



ZimmerKunz PLLC  
Attorneys at Law

## Case Bulletin: Tort Law

Pennsylvania Supreme Court to consider adoption of new strict product liability standard.

### Addresses:

Pittsburgh Office:  
3300 US Steel Tower  
Pittsburgh, PA 15219  
(412) 281-8000  
Fax: (412) 281-1765

Greensburg Office:  
132 South Main Street,  
Suite 400  
Greensburg, PA 15601  
(724) 836-5400  
Fax: (724) 836-5149

Beaver Office:  
983 Third Street  
Beaver, PA 15009  
(724) 774-6000  
Fax: (724) 774-4400

Morgantown Office:  
206 Spruce Street  
Morgantown, WV 26505  
(304) 292-8531  
Fax: (304) 292-7529

*Bogush v. I.U. North America, Inc.*  
The Supreme Court of Pennsylvania  
350 WAL 2007  
*Allocatur granted* February 28, 2008  
7 WAP 2008

The Pennsylvania Supreme Court has agreed to hear an appeal in an asbestos case, which urges the Court to apply Restatement (Third) of Torts § 2, rather than Restatement (Second) of Torts § 402A, to strict product liability cases based on design defect or failure to warn. Commentators have criticized Pennsylvania jurisprudence for its staunch adherence to strict liability concepts in such cases, and for the oft-repeated admonition that “negligence concepts play no part in strict product liability.” That approach is appropriate in manufacturing defect cases, which were the genesis of strict liability law, where the focus is on the product alone, and not on the conduct of the manufacturer. However, as strict liability law evolved to include design defect and failure to warn claims, application of the rigid § 402A analysis became somewhat tortured. In design defect cases, the character of the product and the conduct of the manufacturer are largely inseparable, and ultimately focus on whether the manufacturer negligently designed the product. Restatement (Third) of Torts § 2 retains the traditional § 402A standard for manufacturing defect cases, but introduces negligence concepts in design defect and failure to warn cases. Under the new approach, the finder of fact determines whether a product is defective due to its design or a failure provide adequate warnings, by weighing the utility of the product against the risks posed by its design or inherent properties. In this appeal, a distributor of asbestos-containing building products urges the Supreme Court to expressly recognize the essential role of risk-utility analysis – a concept derived from negligence doctrine – in design defect and failure to warn cases by adopting Restatement (Third) of Torts § 2.