Home Permanent Co.* (1958), 167 Ohio St. 244. Certainly in 1988 the benefit of scholarly thinking on the subject and advances

from other jurisdictions were more easily and comprehensively incorporated into Ohio law by statute rather than piecemeal by case law. Yet this “consumer expectation” test is an example of how ossification of the law may occur if care is not taken to keep it updated.

## **IS OHIO PRODUCTS LAW NOW EXCLUSIVELY STATUTORY?**

Yes and no. Yes, for claims arising after April 7, 2005. Maybe no, for products cases already filed where the claim arose before that date, at least in the Ohio counties covered by the Sixth District Court of Appeals.

Recently the Sixth District issued two decisions which held that, for cases arising before April 7, 2005, there is a three-tiered system of products cases: 1) statutory case law, 2) common law strict products liability case law and 3) negligence products cases. See, *Hertzfeld v. Hayward Pool Products, Inc.* (6<sup>th</sup> Dist. C.A. 2007), 2007-Ohio-7097,<sup>27</sup> and *Doty v. Fellhauer Electric, Inc.* (6<sup>th</sup> Dist. C.A. 2008), 175 Ohio App.3d 681. The basis for the court’s decision in these cases was that the Ohio Supreme Court in *Carrel v. Allied Products Corp.* (1997), 78 Ohio St. 3d 284 held that the common law action of negligent design survived the enactment of the Ohio Products Liability Act of 1988. *Carrel*, using principles of statutory interpretation, held that the General Assembly was not presumed to have intended to abrogate a common law cause of action unless it expressly stated so. The *Carrel* court reasoned that since the 1988 Products Liability Act did not expressly state that it intended to abrogate a common law action for negligent design, that cause of action still existed alongside the statutory product liability causes of action.

This decision in *Carrel* was one of the last to have issued in the “protracted interbranch tension” between the Ohio Supreme Court and the Ohio General Assembly over which branch controlled the direction of Ohio law.

The Sixth District, perhaps interested in still applying this tension, seized upon *Carrel* to reverse a summary judgment granted to the manufacturer in a products case, and in doing so resurrected the plaintiffs’ “common law strict liability” claims and their “negligent product design” claims by interpreting Ohio law as allowing a three-tiered products liability edifice to be built: negligence claims, common law strict liability claims and statutory strict liability claims.

The Sixth District acknowledged that the Ohio General Assembly in 2005 had indicated its intent in passing the 1988 Products Liability Act was to supersede the holding in *Carrel* and to abrogate all common law products liability causes of action, see, R.C. §2307.71(B) and 2004 S. 80, §3 (D) [uncodified statements of intent],<sup>28</sup> but the Sixth District indicated that statutory declaration of intent applied only prospectively, and because the injury occurred in 2003, it was of no effect for causes of action arising before April 7, 2005. *Hertzfeld* at 8, *Doty* at 686-87.

These are just bad decisions. First, the General Assembly in the uncodified section of another statute, 2006 S. 117, §3 declared its intent that the amendments involved were not substantive, but were intended only to clarify the General Assembly’s original intent in 1988. The same could reasonably be said about the 2005 statement of legislative intent. It was not a declaration simply that no non-statutory products cause of action existed from 2005 onward. It was a declaration that the original 1988 intent was to usurp the field, and that the *Carrel* decision was superseded, i.e., of no effect. For the Sixth District to

cling to *Carrel* in light of this legislative language that both answered the call for intent expressed in *Carrel*, and clearly set forth the legislative determination that *Carrel* no longer had any validity, is constitutionally very questionable.

Second, the *Carrel* decision was based on the fact the General Assembly had not clearly enough indicated its intent to abrogate all common law products actions in 1988. The 2005 statute, when it answered *Carrel* by expressing that intent to usurp the field, did not add any substantively new causes of action, or take away any vested rights that existed. The statutory definition of what an Ohio products cause of action required had been set out since 1988, and prospectively applied from that date forward. The Sixth District set up a straw man when it found that the 2005 expression of intent by the General Assembly (that the products claims filed from 1988 henceforth were intended to be solely statutory) could not be applied to causes of action arising after 1988 but before 2005 because it would be unconstitutional to apply it “retroactively.” By adopting this position that expressions of legislative intent can only be applied prospectively, the Sixth District ignored the substantive versus procedural distinction set out elsewhere by the Supreme Court with regard to whether retroactive application of a statute is permissible.<sup>29</sup> There was no retroactive application of the 1988 statute as to the *Hertzfeld* 2003 cause of action. The only retroactive application was the belated expression of intent on the part of the legislature to fully usurp the field, from 1988 onward. This is a far different thing from any retroactive application of a substantive legislative provision. Nowhere is such action prohibited by the Ohio Constitution.

Third, the Sixth District expanded *Carrel* far beyond its holding. *Carrel* spoke only of the failure of the 1988 Act to preclude negligent design claims. It said nothing about the continued existence of common law strict product liability design claims, yet the Sixth Circuit on its own and without supporting authority added this third category – common law products claims – to the list of still-existing causes of action for products claims.

What does it matter whether the claim is couched in statutory terms, common law strict liability terms, or negligent design language? The Sixth District made clear in its decision that it believed the whole panoply of confusing and contradictory prior case law still applied. When the Sixth District cited *Bowling v. Heil Co.* for the principle that comparative fault does not apply to strict liability claims (p. 10, para. 74), it revealed its ignorance of applicable statutes to the contrary (former R.C. §2315.43 through §2315.46) and unnecessarily created uncertainty about whether the applicable rules in products cases depended on whether you term the claim as “statutory,” “common law products liability” or “negligence.” This holding simply elevated form over substance, and created confusion by opening up three different sets of products rules, many of which were contradictory.

What is the scope of this problem? It could be argued that even the Sixth District recognized the Ohio Products Liability Act was the sole cause of action for products cases in actions arising after April, 2005. It could also be argued that by 2008, the number of products cases where this parallel universe of statutory and common law claims will arise is small. Finally, it could be argued that this erroneous interpretation of the Ohio law on products is limited to the Sixth District, only one of twelve appellate districts.

This may well be true. But, the fact that a court of appeals in Ohio has gone off on an erroneous tangent in at least two cases is no reason to allow it to continue to do so. Other courts of appeal may be looking at these decisions for guidance. The litigants themselves will find no comfort in the argument

that the problem may not continue in the future. The number of pending products cases where the cause of action arose before April 7, 2005 is not known, and may be large. Furthermore, regardless of the scope, it is unfortunate that the Ohio General Assembly has led the way in bringing clarity to the Ohio products liability law, only to have at least one court again introduce uncertainty and lack of clarity into that law when the grounds for doing so are so poorly reasoned, and erroneous.

## **WHAT DOES THE FUTURE HOLD?**

Apart from the issues touched upon above – the constitutionality of the statute of repose for improvements to real property, and whether any common law products liability causes of action continue to exist in light of a clear General Assembly statement of intent to the contrary -- there are additional issues in the area of products liability, or which are related to the area of products liability, that need to be addressed.

H.B. 80 contained a provision for the bifurcation of punitive damage presentations from the main trial, it provided for caps on punitive damages, and it provided that the jury shall determine whether punitive damages should be awarded, but the judge must decide the amount of those damages. R.C. §2307.80(B) and (E). Because the Ohio Supreme Court has already held the punitive damages caps are constitutional,<sup>30</sup> that issue is settled. But with regard to whether the judge may set the amount of punitive damages, the Ohio Supreme Court in *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St. 3d 552 held that a similar provision in the 1988 Tort Reform Act violated the Ohio constitutional right to jury. In order for this new statutory procedure for the determination of punitive damages to be deemed constitutionally permissible, it appears that *Zoppo* must either be reversed or distinguished.

In *Arbino*, the Ohio Supreme Court suggested that a United States Supreme Court case<sup>31</sup> “conclusively establishes that regulation of punitive damages is discretionary and that states may regulate and limit them as a matter of law without violating the right to a trial by jury.”<sup>32</sup>

The Ohio Supreme Court also discussed *Zoppo* in *Arbino*, but distinguished it on the basis that the jury in *Zoppo* was not able to engage in its common law function of determining damages, whereas in *Arbino* the jury was able to do so, subject to the punitive damages caps.

This distinction will not be possible with regard to the requirement in R.C. §2307.80(D) that the judge is the sole decision maker regarding the amount of punitive damages to be awarded. This language would appear to be identical to that held unconstitutional previously. The Supreme Court will either have to decide that the U.S. Supreme Court decision rendered subsequent to *Zoppo* has changed the analysis, or it will have to uphold *Zoppo* on the basis of *stare decisis*.

One additional issue should be noted. The *Zoppo* decision was based on the Ohio Constitution, whereas the U.S. Supreme Court punitive damages decision cited in *Arbino* addressed the due process protections inherent in the United States Constitution. It is possible that this statutory provision allowing the judge rather than the jury to decide the amount of punitive damages is constitutional under the Due Process Clause of the federal Constitution, but is not under a more restrictive interpretation of the right to jury trial guaranteed in the Ohio Constitution. It will be interesting to see whether this new found desire by the Ohio Supreme Court to defer to the General Assembly’s legislative pronouncements (absent a clear violation of the Ohio Constitution) will continue with respect to this particular statutory provision.

Another area that will bear close watching is the legislative process itself. An attempt to obtain a referendum vote on H.B. 80 failed. The Ohio senate seems to be firmly in control of the Republicans. Still, just as product liability reform came through the legislative process rather than through the traditional route of common law decisions issued by the courts, it will be interesting to see if the passage of time and the presence of a resurgent Democratic party in Ohio state politics will result in a renewed interest in enacting legislation that involves product liability in an attempt to swing back the pendulum.

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<sup>1</sup> See, e.g., Restatement Third, Torts: Products Liability, §2, at 65: “Ohio law on these issues [regarding the standard for design defect ] is unclear.”

<sup>2</sup> See, discussion of *Hertzfeld v. Hayward Pool Prods., Inc.* (6<sup>th</sup> Dist. C.A. 2007), 2007 –Ohio-7097, 2007 WL 4563446 and *Doty v. Fellhauer Elect., Inc.* (6<sup>th</sup> Dist. C.A. 2008), 175 Ohio App.3d 681, *infra*.

<sup>3</sup> See, e.g., *Arbino v. Johnson & Johnson* (2007), 116 Ohio St.3d 468, and *Groch v. Gen. Motors Corp.* (2008), 117 Ohio St.3d 192, where the United States District Court for the Southern and Northern Districts certified questions of law directly to the Ohio Supreme Court pursuant to S.Ct.Prac.R. XVIII.

<sup>4</sup> Tort Reform Act of 1987, Am.Sub.H.B. No. 1, 142 Ohio Laws, Part I, 1661 (“H.B. 1”), effective

<sup>5</sup> *Perkins v. Wilkinson Sword, Inc.* (1998), 83 Ohio St.3d 507, 508: “In enacting the Ohio Products Liability Act, the General Assembly codified this analytic approach [outlined in prior Supreme Court cases].

<sup>6</sup> See, e.g., *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451), which found the 1997 Tort Reform Act, Am.Sub.H.B. No. 350, 14 Ohio Laws, Part II, 3867, a statute that dealt with (among other things) products liability law, to be unconstitutional as to all provisions.

<sup>7</sup> *Arbino v. Johnson & Johnson*, (2007), 116 Ohio St. 3d at 471.

<sup>8</sup> *Arbino, supra*, and *Groh, supra*, Note 3.

<sup>9</sup> *Arbino, supra*.

<sup>10</sup> *Groh, supra*.

<sup>11</sup> *Ackison v. Anchor Packing Co.*, 2008-Ohio-5243.

<sup>12</sup> And then on to the manufacturer’s customers, although this basic economic fact is generally not addressed in the early published decisions applying strict products liability. Wealth redistribution rather than economics seemed to be the prevailing judicial philosophy.

<sup>13</sup> *Barker v. Lull Engineering Co.* (1978), 20 Cal.3d 413, 430, 573 P.2d 443.

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<sup>14</sup> See, e.g., *Bowling v. Heil Co.* (1987), 31 Ohio St. 3d 277, where the majority claimed “It is obvious that neither prong of this test is grounded upon negligence...”, *Id.* at 282, while the dissent stated: “The elements of strict liability, despite protestations to the contrary, are full of the principles of negligence. One must prove that there was a design defect resulting from the deliberate decision of the manufacturer.” (J. Holmes, dissenting and citing Prosser, *Law of Torts*, 4<sup>th</sup> ed., at 296, fn. 2), *Id.* at 291.

<sup>15</sup> See, e.g., *Crislip v. TCH Liquidating Co.* (1990), 52 Ohio St.3d 251, where the court stated that the duty to warn in a strict liability action is the “same as that imposed in a negligence claim based upon inadequate warning.” *Id.*, at paragraph three of the syllabus. Notwithstanding, the *Crislip* court insisted that there were two distinct causes of action, a strict liability failure to warn claim, and a negligent failure to warn claim. It is clear from the language in the decision that the Supreme Court engaged in this fiction because it was afraid that otherwise the plaintiff’s comparative negligence would then be considered in reducing plaintiff’s damages, something that prior Ohio Supreme Court precedent precluded. The *Crislip* court believed that its holding that a “strict liability failure to warn case” was different from a “negligence failure to warn case” was required by the prior holding rendered in *Bowling v. Heil Co.*, *supra*, where the court determined that in a defective design case contributory or comparative negligence or fault principles did not apply, *Id.* at 286. Thus, this conceptual confusion about the underlying principles of products law led to illogical results.

The Restatement Third, Torts: Products Liability §17 attributed this reluctance to apply comparative or contributory fault principles (which were also expressed in the Restatement 2d, Torts 402A provisions) to the fact that contributory negligence was a complete bar to recovery in most jurisdictions in 1964, whereas today, “a strong majority of jurisdictions” apply comparative responsibility. Thus, the Restatement Third changed the ALI’s position and likewise now allows for apportionment of responsibility.

<sup>16</sup> *Bowling v. Heil Co.* (1987), 31 Ohio St. 3d 277.

<sup>17</sup> R.C. §2305.36.

<sup>18</sup> R.C. §2305.03(B).

<sup>19</sup> R.C. §4513.263(F).

<sup>20</sup> R.C. §2125.02(D)(2) [wrongful death] and R.C. §2305.10(C) [product liability claim for personal injury or injury to personal property]; R.C. §2305.131[improvements to real property].

<sup>21</sup> See Note 3, *supra*.

<sup>22</sup> Former R.C. §2307.75(A)(2).

<sup>23</sup> R.C. §2307.75(B)(5).

<sup>24</sup> *Cremeans v. International Harvester Co.* (1983), 6 Ohio St.3d 232.

<sup>25</sup> Restatement Third, Torts: Products Liability, §2; *see also*, Comment G at 27-28.

<sup>26</sup> *Id.*

<sup>27</sup> The author was counsel for Appellee in this case.

<sup>28</sup> 2004 S. 80, §3(D) reads: “The General Assembly declares its intent that the amendment made by this act to section 2307.71 of the Revised Code is intended to supersede the holding of the Ohio Supreme Court in *Carrel v. Allied Products Corp.* (1997), 78 Ohio St.3d 284, that the common law product liability cause of action of negligent

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design survives the enactment of the Ohio Product Liability Act, sections 2307.71 to 2307.80 of the Revised Code, and to abrogate all common law product liability causes of action.”

<sup>29</sup> See, *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 104-09.

<sup>30</sup> See Note 9.

<sup>31</sup> *Cooper Industries v. Leatherman Tool Group, Inc.* (2001), 532 U.S. 424.

<sup>32</sup> *Arbino, supra*, at 487.