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Pennsylvania Supreme Court Overrules *Azzarello*, Only To Have PBI Suggested Jury Instructions Continue To Seek *Azzarello*'s Reinstatement (Volume 3 – Updates and Addenda to Proper Suggested Standard Jury Instructions)

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Introduction

The First Installment of this series, titled, "**Pennsylvania Supreme Court Overrules *Azzarello*, Only To Have PBI Suggested Jury Instructions Seek *Azzarello*'s Reinstatement (Vol. 1),"** was published in the February 2017 edition of **COUNTERPOINT**. That article discussed the key holdings of the Pennsylvania Supreme Court's decision in *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014)[1]: (1) Pennsylvania's strict liability design defect law remains grounded in the Restatement (2d) of Torts §402A (1965); (2) the 1978 decision in *Azzarello v. Black Bros. Co.,* 391 A.2d 1020 (Pa. 1978), improperly attempted to exclude negligence concepts from strict liability design defect jurisprudence, in a vain attempt at "social engineering" through product liability; (3) *Azzarello* is overruled; and (4) the key inquiry in strict liability design defect cases under *Tincher* is whether a "defective condition *unreasonably dangerous*" to the user existed.

The First Installment further discussed the publication by the Pennsylvania Bar Institute ("PBI") of post-*Tincher* revisions to its "Pennsylvania Suggested Standard Civil Jury Instructions" for Products Liability (Chapter 16) ("Bar Institute SSJI"). As the PBI's opening "Note to the User" indicated, the Bar Institute SSJI are only suggested and are not submitted to the Pennsylvania Supreme Court for approval.[2]

More specifically, the First Installment identified the numerous and systematic problems with the Bar Institute SSJI, including: (1) they ignore the overruling of *Azzarello* by retaining core jury instruction language drawn directly from *Azzarello*, and repudiated by *Tincher*; (2) they ignore *Tincher*'s holding that a concept of a "defective condition unreasonably dangerous" to the user is the "normative principle" in a strict liability trial in Pennsylvania, and that the jury must be so instructed; (3) they contain numerous unfounded assertions of law on corollary issues the *Tincher* Court expressly declined to address, and left to future courts to address incrementally; and (4) every one of the Bar Institute's departures from *Tincher* construed Pennsylvania law in a one-sided fashion beneficial only to plaintiffs.

Finally, the First Installment described the June, 2016 attempt by more than 50 legal organizations, business and insurance organizations, firms and experienced products liability lawyers to open a dialogue with the subcommittee responsible for the Bar Institute SSJI. That *ad hoc* group sought to discuss how to make the Bar Institute SSJI reflect the actual holdings and rationales of *Tincher*, to reflect accurately the law as it is, and to eliminate the slanted advocacy embedded in the Bar Institute SSJI. The subcommittee acknowledged receipt of the letter – but then ignored the outreach completely. The stonewalling continues to this day, leaving no doubt that the subcommittee departed from its own stated goal of "ensuring the proposed instructions reflect the current law and case law"[3] and leaving no doubt that the subcommittee has intentionally published incorrect, improper and biased "suggested standard" instructions.

In the face of the Subcommittee's intransigence and unwillingness even to discuss the pervasive inaccuracies in the Bar Institute SSJI, a group of expe-

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rienced practitioners took action. Together, this "*Tincher* Group" totals more than 200 years of experience in litigating products liability cases at the trial and appellate court levels.

Under the umbrella of the Pennsylvania Defense Institute ("PDI"), the *Tincher* Group decided collectively that the undeserved gloss of validity created by the PBI's publishing of clearly improper suggested jury instructions could not go unanswered. To respond, the *Tincher* Group drafted and proposed suggested jury instructions that accurately reflect the dictates of the Pennsylvania Supreme Court in *Tincher*, its progeny, and those prior cases that were unaffected by the overruling of *Azzarello*.

The results of more than one year's worth of deliberation, drafting and redrafting were published in September 2017 and attached to the Second Installment of this series, entitled "**Pennsylvania Supreme Court Overrules *Azzarello*, Only to Have PBI Suggested Jury Instructions Seek *Azzarello*'s Reinstatement (Volume 2 – Proper Suggested Standard Jury Instructions),** published in the October 2017 edition of **COUNTERPOINT.**

Products Liability Suggested Standard Jury Instructions Pursuant to *Tincher v. Omega-Flex, Inc.*, 104 A.3d 328 (Pa. 2014) September 2017 Edition.

These suggested jury instructions, endorsed by PDI in 2017 ("PDI SSJI"), were prepared as accurate recitations of the law as it is, based on decisions of courts that have actually applied *Tincher* as the basis of Pennsylvania's products liability law. These instructions also recognized that, by directly overruling *Azzarello*, the Supreme Court sent a message that decisions on corollary issues must stand on sound rationale independent of the social engineering embodied in the now-overruled *Azzarello* and its progeny.

The PDI SSJI reflect not only the considered judgment and experience of the drafters and numerous attorneys who reviewed and offered valuable suggestions and input. They reflect the collective judgment of the Pennsylvania Defense Institute, the largest statewide voice for the defense bar, whose Board of Directors unanimously approved their publication.

The October 2017 **COUNTERPOINT** article (Vol 2 of this series) delineated and explained these "alternative" − i.e., **proper** - *Tincher*-based suggested instructions, and attached a full copy of the September 2017 published instructions for ease of reference.

For the convenience of practitioners and the Courts, these instructions were organized and numbered to follow as closely as possible the organizational scheme of the Bar Institute SSJI. Instructions offered as direct alternatives to the Bar Institute SSJI have the same corresponding numbers.

Each of the PDI SSJI was accompanied by a detailed rationale that outlines the grounds, reasoning, and authority under current Pennsylvania law on which it stands. For many of the instructions, the reasoning and rationale came directly from *Tincher* itself, as well as cases applying the *Tincher* paradigm. The remaining instructions rested on Pennsylvania precedent untainted by *Azzarello*. Not only did these rationales provide the reasoning on which the PDI SSJI were based, they explain the deficiencies in the Bar Institute SSJI. The copious citations permit any Court or practitioner to confirm their validity with minimal effort.

As noted, the PDI Suggested Instructions were not intended to take the place of considered advocacy. Nor was it intended that the Courts would employ these reflexively to every case; rather, courts were expressly encouraged to apply the same scrutiny and judgment to these suggested instructions that they would apply to the Bar Institute SSJI. The drafters of these instructions, and the PDI, welcomed that scrutiny, as these organizations believed these suggested instructions were fundamentally fair, were more faithful to the language and reasoning of *Tincher* than the Bar Institute SSJI and stood up to any scrutiny.

Since the 2017 debut of the PDI SSJI, courts have chosen to charge juries with appropriate portions of these instructions in preference to the erroneous instructions published by the PBI. Conversely, the fundamentally flawed nature of the Bar Institute SSJI has become even more apparent.

***"TINCHER II" - Tincher v. Omega Flex, Inc.,* 180 A.3d 386 (Pa. Super. 2018).**

On February 16, 2018, a unanimous three-judge panel of the Pennsylvania Superior Court decided *Tincher v. Omega Flex, Inc.,* 180 A.3d 386 (Pa. Super. 2018) (*"Tincher II"*). The Superior Court held, following the Pennsylvania Supreme Court's landmark *Tincher I* ruling **in the same case**, that in a §402A strict product liability case, it is "fundamental error" to use an *"Azzarello"* jury charge employing the now-overruled "any element" defect test and misinforming the jury that the defendant manufacturer was the "guarantor" of product safety. 180 A.3d at 399.

In **"*Tincher '2'* Provides Clarity for You,"[4]** published in the April 2018 edition of **COUNTERPOINT,** the authors confirmed that *Tincher II* has unequivocally resolved the following:

- *Tincher I* overruled *Azzarello,* and after 36 years returned Pennsylvania as a true Restatement of Torts (Second), §402A jurisdiction, 180 A.3d at 392-93;
- if properly preserved, *Tincher I* applies retroactively to cases previously filed and tried, *id.* at 395;
- in a post-*Tincher* product liability trial, it is fundamental and reversible error for a trial court to give an Azzarello "any element / guarantor" jury charge, and doing so in and of itself requires a new trial, *id.* at 398, 400, 402; and
- proof of "defect" under the Restatement of Torts (Second), §402A requires that the product be "unreasonably dangerous," and the jury must be instructed accordingly. *Id.* at 401-02.

The authors noted that *Tincher II* clearly confirmed that the Bar Institute SSJI are now expressly disapproved in *Tincher II,* on the critical definition of "defect," that *Tincher II* is controlling precedent, that the view stated in the PDI SSJI on that issue is correct, and that using the PBI's *Azzarello*-based definition of "defect" is "fundamental" – and thus reversible – error.

Finally, the authors outlined the clear ramifications of *Tincher II* for the "fruits of the poisonous *Azzarello* tree:"

> By reiterating the principles of the *Tincher I* §402A "unreasonably dangerous" defect construct ***in the same case****, Tincher II* paves the way, legally and logically, for jurors in Pennsylvania strict liability trials to hear and evaluate evidence that had for three decades been excluded by decisions such as *Lewis v. Coffing Hoist Div.,* 528 A.2d 590, 593 (Pa. 1987), that are expressly grounded in the now-overruled *Azzarello* bar against anything that hinted at "negligence."
>
> There is no longer any ***doctrinal*** justification for per-se exclusion of *any* of the following categories of evidence, assuming relevance to the issues in a particular case:
>
> - a product's compliance with governmental regulations;
> - a product's compliance with industry standards, customs, and practices;
> - a product's compliance with design and performance standards set by independent professional organizations;
> - state-of-the-art at the time the product was sold;
> - causative conduct on the part of a plaintiff and others; and
> - a plaintiff's contributory fault.
>
> All of this evidence obviously informs the jury's evaluation of the design choices made by the manufacturer and the consequent integrity of the product under either prong of the *Tincher* two-part coordinate test that the jury must apply to determine if a product design created an "unreasonably dangerous" defect.[5]

Products Liability Suggested Standard Jury Instructions Pursuant to, *Tincher v. Omega-Flex, Inc.* 104 A.3d 328 (Pa. 2014), 2019 Edition.

The 2017 publication of these suggested instructions by no means ended the *Tincher* Group's work. Another longstanding problem with the Bar Institute SSJI has been lack of timely updates. Thus, the group has continued to monitor the development of post-*Tincher* products liability caselaw and to refine and adjust the PDI SSJI and their stated rationale accordingly. In addition, the *Tincher* Group has looked into other areas and issues where additional suggested standard instructions would be appropriate. And as "just fortune" would have it, along with various trial and intermediate appellate decisions addressing the practical application of *Tincher*'s prescripts, along came *Tincher II* as a formal *Tincher* redux!

As promised in the October 2017 edition of **COUNTERPOINT**, the *Tincher* Group has further refined and expanded upon the original September 2017 published PDI SSJI. The Committee has now published the attached **Products Liability Suggested Standard Jury Instructions Pursuant to Tincher v. Omega-Flex, Inc., 104 A.3d 328 (Pa. 2014), 2019 Edition**.

In addition, the 2019 suggested instructions have now been considered and approved by Pennsylvania's other major organization of defense counsel, the Philadelphia Association of Defense Counsel ("PADC"). Accordingly, we refer to the 2019 version as the "PDI/PADC SSJI."

These 2019 PDI/PADC SSJI are attached to this Third Installment. In addition to updating the previous September 2017 "Rationales" for each suggested instruction with additional citations − including but by no means limited to the dispositive "*Tincher II*" decision − the *Tincher* Group has *added* several new Suggested Standard Jury Instructions. Here is a complete index to the 2019 PDI/PADC SSJI:

Products Liability Suggested Standard Jury Instructions Pursuant to *Tincher v. Omega-Flex, Inc.*, 104 A.3d 328 (Pa. 2014), September 2019 Edition

16.10 General Rule of Strict Liability

16.20(1) Strict Liability – Design Defect – Determination of Defect (Finding of Defect Requires "Unreasonably Dangerous" Condition)

16.20(2) Strict Liability – Design Defect – Determination of Defect (Consumer Expectations)

16.20(3) Strict Liability – Design Defect – Determination of Defect (Risk-Utility)

16.30 Strict Liability – Duty to Warn/Warning Defect

16.35 Strict Liability – Post-Sale Duty To Warn (NEW)

16.40 "Heeding Presumption" For Seller/Defendant Where Warnings or Instructions Are Given

16.50 Strict Liability – Duty to Warn – "Heeding Presump-

tion" In Workplace Injury Cases

16.60 Strict Liability – Duty to Warn – Causation, When "Heeding Presumption" For Plaintiff Is Rebutted

16.70 Strict Liability – Factual Cause (NEW)

16.80 Strict Liability – (Multiple Possible Contributing Causes) (NEW)

16.85 Strict Liability – (Multiple Possible Contributing Exposures) (NEW)

16.90 Strict Liability – Manufacturing Defect – Malfunction Theory

16.122(1) Strict Liability – State of the Art Evidence (Unknowability of Claimed Defective Condition)

16.122(2) Strict Liability – State of The Art Evidence (Compliance with Product Safety Statutes or Regulations)

16.122(3) Strict Liability – State of The Art Evidence (Compliance with Industry Standards)

16.122(4) Strict Liability – Plaintiff Conduct Evidence

16.150 Strict Liability – Component Part (NEW)

16.175 Crashworthiness – General Instructions

16.176 Crashworthiness – Elements

16.177 Crashworthiness – Safer Alternative Design Practicable Under the Circumstances

What follows is a specific description of the new sections of the 2019 PDI/PADC SSJI:

16.35 Strict Liability – Post-Sale Duty to Warn

As noted in the Rationale to this instruction, "Pennsylvania recognized a post-sale duty to warn in *Walton v. Avco Corp.*, 610 A.2d 454, 459 (Pa. 1992) . . . limited by negligence considerations of reasonableness and practicality." This added Instruction emphasizes the limited circumstances in which this duty exists under Pennsylvania law. Specifically: (1) the alleged defect must have existed at the time the product left the defendant's control; (2) the potential harm must be "both substantial and preventable;" (3) the defendant must have learned of the risk before plaintiff suffered harm so that it could take reasonable steps to warn foreseeable users; and (4) a reasonable means must have existed to allow the post-sale warning to be acted upon so as to prevent the harm. First and foremost, because under *Tincher* Pennsylvania remains a §402A jurisdiction, ***before the jury may consider a post-sale duty to warn, it must first find, under §402A, both that the product had an unreasonably dangerous defect, and that this defect existed at the time the product was sold***. See PDI/PADC SSJI §§16.10, 16.20(1).

This added instruction also references the important practical considerations recognized in *Walton*, namely "[f]actors that you may consider in deciding if a post-sale warning should have been given include the nature of the product, the nature and likelihood of harm, the feasibility and expense of issuing a warning, whether the claimed defect was repairable, whether the product was mass-produced, or alternatively sold in a small and distinct market, whether the product's users could be easily identified and reached, and the likelihood that the product's purchasers would be unaware of the risk of harm." These considerations of reasonableness and practicality are totally consistent, even more than when *Walton* was originally decided, with *Tincher*'s general abolition of the dichotomy between negligence and strict liability.

Finally, the Rationale reiterates that no duty to recall or retrofit a product exists under Pennsylvania law.

16.70 Strict Liability – Factual Cause

This added instruction expressly relies upon the first paragraph of the Bar Institute SSJI 16.70, which correctly defines Pennsylvania's "but for" causation requirement. However, as explained in the Rationale, this instruction ***eliminates*** the Bar Institute SSJI's comment that "'foreseeability,' and thus abnormal use, were 'stricken from strict liability' as 'a test of negligence,'" a contention that is no longer viable considering *Tincher's* general abolition of the dichotomy between negligence and strict liability. *Tincher,* 104 A.3d at 380-81.

The mishmash of other topics mentioned in Bar Institute SSJI 16.70 is separately addressed in the PDI/PADC SSJI. Proper use of evidence of a plaintiff's conduct is addressed in PDI/PADC SSJI 16.122(4). Crashworthiness is addressed in our instructions 16.175, 16.176, and 16.177.

16.80 Strict Liability – (Multiple Possible Contributing Causes)

This added instruction reinforces Pennsylvania law, which establishes "substantial factor" as the appropriate concurrent causation standard. *E.g.*, *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1037, n.2 (Pa. 2016). The Bar Institute SSJI's causation charge does not apply the "substantial factor" concurrent cause language repeatedly employed by the Pennsylvania Supreme Court; instead, that Instruction incorrectly uses only "factual cause," a vague term never approved as an adequate causation standard by the Pennsylvania Supreme Court. Given the well-established Pennsylvania legal pedigree of "substantial factor" causation, and that terminology's superior ability to convey the concept of causation to the jury in language laypersons can understand, this added instruction adopts "substantial factor" as the standard for charging the jury.

16.85 Strict Liability – (Multiple Possible Contributing Exposures)

This added Instruction states the refined "substantial factor" charge that has been adopted in asbestos litigation. It sets forth "frequency, regularity and proximity" test from *Gregg v. V-J Auto Parts Co.*, 943 A.2d 216, 227 (Pa. 2007). Specifically, to establish that an alleged exposure was a substantial factor in causing a plaintiff's harm, the plaintiff must establish that the exposure was: (1) sufficiently frequent; (2) with sufficient regularity; and (3) "sufficiently proximate" that it contributed to the harm.

While Pennsylvania courts have limited

this test to matters involving asbestos exposure, the Rationale suggests that this charge might be applied to "other multiple exposure cases involving other hazardous substances." *See Melnick v. Exxon Mobil Corp.*, 2014 WL 10916974, at *7 (Pa. Super. June 8, 2014) (mem.).

16.150 Strict Liability – Component Part

Restatement (Second) of Torts §402A (1965), as adopted by *Tincher*, does not come to any conclusions about the liability of component part manufacturers. *Id.* §402A comment q. On numerous occasions, Pennsylvania law has recognized that components involve special considerations. This added instruction addresses these special unique considerations. *See, e.g., Jacobini v. V. & O. Press Co.*, 588 A.2d 476, 479 (Pa. 1991). The jury is to be instructed that a component part is not defective if the entity produced a component which met the requirements of the manufacturer of the completed product. The charge does provide two exceptions which will not relieve a component part manufacturer from liability: (1) if the completed product manufacturer's requirements were "obviously deficient;" and (2) if the component supplier substantially participated in the design or preparation of other, defective parts of a completed product. Both exceptions are well established by Pennsylvania authority.

As the Rationale states, the exceptions stated in this instruction are also recognized by Restatement (Third) of Torts, Products Liability §5 & comment e (1998). While *Tincher* declined to adopt the Third Restatement wholesale, it did not address, let alone criticize, the Third Restatement's approach to component part liability, which has won widespread acceptance.

The *Tincher* Group's Work Continues!!

As before, the April 2019 publication of the expanded and updated PDI/PADC SSJI is part of an ongoing process. The *Tincher* Group continues to monitor the post-*Tincher* development of the Pennsylvania products liability precedent and will refine and adjust these Suggested Instructions as well as their stated Rationale as needed. In addition, the *Tincher* Group will continue to consider other areas and issues where additional guidance and instructions may be appropriate. Any member of PDI or PADC wishing to comment should feel free to contact any of this Article's authors.

ENDNOTES

[1]The Supreme Court's decision is referred to herein as "*Tincher*" or "*Tincher I*," for reasons that will become apparent.

[2]Note to the User, Bar Institute SSJI 2017 ed.

[3]Introduction to the 2016 Supplement.

[4]**COUNTERPOINT,** April 2018 Ed., by James M. Beck, Esquire, Reed Smith, Philadelphia, William J. Ricci, Esquire, Ricci, Tyrrell, Johnson & Grey, LLP, Philadelphia, PA, & C. Scott Toomey, Esquire, Littleton Park Joyce Ughetta & Kelly LLP, Radnor, PA.

[5]Accord, COUNTERPOINT, Dec. 2018 Ed., by James M. Beck Esquire, Reed Smith, Philadelphia, "Admissibility of Compliance Evidence Post-Tincher."

Product Liability

Suggested Standard Jury Instructions

Pursuant to

Tincher v. Omega Flex, Inc.,

104 A.3d 328 (Pa. 2014)

2019 Edition – Supersedes 2017 Edition

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16.10 GENERAL RULE OF STRICT LIABILITY

[Name of plaintiff] claims that [he/she] was harmed by [insert type of product], which was [distributed] [manufactured] [sold] by [name of defendant].

To recover for this harm, the plaintiff must prove by a fair preponderance of the evidence each of the following elements:

(1) [Name of defendant] is in the business of [distributing] [manufacturing] [selling] such a product;

(2) The product in question had a defect that made it unreasonably dangerous;

(3) The product's unreasonably dangerous condition existed at the time the product left the defendant's control;

(4) The product was expected to and did in fact reach the plaintiff, and was thereafter used at the time of the [accident][exposure], without substantial change in its condition; and

(5) The unreasonably dangerous condition of the product was a substantial factor in causing harm to the plaintiff.

RATIONALE

The RESTATEMENT (SECOND) OF TORTS §402A, is the basis for strict products liability in Pennsylvania. *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 399 (Pa. 2014) ("Pennsylvania remains a Second Restatement jurisdiction.").

The elements listed in this instruction are drawn from Section 402A, which provides:

> 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.
>
> RESTATEMENT (SECOND) OF TORTS §402A(1).

The jury should be given additional instructions, as appropriate, to elaborate on each of the elements of this cause of action.

The contrary SSJI (Civ.) §16.10 retains the *Azzarello*-era instruction that a product is defective if it "lacked any element necessary to make it safe for its intended use." *See Azzarello v. Black Bros. Co.*, 391 A.2d 1010 (Pa. 1978) (endorsing a jury charge instructing that a product must be "provided with every element necessary to make it safe for its intended use").

The SSJI charge is reversible error and should not be given. The Supreme Court overruled *Azzarello* in *Tincher*, specifically rejecting the jury charge that *Azzarello* had endorsed. *See Tincher*, 104 A.3d at 335 (declaring *Azzarello* to be overruled); 378-79 (criticizing *Azzarello* standard as "impractical" and noting that the "every element" language had been taken out of context). Giving an *Azzarello* charge post-*Tincher* is "a paradigm example of fundamental error." *Tincher v. Omega Flex, Inc.*, 180 A.3d 386, 399 (Pa. Super. 2018) ("*Tincher II*"). Such a charge "employ[s] an incorrect definition of a product 'defect' in light of the Supreme Court's decision" in *Tincher*. *Id.* SSJI (Civ.) §16.10 thus "undervalues the importance of the Supreme Court's decision" in *Tincher*. *Tincher II.* 180 A.3d at 401.

Even before *Tincher*, the "every element" jury instruction had long been the subject of criticism, with the Superior Court remarking three decades ago, "[t]his instruction calls forth fantastic cartoon images of products, both simple and complex, laden with fail-safe mechanism upon fail-safe mechanism." *McKay v.*

Sandmold Systems, Inc., 482 A.2d 260, 263 (Pa. Super. 1984) (quoting Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 637-39 (1980)). Given the longstanding problems with this instruction, as well as its express rejection in *Tincher*, the "every/any element" language has no place in a modern Pennsylvania jury charge.

The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992).

More recent precedent uses the concept of the defendant's "control" in articulating the defect-at-sale element of §402A. *See Barnish v. KWI Building Co.*, 980 A.2d 535, 547 (Pa. 2009). Older cases express the same concept as the product leaving the defendant's "hands." *See Duchess v. Langston Corp.*, 769 A.2d 1131, 1140 (Pa. 2001). These instructions use the term "control" as a more precise description.

"The seller is not liable if a safe product is made unsafe by subsequent changes." *Davis v. Berwind Corp.*, 690 A.2d 186, 190 (Pa. 1997). Whether a post-manufacture change to a product is "substantial" so as to preclude strict liability depends on "whether the manufacturer could have reasonably expected or foreseen such an alteration of its product." *Id.* (citing *Eck v. Powermatic Houdaille, Div.*, 527 A.2d 1012, 1018-19 (Pa. Super. 1987)). This standard accords with *Tincher*'s recognition of negligence concepts in strict liability. *See Nelson v. Airco Welders Supply*, 107 A.3d 146, 159 n.17 (Pa. Super. 2014) (en banc) (post-*Tincher*); *Roudabush v. Rondo, Inc.*, 2017 WL 3912370, at *3 (W.D. Pa. Sept. 5, 2017) (same).

"[R]equirements of proving substantial-factor causation remain the same" for both negligence and strict liability." *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1165 (Pa. 2010). The Pennsylvania Supreme Court has repeatedly specified "substantial factor" as the causation standard in products liability cases. *E.g. Rost v. Ford Motor Co.*, 151 A.3d 1032, 1049 (Pa. 2016) (post-*Tincher*); *Reott v. Asia Trend, Inc.*, 55 A.3d 1088, 1091 (Pa. 2012); *Harsh v. Petroll*, 887 A.2d 209, 213-14 & n.9 (Pa. 2005). *See* instruction §16.80.

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16.20(1) STRICT LIABILITY – DESIGN DEFECT – DETERMINATION OF DEFECT

Finding of Defect Requires "Unreasonably Dangerous" Condition

The Plaintiff claims that the [identify the product] was defective and that the defect caused [him/her] harm. The plaintiff must prove that the product contained a defect that made the product unreasonably dangerous.

The plaintiff's evidence must convince you both that the product was defective and that the defect made the product unreasonably dangerous.

In considering whether a product is unreasonably dangerous, you must consider the overall safety of the product for all [intended] [reasonably foreseeable] uses. You may not conclude that the product is unreasonably dangerous only because a different design might have reduced or prevented the harm suffered by the plaintiff in this particular incident. Rather, you must consider whether any alternative proposed by the plaintiff would have introduced into the product other dangers or disadvantages of equal or greater magnitude.

RATIONALE

The RESTATEMENT (SECOND) OF TORTS §402A, is the basis for strict products liability in Pennsylvania. Section 402A limits liability to products "in a defective condition *unreasonably dangerous* to the user or consumer." Restatement (Second) of Torts §402A (emphasis added). "Pennsylvania remains a Second Restatement jurisdiction." *Tincher v. Omega Flex, Inc.,* 104 A.3d 328, 399 (Pa. 2014). Thus,

> in a jurisdiction following the Second Restatement formulation of strict liability in tort, the critical inquiry in affixing liability is whether a product is "defective"; in the context of a strict liability claim, whether a product is defective depends upon whether that product is "unreasonably dangerous."

Tincher, 104 A.3d at 380, 399. "[T]he notion of 'defective condition unreasonably dangerous' is the normative principle of the strict liability cause of action." *Id.* at 400. *Accord* Dunlap v. Federal Signal Corp., 194 A.3d 1067, 1071 (Pa. Super. 2018) ("plaintiff . . . had to prove that [defendant's product] was unreasonably dangerous").

For many years, the now-overruled *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978), decision prohibited jury instructions in products liability cases from using the term "unreasonably dangerous." Instead of juries making this decision, trial courts were required to make "threshold" determinations whether a "plaintiff's allegations" supported a finding that the product at issue was "unreasonably dangerous," justifying submission of the case to the jury. *Id.* at 1026; *Dambacher v. Mallis*, 485 A.2d 408, 423 (Pa. Super. 1984) (en banc), *appeal dismissed*, 500 A.2d 428 (Pa. 1985).

Tincher expressly overruled *Azzarello*, finding *Azzarello*'s division of labor between judge and jury "undesirable" because it "encourage[d] trial courts to make either uninformed or unfounded decisions of social policy." *Tincher*, 104 A.3d at 381. "[T]rial courts simply do not have the expertise to conduct the social policy inquiry into the risks and utilities of a plethora of products and to decide, as a matter of law, whether a product is unreasonably dangerous." *Id.* at 380.

Tincher found "undesirable" *Azzarello*'s "strict" separation of negligence and strict liability concepts. "[E]levat[ing] the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative" was not "consistent with reason," and "validate[d] the suggestion that the cause of action, so shaped, was not viable." *Id.* at 380-81. Far from separating strict liability and negligence, *Tincher* emphasized their overlap. *Id.* at 371 (describing "negligence-derived risk-utility balancing in design defect litigation"); *id.* ("in design cases the character of the product and the conduct of the manufacturer are largely inseparable"); *id.* at 401 ("the theory of strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty") (internal citations omitted).

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In *Tincher,* the court rejected the prevailing standard that a defective product is one that lacks every "element" necessary to make it safe for use. 104 A.3d at 379. In its place, the *Tincher* court instituted a "composite" standard for proving when a design defect makes a product unreasonably dangerous: this composite standard includes both a consumer expectations test, and a risk-utility test. *See id.* at 400-01. These tests are discussed in §§16.20(2-3), *infra*.

Before *Azzarello*, proof that "the defective condition was unreasonably dangerous" was an accepted element of strict liability, along with the defect itself, existence of the defect at the time of sale, and causation. *E.g.*, *Bialek v. Pittsburgh Brewing Co.*, 242 A.2d 231, 235-36 (Pa. 1968); *Forry v. Gulf Oil Corp.*, 237 A.2d 593, 597 (Pa. 1967). Given the Supreme Court's rejection of *Azzarello* and its rationale, post-*Tincher* cases have returned to that pre-*Azzarello* formulation, and hold that juries must be asked whether the product at issue is "unreasonably dangerous." *See*, *e.g., High v. Pennsy Supply, Inc.*, 154 A.3d 341, 347 (Pa. Super. 2017) ("the *Tincher* Court concluded that the question of whether a product is in a defective condition unreasonably dangerous to the consumer is a question of fact that should generally be reserved for the factfinder, whether it be the trial court or a jury"); *Amato v. Bell & Gossett*, 116 A.3d 607, 620 (Pa. Super. 2015) ("in *Tincher*, the Court returned to the finder of fact the question of whether a product is 'unreasonably dangerous,' as that determination is part and parcel of whether the product is, in fact, defective"), *appeal dismissed*, 150 A.3d 956 (Pa. 2016); *Hatcher v. SCM Group, Inc.*, 167 F. Supp.3d 719, 727 (E.D. Pa. 2016) ("a product is only defective . . . if it is 'unreasonably dangerous'"); *Rapchak v. Haldex Brake Products Corp.*, 2016 WL 3752908, at *2 (W.D. Pa. July 14, 2016) ("the *Tincher* Court also made clear that it is now up to the jury not the judge to determine whether a product is in a 'defective condition unreasonably dangerous' to the consumer"); *Nathan v. Techtronic Industries North America., Inc.*, 92 F. Supp.3d 264, 270-71 (M.D. Pa. 2015) (court no longer to make threshold "unreasonably dangerous" determination; issues of defect are questions of fact for the jury).

Charging the jury to decide whether defects render products "unreasonably dangerous" is consistent with the vast majority of states that follow §402A (or §402A-based statutes). *See* Arizona – RAJI (Civil) PLI 4; Arkansas – AMJI Civ. 1017; Colorado – CJI Civ. 14:3; Florida – FSJI (Civ.) 403.7(b); Illinois – IPJI-Civ. 400.06; Indiana – IN-JICIV 2117; Kansas – KS-PIKCIV 128.17; Louisiana – La. CJI §11:2; Maryland – MPJI-Cv 26:12; Massachusetts – CIVJI MA 11.3.1; Minnesota – 4A MPJI-Civ. 75.20; Mississippi – MMJI Civ. §16.2.7; Missouri – MAJI (Civ.) 25.04; Nebraska – NJI2d Civ. 11.24; Oklahoma – OUJI-CIV 12.3; Oregon – UCJI No. 48.07; South Carolina – SCRC – Civ. §32-45 (2009); Tennessee – TPI-Civ. 10.01; Virginia – VPJI §39:15 (implied warranty). *Compare*: Georgia – GSPJI 62.640 ("reasonable care"); New Mexico – NMRA, Civ. UJI 13-1407 ("unreasonable risk"); New Jersey – NJ-JICIV 5.40D-2 ("reasonably safe"); New York – NYPJI 2:120 ("not reasonably safe").

Tincher left open the extent to which the "intended use"/"intended user" doctrine that developed under *Azzarello* remains viable, or conversely, whether it has been displaced by negligence concepts of reasonableness and foreseeability. 104 A.3d at 410; *see*, *e.g.*, *Pennsylvania Dep't of Gen. Services v. U.S. Mineral Products Co.*, 898 A.2d 590, 600 (Pa. 2006) (strict liability exists "only for harm that occurs in connection with a product's intended use by an intended user"). This instruction takes no position on that issue, offering alternative "intended" and "reasonably foreseeable" language.

The contrary SSJI (Civ.) §16.20 omits the §402A phrase "unreasonably dangerous," thereby ignoring *Tincher*'s return of this "normative principle" of strict liability to the jury. *See Tincher*, 104 A.3d at 400. The SSJI charge thus "employ[s] an incorrect definition of a product 'defect' in light of the Supreme Court's decision" in *Tincher*, and "undervalues the importance of the Supreme Court's decision" in *Tincher*. *Tincher v. Omega Flex, Inc.*, 180 A.3d 386, 399, 401 (Pa. Super. 2018) ("*Tincher II*"). The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992).

The second paragraph of the charge, regarding the scope of the unreasonably dangerous determination, follows the pre-*Tincher* §402A decision, *Beard v. Johnson & Johnson, Inc.*, 41 A.3d 823 (Pa. 2012), which "decline[d] to limit [unreasonably dangerous analysis – then "relegated" to the trial court by *Azzarello*] to a particular intended use." *Id.* at 836. "[A] product's utility obviously may be enhanced by multi-functionality." *Id.* Therefore, "alternative designs must be safer to the

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relevant set of users overall, not just the plaintiff." *Id.* at 838. *Accord*, *e.g.*, *Tincher*, 104 A.3d at 390 n.16 (characterizing *Beard* as holding that the defect determination is "not restricted to considering single use of multi-use product in design defect" case); *Dunlap v. Federal Signal Corp.*, 194 A.3d 1067, 1073 (Pa. Super. 2018) (*Tincher* requires evidence that an alternative design is "more effective for all users," not just plaintiff); *Phatak v. United Chair Co.*, 756 A.2d 690, 693 (Pa. Super. 2000) (allowing evidence that "incorporating the design [plaintiffs] proffered would have created a substantial hazard to other workers"); *Kordek v. Becton, Dickinson & Co.*, 921 F. Supp.2d 422, 431 (E.D. Pa. 2013) (the "determination of whether a product is a reasonable alternative design must be conducted comprehensively").

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16.20(2) STRICT LIABILITY – DESIGN DEFECT – DETERMINATION OF DEFECT

Consumer Expectations

The plaintiff claims that [he/she] was harmed by a product that was defective in that it was unreasonably dangerous under the consumer expectations test.

Under the consumer expectations test, a product is unreasonably dangerous if you find that the product is dangerous to an extent beyond what would be contemplated by the ordinary consumer who purchases the product, taking into account that ordinary consumer's knowledge of the product and its characteristics.

Under this consumer expectations test, a product is unreasonably dangerous only if the plaintiff proves first, that the risk that the plaintiff claims caused harm was unknowable; and, second, that the risk that the plaintiff claims caused harm was unacceptable to the average or ordinary consumer.

In making this determination, you should consider factors such as the nature of the product and its intended use; the product's intended user; whether any warnings or instructions that accompanied the product addressed the risk involved; and the level of knowledge in the general community about the product and its risks.

RATIONALE

This instruction should only be given after the court has made a threshold finding that the consumer expectations test is appropriate, under the facts of a given case, as outlined below.

In *Tincher v. Omega Flex, Inc.,* 104 A.3d 328 (Pa. 2014), the court rejected the prevailing standard that a defective product is one that lacks every element necessary to make it safe for use. *Id.* at 379. In its place, the *Tincher* court instituted a "composite" standard for proving when a defect makes a product unreasonably dangerous: this composite standard includes both a consumer expectations test, and a risk-utility test. *See id.* at 400-01.

Both tests have their own "theoretical and practical limitations," and are not both appropriate in every products liability case. *See id.* at 388-89 (limitations of consumer expectations test), 390 (limitations of risk-utility test). Although the plaintiff may choose to pursue one or both theories of defect, that choice does not bind the defense. Rather, the defendant may call on the trial court to act as a "gate-keeper" and to submit to the jury only the test that the evidence warrants. *Id.* at 407 ("A defendant may also seek to have dismissed any overreaching by the plaintiff via appropriate motion and objection"). Judicial "gate-keeping" to ensure that each test is only employed in appropriate cases "maintain[s] the integrity and fairness of the strict products liability cause of action." *Id.* at 401. As discussed below, post-*Tincher* "gate-keeping" has been repeatedly invoked against the consumer expectations test.

Under the consumer expectations test, a product is unreasonably dangerous by reason of a "defective condition" that makes that product "upon normal use, dangerous beyond the reasonable consumer's contemplations." *Tincher*, 104 A.3d at 387 (citations omitted). This test reflects the "surprise element of danger," and asks whether the danger posed by the product is "unknowable and unacceptable to the average or ordinary consumer." *See id.*; *High v. Pennsy Supply, Inc.*, 154 A.3d 341, 348 (Pa. Super. 2017).

The consumer expectations test is "'reserved for cases in which the everyday experience of the product users permits a conclusion that the product design violated minimum safety

assumptions.'" *Tincher*, 104 A.3d at 392 (quoting *Soule v. General Motors Corp.*, 882 P.2d 298, 308-09 (Cal. 1994)). The consumer expectations test does not apply where an "ordinary consumer would reasonably anticipate and appreciate the dangerous condition." *High*, 154 A.3d at 350 (quoting *Tincher*, 104 A.3d at 387).

As noted above, the Supreme Court recognized several "theoretical and practical limitations" of the consumer expectations test. Because this test only finds a defect where the dangerous condition is unknowable, a product "whose danger is obvious or within the ordinary consumer's contemplation" would not fall within the consumer expectations test. *Id.* at 388. *See High*, 154 A.3d at 350-51 (obviousness of risk created jury question under *Tincher* factors for consumer expectations test).

On the other end of the spectrum, the consumer expectations test will ordinarily not apply to products of complex design, or that present esoteric risks, because an ordinary consumer simply does not have reasonable safety expectations about those products or those risks. *Tincher*, 104 A.3d at 388. As the *Tincher* court explained:

> [A] complex product, even when it is being used as intended, may often cause injury in a way that does not engage its ordinary consumers' reasonable minimum assumptions about safe performance. For example, the ordinary consumer of an automobile simply has 'no idea' how it should perform in all foreseeable situations, or how safe it should be made against all foreseeable hazards.

Id. (quoting *Soule* 882 P.2d at 308).

Accordingly, post-*Tincher* cases decline to allow the consumer expectations standard in cases involving complicated machinery. *See*, *e.g.*, *Yazdani v. BMW of North America, LLC*, 188 F. Supp.3d 468, 493 (E.D. Pa. 2016) (air-cooled motorcycle engine); *Wright v. Ryobi Technologies, Inc.*, 175 F. Supp.3d 439, 452-53 (E.D. Pa. 2016) ("rip fence" on table saw); *DeJesus v. Knight Industries & Associates, Inc.*, 2016 WL 4702113, at *8-9 (E.D. Pa. Sept. 8, 2016) (industrial lift table).

These holdings are consistent with those in other jurisdictions applying a similar consumer expectations test. *See*, *e.g.*, *Brown v. Raymond Corp.*, 432 F.3d 640 (6th Cir. 2005) (ordinary consumer has no expectation regarding safety of forklift design) (applying Tennessee law); *Fremaint v. Ford Motor Co.*, 258 F. Supp.2d 24, 29-30 (D.P.R. 2003) (consumer expectations test "cannot be the basis of liability in a case involving complex technical matters," such as automotive design); *Kokins v. Teleflex, Inc.*, 621 F.3d 1290, 1295-96 (10th Cir. 2010) ("complex product liability claims involving primarily technical and scientific information *require* use of a risk-benefit test *rather than* a consumer expectations test") (emphasis original) (applying Colorado law).

The contrary SSJI (Civ.) §16.20 does not use *Tincher*'s formulation of the consumer expectations test, but rather the test enunciated in *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978). While *Tincher* at times looked to California law, including *Barker*, in discussing the consumer expectations test, the Pennsylvania Supreme Court chose not to follow *Barker*. Instead, the Court chose the language appearing in the above instruction as the governing test. *See Tincher*, 104 A.3d at 335 (holding that consumer expectations test requires proof that "the danger is unknowable and unacceptable to the average or ordinary consumer"), 387 (a "product is defective [under the consumer expectations test] if the danger is unknowable and unacceptable to the average or ordinary consumer").

The contrary SSJI's omission of *Tincher*'s controlling language – "unknowable and unacceptable" – is incorrect. Section 16.20 thus "employ[s] an incorrect definition of a product 'defect' in light of the Supreme Court's decision" in *Tincher*, and "undervalues the importance of the Supreme Court's decision" in *Tincher*. *Tincher v. Omega Flex, Inc.*, 180 A.3d 386, 399, 401 (Pa. Super. 2018) ("*Tincher II*"). The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992).

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16.20(3) STRICT LIABILITY – DESIGN DEFECT – DETERMINATION OF DEFECT

Risk-Utility

The plaintiff claims that [he/she] was harmed by a product that was defective in that it was unreasonably dangerous under the risk-utility test.

The risk-utility test requires the plaintiff to prove how a reasonable manufacturer should weigh the benefits and risks involved with a particular product, and whether the omission of any feasible alternative design proposed by the plaintiff rendered the product unreasonably dangerous.

In determining whether the product was defectively designed under the risk-utility test, and whether its risks outweighed the benefits, or utility, of the product, you may consider the following factors:

[Not all factors apply to every case; charge only on those reasonably raised by the evidence.]

(1) The usefulness, desirability and benefits of the product to all ordinary consumers – the plaintiff, other users of the product, and the public in general – as compared to that product's dangers, drawbacks, and risks of harm;

(2) The likelihood of foreseeable risks of harm and the seriousness of such harm to foreseeable users of the product;

(3) The availability of a substitute product which would meet the same need and involve less risk, considering the effects that the substitute product would have on the plaintiff, other users of the product, and the public in general;

(4) The relative advantages and disadvantages of the design at issue and the plaintiff's proposed feasible alternative, including the effects of the alternative design on product costs and usefulness, such as, longevity, maintenance, repair, and desirability;

(5) The adverse consequences of, including safety hazards created by, a different design to the plaintiff, other users of the product, and the public in general;

(6) The ability of product users to avoid the danger by the exercise of care in their use of the product; and

(7) The awareness that ordinary consumers would have of dangers associated with their use of the product, and their likely knowledge of such dangers because of general public knowledge, obviousness, warnings, or availability of training concerning those dangers.

RATIONALE

This instruction should only be given after the court has made a threshold finding that the risk-utility test is appropriate, under the facts of a given case, as outlined below.

In *Tincher v. Omega Flex, Inc.,* 104 A.3d 328 (Pa. 2014), the court rejected the prevailing standard that a defective product is one that lacks every element necessary to make it safe for use. *Id.* at 379. In its place, the *Tincher* court instituted a "composite" standard for proving when defect makes a product unreasonably dangerous: this composite standard includes both a consumer expectations test, and a risk-utility test. *See id.* at 400-01.

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Both tests have their own "theoretical and practical limitations," and are not both appropriate in every products liability case. *See id.* at 388-89 (limitations of consumer expectations test), 390 (limitations of risk-utility test). Although the plaintiff may choose to pursue one or both theories of defect, that choice does not bind the defense. Rather, the defendant may call on the trial court to act as a "gate-keeper" and to submit to the jury only the test that the evidence warrants. *See id.* at 407("A defendant may also seek to have dismissed any overreaching by the plaintiff via appropriate motion and objection"). Judicial "gate-keeping" to ensure that each test is only employed in appropriate cases "maintain[s] the integrity and fairness of the strict products liability cause of action." *Id.* at 401.

Under the risk-utility test, a product is in a defective condition "if a 'reasonable person' would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions." *Id.* at 389 (citations omitted). A product is not defective if the seller's precautions anticipate and reflect the type and magnitude of the risk posed by the use of the product. *See id.* The risk-utility test asks courts to "analyze *post hoc* whether a manufacturer's conduct in manufacturing or designing a product was reasonable." *Id.* This standard is a "negligence-derived risk-utility alternative formulation" that "reflects the negligence roots of strict liability." *Id.* at 389, 403.

In defining this "cost-benefit analysis," many jurisdictions rely on the seven risk-utility factors identified by John Wade, a leading authority on tort law. *See id.* at 389-90 (quoting John W. Wade, ON THE NATURE OF STRICT TORT LIABILITY FOR PRODUCTS, 44 Miss. L.J. 825, 837-38 (1973)). The Pennsylvania Supreme Court did not fully endorse these so-called "Wade factors," as not all would necessarily apply, depending on the "allegations relating to a particular design feature." *See id.* at 390. Given their longevity and widespread approval, six of the seven concepts addressed by the Wade factors are incorporated into the above instruction, to be selected and charged in particular cases as the evidence warrants. *See generally Dunlap v. Federal Signal Corp.*, 194 A.3d 1067, 1070 (Pa. Super. 2018) (listing Wade factors as "[t]he relevant factors" in risk-utility analysis after *Tincher*"); *Phatak v. United Chair Co.*, 756 A.2d 690, 695 (Pa. Super. 2000) (applying several Wade factors; "the safeness of [plaintiffs'] proposed design feature was a factor that was relevant to the determination of whether the chair was 'defectively designed'"). The above instruction omits the final Wade factor, which concerns the availability of insurance to the defendant. This consideration is inappropriate for a jury charge in Pennsylvania. *See*, *e.g.*, *Deeds v. University of Pennsylvania Medical Center*, 110 A.3d 1009, 1013-14 (Pa. Super. 2015) (discussion of insurance violated collateral source rule). It has been replaced with a factor examining various avenues of available public knowledge about relevant product risks. Other factors, not listed here, may be appropriate for jury consideration in particular cases. *See Tincher*, 104 A.3d at 408 ("the test we articulate today is not intended as a rigid formula to be offered to the jury in all situations").

Like the consumer expectations test, the risk-utility test has "theoretical and practical limitations." *See Tincher*, 104 A.3d at 390. The goal of the risk-utility test is to "achieve efficiency" by weighing costs and benefits, but such an economic calculation can, in some respects, "conflict[] with bedrock moral intuitions regarding justice in determining proper compensation for injury" in particular cases. *Id.* Additionally, the holistic perspective to product design suggested by the risk-utility test "may not be immediately responsive" in a case focused on a particular design feature. *Id.* Thus, although no decision has yet occurred, there may be cases where the risk-utility test is inappropriate.

The contrary SSJI (Civ.) §16.20 truncates the factors to be considered in the risk-utility analysis. It paraphrases only two of the Wade factors, drawing not from *Tincher*, but from the California decision, *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978). While *Tincher* at times looked to California law, including *Barker*, in describing the risk-utility test, the Pennsylvania Supreme Court chose not to follow *Barker*, and instead cited the Wade factors in preference to the test enunciated in *Barker*. Section 16.20 thus "employ[s] an incorrect definition of a product 'defect' in light of the Supreme Court's decision" in *Tincher*, and "undervalues the importance of the Supreme Court's decision" in *Tincher*. *Tincher v. Omega Flex, Inc.*, 180 A.3d 386, 399, 401 (Pa. Super. 2018) ("*Tincher II*").

Tincher's broader sweep indicates that it would be error to foreclose potentially relevant factors *a priori*. *See Tincher*, 104 A.3d at 408 ("In charging the jury, the trial

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court's objective is 'to explain to the jury how it should approach its task and the factors it should consider in reaching its verdict.' Where evidence supports a party-requested instruction on a theory or defense, a charge on the theory or defense is warranted.") (internal citation omitted). The Wade-factor-based approach here, rather than SSJI §16.20(1), best reflects Pennsylvania law, and offers a wide-ranging list of factors in the proposed jury instruction, with the intent that the court and the parties in each particular case will identify those factors reasonably raised by the evidence for inclusion in the ultimate jury charge. The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992).

* * *

The contrary SSJI (Civ.) §16.20 also includes an "alternative" jury instruction that would shift the burden of proof in the risk-utility test to the defendant. Such an instruction is premature and speculative. It should not be included in any standard charge. As noted, the *Tincher* court drew on certain principles of California law, while rejecting others. *See Tincher*, 104 A.3d at 408 (adopting *Barker* "composite" defect analysis); *id.* at 377-78 (rejecting *Cronin* "rings of negligence" approach). *Tincher*'s discussion of *Barker* and the burden of production and persuasion was pure *dictum*, and recognized as such. The parties had not briefed the issue, and the Court expressly declined to decide it. *See id.* at 409 ("[W]e need not decide it [*i.e.*, the question of burden-shifting] to resolve this appeal"). Rather, the Supreme Court also discussed "countervailing considerations [that] may also be relevant," including, *inter alia*, the principle that Pennsylvania tort law assigns the burden of proof to the plaintiff. *Id.*

In Pennsylvania, the burden of proving product defect has always belonged to the plaintiff. *See Tincher*, 104 A.3d at 378 (discussing "plaintiff's burden of proof" under *Azzarello*). *Accord*, *e.g.*, *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1003 (Pa. 2003); *Schroeder v. Pa. Dep't of Transportation*, 710 A.2d 23, 27 (Pa. 1998); *Spino v. John S. Tilley Ladder Co.,* 696 A.2d 1169, 1172 (Pa. 1997); *Davis v. Berwind Corp.*, 690 A.2d 186, 190 (Pa. 1997); *Phillips v. A-Best Products Co.*, 665 A.2d 1167, 1171 (Pa. 1995); *Walton v. Avco Corp.*, 610 A.2d 454, 458 (Pa. 1992); *Rogers v. Johnson & Johnson Products, Inc.*, 565 A.2d 751, 754 (Pa. 1989). Shifting the burden of proof would be a drastic step and a change to a foundational principle of tort law. To take that step would run counter to the *Tincher* Court's repeated respect for "judicial modesty." *See Tincher*, 104 A.3d at 354 n.6, 377-78, 397-98, 406. Indeed, the *Tincher* Court explained that resolution of the burden-shifting question, like other subsidiary issues, would require targeted briefing and advocacy in a factually apposite case. *See id.* at 409-10. Accordingly, the expressly undecided question of burden-shifting is inappropriate for inclusion in a standard jury charge.

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16.30 STRICT LIABILITY – DUTY TO WARN/WARNING DEFECT

Even a perfectly made and designed product may be defective if not accompanied by adequate warnings or instructions. Thus, the defendant may be liable if you find that inadequate, or absent, warnings or instructions made its product unreasonably dangerous for [intended] [reasonably foreseeable] uses. A product is defective due to inadequate warnings when distributed without sufficient warnings to notify [intended] [reasonably foreseeable] users of non-obvious dangers inherent in the product.

Factors that you may consider in deciding if a warning is adequate are the nature of the product, the identity of the user, whether the product was being used in an [intended] [reasonably foreseeable] manner, the expected experience of its intended users, and any implied representations by the manufacturer or other seller.

RATIONALE

The RESTATEMENT (SECOND) OF TORTS §402A, is the basis for strict products liability in Pennsylvania. Section 402A limits liability to products "in a defective condition *unreasonably dangerous* to the user or consumer." Restatement (Second) of Torts §402A (emphasis added). "Pennsylvania remains a Second Restatement jurisdiction." *Tincher v. Omega Flex, Inc.,* 104 A.3d 328, 399 (Pa. 2014). Thus,

> in a jurisdiction following the Second Restatement formulation of strict liability in tort, the critical inquiry in affixing liability is whether a product is "defective"; in the context of a strict liability claim, whether a product is defective depends upon whether that product is "unreasonably dangerous."

Tincher, 104 A.3d at 380, 399. "[T]he notion of 'defective condition unreasonably dangerous' is the normative principle of the strict liability cause of action." *Id.* at 400. *Accord* Dunlap v. Federal Signal Corp., 194 A.3d 1067, 1071 (Pa. Super. 2018) ("plaintiff . . . had to prove that [defendant's product] was unreasonably dangerous" due to inadequate warnings).

For many years, the now-overruled *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978), decision prohibited jury instructions in products liability cases from using the term "unreasonably dangerous." Instead of juries making this decision, trial courts were required to make "threshold" determinations" whether a "plaintiff's allegations" supported a finding that the product at issue was "unreasonably dangerous," justifying submission of the case to the jury. *Id.* at 1026; *Dambacher v. Mallis*, 485 A.2d 408, 423 (Pa. Super. 1984) (en banc), *appeal dismissed*, 500 A.2d 428 (Pa. 1985).

Tincher expressly overruled *Azzarello*, finding *Azzarello*'s division of labor between judge and jury "undesirable" because it "encourage[d] trial courts to make either uninformed or unfounded decisions of social policy." *Tincher*, 104 A.3d at 381. "[T]rial courts simply do not have the expertise to conduct the social policy inquiry into the risks and utilities of a plethora of products and to decide, as a matter of law, whether a product is unreasonably dangerous." *Id.* at 380.

While neither *Azzarello* nor *Tincher* involved alleged inadequate product warnings or instructions, comment j to §402A recognizes that "to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning." *Tincher* acknowledged that overruling *Azzarello* "may have an impact upon . . . warning claims." 104 A.3d at 409. Before *Tincher*, the Supreme Court held that "[t]o establish that the product was defective, the plaintiff must show that a warning of a particular danger was either inadequate or altogether lacking, and that this deficiency in warning made the product 'unreasonably dangerous.'" *Phillips v. A-Best Products Co.*, 665 A.2d 1167, 1171 (Pa. 1995). *Tincher* restored the "unreasonably dangerous" element of strict liability to the jury as the finder of fact. 104 A.3d at 380-81.

After *Tincher*, "[a] plaintiff can show a product was defective" where a "deficiency in warning made the product unreasonably dangerous." *High v. Pennsy Supply, Inc.*, 154 A.3d 341, 351 (Pa. Super. 2017) (quoting *Phillips*, *supra*). With design and warning defect claims routinely tried

together, juries would be confused, and error invited, by using the overruled *Azzarello* instruction in warning cases. Thus, the *Tincher*/§402A "unreasonably dangerous" element should be charged in warning cases. *See Amato v. Bell & Gossett*, 116 A.3d 607, 620 (Pa. Super. 2015) (*Tincher* "provided something of a road map for navigating the broader world of post-*Azzarello* strict liability law" in warning cases), *appeal dismissed*, 150 A.3d 956 (Pa. 2016); *Horst v. Union Carbide Corp.*, 2016 WL 1670272, at *15 (Pa. C.P. Lackawanna Co. April 27, 2016) (*Tincher* and "defective product unreasonably dangerous" apply to warning claims); *Chandler v. L'Oreal USA, Inc.*, 340 F. Supp.3d 551, 561 (W.D. Pa. 2018) (applying *Tincher* to warning claim); *Igwe v. Skaggs*, 258 F. Supp.3d 596, 609-10 (W.D. Pa. 2017) (plaintiff "may recover only if the lack of warning rendered the product unreasonably dangerous"); *Wright v. Ryobi Technologies, Inc.*, 175 F. Supp.3d 439 (E.D. Pa. 2016) ("[a] plaintiff raising a failure-to-warn claim must establish . . . the product was sold in a defective condition unreasonably dangerous to the user"); *Inman v. General Electric Co.*, 2016 WL 5106939, at *7 (W.D. Pa. Sept. 20, 2016) ("a plaintiff raising a failure to warn claim must establish . . . that the product was sold in a defective condition 'unreasonably dangerous' to the user"); *Bailey v. B.S. Quarries, Inc.*, 2016 WL 1271381, at *14-15 (M.D. Pa. March 31, 2016) (*Azzarello* . . . and its progeny are no longer good law" with respect to plaintiff's warning claim).

Tincher relied heavily on David G. Owen, *Products Liability Law* (Hornbook Series 2d ed. 2008). 104 A.3d at 387-402 (twelve separate citations). The Owen Handbook further supports applying *Tincher*'s negligence-influenced defect analysis to warning claims. Owen Handbook §9.2 at 589 ("claims for warning defects in negligence and strict liability in tort are nearly, or entirely, identical").

Another issue *Tincher* left open is the extent to which the "intended use"/"intended user" doctrine that developed under *Azzarello* remains viable, or conversely, whether it has been displaced by negligence concepts of reasonableness and foreseeability. 104 A.3d at 410; *see*, *e.g.*, *Pennsylvania Dep't of Gen. Services v. U.S. Mineral Products Co.*, 898 A.2d 590, 600 (Pa. 2006) (strict liability exists "only for harm that occurs in connection with a product's intended use by an intended user"). This instruction takes no position on that issue, offering alternative "intended" and "reasonably foreseeable" language.

The Pa. Bar institute's SSJI (Civ.) §16.122 fails to follow *Tincher* by omitting §402A's "unreasonably dangerous" defect standard, returned to the jury by *Tincher*. The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). Here, the SSJI ignore *Tincher*'s "significant[] alter[ation of] the common law framework for strict products liability." *High v. Pennsy Supply, Inc.*, 154 A.3d 341, 347 (Pa. Super. 2017).

Also unlike the SSJI, this instruction follows *Tincher* by including factors that a jury may consider in evaluating whether a defective warning made the product unreasonably dangerous. *See* 104 A.3d at 351 ("when a court instructs the jury, the objective is to explain to the jury how it should approach its task and the factors it should consider in reaching its verdict"). The factors are derived from *Tincher*'s list of those relevant to the "consumer expectations" design defect test. *Id.* at 387. Using these factors is appropriate since "express" representations such as warnings and instructions are a major source of consumer expectations about products. *Id.*; *High*, 154 A.3d at 348.

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16.35 STRICT LIABILITY – POST-SALE DUTY TO WARN

The duty to provide an adequate product warning can arise even after the product is sold, under certain circumstances. First, as you were instructed earlier, the product's unreasonably dangerous condition must have existed at the time the product left the defendant's control. Second, the potential harm must be both substantial and preventable. Third, the defendant must have learned about the risk created by the product's unreasonably dangerous condition sufficiently before the plaintiff suffered harm so that the defendant could take reasonable steps to warn reasonably foreseeable users about the risk. Fourth, a reasonable and practical means must have existed so that the defendant's post-sale warning would have been received and acted upon, either by the plaintiff, or by someone else in a position to act, in a way that would have prevented the plaintiff's harm.

Factors that you may consider in deciding if a post-sale warning should have been given include the nature of the product, the nature and likelihood of harm, the feasibility and expense of issuing a warning, whether the claimed defect was repairable, whether the product was mass-produced, or alternatively sold in a small and distinct market, whether the product's users could be easily identified and reached, and the likelihood that the product's purchasers would be unaware of the risk of harm.

RATIONALE

Pennsylvania recognized a post-sale duty to warn in *Walton v. Avco Corp.*, 610 A.2d 454, 459 (Pa. 1992). In *Walton*, there was "no dispute" that the product was defective. *Id.* at 456. As discussed in the rationale for Instruction §16.10, strict liability under the Restatement (Second) of Torts §402A (1965), requires that the product defect exist when the product leaves the defendant's control. In *DeSantis v. Frick Co.*, 745 A.2d 624 (Pa. Super. 1999), the court applied §402A's defect-at-sale requirement to the *Walton* post-sale duty to warn, holding that "whether the claim is grounded in negligence or strict liability, no post-sale duty to warn about changes in technology existed where the product was not defective at the time of sale." *Id.* at 630-31. Thus, before the jury may consider a ***post-sale*** duty to warn, it must first find, under §402A, both that the product had an unreasonably dangerous defect, and that this defect existed at the time the product was sold. *See* Instructions §§16.10, 16.20(1).

The duty recognized in *Walton* was limited by negligence considerations of reasonableness and practicality. 610 A.2d at 459 ("sellers must make reasonable attempts to warn the user or consumer"). "[T]he peculiarities of the industry . . . support[ed] the imposition" of a post-sale duty to warn. The product was not an "ordinary good . . . that could get swept away in the currents of commerce, becoming impossible to track or difficult to locate." *Id.* It was "not mass-produced or mass-marketed," but rather was "sold in a small and distinct market" in which product servicers were a "convenient and logical points of contact." *Id.* Moreover, the manufacturer "remained in contact" with such servicers "for the very purpose of keeping [them] current on all pertinent information." *Id.* All these factors made imposition of a post-sale duty to warn "proper." *Id.*

Walton's reliance on considerations of reasonableness and practicality is consistent with the subsequent general abolition of the dichotomy between negligence and strict liability. *See Tincher v. Omega Flex, Inc.,* 104 A.3d 328, 380-81 (Pa. 2014) ("strict" separation of negligence and strict liability concepts is "undesirable"; "elevat[ing] the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative" not "consistent with reason," and "validate[d] the suggestion that the cause of action, so shaped, was not viable"). *Tincher* also confirmed Restatement §402A as the basis for strict products liability in Pennsylvania. 104 A.3d at 399. Thus, *DeSantis* correctly rejected Restatement (Third) of Torts, Products Liability §10 (1998), which would have extended post-sale warning duties to products that were not defective when they left the defendant's control. *Accord Inman v. General Electric Co.*,

2016 WL 5106939, at *6 (W.D. Pa. Sept. 20, 2016) (following *DiSantis* post-*Tincher*); *Trask v. Olin Corp.*, 2016 WL 1255302, at *9 n.20 (W.D. Pa. March 31, 2016) (same).

No post-sale duty to warn has been imposed on "common business appliances." *Habecker v. Clark Equipment Co.*, 797 F. Supp. 381, 388 (M.D. Pa. 1992), *aff'd*, 36 F.3d 278 (3d. Cir. 1994); *Boyer v. Case Corp.*, 1998 WL 205695, at *1-2 (E.D. Pa. 1998) (same). *See Ierardi v. Lorillard, Inc.*, 777 F. Supp. 420, 423 (E.D. Pa. 1991) (impossible to give post-sale warnings to cigarette smokers). There must be "logical and convenient locations through which [product] manufacturers can contact customers" before a post-sale duty to warn can exist. *Trask*, 2016 WL 1255302, at *10 (post-*Tincher*).

The factors in the second paragraph are drawn not only from *Walton*, but also from the extensive discussion in *Patton v. Hutchinson Wil-Rich Manufacturing Co.*, 861 P.2d 1299, 1315 (Kan. 1993).

Beyond warnings, no duty to recall or retrofit a product exists under Pennsylvania law. *Lynch v. McStome & Lincoln Plaza Assocs.*, 548 A.2d 1276, 1281 (Pa. Super. 1988); *Sliker v. National Feeding Systems, Inc.*, 52 D.&C.5th 65, 92-93 (Pa. C.P. Clarion Co. 2015) (post-*Tincher*); *Habecker v. Copperloy Corp.*, 893 F.2d 49, 54 (3d Cir. 1990) (applying Pennsylvania law); *Talarico v. Skyjack, Inc.*, 191 F. Supp.3d 394, 398-401 (M.D. Pa. 2016) (post-*Tincher*); *McLaud v. Industrial Resources, Inc.*, 2016 WL 7048987, at *8 (M.D. Pa. 2016) (post-*Tincher*); *Inman*, 2016 WL 5106939, at *7 (post-*Tincher*); *Padilla v. Black & Decker Corp.*, 2005 WL 697479, *7 (E.D. Pa. 2005); *Girard v. Allis Chalmers Corp.*, 787 F. Supp. 482, 486 n,3 (W.D. Pa. 1992); *Boyer*, 1998 WL 205695, at *2. Nor has a general post-sale duty to warn been imposed on a successor corporation, corporate affiliates, or third-party suppliers, *See LaFountain v. Webb Industies Corp.*, 951 F.2d 544, 549 (3d Cir. 1991) (applying Pennsylvania law); *Zhao v. Skinner Engine Co.*, 2013 WL 6506125, at *4 & n.13 (E.D. Pa. Dec. 10, 2013); *Olejar v. Powermatic Division*, 1992 WL 236960, at *5 (E.D. Pa. Sept. 17, 1992); *Gillyard v. Eastern Lift Truck Co.*, 1992 WL 25826, at *3 (E.D. Pa. Feb. 7, 1992).

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16.40 "HEEDING PRESUMPTION" FOR SELLER/DEFENDANT WHERE WARNINGS OR INSTRUCTIONS ARE GIVEN

Where the defendant provides adequate product warnings or instructions, it may reasonably assume that those warnings will be read and heeded. You may not find the defendant liable for harm caused by the plaintiff not reading or heeding adequate warnings or instructions provided by the defendant.

RATIONALE

"Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." Restatement (Second) of Torts §402A, comment j (1965). Comment j is the law of Pennsylvania. *E.g.*, *Davis v. Berwind Corp.*, 690 A.2d 186, 190 (Pa. 1997); *Hahn v. Richter*, 673 A.2d 888, 890 (Pa. 1996) (both applying comment j). Thus, "comment j gives an evidentiary advantage to the defense" where warnings are adequate. *Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534, 538 (Pa. Super. 2003), *aff'd mem.*, 881 A.2d 1262 (Pa. 2005). The comment j presumption was rejected by the Restatement (Third) of Torts, Products Liability §2, comment l & Reporter's Notes (1998). In *Tincher*, however, Pennsylvania declined to "move" to the Third Restatement. *Tincher v. Omega Flex, Inc.,* 104 A.3d 328, 399 (Pa. 2014). Thus, the comment j presumption remains the law of Pennsylvania.

In *Davis* the defendant could not be liable for its product lacking an unremovable guard where it adequately warned users to use the guard and avoid the area in question while the product was operating. Because "the law presumes that warnings will be obeyed," *id.* at 190 (following comment j), it was "untenable" that defendants "must anticipate that a specific warning" would not be obeyed. *Id.* at 190-91. Disobedience of adequate warnings is unforeseeable as a matter of law. *Id. Accord Gigus v. Giles & Ransome, Inc.*, 868 A.2d 459, 462-63 (Pa. Super. 2005); *Fletcher v. Raymond Corp.*, 623 A.2d 845, 848 (Pa. Super. 1993); *Roudabush v. Rondo, Inc.*, 2017 WL 3912370, at *7 (W.D. Pa. Sept. 5, 2017) (post-*Tincher*). Thus, where plaintiffs advance design defect allegations, as in *Davis*, *Gigus*, *Fletcher*, and *Roudabush*, juries should be instructed on the legal import of relevant warnings, should they find them adequate.

The Pa. Bar Institute's SSJI 16.40 is classified as a warning instruction. That is incorrect. In warning defect cases, where the warning is "proper and adequate," *id.*, the defendant necessarily prevails on the warning's adequacy alone. *E.g.*, *Mackowick v. Westinghouse Electric Corp.*, 575 A.2d 100, 103-04 (Pa. 1990). Thus a warning causation instruction predicated on an "adequate" warning is superfluous because where a warning is found adequate, the jury will never reach causation. The effect of adequate warnings can only be a subject of jury consideration where the defect that is claimed to render the product unreasonably dangerous is not the warning itself. *See Cloud v. Electrolux Home Products, Inc.*, 2017 WL 3835602, at *2-3 (E.D. Pa. Jan. 26, 2017) (jury to consider whether plaintiff conduct in not "heeding instructions" that "a reasonable consumer" would have followed is part of design defect analysis).

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16.50 STRICT LIABILITY – DUTY TO WARN – "HEEDING PRESUMPTION" IN WORKPLACE INJURY CASES

[This instruction is only to be given in cases involving workplace injuries.]

If you find that warnings or instructions were required to make the product nondefective, and that the product was unreasonably dangerous without such warnings or instructions, then the law presumes, and you would have to presume, that, if there had been adequate warnings or instructions, the plaintiff would have followed them.

This presumption is rebuttable, and to overcome it, the defendant's evidence must establish that the plaintiff would not have heeded adequate warnings or instructions. If you find that the defendant has not rebutted this presumption, then you may not find for the defendant based on a conclusion that, even with adequate warnings or instructions, the plaintiff would not have read or heeded them.

RATIONALE

During the *Azzarello* era, some courts recognized a "logical corollary" to the comment j presumption that adequate warnings are read and heeded (*see* Rationale for SSJI 16.40, *supra*) that where a warning is inadequate, a plaintiff will be presumed to have read and heeded an adequate warning, had one been given. *Coward v. Owens-Corning Fiberglas Corp.*, 729 A.2d 614, 621 (Pa. Super. 1999), *appeal granted*, 743 A.2d 920 (Pa. 1999); *Pavlik v. Lane Limited/Tobacco Exporters International*, 135 F.3d 876, 883 (3d Cir. 1998) (applying Pennsylvania law). However, the bankruptcy of the asbestos defendant in *Coward* foreclosed the Pennsylvania Supreme Court from ruling on the issue in *Coward* and the high court has yet to revisit it.

In *Tincher v. Omega Flex, Inc.,* 104 A.3d 328 (Pa. 2014), the court declined to adopt the Third Restatement of Torts, which would have abolished the comment j presumption, and thus its "corollary." *Id.* at 399; *compare* Restatement (Third) of Torts, Products Liability §2, comment l & Reporter's Notes (1998).

In Pennsylvania, the heeding presumption has been limited to products liability cases involving workplace injuries such as *Coward*. "[W]here the plaintiff is not forced by employment to be exposed to the product causing harm, then the public policy argument for an evidentiary advantage becomes less powerful." *Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534, 538 (Pa. Super. 2003), *aff'd*, 881 A.2d 1262 (Pa. 2005) (per curiam); *accord Moroney v. General Motors Corp.*, 850 A.2d 629, 634 & n.3 (Pa. Super. 2004) (heeding presumption "authorized only in cases of workplace exposure," not automobiles); *Goldstein v. Phillip Morris*, 854 A.2d 585, 587 (Pa. Super. 2004) (same as *Viguers*); *Sliker v. National Feeding Systems, Inc.*, 52 D.&C.5th 65, 68-69(Pa. C.P. Clarion Co. 2015). *See Demmler v. SmithKline Beecham Corp.*, 671 A.2d 1151, 1155 (Pa. Super. 1996) ("proximate cause is not presumed" in prescription medical product cases); *Chandler v. L'Oreal USA, Inc.*, 340 F. Supp.3d 551, 562-64 (W.D. Pa. 2018) (not applying heeding presumption in consumer product case where plaintiff failed to read warning).

The heeding presumption is "rebuttable upon evidence that the plaintiff would have disregarded a warning even had one been given, *Coward*, 729 A.3d at 620, with the burden of production of such evidence initially on the defendant. *Coward*, 720 A.2d at 622. Once the defendant has produced rebuttal evidence, the burden "shifts back to the plaintiff to produce evidence that he would have acted to avoid the underlying hazard had the defendant provided an adequate warning." *Id.* Examples of proper rebuttal evidence are: (1) that the plaintiff already knew of the risk, or (2) in fact failed to read the warnings (if any) that were given. *Id.* at 620-21 (discussing *Sherk v. Daisy-Heddon*, 450 A.2d 615, 621 (Pa. 1982), and *Phillips v. A-Best Products Co.*, 665 A.2d 1167, 1171 (Pa. 1995)); *see*, *e.g.*, *Nesbitt v. Sears, Roebuck & Co.*, 415 F. Supp.2d 530, 543-44 (E.D. Pa. 2005). Rebutting the heeding presumption requires only

evidence "sufficient to support a finding contrary to the presumed fact." *Coward*, 729 A.2d at 621.

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16.60 STRICT LIABILITY – DUTY TO WARN – CAUSATION, WHEN "HEEDING PRESUMPTION" FOR PLAINTIFF IS REBUTTED

[No instruction should be given.]

RATIONALE

Once the heeding presumption has been rebutted, it "is of no further effect and drops from the case." *Coward*, 729 A.2d at 621; *accord*, *e.g.*, *Overpeck v. Chicago Pneumatic Tool Co.*, 823 F.2d 751, 756 (3d Cir. 1987) (applying Pennsylvania law). Thus, there is no need for a separate standard instruction, concerning how the jury should proceed once the presumption has been rebutted. *Cf.* PBI SSJI (Civ) 16.60 ("Duty to Warn – Causation, When 'Heeding Presumption' for Plaintiff Is Rebutted"). Where the jury is to decide whether the heeding presumption is rebutted, the only additional instruction appropriate in the event that the jury finds in favor of rebuttal is the generally applicable causation instruction. Thus, there is no need for a separate SSJI 16.60.

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16.70 STRICT LIABILITY – FACTUAL CAUSE

If you find that the product was defective, the defendant is liable for all harm caused to the plaintiff by such defective condition. A defective condition is the factual cause of harm if the harm would not have occurred absent the defect. In order for the plaintiff to recover in this case, the defendant's conduct must have been a factual cause of the accident.

RATIONALE

This instruction incorporates the first paragraph of PBI SSJI (Civ) 16.70, which is a correct statement of the "but for" causation requirement of Pennsylvania law. "But for" causation is a well-established element in ordinary Pennsylvania product liability cases. *E.g.*, *Summers v. Giant Food Stores, Inc.,* 743 A.2d 498, 509 (Pa. Super. 1999); *First v. Zem Zem Temple*, 686 A.2d 18, 21 & n.2 (Pa. Super. 1996); *Klages v. General Ordnance Equipment Corp.*, 367 A.2d 304, 313 (Pa. Super. 1976); *E.J. Stewart, Inc. v. Aitken Products, Inc.*, 607 F. Supp. 883, 889 (E.D. Pa. 1985) (followed in *Summers* and *First*). Where more than one possible cause of the plaintiff's harm is at issue, *see* instruction 16.80, below.

The PBI commentary, however, is no longer viable after *Tincher v. Omega Flex, Inc.,* 104 A.3d 328 (Pa. 2014). Its suggestion that "foreseeability," and thus abnormal use, were "stricken from strict liability" as "a test of negligence" is no longer the law. *Tincher* found "undesirable" *Azzarello*'s "strict" separation of negligence and strict liability concepts. "[E]levat[ing] the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative" was not "consistent with reason," and "validate[d] the suggestion that the cause of action, so shaped, was not viable." *Id.* at 380-81. Far from separating strict liability and negligence, *Tincher* emphasized their overlap. *Id.* at 371 (describing "negligence-derived risk-utility balancing in design defect litigation"); *id.* ("in design cases the character of the product and the conduct of the manufacturer are largely inseparable"); *id.* at 401 ("the theory of strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty") (internal citations omitted).

The PBI commentary as to abnormal use, relying on the plurality decision in *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 898 (Pa. 1975), is also obsolete in that *Berkebile* was overruled, specifically as to abnormal use, by *Reott v. Asia Trend, Inc.*, 55 A.3d 1088, 1100 (Pa. 2012) (rejecting "non-precedential sentiments raised by the lead opinion in *Berkebile* that 'abnormal use' is to be used as rebuttal evidence only"). As confirmed in *Reott*, abnormal use remains a well-established strict liability defense in Pennsylvania. *See also Barnish v. KWI Building Co.*, 980 A.2d 535, 544-45 (Pa. 2009); *Sherk v. Daisy-Heddon*, 450 A.2d 615, 617-18 (Pa. 1982); *Brill v. Systems Resources, Inc.*, 592 A.2d 1377, 1379 (Pa. Super. 1991); *Metzgar v. Playskool Inc.*, 30 F.3d 459, 464-65 & n.9 (3d Cir. 1994) (applying Pennsylvania law).

Other topics mentioned in PBI SSJI (Civ) 16.70 are separately addressed in these suggested instructions. The proper use of evidence of a plaintiff's conduct is addressed in suggested instruction 16.122(4). Crashworthiness is addressed in suggested instructions 16.175, 16.176, and 16.177.

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16.80 STRICT LIABILITY – (MULTIPLE POSSIBLE CONTRIBUTING CAUSES)

In this case you must evaluate evidence of several possible causes, including a defective condition in the defendant's product, to decide which, if any, are factual causes of the plaintiff's harm. A possible cause becomes a legal cause of the plaintiff's harm when it was a substantial factor in bringing that harm about. In order for the plaintiff to recover in this case, the defective condition in the defendant's product thus must have been a substantial factor in bringing about the plaintiff's harm. More than one substantial factor may combine to bring about the plaintiff's harm.

You should use your common sense in determining whether each possible cause was a substantial factor in bringing about the plaintiff's harm. A substantial factor must be an actual real factor, although the result may be unusual or unexpected, but it is not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with the plaintiff's harm.

RATIONALE

This instruction restores the "substantial factor" concurrent causation test of Restatement (Second) of Torts §431 (1965), in concurrent cause cases. "We have adopted a 'substantial factor' standard for legal causation." *Commonwealth v. Terry*, 521 A.2d 398, 407 (Pa. 1987). The Pennsylvania Supreme Court has repeatedly confirmed "substantial factor" as the proper concurrent causation standard specifically in product liability cases. "In a products liability action, Pennsylvania law requires that a plaintiff prove . . . that the [product] defect was the substantial factor in causing the injury." *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1037 n.2 (Pa. 2016) (quoting *Spino v. John S. Tilley Ladder Co.*, 696 A.2d 1169, 1172 (Pa. 1997)). *See Betz v. Pneumo Abex LLC*, 44 A.3d 27, 58 (Pa. 2012); *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1165 (Pa. 2010); *Gregg v. V-J Auto Parts, Co.*, 943 A.2d 216, 227 (Pa. 2007); *Harsh v. Petroll*, 887 A.2d 209, 213 n.9 (Pa. 2005). *See also* Restatement (Second) of Torts §431 (1965).

The second paragraph is based on the concurrent causation jury charge affirmed in *Roverano v. John Crane, Inc.*, 177 A.3d 892, 899 (Pa. Super. 2017), *appeal granted,* 190 A.3d 591 (Pa. 2018). "[T]he jury should consider [whether] the plaintiff's exposure to each defendant's product "was on the one hand, a substantial factor or a substantial cause or, on the other hand, whether the defendant's conduct was an insignificant cause or a negligible cause." *Id.* at 897 (quoting *Rost*, 151 A.3d at 1049). "[W]e have consistently held that multiple substantial causes may combine and cooperate to produce the resulting harm to the plaintiff." *Id.* at 898

While the PBI's SSJI (Civ.) initially enunciated the correct "substantial factor" concurrent causation standard (*e.g.* SSJI (Civ.) §8.04 (1980 revision), the current suggested instructions, use only "factual cause," a vague term that has not been recognized as an adequate causation standard by the Pennsylvania Supreme Court. SSJI (Civ.) §§16.70. 16.80, Given the well-established Pennsylvania legal pedigree of "substantial factor" causation, and that terminology's superior ability to convey the concept of causation to the jury in language laypersons can understand, these suggested instructions adopt "substantial factor" as the standard for charging the jury.

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16.85 STRICT LIABILITY – (MULTIPLE POSSIBLE CONTRIBUTING EXPOSURES)

In this case you must evaluate evidence of the [plaintiff's/decedent's] exposure to asbestos from several possible sources. In order to recover from any of the defendants, plaintiff must establish that [s/he/the decedent] inhaled asbestos fibers from that defendant's product(s), and that the [plaintiff's/decedent's] exposure from that defendant's product(s) was a substantial factor in causing the [plaintiff's/decedent's] harm. You may find asbestos exposure to be such a substantial factor if you believe that evidence establishes that the [plaintiff/decedent] was exposed to that defendant's asbestos containing product(s): (1) sufficiently frequently; (2) with sufficient regularity; (3) and the exposure was sufficiently proximate – that is, [s/he] was close enough to the product – that it contributed to [his/her] harm. You must make this determination as to each defendant separately. However, more than one substantial factor may combine to bring about the [plaintiff's/decedent's] harm.

You should use your common sense in determining whether each possible cause was a substantial factor in bringing about the [plaintiff's/decedent's] harm. A substantial factor must be an actual real factor, although the result may be unusual or unexpected, but it is not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with the plaintiff's harm.

RATIONALE

In asbestos litigation, the "substantial factor" concurrent causation test (see Instruction §16.80) has been refined to require the plaintiff to produce "evidence concerning the frequency, regularity, and proximity of [the plaintiff's or the decedent's] exposure to asbestos-containing products sold by" each defendant. *Gregg v. V-J Auto Parts, Co.*, 943 A.2d 216, 227 (Pa. 2007). *See also Betz v. Pneumo Abex LLC*, 44 A.3d 27, 56-57 (Pa. 2012) (discussing application of frequency, regularity, and proximity test); *Nelson v. Airco Welders Supply*, 107 A.3d 146, 157-58 (Pa. Super. 2014) (en banc) (same). "Our decisions in *Gregg* and *Betz* aligned Pennsylvania with the majority of other courts adopting the 'frequency, regularity, and proximity' test." *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1049 (Pa. 2016).

Under this test, "to create a jury question, a plaintiff must adduce evidence that exposure to defendant's asbestos-containing product was sufficiently 'frequent, regular, and proximate' to support a jury's finding that defendant's product was substantially causative of the disease." *Rost*, 151 A.3d at 1044. Such evidence varies from case to case, but must "tak[e] into consideration exposure history, individual susceptibility, biological plausibility, and relevant scientific evidence (including epidemiological studies)." *Id.* at 1046 (footnote omitted). A single, or *de minimis* exposure to a defendant's product is insufficient. *Id.* at 1048 ("causation experts may not testify that a single exposure (i.e., 'one or a *de minimis* number of asbestos fibers') is substantially causative"); *Vanaman v. DAP, Inc.*, 966 A.2d 603, 610 (Pa. Super. 2009) (en banc) ("very minimal exposure is insufficient to implicate a fact issue concerning the substantial-factor causation").

The rest of this instruction incorporates the general instruction on substantial factor causation discussed in Instruction §16.80.

Because the frequency, regularity, and proximity test has often been applied in asbestos mesothelioma cases, this instruction includes as optional phrasing consistent with a wrongful death action.

While the frequency, regularity, and proximity test has to date been limited to asbestos litigation, it is possible that this test might apply in other multiple exposure cases involving other hazardous substances. *See Melnick v. Exxon Mobil Corp.*, 2014 WL 10916974, at *7

(Pa. Super. June 9, 2014) (mem.) (test applies in "exposure cases," which could include benzene).

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16.90 STRICT LIABILITY – MANUFACTURING DEFECT – MALFUNCTION THEORY

The plaintiff may prove a manufacturing defect indirectly by showing the occurrence of a malfunction of a product during normal use, without having to prove the existence of a specific defect in the product that caused the malfunction. The plaintiff must prove three facts: that the product malfunctioned, that it was given only normal or reasonably foreseeable use prior to the accident, and that no reasonable secondary causes were responsible for the product malfunction.

RATIONALE

The so-called "malfunction theory" is a method of circumstantial proof of defect available "[i]n certain cases of alleged manufacturing defects." *Long v. Yingling*, 700 A.2d 508, 514 (Pa. Super. 1997). To establish a basis for liability under the malfunction theory, a plaintiff must prove three things: a product malfunction, only normal product use, and absence of "reasonable secondary causes" for the malfunction:

> First, the "occurrence of a malfunction" is merely circumstantial evidence that the product had a defect, even though the defect cannot be identified. The second element in the proof of a malfunction theory case, which is evidence eliminating abnormal use or reasonable, secondary causes, also helps to establish the first element of a standard strict liability case, the existence of a defect. By demonstrating the absence of other potential causes for the malfunction, the plaintiff allows the jury to infer the existence of defect from the fact of a malfunction.

Barnish v. KWI Building Co., 980 A.2d 535, 541 (Pa. 2009). Without this proof, "[t]he mere fact that an accident happens . . . does not take the injured plaintiff to the jury." *Dansak v. Cameron Coca-Cola Bottling Co.*, 703 A.2d 489, 496 (Pa. Super. 1997).

This instruction follows the post-*Barnish* charge approved in *Wiggins v. Synthes*, 29 A.3d 9, 18-19 (Pa. Super. 2011), as modified by *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), to include "reasonably foreseeable" as the standard for abnormal use. Prior to *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978), the standard for abnormal use in a malfunction theory case "depend[ed] on whether the use was reasonably foreseeable by the seller." *Kuisis v. Baldwin-Lima-Hamilton Corp.*, 319 A.2d 914, 921 n.13 (Pa. 1974) (plurality opinion). *Tincher* overruled *Azzarello*'s bar to strict liability jury instructions mentioning reasonableness and foreseeability, 104 A.3d at 389, and cited *Kuisis* favorably. *Id.* at 363-64. Since plaintiffs must prove lack of abnormal use as an element of their *prima facie* circumstantial defect case, a second, separate jury instruction on abnormal use is unnecessary. *Wiggins*, 29 A.3d at 18-19.

The malfunction theory is proper only in manufacturing defect cases. *Rogers v. Johnson & Johnson Products, Inc.*, 565 A.2d 751, 755 (Pa. 1989) (accepting malfunction theory "as appropriate in ascertaining the existence of a defect in the manufacturing process"); *Dansak*, 703 A.2d at 495 ("in cases of a manufacturing defect, a plaintiff could prove a defect through a malfunction theory"); *accord Ducko v. Chrysler Motors Corp.*, 639 A.2d 1204, 1205 (Pa. Super. 1994); *Smith v. Howmedica Osteonics Corp.*, 251 F. Supp.3d 844, 851-52 (E.D. Pa. 2017); *Varner v. MHS, Ltd.*, 2 F. Supp.3d 584, 592 (M.D. Pa. 2014).

In design defect cases, *Tincher* adopted a "composite" approach to liability that "requires proof, in the alternative, either of the ordinary consumer's expectations or of the risk-utility of a product." 104 A.3d at 401. Although *Tincher* considered the malfunction theory, *id.* at 362-63, it did not identify product malfunction as a relevant factor for either method of proving design defect. *Id.* at 387 (consumer expectations), 389-90 (risk-utility). Thus, under *Tincher*, the malfunction theory cannot be a method of proving design defect. *See also Dansak*, 703 A.2d at 495 n.8 ("to prove that an entire line of products was designed improperly, the plaintiff need not resort to the malfunction theory").

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A warned-of malfunction would not be unexplained. Thus, no precedent supports use of the malfunction theory in warning cases. *See Dolby v. Ziegler Tire & Supply Co.*, 2017 WL 781650, at *6, 161 A.3d 393 (Table) (Pa. Super. 2017) (plaintiffs "only pursued a strict liability failure to warn case, the malfunction theory is not applicable") (unpublished); *cf. Barnish*, 980 A.2d at 542 ("facts indicating that the plaintiff was using the product in violation of the product directions and/or warnings" defeats malfunction theory as a matter of law).

The malfunction theory is limited to new, or nearly new products, as the longer a product is used, the more likely reasonable secondary causes, such as improper maintenance or ordinary wear and tear, become. "[P]rior successful use" of a product "undermines the inference that the product was defective when it left the manufacturer's control." *Barnish*, 980 A.2d at 547; *accord Kuisis*, 319 A.2d at 922-23 ("normal wear-and-tear" over 20 years precluded malfunction theory); *Nobles v. Staples, Inc.*, 2016 WL 6496590, at *6 (Pa. C.P. Phila. Co. Feb. 9, 2016) (three years of successful use precludes malfunction theory), *aff'd*, 150 A.3d 110 (Pa. Super. 2016); *Wilson v. Saint-Gobain Universal Abrasives, Inc.*, 2015 WL 1499477, at *15 (W.D. Pa. Apr. 1, 2015) (malfunction theory allowed where new product "failed as soon as [plaintiff] touched it"); *Banks v. Coloplast Corp.*, 2012 WL 651867, at *3 (E.D. Pa. Feb. 28, 2012) (malfunction on "first use" allows malfunction theory); *Hamilton v. Emerson Electric Co.*, 133 F. Supp.2d 360, 378 (M.D. Pa. 2001) ("one to two years" of successful use precludes malfunction theory).

The malfunction theory only applies "where the allegedly defective product has been destroyed or is otherwise unavailable." *Barnish*, 980 A.2d at 535; *accord Wiggins*, 29 A.3d at 14; *Wilson*, 2015 WL 1499477, at *12-13; *Houtz v. Encore Medical Corp.*, 2014 WL 6982767, at *7 (M.D. Pa. Dec. 10, 2014); *Ellis v. Beemiller, Inc.*, 910 F. Supp.2d 768, 775 (W.D. Pa. 2012).

A plaintiff has the burden of producing "evidence eliminating abnormal use or reasonable, secondary causes." *Barnish*, 980 A.2d at 541 (quoting *Rogers*, 656 A.2d at 754); *accord Beard v. Johnson & Johnson, Inc.*, 41 A.3d 823, 830 n.10 (Pa. 2012) (noting "plaintiff's burden, under malfunction theory, of addressing alternative causes"). Thus, "a plaintiff does not sustain its burden of proof in a malfunction theory case when the defendant furnishes an alternative explanation for the accident." *Raskin v. Ford Motor Co.*, 837 A.2d 518, 522 (Pa. Super. 2003); *accord Thompson v. Anthony Crane Rental, Inc.*, 473 A.2d 120, 125 (Pa. Super. 1984) (jury finding product operator negligent established "secondary cause" precluding malfunction theory). A plaintiff must also "present[] a case-in-chief free of secondary causes." *Rogers*, 565 A.2d at 755; *accord Stephens v. Paris Cleaners, Inc.*, 885 A.2d 59, 72 (Pa. Super. 2005) (malfunction theory precluded where "record also establishes" use of product in excess of what "it was either designed or manufactured to withstand"). "Defendant's only burden is to identify other possible non-defect oriented explanations." *Long*, 700 A.2d at 515.

This instruction differs from the Pa. Bar Institute's SSJI (Civ.) §16.90 in: (1) explicitly limiting the instruction to manufacturing defect, and (2) using "reasonable foreseeability" language. The SSJI fails to follow *Tincher*. *See Chandler v. L'Oreal USA, Inc.*, 340 F. Supp.3d 551, 564-65 n.4 (W.D. Pa. 2018) (applying *Tincher* to manufacturing defect case). The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). The SSJI notes are also obsolete, citing no precedent less than 20 years old, and in particular omitting *Barnish*.

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16.122(1) STRICT LIABILITY – STATE OF THE ART EVIDENCE

Unknowability of Claimed Defective Condition

You have been instructed about applicable test[s] for unreasonably dangerous product defect. Under the risk/utility test, you must consider known or knowable product risks and benefits. Under the consumer expectations test, the plaintiff must prove that the risk[s] [was/were] unknowable when the product was sold.

[Omit consumer expectations or risk/utility language if that test is not at issue]

Thus, [under either test,] you may only find the defendant liable where the plaintiff proves that the [plans or designs] for the product [or the methods and techniques for the manufacture, inspection, testing and labeling of the product] were state of the art at the time the product left the defendant's control.

"State of the art" means that the technical, mechanical, scientific, [and/or] safety knowledge were known or knowable at the time the product left the defendant's control. Thus, you may not consider technical, mechanical, scientific [and/or] safety knowledge that became available only by the time of trial or at any time after the product left the defendant's control.

RATIONALE

This instruction is to be given where the jury must resolve a dispute over whether the product risk that the plaintiff claims has caused injury was knowable, given the technological state of the art when the product was manufactured or supplied.

In *Tincher v. Omega Flex, Inc.,* 104 A.3d 328 (Pa. 2014), the court rejected the strict separation of negligence and strict liability theories that had been characteristic of Pennsylvania products liability litigation under *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978). *Tincher* replaced *Azzarello*-era defect standards with a "composite" test utilizing both "risk/utility" and "consumer expectations" defect approaches derived from *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978). *See* 104 A.3d at 387-89.

The risk/utility prong of *Tincher*'s "composite" defect test provides "an opportunity to analyze *post hoc* whether a manufacturer's conduct in manufacturing or designing a product was reasonable, which obviously reflects the negligence roots of strict liability." 104 A.3d at 389. The consumer expectations prong is explicitly limited to risks that are "unknowable and unacceptable" to "average or ordinary consumer[s]." *Id.* at 335, 387. *Tincher* did "not purport to either approve or disapprove prior decisional law," on issues such as state of the art. *Id.*

Likewise, Restatement §402A, reaffirmed in *Tincher*, limits the duty to warn to information that the manufacturer or seller "has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge," thus rejecting liability for unknowable product risks. Restatement (Second) of Torts §402A, comment j (1965).

Tincher relied heavily on David G. Owen, *Products Liability Law* (Hornbook Series 2d ed. 2008). 104 A.3d at 387-402 (twelve separate citations). The Owen Handbook supports admission of state of the art evidence, dismissing liability for unknowable defects as a "dwindling idea." Owen Handbook §9.2 at 587. The state of the art is relevant to consumer

expectations "to determine the expectation of the ordinary consumer," and to risk/utility, since the risk-utility test rests on the *foreseeability* of the risk and the availability of a *feasible* alternative design." *Id.* §10.4, at 715 (emphasis original). "[T]he great majority of judicial opinions" hold that "the practical availability of safety technology is relevant and admissible." *Id.* at 717. Likewise, *Barker* recognized that "the evidentiary matters" relevant to its test "are similar to those issues typically presented in a negligent design case." 573 P.2d at 326. Thus, the *Azzarello*-era rationale for exclusion no longer exists after elimination of the strict separation of negligence and strict liability.

Tincher held that, "strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty." 104 A.3d at 401. Accordingly, *Tincher* rejected the view that "negligence concepts" in strict liability could only "confuse" juries.

> [A] strict reading of *Azzarello* is undesirable. . . . Subsequent application of *Azzarello* elevated the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative, whose merits were not examined to determine whether such a bright-line rule was consistent with reason. . . . [T]he effect of the per se rule that negligence rhetoric and concepts were to be eliminated from strict liability law was to validate the suggestion that the cause of action, so shaped, was not viable.

Id. "Even a cursory reading of *Tincher* belies th[e] argument" that *Tincher* "overruled *Azzarello* but did little else." *Renninger v. A&R Machine Shop*, 163 A.3d 988, 1000 (Pa. Super. 2017). Rather, in *Tincher*, "the Supreme Court rejected the '*per se* rule that negligence rhetoric and concepts were to be eliminated from strict liability law.'" *DeJesus v. Knight Industries & Associates, Inc.*, 2016 WL 4702113, at *6 (E.D. Pa. Sept. 8, 2016) (quoting *Tincher*, 104 A.3d at 381). *Tincher* "rejected prior law's effort to completely divorce negligence and strict liability concepts," *Roverano v. John Crane, Inc.*, 177 A.3d 892, 907 (Pa. Super. 2017), *appeal granted,* 190 A.3d 591 (Pa. 2018), thereby "overturn[ing] more than 35 years of Pennsylvania product liability precedent." *Plaxe v. Fiegura*, 2018 WL 2010025, at *6 (E.D. Pa. April 27, 2018).

During the now-repudiated *Azzarello* period, the Superior Court held that strict liability allowed liability for scientifically unknowable product risks, because "inviting the jury to consider the 'state of the art' . . . injects negligence principles into a products liability case." *Carrecter v. Colson Equipment Co.*, 499 A.2d 326, 329 (Pa. Super. 1985). Both pre-*Azzarello* strict liability and negligence liability rejected liability for unknowable product risks. *See Leibowitz v. Ortho Pharmaceutical Corp.*, 307 A.2d 449, 458 (Pa. Super. 1973) ("[a] warning should not be held improper because of subsequent revelations") (opinion in support of affirmance); *Mazur v. Merck & Co.*, 964 F.2d 1348, 1366-67 (3d Cir. 1992) (defect depends on "the state of medical knowledge" at manufacture) (applying Pennsylvania law); *Frankel v. Lull Engineering Co.*, 334 F. Supp. 913, 924 (E.D. Pa. 1971) (§402A "requires only proof that the manufacturer reasonably should have known"), *aff'd*, 470 F.2d 995 (3d Cir. 1973) (*per curiam*).

Post-*Tincher*, technological infeasibility has been recognized as relevant. *Igwe v. Skaggs*, 258 F. Supp.3d 596, 611 (W.D. Pa. 2017) (risk "cannot be reasonably designed out based on the technology used at the time of production"). Pennsylvania cases also support admissibility of state of the art evidence generally. *See Renninger*, 163 A.3d at 1000 ("a large body of post-*Azzarello* and pre-*Tincher* law" is no longer binding precedent); *Webb v. Volvo Cars, LLC*, 148 A.3d 473, 482 (Pa. Super. 2016) (the *Azzarello* "strict prohibition on introducing negligence concepts into strict products liability claims, is no longer the law in Pennsylvania"); *Amato v. Bell & Gossett*, 116 A.3d 607, 622 (Pa. Super. 2015) (defendants may defend on "state-of-the-art" grounds after *Tincher*), *appeal dismissed*, 150 A.3d 956 (Pa. 2016). "A product is not defective if the ordinary consumer would reasonably anticipate and appreciate the dangerous condition of the product and the attendant risk of injury of which the plaintiff complains." *Meyers v. LVD Acquisitions, LLC*, 2016 WL 8652790, at *2 (Pa. C.P. Mifflin Co. Sept. 23, 2016), *aff'd mem.*, 168 A.3d 359 (Pa. Super. 2017).

The contrary SSJI (Civ.) §16.122 does not rely on Pennsylvania law, but rather on the "Wade-Keeton test" that would impute all knowledge available at the time to the

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manufacturer/supplier. *Id.* at Subcommittee Note. However, that test has never been adopted in Pennsylvania, and was criticized by *Tincher*. 104 A.3d at 405 ("Imputing knowledge . . . was theoretically counter-intuitive and offered practical difficulties, as illustrated by the Wade-Keeton debate."). *See* Owen Handbook §10.4 at 733 ("modern products liability law is quite surely better off without a duty to warn or otherwise protect against unknowable risks"). The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). Here, the SSJI ignore *Tincher*'s "significant[] alter[ation of] the common law framework for strict products liability." *High v. Pennsy Supply, Inc.*, 154 A.3d 341, 347 (Pa. Super. 2017).

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16.122(2) STRICT LIABILITY – STATE OF THE ART EVIDENCE

Compliance with Product Safety Statutes or Regulations

You have heard evidence that the [product] complied with the [identify applicable statute or regulation]. While compliance with that [statute or regulation] is not conclusive, it is a factor you should consider in determining whether the design of the product was defective so as to render the product unreasonably dangerous.

RATIONALE

This instruction is to be given where the jury has heard evidence that the product at issue complied with the requirements of an applicable product safety statute or governmental regulation.

In *Tincher v. Omega Flex, Inc.,* 104 A.3d 328 (Pa. 2014), the court rejected the strict separation of negligence and strict liability theories that had been characteristic of Pennsylvania products liability litigation under *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978). *Tincher* replaced *Azzarello*-era defect standards with a "composite" test utilizing both "risk/utility" and "consumer expectations" defect approaches derived from *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978). *See* 104 A.3d at 387-89. *Barker* also recognized that "the evidentiary matters" relevant to its test "are similar to those issues typically presented in a negligent design case." 573 P.2d at 326.

The risk/utility prong of *Tincher*'s "composite" defect test provides "an opportunity to analyze *post hoc* whether a manufacturer's conduct in manufacturing or designing a product was reasonable, which obviously reflects the negligence roots of strict liability." 104 A.3d at 389. The consumer expectations prong is explicitly limited to risks that are "unknowable and unacceptable" to "average or ordinary consumer[s]." *Id.* at 335, 387.

Tincher did "not purport to either approve or disapprove prior decisional law," on issues such as state of the art. *Id.* at 409-10. However, the *Azzarello*-era rationale for exclusion of regulatory compliance evidence no longer exists after elimination of the strict separation of negligence and strict liability. "[S]ubsequent application" of what "bright-line" or "per se" rules against "negligence rhetoric and concepts" is neither "consistent with reason" nor "viable." *Tincher*, 104 A.3d at 380-81. Courts excluding such evidence "relied primarily on *Azzarello* to support the preclusion of government or industry standards evidence, because it introduces negligence concepts into a strict liability claim." *Webb v. Volvo Cars, LLC*, 148 A.3d 473, 483 (Pa. Super. 2016). Thus, "a large body of post-*Azzarello* and pre-*Tincher* law" can no longer be considered binding precedent. *Renninger v. A&R Machine Shop*, 163 A.3d 988, 1000 (Pa. Super. 2017).

Tincher relied heavily on David G. Owen, *Products Liability Law* (Hornbook Series 2d ed. 2008). 104 A.3d at 387-402 (twelve separate citations). The Owen Handbook supports admission of regulatory compliance:

> The rule as to a manufacturer's compliance with a governmental safety standard set forth in a statute or regulation largely mimics the rule on violation: compliance with a regulated safety standard . . . is widely considered proper evidence of a product's nondefectiveness but is not conclusive on that issue.

Id. §6.4, at 401 (footnote omitted).

Tincher held that, "strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty." 104 A.3d at 401. Accordingly, *Tincher* rejected the view that "negligence concepts" in strict liability could only "confuse" juries.

> [A] strict reading of *Azzarello* is undesirable. . . . Subsequent application of *Azzarello* elevated the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative, whose merits were not examined to determine whether such a bright-line rule was consistent with reason. . . . [T]he effect of the per se rule that negligence rhetoric and concepts were to be eliminated

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> from strict liability law was to validate the suggestion that the cause of action, so shaped, was not viable.

Id. "Even a cursory reading of *Tincher* belies th[e] argument" that *Tincher* "overruled *Azzarello* but did little else." *Renninger*, 163 A.3d at 1000. Rather, in *Tincher*, "the Supreme Court rejected the '*per se* rule that negligence rhetoric and concepts were to be eliminated from strict liability law.'" *DeJesus v. Knight Industries & Associates, Inc.*, 2016 WL 4702113, at *6 (E.D. Pa. Sept. 8, 2016) (quoting *Tincher*, 104 A.3d at 381). *Tincher* "rejected prior law's effort to completely divorce negligence and strict liability concepts," *Roverano v. John Crane, Inc.*, 177 A.3d 892, 907 (Pa. Super. 2017), *appeal granted,* 190 A.3d 591 (Pa. 2018), thereby "overturn[ing] more than 35 years of Pennsylvania product liability precedent." *Plaxe v. Fiegura*, 2018 WL 2010025, at *6 (E.D. Pa. April 27, 2018).

During the now-repudiated *Azzarello* period, the Superior Court held that strict liability precluded evidence that the defendant's product complied with governing safety statutes or regulations because "the use of such evidence interjects negligence concepts and tends to divert the jury from their proper focus, which must remain upon whether or not the product . . . was 'lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use.'" *Estate of Hicks v. Dana Cos.*, 984 A.2d 943, 962 (Pa. Super. 2009) (en banc). *Hicks* used the now-repudiated *Azzarello* defect standard to overrule prior precedent that held regulatory compliance admissible in strict liability actions. *See Cave v. Wampler Foods, Inc.*, 961 A.2d 864, 869 (Pa. Super. 2008) (regulatory compliance "evidence is directly relevant to and probative of [plaintiff's] allegation that the product at issue was defective") (overruled in *Hicks*); *Jackson v. Spagnola*, 503 A.2d 944, 948 (Pa. Super. 1986) (regulatory compliance is "of probative value in determining whether there is a defect") (overruled in *Hicks*); *Brogley v. Chambersburg Engineering Co.*, 452 A.2d 743, 745-46 (Pa. Super. 1982) (negligence case; courts have "uniformly held admissible . . . safety codes and regulations intended to enhance safety").

Even *Hicks*, however, recognized that regulatory compliance would be relevant to a consumer expectations test for defect, because "evidence of wide use in an industry may be relevant to prove a defect because the evidence is probative, while not conclusive, on the issue of what the consumer can reasonably expect." 984 A.2d at 966. Likewise, the risk/utility test "reflects the negligence roots of strict liability" and "analyzes *post hoc* whether a manufacturer's conduct . . . was reasonable." *Tincher*, 104 A.3d at 389. Since the risk/utility inquiry involves "conduct," regulatory compliance is admissible evidence. "Pennsylvania courts permit[] defendants to adduce evidence of compliance with governmental regulation in their efforts to demonstrate due care (when conduct is in issue)." *Lance v. Wyeth*, 85 A.3d 434, 456 (Pa. 2014).

Post-*Tincher* Pennsylvania cases support admissibility of state of the art evidence generally. *See Webb*, 148 A.3d at 482 (the *Azzarello* "strict prohibition on introducing negligence concepts into strict products liability claims, is no longer the law in Pennsylvania"); *Amato v. Bell & Gossett*, 116 A.3d 607, 622 (Pa. Super. 2015) (defendants may defend on "state-of-the-art" grounds after *Tincher*), *appeal dismissed*, 150 A.3d 956 (Pa. 2016); *Rapchak v. Haldex Brake Products Corp.*, 2016 WL 3752908, at *3 (W.D. Pa. July 14, 2016) (the "the principles of *Tincher* counsel in favor of [the] admissibility" of compliance with "industry or government standards"); *Morello v. Kenco Toyota Lift*, 142 F. Supp.3d 378, 386 (E.D. Pa. 2015) (expert regulatory compliance testimony held relevant in strict liability).

Neither *Webb* nor *Dunlap v. Federal Signal Corp.*, 194 A.3d 1067 (Pa. Super. 2018), support continuation of *Azzarello*-era evidentiary exclusions. *Webb* chose to apply pre-*Tincher* law to a pre-*Tincher* trial due to concerns about *Tincher*'s "retroactivity." 148 A.3d at 482-83. "The continued viability of the evidentiary rule espoused in *Lewis* and *Gaudio* [was] not before us" in *Dunlap*. 194 A.3d at 1072 n.8.

The contrary SSJI (Civ.) §16.122 would perpetuate the *Lewis per se* exclusion of regulatory compliance evidence. *Id.* at Subcommittee Note (relying solely upon the *Lewis* line of cases). The "suggested" instructions "exist only as a reference material available to

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assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). Here, the SSJI ignore *Tincher*'s "significant[] alter[ation of] the common law framework for strict products liability." *High*, 154 A.3d at 347.

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16.122(3) STRICT LIABILITY – STATE OF THE ART EVIDENCE

Compliance with Industry Standards

You have heard evidence that the [product] complied with the design and safety customs or practices in the [type of product] industry. While compliance with these industry standards is not conclusive, it is a factor you should consider in determining whether the design of the product was defective so as to render the product unreasonably dangerous.

RATIONALE

This instruction is to be given where the jury has heard evidence that the product at issue complied with industry-wide standards.

In *Tincher v. Omega Flex, Inc.,* 104 A.3d 328 (Pa. 2014), the court rejected the strict separation of negligence and strict liability theories that had been characteristic of Pennsylvania products liability litigation under *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978). *Tincher* replaced *Azzarello*-era defect standards with a "composite" test utilizing both "risk/utility" and "consumer expectations" defect approaches derived from *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978). *See* 104 A.3d at 387-89. *Barker* recognized that "the evidentiary matters" relevant to its test "are similar to those issues typically presented in a negligent design case." 573 P.2d at 326.

The risk/utility prong of *Tincher*'s "composite" defect test provides "an opportunity to analyze *post hoc* whether a manufacturer's conduct in manufacturing or designing a product was reasonable, which obviously reflects the negligence roots of strict liability." 104 A.3d at 389; *accord Renninger v. A&R Machine Shop*, 163 A.3d 988, 997 (Pa. Super. 2017) (*Tincher* risk/utility test "is derived from negligence principles"). Likewise, compliance with industry standards would be relevant to consumer expectations test for defect, because "evidence of wide use in an industry may be relevant to prove a defect because the evidence is probative, while not conclusive, on the issue of what the consumer can reasonably expect." *Estate of Hicks v. Dana Cos.*, 984 A.2d 943, 966 (Pa. Super. 2009) (en banc).

Tincher did "not purport to either approve or disapprove prior decisional law," on issues such as state of the art. 104 A.3d at 409-10. However, the *Azzarello*-era rationale for exclusion of industry standards evidence no longer exists after elimination of the strict separation of negligence and strict liability. "[S]ubsequent application" of what "bright-line" or "per se" rules against "negligence rhetoric and concepts" is neither "consistent with reason" nor "viable." *Id.* at 380-81. Courts excluding such evidence "relied primarily on *Azzarello* to support the preclusion of government or industry standards evidence, because it introduces negligence concepts into a strict liability claim." *Webb v. Volvo Cars, LLC*, 148 A.3d 473, 483 (Pa. Super. 2016). *Lewis*, which *Tincher* recognized as "in harmony with *Azzarello*," is part of "a large body of post-*Azzarello* and pre-*Tincher* law" that can no longer be considered binding precedent. *Renninger*, 163 A.3d at 1000-01.

Tincher relied heavily on David G. Owen, *Products Liability Law* (Hornbook Series 2d ed. 2008). 104 A.3d at 387-402 (twelve separate citations). The Owen Handbook views the *Lewis* blanket inadmissibility rule is "an outmoded holdover from early, misguided efforts to distinguish strict liability from negligence," and recognizes that a "great majority of courts allow applicable evidence of industry custom." *Id.* §6.4, at 392-93 (footnote omitted). Industry standards are "some evidence" concerning defect and "does not alone conclusively establish whether a product is defective." *Id.* at 394-95 (footnote omitted).

Tincher held that, "strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty." 104 A.3d at 401. Accordingly, *Tincher* rejected the view that "negligence concepts" in strict liability could only "confuse" juries.

> [A] strict reading of *Azzarello* is undesirable. . . . Subsequent application of *Azzarello* elevated the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative,

> whose merits were not examined to determine whether such a bright-line rule was consistent with reason. . . . [T]he effect of the per se rule that negligence rhetoric and concepts were to be eliminated from strict liability law was to validate the suggestion that the cause of action, so shaped, was not viable.

Id. "Even a cursory reading of *Tincher* belies th[e] argument" that *Tincher* "overruled *Azzarello* but did little else." *Renninger*, 163 A.3d at 1000. Rather, in *Tincher*, "the Supreme Court rejected the '*per se* rule that negligence rhetoric and concepts were to be eliminated from strict liability law.'" *DeJesus v. Knight Industries & Associates, Inc.*, 2016 WL 4702113, at *6 (E.D. Pa. Sept. 8, 2016) (quoting *Tincher*, 104 A.3d at 381). *Tincher* "rejected prior law's effort to completely divorce negligence and strict liability concepts," *Roverano v. John Crane, Inc.*, 177 A.3d 892, 907 (Pa. Super. 2017), *appeal granted,* 190 A.3d 591 (Pa. 2018), thereby "overturn[ing] more than 35 years of Pennsylvania product liability precedent." *Plaxe v. Fiegura*, 2018 WL 2010025, at *6 (E.D. Pa. April 27, 2018).

During the now-repudiated *Azzarello* period, the Pennsylvania Supreme Court held that strict liability precluded evidence that the defendant's product complied with industry standards in *Lewis v. Coffing Hoist Div.*, 528 A.2d 590 (Pa. 1987). "'[I]ndustry standards'" go to the negligence concept of reasonable care, and . . . under our decision in *Azzarello* such a concept has no place in an action based on strict liability in tort." *Id.* at 594. *Lewis* thus used the now-repudiated *Azzarello* defect standard to depart from prior precedent that had held industry standards admissible in strict liability. *See Forry v. Gulf Oil Corp.*, 237 A.2d 593, 598 & n.10 (Pa. 1968) (industry standards – "the custom and practice in the [relevant] industry" held relevant to establishing product defect under §402A).

Post-*Tincher* Pennsylvania cases support admissibility of state of the art evidence generally. *See High v. Pennsy Supply, Inc.*, 154 A.3d 341, 350 n.5 (Pa. Super. 2017) (expert industry standards compliance testimony relevant to product's "nature" in consumer expectations approach); *Webb*, 148 A.3d at 482 (the *Azzarello* "strict prohibition on introducing negligence concepts into strict products liability claims, is no longer the law in Pennsylvania"); *Amato v. Bell & Gossett*, 116 A.3d 607, 622 (Pa. Super. 2015) (defendants may defend on "state-of-the-art" grounds after *Tincher*), *appeal dismissed*, 150 A.3d 956 (Pa. 2016); *Vitale v. Electrolux Home Products, Inc.*, 2018 WL 3868671, at *3 (E.D. Pa. Aug. 14, 2018) ("*Tincher* blurred the bright line demarcation between negligence theories and strict products liability . . . in favor of the admissibility of evidence of compliance with industry standards to defend against strict liability claims"); *Mercurio v. Louisville Ladder, Inc.*, 2018 WL 2465181, at *7 (M.D. Pa. May 31, 2018) (following *Cloud* and *Rapchak*); *Cloud v. Electrolux Home Products, Inc.*, 2017 WL 3835602, at *2 (E.D. Pa. Jan. 26, 2017) ("After *Tincher*, courts should not draw a bright line between negligence theories and strict liability theories regarding evidence of industry standards"); *Rapchak v. Haldex Brake Products Corp.*, 2016 WL 3752908, at *3 (W.D. Pa. July 14, 2016) (the "the principles of *Tincher* counsel in favor of [the] admissibility" of compliance with "industry or government standards"); *Sliker v. National Feeding Systems, Inc.*, 52 D.&C.5th 65, 83 (Pa. C.P. Clarion Co. 2015) (industry standards evidence admissible as "particularly relevant to factor (2)" of *Tincher*'s risk/utility approach).

Neither *Webb* nor *Dunlap v. Federal Signal Corp.*, 194 A.3d 1067 (Pa. Super. 2018), support continuation of *Azzarello*-era evidentiary exclusions. *Webb* chose to apply pre-*Tincher* law to a pre-*Tincher* trial due to concerns about *Tincher*'s "retroactivity." 148 A.3d at 482-83. "The continued viability of the evidentiary rule espoused in *Lewis* and *Gaudio* [was] not before us" in *Dunlap*. 194 A.3d at 1072 n.8.

The contrary SSJI (Civ.) §16.122 would perpetuate the *Lewis per se* exclusion of industry standards evidence. *Id.* at Subcommittee Note (relying solely upon the *Lewis* line of cases). The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). Here, the SSJI ignore *Tincher*'s "significant[] alter[ation of] the common law framework for strict products liability." *High*, 154 A.3d at 347.

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16.122(4) STRICT LIABILITY – PLAINTIFF CONDUCT EVIDENCE

You have heard evidence about the manner that the plaintiff[s] used the product. You may consider this evidence as you evaluate whether the product was in a defective condition and unreasonably dangerous to the user. However, a plaintiff's failure to exercise care while using a product does not require your verdict to be for the defendant.

[If the evidence is that the plaintiff's conduct was "highly reckless" and creates a jury question whether this conduct could be "a sole or superseding cause" of the plaintiff's harm, then the jury should also be instructed on that conduct as a superseding cause.]

RATIONALE

The pre-*Tincher* decision *Reott v. Asia Trend, Inc.*, 55 A.3d 1088 (Pa. 2012), held that a plaintiff conduct, such as product misuse, was admissible in strict liability when "highly reckless" and tending to establish that such conduct "was the sole or superseding cause of the injuries sustained." *Id.* at 1101. *See Chandler v. L'Oreal USA, Inc.*, 340 F. Supp.3d 551, 562-63 (W.D. Pa. 2018) (that plaintiff "did not read" warnings defeated causation). Evidence that showed nothing more than "a plaintiff's comparative or contributory negligence" was not admissible. *Id.* at 1098. Under the Pennsylvania Fair Share Act, plaintiff conduct cannot be apportioned to reduce recovery in strict liability – liability is reduced only by the conduct of "joint defendants." 42 Pa. C.S. §7102(a.1).

However, *Tincher* also viewed plaintiff conduct as relevant to whether a claimed product defect creates an "unreasonably dangerous" product, particularly under the risk/utility prong of its "composite" test. *Tincher v. Omega Flex, Inc.,* 104 A.3d 328, 401-02 (Pa. 2014). The fifth risk/utility factor is, "The user's ability to avoid danger by the exercise of care in the use of the product." *Id.* at 389-90 (quoting factors). Post-*Tincher* courts applying the risk/utility prong utilize these factors to determine unreasonably dangerous defect. *Punch v. Dollar Tree Stores*, 2017 WL 752396, at *8 (Mag. W.D. Pa. Feb. 17, 2017), *adopted*, 2017 WL 1159735 (W.D. Pa. March 29, 2017); *Rapchak v. Haldex Brake Products Corp.*, 2016 WL 3752908, at *2-3 (W.D. Pa. March 15, 2016); *Lewis v. Lycoming*, 2015 WL 3444220, at *3 (E.D. Pa. May 29, 2015); *Capece v. Hess Maschinenfabrik GmbH & Co. KG*, 2015 WL 1291798, at *3 (M.D. Pa. July 14, 2015); *Meyers v. LVD Acquisitions, LLC*, 2016 WL 8652790, at *3 (Pa. C.P. Mifflin Co. Sept. 23, 2016), *aff'd mem.*, 168 A.3d 359 (Pa. Super. 2017); *Sliker v. National Feeding Systems, Inc.*, 52 D.&C.5th 65, 74-76 (Pa. C.P. Clarion Co. Oct. 19, 2015).

Plaintiff conduct evidence thus has been held relevant, regardless of causation, where such evidence would make the risk/utility factor of avoidance of danger through exercise of care in using the product more or less probable. *Cloud v. Electrolux Home Products, Inc.*, 2017 WL 3835602, at *2-3 (E.D. Pa. Jan. 26, 2017) (plaintiff conduct in not "heeding instructions" that "a reasonable consumer" would have followed is admissible); *Punch*, 2017 WL 752396, at *11 ("a jury could conclude that the Plaintiffs might have avoided the injury had they exercised reasonable care with the product"); *Sliker*, 52 D.&C.5th 65, 77 (plaintiff conduct "may be relevant to the risk-utility standard articulated in *Tincher* and is therefore admissible for that purpose"). Exercise of care as risk avoidance, however, is just one factor in the risk/utility determination.

Contributory fault, in and of itself, is not a defense to strict liability. 42 Pa. C.S. §7102(a.1); *see Kimco Development Corp. v. Michael D's Carpet Outlets*, 637 A.2d 603, 606 (Pa. 1993). In cases where plaintiff conduct evidence is admitted as relevant to defect, the plaintiff would be entitled to request a cautionary instruction to prevent the jury from considering such evidence for any other purpose. *Spino v. John S. Tilley Ladder Co.*, 696 A.2d 1169, 1172 (Pa. 1997); *Bialek v. Pittsburgh Brewing Co.*, 242 A.2d 231, 235 (Pa. 1968).

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The contrary SSJI (Civ.) §16.122 does not mention the *Tincher* risk/utility factor of avoidance of danger through exercise of care. *Id.* at Subcommittee Note (discussing plaintiff conduct solely in the causation context). The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). Here, the SSJI, ignore *Tincher*'s "significant[] alter[ation of] the common law framework for strict products liability," specifically *Tincher*'s recognition of a new test for product defect. *High*, 154 A.3d at 347.

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16.150 STRICT LIABILITY – COMPONENT PART

A component part, used to make a completed product assembled by the completed product's manufacturer, is not in a defective condition or unreasonably dangerous if the [manufacturer/seller/distributor] of the component produced a component that met the requirements of the manufacturer of the completed product, unless you find: (1) the completed product manufacturer's requirements were obviously deficient, or (2) the component supplier substantially participated in the [design/preparation] of the completed product.

A [manufacturer/seller/distributor] of a component part who produced a component that met the specifications and requirements set forth by the assembler of the completed product, is not liable for harm resulting from unreasonably dangerous defects in other part(s) of the completed product that the component part [manufacturer/seller/distributor] did not produce, unless you find that the component part [manufacturer/seller/distributor] substantially participated in the [design/preparation] of those other part(s) of the completed product.

RATIONALE

Restatement (Second) of Torts §402A (1965), as adopted by *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), does not address liability considerations involving component parts. *Id.* §402A comment q. Pennsylvania law has recognized special considerations concerning component parts on numerous occasions. *See Jacobini v. V. & O. Press Co.*, 588 A.2d 476, 479 (Pa. 1991) ("untenable" to impose duties of a completed product assembler on a "manufacturer [that] supplies a mere component of a final product that is assembled by another party"); *Wenrick v. Schloemann-Siemag Aktiengesellschaft*, 564 A.2d 1244, 1247 (Pa. 1989) (component not defective where "the placement of the [relevant components] were all decisions made by [the completed product assembler] in manufacturing the [completed product]").

> [T]he appellant's argument on this appeal amount[s] to no more than an assertion that knowledge of a potential danger created by the acts of others gives rise to a duty to abate the danger. We are not prepared to accept such a radical restructuring of social obligations.

Id. at 1248.

Component part suppliers are strictly liable for defects that render the components they supply unreasonably dangerous. *E.g.*, *Walton v. Avco Corp.*, 610 A.2d 454, 456-57 (Pa. 1992); *Burbage v. Boiler Engineering & Supply Co.*, 249 A.2d 563, 566 (Pa. 1989); *Kephart v. ABB, Inc.*, 2015 WL 1245825, at *11 (W.D. Pa. Mar. 18, 2015) (post-*Tincher*). The component part doctrine does not affect the liability of a complete product manufacturer for incorporating defective components into the overall product. *Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701, 716 (3d Cir. 2018) (applying Pennsylvania law).

A component part supplier's compliance with the specifications or requirements of the assembler of the completed product ordinarily shields the component supplier from liability. *E.g. Wenrick*, 564 A.2d at 1246-47 (compliance with assembler's decisions precluded liability); *Stephens v. Paris Cleaners, Inc.*, 885 A.2d 59, 70 (Pa. Super. 2005) (same with respect to assembler's contractual specifications); *Summers v. Giant Food Stores, Inc.*, 743 A.2d 498, 508-09 (Pa. Super. 1999) (component purchaser's refusal to buy non-defective component held sole cause of injury); *Taylor v. Paul O. Abbe, Inc.*, 516 F.2d 145, 148 (3d Cir. 1975) (compliance with assembler's specifications precluded liability) (applying Pennsylvania law); *Willis v. National Equipment Design Co.*, 868 F. Supp. 725, 728-29 (E.D. Pa. 1994) (same), *aff'd without op.*, 66 F.3d 314 (3d Cir. 1995); *Lesnefsky v. Fisher & Porter Co.*, 527 F. Supp. 951, 955 (E.D. Pa. 1981) ("no public policy is served by requiring the component manufacturer to hire experts, at great cost, to review specifications provided by an experienced purchaser in order to determine whether the

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product design will be safe"). Liability is allowed where the component part supplier, rather than the completed product assembler, prepared the component's specifications. *Stecyk v. Bell Helicopters Textron, Inc.*, 1996 WL 153555, at *12 (E.D. Pa. Apr. 2, 1996).

The maker of a non-defective component part could not be liable where the plaintiff's "injury [was] caused by another component part, manufactured by another company" and the component part supplier "did not participate in the decisions regarding the design [of the completed product] or the location of" any other component. *Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298, 1302, 1310 (3d Cir. 1995) (applying Pennsylvania law); *accord Schwartz v. Abex Corp.*, 106 F. Supp. 3d 626, 654 & n.75 (E.D. Pa. 2015) ("a component part is a separate 'product' for purposes of application of Section 402A") (post-*Tincher*).

The exceptions stated in this instruction, for transparently inadequate specifications and substantial participation in design or preparation of other, defective parts of a completed product, are recognized by Restatement (Third) of Torts, Products Liability §5 & comment e (1998). While *Tincher* declined to adopt the Third Restatement wholesale, it did not address, let alone criticize, the Third Restatement's approach to component part liability, which has won widespread acceptance. *E.g. Ramos v. Brenntag Specialties, Inc.*, 372 P.3d 200, 204 (Cal. 2016) (Restatement §5 "accurately reflect[s]" the law); *In re New York City Asbestos Litigation*, 59 N.E.3d 458, 478 (N.Y. 2016) (applying Restatement §5 substantial participation standard); *Gudmundson v. Del Ozone*, 232 P.3d 1059, 1073-74 (Utah 2010) (collecting cases). Similar rules exist in negligence. *See* Restatement (Second) of Torts § 404, comment a ("chattels are often made by independent contractors. . . . In such a case, the contractor is not required to sit in judgment on the plans and specifications or the materials provided by his employer.")

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16.175 CRASHWORTHINESS – GENERAL INSTRUCTIONS

The plaintiff has alleged a crashworthiness defect. By "crashworthiness" I mean the accident that happened was not caused by any defect in the [product]/[vehicle]. Instead the plaintiff alleges that a defect enhanced injuries that [he]/[she] sustained in that accident, making those injuries worse than if the alleged defect did not exist.

In a crashworthiness case, the first question is whether the [product]/[vehicle] was defective. Only if you find that the design of the [product's]/[vehicle's] [specific defect alleged] was unreasonably dangerous and defective, under the definitions I have just given you, should you proceed to examine the remaining elements of crashworthiness.

RATIONALE

"Crashworthiness," in Pennsylvania, has been considered a design defect-related "subset of a products liability action pursuant to Section 402A ." *Kupetz v. Deere & Co.*, 644 A.2d 1213, 1218 (Pa. Super. 1994); *accord Parr v. Ford Motor Co.*, 109 A.3d 682, 689 (Pa. Super. 2014) (post-*Tincher*). *Cf. Harsh v. Petroll,* 887 A.2d 209, 211 n.1 (Pa. 2005) (noting "continuing controversy" about "whether crashworthiness claims . . . are appropriately administered as a subset of strict liability and/or negligence theory"). "The effect of the crashworthiness doctrine is that a manufacturer has a legal duty to design and manufacture its product to be reasonably crashworthy." *Kupetz*, 644 A.2d at 1218.

"[T]he crashworthiness doctrine is uniquely tailored to address those situations where the defective product did not cause the accident but served to increase the injury." *Colville v. Crown Equip. Corp.*, 809 A.2d 916, 925-26 (Pa. Super. 2002). Crashworthiness thus is not merely "an additional theory of recovery that a plaintiff may elect to pursue." *Id.* at 926 ("disagree[ing]" with that proposition). Rather crashworthiness requires "particularized instructions to jurors concerning increased harm." *Pennsylvania Dep't of Gen. Servs. v. U.S. Mineral Prod. Co.*, 898 A.2d 590, 602 (Pa. 2006). These crashworthiness instructions are to be given in any case involving enhanced injuries from a design defect not alleged to cause the accident itself.

While the crashworthiness doctrine in Pennsylvania applies most commonly in the context of motor vehicles, it is not limited to that scenario. *Colville*, 809 A.2d at 923 (standup rider). The principle underlying the doctrine is compensation for injuries that result not from an initial impact, but from an unnecessary aggravation or enhancement caused by the design of the product. *Id.* For example, a claim that the structure of an automobile failed to prevent an otherwise preventable injury in a foreseeable accident would fall under the crashworthiness doctrine. *Harsh*, 887 A.2d at 211 n.1. The crashworthiness doctrine likewise applies to safety devices such as helmets that are designed to reduce or mitigate injury in foreseeable impacts. *Svetz v. Land Tool Co.*, 513 A.2d 403 (Pa. Super. 1986) (motorcycle helmet); *Craigie v. General Motors,* 740 F. Supp. 353, 360 (E.D. Pa. 1990) (characterizing *Svetz*).

Although the crashworthiness doctrine is sometimes described in terms of "second collision," this terminology is disfavored. Crashworthiness is frequently invoked where no literal "second collision" or "enhanced injury" is present. *Colville*, 809 A.2d at 924; *Kupetz*, 644 A.2d at 1218. The doctrine applies, for instance, not only when a vehicle occupant sustains injuries within the vehicle itself, but also when an occupant is ejected or suffers injury without an actual second collision or "impact." *Colville*, 809 A.2d at 924.

Likewise, while the doctrine refers to the "enhancement" of an occupant's injuries, its application is not limited to instances of literal "enhancement" of an otherwise existing injury. Rather, the crashworthiness doctrine extends to situations of indivisible injury, such as death. *Harsh*, 887 A.2d at 219. The doctrine also "include[s] those circumstances where an individual would not have received any injuries in the absence of a defect."

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Colville, 809 A.2d at 924-25; *see Kolesar v. Navistar Int'l Transp. Corp.*, 815 F. Supp. 818, 819 (M.D. Pa. 1992) (permitting plaintiff to proceed on a crashworthiness theory where the plaintiff would have walked away uninjured absent the defect), *aff'd*, 995 F.2d 217 (3d Cir. 1993).

This instruction's "unreasonably dangerous" language recognizes that *Tincher v. Omega Flex, Inc.*, changed the defect test in all §402A strict liability actions by returning to the jury the inquiry of whether a product is "unreasonably dangerous." 104 A.3d 328, 380 389-91 (Pa. 2014). See Rationale for Suggested Instruction 16.20(1). The consumer expectations test for "unreasonably dangerous" will ordinarily not apply to products of complex design or that present esoteric risks, because an ordinary consumer does not have reasonable safety expectations about those products or those risks. *Tincher*, 104 A.3d at 388. As the *Tincher* court explained:

> [A] complex product, even when it is being used as intended, may often cause injury in a way that does not engage its ordinary consumers' reasonable minimum assumptions about safe performance. For example, the ordinary consumer of an automobile simply has 'no idea' how it should perform in all foreseeable situations, or how safe it should be made against all foreseeable hazards.

Id. (quoting *Soule* 882 P.2d at 308). The crashworthiness doctrine exists to address exactly such products and scenarios. *Cf. Harsh*, 887 A.2d at 219. Accordingly, the consumer expectations method of proof should not be permitted, and the jury should not be instructed on the consumer expectations test in crashworthiness cases.

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16.176 CRASHWORTHINESS - ELEMENTS

I will now instruct you on the plaintiff's burden in a crashworthiness case. In order to prove the defendant liable in a "crashworthiness" case, the plaintiff has the burden of proving:

1. That the design of the [product]/[vehicle] in question was defective, rendering the product unreasonably dangerous, and that at the time the [product]/[vehicle] left the defendant's control, an alternative, safer design, practicable under the circumstances existed;

2. What injuries, if any, the plaintiff would have sustained had the alternative, safer design been used; and

3. The extent to which the plaintiff would not have suffered these injuries if the alternative design had been used, so that those additional injuries, if any, were caused by the defendant's defective design.

If after considering all of the evidence you feel persuaded that these three propositions are more probably true than not, your verdict must be for plaintiff. Otherwise your verdict must be for the defendant.

RATIONALE

The burden of proving the elements of crashworthiness rests on the plaintiff. *Schroeder v. Com., DOT*, 710 A.2d 23, 27 n.8 (Pa. 1998); *Parr v. Ford Motor Co.*, 109 A.3d 682, 689 (Pa. Super. 2014) (post-*Tincher*); *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 532, 548, 550-551 (Pa. Super. 2009); *Raskin v. Ford Motor Co.*, 837 A.2d 518, 524 (Pa. Super. 2003); *Colville v. Crown Equip. Corp.*, 809 A.2d 916, 922-23 (Pa. Super. 2002); *Kupetz v. Deere & Co.*, 644 A.2d 1213, 1218 (Pa. Super. 1994). In *Stecher v. Ford Motor Co.*, 812 A.2d 553, 558 (Pa. 2002), the Supreme Court reversed as deciding a moot issue a Superior Court ruling that purported to shifted the burden of proof in crashworthiness cases to defendants. All post-*Stecher* appellate decisions impose the burden of proof on plaintiffs.

Although some federal cases predicting Pennsylvania law listed four elements of crashworthiness (breaking element one, above, into two elements at the "and"), *see Oddi v. Ford Motor Co.*, 234 F.3d 136, 143 (3d Cir. 2000); *Habecker v. Clark Equip. Co.*, 36 F.3d 278, 284 (3d Cir. 1994), the great majority of Pennsylvania precedent, including all recent state appellate authority, defines crashworthiness as having three elements. *See Schroeder*, 710 A.2d at 27 n.8; *Parr*, 109 A.3d at 689; *Gaudio*, 976 A.2d at 532, 550-551; *Colville*, 809 A.2d at 922-23; *Kupetz*, 644 A.2d at 1218. This instruction follows the controlling Pennsylvania cases. It is based on the crashworthiness charge approved as "correct" in *Gaudio*, 976 A.3d at 550-51, to which is added the "unreasonably dangerous" language required of all §402A instructions by *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 380 399-400 (Pa. 2014). *See* Rationale for Suggested Instruction 16.20(1), *supra*.

Crashworthiness "requir[es] the fact finder to distinguish non-compensable injury (namely, that which would have occurred in a vehicular accident in the absence of any product defect) from the enhanced and compensable harm resulting from the product defect." *Pennsylvania Dep't of Gen. Servs. v. U.S. Mineral Prod. Co.*, 898 A.2d 590, 601 (Pa. 2006). Crashworthiness allows recovery of "increased or enhanced injuries over and above those which would have been sustained as a result of an initial impact, where a vehicle defect can be shown to have increased the severity of the injury." *Harsh v. Petroll*, 887 A.2d 209, 210 n.1 (Pa. 2005). These instructions direct the jury to apportion the plaintiff's injury, in order to limit recovery to compensable harm. *Kupetz*, 644 A.2d at

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1218. Thus, "[t]he second of these elements required the plaintiff to demonstrate "what injuries, *if any*, the plaintiff would have received had the alternative safer design been used." *Colville*, 809 A.2d at 924 (emphasis original).

The "precept of strict liability theory that a product's safety be adjudged as of the time that it left the manufacturer's hands," *Duchess v. Langston Corp.*, 769 A.2d 1131, 1140 (Pa. 2001), is recognized throughout Pennsylvania strict liability jurisprudence, including the "subset" of crashworthiness doctrine.

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16.177 CRASHWORTHINESS – SAFER ALTERNATIVE DESIGN PRACTICABLE UNDER THE CIRCUMSTANCES

In determining whether the plaintiff's proposed alternative design was safer and practicable under the circumstances at the time the [product][vehicle] left the defendant's control, the plaintiff must prove that the combined risks and benefits of the product as designed by the defendant made it unreasonably dangerous compared to the combined risks and benefits of the product incorporating the plaintiff's proposed feasible alternative design.

In determining whether the product was crashworthy under this test, you may consider the following factors:

[Instruct on the risk-utility factors from Suggested Instruction 16.20(3)]

RATIONALE

Crashworthiness involves a risk-utility test that compares the defendant's design with the plaintiff's proposed alternative. *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 548-50 (Pa. Super. 2009). While *Tincher v. Omega Flex, Inc.,* permits a plaintiff in an ordinary §402A claim to prove that a product is unreasonably dangerous and defective under either a consumer expectations test or a risk-utility test, 104 A.3d 328, 335, 388, 406-07 (Pa. 2014); *see* Suggested Instructions 16.120(2) & 16.120(3), *supra*, the comparison between the manufacturer's design, present in the challenged product, and the plaintiff's proposed alternative design, is an essential element of crashworthiness. *E.g.*, *Schroeder v. Commonwealth, DOT*, 710 A.2d 23, 28 n.8 (Pa. 1998); *Parr v. Ford Motor Co.,* 109 A.3d 682 (Pa. Super. 2014) (post-*Tincher*); *Gaudio*, 976 A.2d at 532; *Colville v. Crown Equip. Corp.,* 809 A.2d 916, 922 (Pa. Super. 2002); *Kupetz v. Deere & Co.*, 644 A.2d 1213, 1218 (Pa. Super. 1994). This instruction therefore utilizes the same risk-utility factors as the risk-utility prong of the "composite" defect test from *Tincher,* 104 A.3d at 389-91.

Prior to its *Tincher* decision, the Supreme Court recognized that risk-utility analysis encompasses all intended uses of a product, not limited to the narrowly defined set of circumstances that led to the injury at issue. *Beard v. Johnson & Johnson, Inc.*, 41 A.3d 823, 836-37 (Pa. 2012) (scope of the risk-utility analysis in a strict-liability design defect case is not limited to a particular intended use of the product). Because the real likelihood exists that an increase in safety in one aspect of a product may result in a decrease in safety in a different aspect of the same product, Pennsylvania courts have recognized that a manufacturer's product development and design considerations are relevant, in the context of a risk-utility analysis, to assess a plaintiff's crashworthiness claim. *Gaudio,* 976 A.2d at 548 ("If, in fact, making the [product] in question 'safer' for its occupants also created an 'unbelievable hazard' to others, the risk-utility is essentially negative. The safety utility to the occupant would seemingly be outweighed by the extra risk created to others.") (quoting *Phatak v. United Chair Co.*, 756 A.2d 690, 694 (Pa. Super. 2000)). For these reasons, juries consider the same set of factors in evaluating a proposed alternative design that are used to evaluate whether the subject design is unreasonably dangerous. Just as when the jury assesses overall product design, some, or all of the factors may be particularly relevant, or somewhat less relevant, to the jury's risk-utility assessment. *See* Rationale of Suggested Instruction 16.120(3), *supra*.

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Personal Jurisdiction & Litigation Tourism in Pennsylvania

By James M. Beck, Reed Smith, LLP, Senior Life Sciences Policy Analyst

Even PDI members who have not read a personal jurisdiction case since law school have surely heard, by now, about the Supreme Court's reinvigorated Due Process analysis placing restrictions on litigation tourism. For decades, the plaintiff-friendly reputation of the Philadelphia (and to a lesser extent Allegheny) County Court of Common Pleas has led to non-Pennsylvania plaintiffs flocking from all over the country to file product liability and other tort claims in these jurisdictions, overtaxing the court system, inconveniencing local residents forced to serve as jurors, and delaying resolution of local litigation.

The Due Process principles established in Bristol-Myers Squibb Co. v. Superior Court, ___ U.S. ___, 137 S. Ct. 1773 (2017) ("BMS"); BNSF Railway. v. Tyrell, ___ U.S. ___, 137 S.Ct. 1549 (2017); Daimler AG v. Bauman, 571 U.S. 117 (2014) ("Bauman"); and Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 925 (2011) ("Brown"), carry with them the possibility, indeed probability, of substantially curtailing litigation tourism. Knowledge and timely exercise of these jurisdictional defenses – every personal jurisdiction defense is waivable – are essential to make this happen. Conversely, if other states curtail litigation tourism, and Pennsylvania does not, that result would draw even more non-resident mass tort ligation to the Commonwealth.

The purpose of this article is to provide an overview of the jurisdictional Due Process arguments now open to defendants.

General Jurisdiction

A court with general jurisdiction may hear any claim against the affected defendant, even claims that happened elsewhere and bear no relation to the forum state.[1] From the beginning of the modern era, the Supreme Court had held that "continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity,"[2] however, for decades the lower courts ignored this principle, the result being that large corporations with a substantial presence in many states were subjected to general personal jurisdiction in all of them.[3] Plaintiffs exploited this divergence of practice from principle to create so-called litigation "hellholes" where anybody from anywhere was allowed to sue.

That changed when Brown rephrased the test for general jurisdiction, emphasizing that "[a] court may assert general jurisdiction over foreign . . . corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."[4] A corporation is "at home" in its "place of incorporation" or "principal place of business."[5]

The full implications of this "at home" test became clear when Bauman declared that extensive business activity in a jurisdiction,[6] without more, could never support general jurisdiction.[7] A Due Process "formulation" that allows "exercise of general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business. . . . is unacceptably grasping."[8] If mere "doing business" were enough:

> the same global reach would presumably be available in every other State in which [a large corporation's] sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[9]

Thus, the "magnitude of a defendant's in-state contacts" is not controlling. . . . A corporation that operates in many places can scarcely be deemed at home in all of them."[10]

With the demise of general jurisdiction based solely on amount of business, plaintiffs sought alternative grounds to accomplish the same result. They have mostly failed,[11] but Pennsylvania is ground zero in this effort, primarily because the Pennsylvania Long Arm Statute, uniquely, provides for "the tribunals of this Commonwealth to exercise general personal jurisdiction" based on "[i]ncorporation under or qualification as a foreign corporation under the laws of this Commonwealth."[12] That statutory language, combined with a pre-Bauman Third Circuit decision, Bane v. Netlink, that allowed general jurisdiction by consent,[13] have led a number of recent Pennsylvania decisions to break with the majority trend and hold that the mere compliance with the Pennsylvania corporate domestication statute exposes a corporation to general jurisdiction for any claim by any plaintiff from anywhere.[14]

This battle is by no means over. Not all federal district courts follow Bane,[15] Bane is ripe for post-Bauman reconsideration,[16] and the issue is presently before the en banc Pennsylvania Superior Court.[17] The arguments against general jurisdiction by consent, even in Pennsylvania, are stronger than those in favor. Briefly:

- The pre-International Shoe cases on which general jurisdiction by consent rests "should not attract heavy reliance today,"[18] and are almost certainly among the decisions subject to the Court's blanket overruling of pre-International Shoe precedent.[19]
- In International Shoe and subsequent cases, the Supreme Court has repeatedly criticized generalized "consent" arguments as "legal fiction," "abandoned," and the like[20] and has only recognized consent jurisdiction on a case-specific basis.[21]
- The overwhelming weight of post-Bauman precedent nationwide rejects general jurisdiction by consent as "exorbitant" and "unacceptably grasping," and thus inconsistent with Bauman.[22]
- Language in a state statute violates

Due Process where it purports to create a "basis for jurisdiction to adjudicate claims over which the State would not have jurisdiction if International Shoe applied."[23]

- To interpret §5301(a) in a way that exposes it to constitutional challenge flies in the face of other sections of the Long Arm Statute, as well as general rules of statutory construction.[24]
- It is wrong to interpret a corporate domestication statute in a way that makes a violation by failing to register more advantageous than compliance.[25]
- With every other state having a significant mass tort docket already rejecting general jurisdiction by consent, allowing it in Pennsylvania would open the litigation floodgates wide.

Defeating general jurisdiction by consent is particularly important as a curb against litigation tourism by asbestos plaintiffs. Because asbestos complaints typically join scores of defendants without regard to their domicile, the lack of a viable general jurisdiction theory in asbestos cases would effectively force those plaintiffs to sue in their home states, where specific jurisdiction would be available over most of the named defendants.

Specific ("Case Linked") Jurisdiction

Another avenue for litigation tourists was to claim that, because in-state plaintiffs were suing over the same products, causation theories, and types of damages, non-residents asserting similar claims were sufficiently "related" to the litigation to support specific jurisdiction. In BMS, the Supreme Court rejected this theory as "a loose and spurious form of general jurisdiction."[26] BMS reaffirmed the established test for specific jurisdiction:

> [T]he suit must arise out of or relate to the defendant's contacts with the forum. In other words, there must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.[27]

In specific jurisdiction cases, BMS reaffirmed that "the primary concern is the burden on the defendant."[28] Product liability plaintiffs who neither purchased a product nor were injured in the forum state could not assert the requisite "affiliation between the forum and the underlying controversy," and could not, after Bauman, rely on the defendant's overall presence.[29] Nor could either a plaintiff's or defendant's "relationship with a third party, standing alone" establish specific jurisdiction.[30]

In particular, joinder of an in-state distributor of the defendant's product, not involved in a plaintiff's chain of sale, could not support specific jurisdiction.[31] "The requirements of International Shoe must be met as to each defendant," and "the nonresidents have adduced no evidence to show how or by whom the [drug] they took was distributed to the pharmacies that dispensed it to them."[32]

BMS recognized two situations where mass tort aggregation was jurisdictionally proper. First, any plaintiffs may bring "a consolidated action" in a state that has "general jurisdiction" – that is, the defendant's state of incorporation or principal place of business. Second, "residents of a particular state" can "probably sue together in their home states," assuming they were injured there.[33] Thus, BMS substantially limits litigation tourism in mass tort litigation.[34]

The Supreme Court in BMS stopped short of expressly holding that the "arise out of or relate to" specific jurisdiction test required that the "defendant's contacts with the forum" actually have caused the plaintiff's injuries.[35] Non-resident plaintiffs scrambling for in-state contacts sufficient to support litigation tourism have latched onto various activities, including in-state studies (particularly FDA-regulated clinical trials),[36] consultation/collaboration with third parties,[37] marketing efforts,[38] obtaining federal approval of a product,[39] distribution of federally-required materials,[40] contracts with third-party in-state residents,[41] and product trans-shipment.[42] In most of these cases, plaintiffs lost.

But not in Pennsylvania. As with general jurisdiction, Pennsylvania courts have been unduly hospitable to litigation tourists post-BMS. In Hammons v. Ethicon, Inc.,[43] non-resident plaintiffs not injured in Pennsylvania successfully asserted that a non-resident defendant could be subject to specific jurisdiction because: (1) a step in the product's manufacturing process was conducted by a Pennsylvania contractor, and (2) the defendant "worked closely" with a Pennsylvania consultant during the product's development stage.[44] While the relevance of these Pennsylvania contacts is questionable, given the plaintiffs' theories of liability, the greater objection[45] to Hammons is its creation of another "loose and spurious form of general jurisdiction," expressly rejected by BMS, since the "contacts" Hammons identifies are not "case-specific" and could be asserted by any plaintiff in the country. The type of forum contacts BMS recited as being absent – "not prescribed," "not purchase[d]," "not ingest[ed]," "not injured" in the forum state[46] – are indicative. Those contacts are all "case-linked," *i.e.*, tied to the specific facts of a particular plaintiff's case. The contacts Hammons relied upon are not, thus Pennsylvania defense counsel should assert and preserve objections to assertions of jurisdictional contacts that, in effect, create general jurisdiction for all plaintiffs in mass tort litigation. Such a result, epitomized by Hammons, is incompatible with BMS.

In addition to their effect on mass torts, the Supreme Court's specific jurisdiction holdings in BMS have several other implications that defense counsel should keep in mind:

"Stream of Commerce" jurisdiction – Plaintiffs in individual cases, often those involving resold products, frequently rely on "stream of commerce" jurisdictional theories that turn on the actions of third-parties, unaffiliated with the defendant, causing the injury-causing product to cross state lines and eventually to enter the state where the plaintiff was injured. But under BMS, specific jurisdiction must "arise out of or relate to the defendant's contacts with the **forum**."[47] Where the "relevant conduct occurred entirely" out of state, "the mere

fact that this conduct affected plaintiffs with connections to the forum state did not suffice to authorize jurisdiction."[48] A "relationship with a third party, standing alone, is . . . insufficient."[49] Since all forms of stream of commerce jurisdiction depend on precisely those contacts that BMS found insufficient, defendants should contest the continued viability of such theories.[50]

Nationwide Class Actions – BMS also has implications for the permissible scope of class actions. Unless the defendant is "at home" in the jurisdiction, and thus subject to general jurisdiction under Bauman, any attempt to assert class action claims on behalf of non-resident plaintiffs is indistinguishable from BMS – the presence of other, resident plaintiffs asserting the same kind of claims against the same non-resident defendant cannot support "case-linked" personal jurisdiction over the claims of similarly situated non-residents. As held by a Pennsylvania court:

> Only [plaintiffs'] Pennsylvania Claims arise out of or relate to Selling Defendants' sales of [products] in Pennsylvania. . . . [T]he Non-Pennsylvania Claims do not arise out of or relate to any of Selling Defendants' conduct within the forum state. Accordingly, the Court cannot exercise specific jurisdiction over the Non-Pennsylvania Claims brought against [moving] Defendants.[51]

While class action plaintiffs have hotly contested application of BMS, and have had some success,[52] ultimately they are likely to lose, because there is only one "Due Process," and class action rules cannot change substantive law.[53]

> The constitutional requirements of due process does not wax and wane when the complaint is individual or on behalf of a class. Personal jurisdiction in class actions must comport with due process just the same as any other case.[54]

Appellate precedent addressing BMS and class actions is (for the moment) lacking. Defendants should use BMS to oppose class actions whenever the result would be non-resident plaintiffs suing non-resident defendants.

Third-Party Discovery – The BMS requirement that personal jurisdiction be based on a party's forum-related activities also limits the ability to compel persons who are not parties to litigation to comply with third-party discovery. For instance, in Leibovitch v. Islamic Republic of Iran, third-party subpoenas against banks could not be executed where they sought discovery unrelated to the banks' forum activities.[55]

* * * *

Recent United States Supreme Court decisions have handed defendants the tools wsith which to challenge many types of litigation tourism that have contributed to overcrowded dockets in the Philadelphia and Allegheny County Courts of Common Pleas. Plaintiffs, however, cannot be expected to surrender extremely lucrative forum-shopping techniques without a fight. They have been fighting back tenaciously and with considerable success, as exemplified by the Webb-Benjamin and Hammons decisions. However, defendants have the better side of the various Due Process arguments involving personal jurisdiction. If defense counsel make these arguments, we should ultimately be able to prevail on behalf of our clients.

ENDNOTES

[1]Brown, 564 U.S. at 919.

[2]International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945) (citations omitted).

[3]E.g., Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163 (9th Cir. 2006); Lakin v. Prudential Securities, 348 F.3d 704 (8th Cir. 2003); Metropolitan Life Insurance Co. v. Robertson-Ceco Corp., 84 F.3d 560 (2d Cir. 1996); Bane v. Netlink, Inc., 925 F.2d 637 (3d Cir. 1991).

[4]Brown, 564 U.S. at 924.

[5]Id.

[6]General jurisdiction failed in Bauman although the defendant was "the largest supplier of luxury vehicles to the California market"; "over 10% of all sales of new vehicles in the United States take place in California"; and its "California sales account for 2.4% of [its] worldwide sales." 571 U.S. at 123.

[7]Bauman left open the possibility that an "extraordinary" case might be an exception. Id. at 139 n.19. That exception has yet to be asserted successfully in tort litigation.

[8]Id. at 138 (citation and quotation marks omitted).

[9]Id. at 139 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)).

[10]Id. at 139 n.20.

[11]Nationwide, only five states permit general jurisdiction by consent. See 50-State Survey of Consent Jurisdiction, at https://www.druganddevicelawblog.com/2018/11/updating-our-post-bauman-50-state-survey-on-general-jurisdiction-by-consent.html.

[12]42 Pa. C.S. §5301(a).

[13]925 F.2d at 641.

[14]Webb-Benjamin, LLC v. International Rug Group, LLC, 192 A.3d 1133, 1138-39 (Pa. Super. 2018); Youse v. Johnson & Johnson, 2019 WL 233884, at *3-4 (E.D. Pa. Jan. 16, 2019); Gorton v. Air & Liquid Systems Corp., 303 F. Supp.3d 278, 295-99 (M.D. Pa. 2018); Shipman v. Aquatherm L.P., 2018 WL 6300478, at *2 (E.D. Pa. Nov. 28, 2018); Pager v. Metropolitan Edison, 2018 WL 491014, at *2 (M.D. Pa. Jan. 19, 2018); Kukich v. Electrolux Home Products, Inc., 2017 WL 345856, at *6 (D. Md. Jan. 24, 2017); Bors v. Johnson & Johnson, 208 F. Supp.3d 648, 955 (E.D. Pa. 2016).

[15]Antonini v. Ford Motor Co., 2017 WL 3633287, at *2 n.2 (M.D. Pa. Aug. 23, 2017); McCaffrey v. Windsor at Windermere Ltd. Partnership, 2017 WL 1862326, at *4 (E.D. Pa. May 8, 2017); George v. A.W. Chesterton Co., 2016 WL 4945331, at *2-3 (W.D. Pa. Sept. 16, 2016); Spear v. Marriott Hotel Services, Inc., 2016 WL 194071, at *2 (E.D. Pa. Jan. 15, 2016); Osadchuk v. CitiMortgage, 2015 WL 4770813, at *2 (E.D. Pa. Aug. 12, 2015); Mallory v. Norfolk Southern Railway Co., 2018 WL 3043601, at *4-5 (Pa. C.P. May 30, 2018), appeal stayed, 802 EDA 2018 (Pa. Super.).

[16]The discussion in Bane is terse, only a single paragraph, and relied entirely on pre-International Shoe precedent.

[17]See Murray v. American Lafrance, LLC, Nos. 2105 EDA 2016, *et al.* (Pa. Super.). The en banc panel is not bound by Bane or Webb-Benjamin, and could overrule the latter.

[18]Bauman, 571 U.S. at 138 n.18.

[19]Shaffer v. Heitner, 433 U.S. 186, 212 n.39 (1977). See "Has Pa. Fire Already Been Extinguished," at https://www.druganddevicelawblog.com/2019/03/more-adventures-in-personal-jurisdiction-has-pennsylvania-fire-already-been-extinguished.html.

[20]Burnham v. Superior Court, 495 U.S. 604, 617-18 (1990) (plurality); McGee v. International Life Insurance Co., 355 U.S. 220, 222 (1957); Shaffer, 433 U.S. at 202-03; International Shoe, 326 U.S. at 316, 318-19. See also Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 445 (1952) (registration is "helpful" but not "conclusive" in determining specific (not general) jurisdiction); J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 900-01 (2011) (dissenting opinion).

[21]McIntyre, 564 U.S. at 880-81 (plurality); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704-06 (1982).

[22]See "Post-BMS Personal Jurisdiction Cheat Sheet," at https://www.druganddevicelawblog.com/2017/07/post-bms-personal-jurisdiction-cheat-sheet.html, "50-State Survey," supra.

[23]Shaffer, 433 U.S. at 209.

[24]42 Pa. C.S. §§5307-08, 5322(b); 1 Pa. C.S. §1922(3).

[25]Dutch Run Mays Draft, LLC v. Wolf Block LLP, 164 A.3d 435, 444 (N.J. App. Div. 2017).

[26]137 S. Ct. at 1781.

[27]Id. at 1780 (citations and quotation marks omitted).

[28]Id. (citations and quotation marks omitted). See Id. at 1780-81 ("[E]ven if the defendant would suffer minimal or no inconvenience . . .; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due

Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment") (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980)).

[29]Id. at 1781 ("The mere fact that **other** plaintiffs were prescribed, obtained, and ingested [the drug] in California − and allegedly sustained the same injuries as did the nonresidents − does not allow the State to assert specific jurisdiction over the nonresidents' claims.") (emphasis original).

[30]Id.

[31]"[T]he requirements of International Shoe must be met as to each defendant" separately. Id. at 1783 (citations and quotation marks omitted).

[32]Id. at 1783 (citations and quotation marks omitted).

[33]Id.

[34]BMS left open whether Fifth Amendment (federal question) Due Process was different than Fourteenth Amendment (state law) Due Process. Id. at 1784. However, that decision's heavy reliance on Walden v. Fiore, 571 U.S. 277 (2014), a Fourteenth Amendment case, suggests there is none. Cases in federal court on the basis of diversity of citizenship are governed by the Fourteenth Amendment. Burger King, 471 U.S. at 464.

[35]See In re Zostavax (Zoster Vaccine Live) Products Liability Litigation, 358 F. Supp. 3d 418, 2019 WL 121199, at *2 (E.D. Pa. Jan. 7, 2019) ("arising from" requires in-state injury).

[36]M.M. v. GlaxoSmithKline LLC, 61 N.E.3d 1026, 1037 (Ill. App. 2016) (sufficient); Moore v. Bayer Corp., 2018 WL 4144795, at *3 (E.D. Mo. Aug. 29, 2018) (insufficient); Dyson v. Bayer Corp., 2018 WL 534375, at *5 (E.D. Mo. Jan. 24, 2018) (insufficient); Douthit v. Janssen Research & Development, LLC, 2017 WL 4224031, at *5 (S.D. Ill. Sept. 22, 2017) (insufficient); Dubose v. Bristol-Myers Squibb Co., 2017 WL 2775034, at *4 (N.D. Cal. June 27, 2017) (sufficient, but matter transferred); Pradaxa Cases, 2019 WL 1177510, at *3 (Cal. Super. Jan. 31, 2019) (insufficient); In re Xarelto Cases, 2018 WL 809633, at *10-11 (Cal. Super. Feb. 6, 2018) (insufficient to justify jurisdictional discovery).

[37]In re Nexus 6P Products Liability Litigation, 2018 WL 827958, at *5 (N.D. Cal. Feb. 12, 2018) (sufficient to justify jurisdictional discovery); In re Talc Product Liability Litigation, 2018 WL 4340012, at *7 (Del. Super. Sept. 10, 2018) (product testing) (insufficient).

[38]Goldstein v. Johnson & Johnson, 2019 WL 289290, at *3 (S.D. Fla. Jan. 21, 2019) (insufficient); Carney v. Guerbet, LLC, 2018 WL 6524003, at *4 (E.D. Mo. Dec. 12, 2018) (insufficient); Goellner-Grant v. JLG Industries, Inc., 2018 WL 3036453, at *2 (E.D. Mo. June 19, 2018) (insufficient); Dyson, 2018 WL 534375, at *4 (insufficient); In re Santa Fe National Tobacco Co. Marketing & Sales Practices & Products Liability Litigation, 288 F. Supp.3d 1087, 1214 (D.N.M. 2017) (insufficient); Spratley v. FCA US LLC, 2017 WL 4023348, at *6-7 (N.D.N.Y. Sept. 12, 2017) (insufficient); Xarelto, 2018 WL 809633, at *10-11 (insufficient to justify jurisdictional discovery).

[39]Blackburn v. Shire US, 2018 WL 2159927, at *6 (N.D. Ala. May 10, 2018) (insufficient because obtaining federal product approval did not target any particular state).

[40]Old Republic Insurance Co. v. Continental Motors, Inc., 877 F.3d 895, 916-17 (10th Cir. 2017) (insufficient).

[41]Carbonite Filter Corp. v. C. Overaa & Co., 353 F. Supp.3d 332, 341 (M.D. Pa. 2018) (insufficient); In re Amiodarone Cases, 2019 WL 235339, at *3-6 (Cal. Super. Jan. 10, 2019) (insufficient).

[42]Sae Han Sheet Co. v. Eastman Chemical Corp., 2017 WL 4769394, at *8 (S.D.N.Y. Oct. 19, 2017) (insufficient).

[43]190 A.3d 1248, 1263-64 (Pa. Super. 2018).

[44]Id. at 1263.

[45]Another objection to Hammons is its almost unique placement of the jurisdictional burden of proof on the defendant, rather than on the plaintiff asserting jurisdiction. Doing so is contrary to much prior Superior Court precedent, as well as federal cases deciding the same issue, See "Simple Question; Not So Simple Answer," at https://www.druganddevicelawblog.com/2018/07/simple-question-not-so-simple-answer.html.

[46]137 S. Ct. at 1781.

[47]Id. at 1780 (internal quotes omitted) (emphasis original).

[48]Id.

[49]Id. at 1783.

[50]Cases relying on BMS to reject stream of commerce jurisdiction include: Shuker v. Smith & Nephew, PLC, 885 F.3d 760, 780 (3d Cir. 2018); Montgomery v. Airbus Helicopters, Inc., 414 P.3d 824, 833-34 (Okla. 2018); Venuti v. Continental Motors, Inc., 414 P.3d 943, 951 (Utah App. 2018).

[51]Plumbers' Local Union No. 690 Health Plan v. Apotex Corp., 2017 WL 3129147, at *9 (E.D. Pa. July 24, 2017).

[52]Adverse cases include Molock v. Whole Foods Market, Inc., 297 F. Supp.3d 114, 126 (D.D.C. 2018), appeal pending No. 18-7162 (D.C. Cir.); Sloan v. General Motors LLC, 287 F. Supp.3d 840, 861-62 (N.D. Cal. 2018); In re Chinese-Manufactured Drywall Products Liability Litigation, 2017 WL 5971622, at *12-21 (E.D. La. Nov. 30, 2017).

[53]"A putative class representative seeking to hale a defendant into court to answer to the class must have personal jurisdiction over that defendant just like any individual litigant must." In re Dental Supplies Antitrust Litigation, 2017 WL 4217115, at *6 (S.D.N.Y. Sept. 20, 2017) (quoting Newberg on Class Actions §6:25 (5th ed. 2011)). See Mussat v. IQVIA Inc., 2018 WL 5311903, at *6 (N.D. Ill. Oct. 26, 2018) (discussing how a class action cannot "abridge, enlarge or modify" personal jurisdiction under the Rules Enabling Act, 28 U.S.C. §2072).

[54]Dental Supplies, 2017 WL 4217115, at *9 (citation omitted). See, e.g., Mussat, 2018 WL 5311903, at *5 ("Whether it be an individual, mass, or class action, the defendant's rights should remain constant."); Al Haj v. Pfizer, Inc., 2018 WL 1784126, at *6 (N.D. Ill. April 13, 2018) (BMS "applies whether or not the plaintiff is a putative class representative"); Howe v. Samsung Electronics America, Inc., 2018 WL 2212982, at *4 (N.D. Fla. Jan. 5, 2018) ("Rule 23 does not expand a court's personal jurisdiction over a defendant"; "a defendant who is not subject to personal jurisdiction on an individual claim also is not subject to jurisdiction on a class-action claim.").

[55]852 F.3d 687, 690 (7th Cir. 2017). See Tiffany (NJ) LLC, v. China Merchants Bank, 589 F. Appx. 550, 553 (2d Cir. 2014) ("a district court can enforce an injunction against a nonparty only if it has personal jurisdiction over that nonparty").

Insured Pots Calling the Kettle Black: A Nationwide Look at the Landscape of Reverse Bad Faith Law

By Hema Mehta, Esquire, Fineman Krekstein & Harris and Matthew E. Selmasska, Esquire, Fineman Krekstein & Harris

Historically, courts have stated that both parties to an insurance contract have a duty to act in good faith and fair dealing with one another with respect to the policy.[1] This duty requires that both the insurer and the policyholder act fairly and honestly toward one another, and refrain from acting in a way that would frustrate the purpose of the parties' agreement. When insurers breach that duty, it is well-settled law that policyholders are armed with a claim of bad faith and may bring a tort action against their insurer. But when the policyholder breaches the duty of good faith, reason dictates that the insurer should be able to pursue a similar action against the policyholder. Such is the essence of a reverse bad faith claim. The viability of a reverse bad faith claim, however, is nowhere near that of a standard bad faith claim, and an insurer's success in utilizing reverse bad faith is highly jurisdictionally dependent.

Presently, only the state of Tennessee has a statutorily authorized remedy for insurers when a policyholder lacks a good faith basis for suing their insurer. The statute states:

> In the event it is made to appear to the court or jury trying the cause that the action of the policyholder in bringing the suit was not in good faith, and recovery under the policy is not had, the policy holder shall be liable to such insurance company, corporation, firm, or person in a sum not exceeding twenty-five percent (25%) of the amount of the loss claimed under the policy; provided, that such liability, within limits prescribed, shall, in the discretion of the court or jury trying the cause, be measured by the additional expense, loss, or injury inflicted upon the defendant by reason of the suit.[2]

Thus, under the statute, courts in Tennessee have allowed insurers to recoup litigation expenses incurred from policyholders who had no reasonable basis to bring their bad faith claims.[3]

Outside of this narrow statutory realm, insurance defense counsel look to judges to apply basic principles of fairness and equality in upholding claims of reverse bad faith. Many believed that California would lead the way in recognizing claims for reverse bad faith. Industry professionals had thought this day had come in 1977, when an appeals court in California ruled that an insurer could properly enforce the implied covenant of good faith and fair dealing against a policyholder.[4] The Court of Appeals of California upheld this ruling eight years later, when it further held that an insurer could allege an affirmative defense of comparative bad faith, and reasoned that the implied covenant of good faith and fair dealing was a "two-way street," applicable to both the insurance company and the policyholder.[5]

Unfortunately for insurers, the Supreme Court of California slammed the brakes on viable reverse bad faith claims in 2000. In *Kransco v. Am. Empire Surplus Lines Ins. Co.*, the court held that an insurer may not plead a defense of comparative bad faith, and an insurance company's remedies for enforcing the implied covenant with its policyholders could only sound in contract, not tort.[6] The court reasoned that the insurer's remedies should not be as expansive as those of policyholders because of the inherent unequal footing of the parties, the adhesive nature of insurance policies, and policyholders, not insurers, are more likely to face a calamity due to a breach of the implied covenant.[7] Like *Kransco*, courts in Kentucky, Hawaii, Iowa, Montana, Ohio, Oklahoma, Oregon, Texas, and Florida have all outright rejected reverse bad faith as a viable claim for insurers.[8]

However, while no court has definitively ruled that reverse bad faith is a legitimate claim in its jurisdiction, various courts have acknowledged the claim in dicta. In *Callahan v. Norfolk & Dedham Grp.*, an insurer raised a defense of reverse bad faith in a Massachusetts court after being sued by a policyholder for unfair claims settlement practices.[9] The policyholder moved to strike the insurer's reverse bad faith defense, and the court denied the motion, and held that, "the insurer's action in raising this issue . . . was not inappropriate."[10] Additionally, in *AMEC Constr. Mgmt v. Fireman's Fund Ins. Co.*, a federal court in Louisiana declined to dismiss a claim for breach of the duty of good faith and fair dealing brought by an insurer.[11] Furthermore, a federal court in Washington State awarded an insurer summary judgment in a declaratory judgment action after it found that the policyholder misled the insurer and hindered the investigation.[12] The court characterized the action as a "reverse bad faith" case.[13] Lastly, in *Utica Mut. Ins. Co. v. Century Indem. Co.*, a New York court held that a reinsurer's reverse bad faith claim was plausible under state law.[14]

Pennsylvania case law reveals penumbras of partially viable reverse bad faith claims. In *Scalia v. Erie Ins. Exch.*, the Superior Court of Pennsylvania upheld an award of attorneys' fees in favor of an insurer because the court found that the policyholders had no good faith basis in bringing an action against their insurer.[15] However, six years later, the Superior Court rejected an insurer's reverse bad faith argument, and held, "the relevant inquiry in a bad faith case is whether the insurer had a reasonable basis for its conduct. The state of mind of the insured is irrelevant."[16] The Superior Court's holding appears tenuous in light of the fact that many courts view the actions of the policyholder as relevant in determining whether an insurer conducted itself reasonably. Although the Superior Court appears hesitant to unequivocally acknowledge a new tort of reverse bad faith, it has awarded favorable judgments to insurers and against policyholders on common law fraud claims.[17] Additionally, a federal court in the Middle District of Pennsylvania denied a policyholder's motion to strike a bad faith avoidance defense asserted by the insurer.[18] Thus, the policyholder's alleged violation

of her own duty of good faith and fair dealing could have precluded recovery on her bad faith claim, if successfully proven by the insurer.

It's no great revelation that policyholders at times fail to adequately meet their own implied duty of good faith and fair dealing. In these situations, however, before bringing a claim for reverse bad faith, practitioners in the insurance industry need to research the case law of their jurisdiction to gauge viability. In jurisdictions where reverse bad faith claims remain open, advocates need to persuade the court that policyholders and insurers should be treated with equal justice under the law.[19] The insurance industry suffers from an estimated $80 billion in fraud annually; costs that are then partially borne by policyholders in the form of increased premiums.[20] Thus, insurance companies should have the same tools policyholders wield in enforcing and remedying alleged breaches of the implied covenant.

ENDNOTES

[1]*Comunale v. Traders & Gen. Ins. Co.*, 328 P.2d 198 (Cal. 1958); *Greater N.Y. Mut. Ins. Co. v. North River Ins. Co.*, 872 F. Supp. 1403 (E.D. Pa. 1995).

[2]Tenn. Code Add. § 56-7-106.

[3]*Adams v. Tennessee Farmers Mut. Ins. Co.*, 898 S.W.2d 216 (Tenn. Ct. App. 1994).

[4]*Liberty Mut. Ins. Co. v. Altfillisch Constr. Co.*, 139 Cal. Rptr. 91, 95 (Cal. Ct. App. 1977).

[5]*California Cas.Gen. Ins. Co. v. Superior Court*, 218 Cal. Rptr. 817, 822 (Cal. Ct. App. 1985).

[6]*Kransco v. Am. Empire Surplus Lines Ins. Co.*, 2 P.3d 1 (Cal. 2000).

[7]*Id*. at 11.

[8]*Houchin v. Allstate Indem. Ins. Co.*, No. 4:07-cv-00071, 2012 U.S. Dist. LEXIS 88213 (W.D. Ky. June 26, 2012); *Wailua Assocs. v. Aetna Cas. & Sur. Co.*, 183 F.R.D. 550 (D. Haw. Oct. 30, 1998); *Johnson v. Farm Bureau Mut. Ins. Co.*, 533 N.W.2d 203 (Iowa 1995); *Stephens v. Safeco Ins. Co. of Am.*, 852 P.2d 565 (Mont. 1993); *Tokles & Son v. Midwestern Indem. Co.*, 605 N.E.2d 936 (Ohio 1992); *First Bank of Turley v. Fid. & Deposit Ins. Co.*, 928 P.2d 298 (Okla. 1996); *Stumpf v. Continental Cas. Co.*, 794 P.2d 1228 (Or. 1990); *Southland Lloyd's Ins. Co. v. Tomberlain*, 919 S.W.2d 822 (Tex. Ct. App. 1996); and *Nationwide Property & Cas. Ins. Co. v. King*, 568 So.2d 990 (Fla. Dist. Ct. App. 1990).

[9]*Callahan v. Norfolk & Dedham Grp.*, No. CV2007-0265, 2009 Mass. Super. LEXIS 239 (Mass. Supp. Aug. 6, 2009).

[10]*Id*. at *9.

[11]*AMEC Constr. Mgmt. v. Fireman's Fund Ins. Co.*, Case No. 13-718, 2015 U.S. Dist. LEXIS 23729 (M.D. La. Feb. 27, 2015).

[12]*Granite State Ins. Co. v. Integrity Structures, LLC*, Case No. CV-14-5085 2015 U.S. Dist. LEXIS 2712 (W.D. Wash. Jan. 9, 2015).

[13]*Id*. at 2.

[14]*Utica Mut. Ins. Co. v. Century Indem. Co.*, No. 6:13-cv-995, 2015 U.S. Dist. LEXIS 71348 (N.D.N.Y. May 11, 2015).

[15]*Scalia v. Erie Ins. Exch.*, 878 A.2d 114 (Pa. Super. June 17, 2005).

[16]*Rhodes v. USAA Cas. Ins. Co.*, 21 A.3d 1253 (Pa. Super. Ct. 2011).

[17]See *Pallante v. Certain Underwriters at Lloyd's, London*, Case. No. 17-1142, 2018 U.S. Dist. LEXIS 141427 (E.D. Pa. Aug. 21, 2018); see also http://www.pabadfaithlaw.com/index.php/category/reverse-bad-faith/.

[18]*Shannon v. New York Cent. Mut. Ins. Co.*, 2013 U.S. Dist. LEXIS 165280 (M.D. Pa. Nov. 21, 2013).

[19]Victor E. Schwartz and Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Practices: Restoring the Good Faith in Bad Faith*, 58 Am. U.L. Rev. 1477, 1510 (Aug. 2009).

[20]*Id*.; How Big is $80 Billion?, Coalition Against Insurance Fraud, http://www.insurancefraud.org/80-billion.htm.

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PREMISES LIABILITY

By Daniel E. Cummins, Esq., Foley, Comerford & Cummins

Licensee vs. Invitee

In its recent decision in the case of ***Hackett v. Indian King Residents Ass'n.*, 195 A.3d 248 (Pa. Super. 2018) (Shogan, J., Gantman, J., and Platt, J.)**, the Superior Court affirmed the denial of a plaintiff's post-trial motions after a defense verdict in a slip or trip and fall case.

The plaintiff alleged that she tripped and fell in a common area of a community. One of the main issues in the case was whether the plaintiff should be deemed a licensee or an invitee.

The plaintiff asserted that, since she had paid common area maintenance fees to the residents' association, she should be considered a business invitee. The Superior Court disagreed, and found that the mere paying of common area maintenance fees did not create invitee status under Pennsylvania law. Rather, the plaintiff was deemed a licensee since, as a resident of the community, she used the common areas by permission and not by the defendant's invitation.

The Superior Court also noted that an invitation must be more than mere permission to access common areas in order to make one a business invitee. Also of note was the Court's conclusion that the Condominium Act does not apply to homeowners' associations.

Actual or Constructive Notice

In the case of ***Pace v. Wal-Mart Stores*, 337 F. Supp. 3d 513 (E.D. Pa. 2018) (Baylson, J.)**, the court granted summary judgment to the defendant on the basis that plaintiff was unable to show that the defendant had actual or constructive notice of a hazardous condition in an alleged slip and fall on grapes or grape juice.

Notably, where the defendant produced an affidavit confirming that there was no video of the location where the plaintiff fell and that no videos had been destroyed, the plaintiff's request for an inference of spoliation of evidence was denied. A nice overview of the current status of Pennsylvania premises liability law can be seen in this opinion.

Source: "Digest of Recent Opinions." *Pennsylvania Law Weekly* (October 2, 2018).

Open and Obvious Condition

Summary Judgment was granted to a defendant in ***Thomas v. Family Dollar Stores of Pennsylvania, LLC*, No. 2:17-CV-04989, 2018 U.S. Dist. LEXIS 196569, 2018 WL 6044931 (E.D. Pa. Nov. 19, 2018) (Kelly, J.)**—a slip and fall case.

The plaintiff alleged that she slipped and fell on a thick, yellow substance on the floor of the defendant's store while she was looking at the store shelves. The court noted that the substance on the floor was next to a broken glass bottle.

In its motion for summary judgment, the defendant argued that the substance was an open and obvious condition and that it owed no duty of care to the plaintiff as it had no actual or constructive notice of the condition.

The court noted that the record confirmed that the plaintiff had acknowledged that there were no visual obstructions surrounding the liquid that concealed it from her view. However, the plaintiff was arguing that she was focused on the products on display on the store's shelves at the time she fell. The plaintiff contended that this was reasonable conduct for a shopper. The court rejected the plaintiff's argument, finding that it was "hornbook law in Pennsylvania that a person must look where he [or she] is going."

Judge Kelly also reviewed various Pennsylvania and Federal Court decisions applying Pennsylvania law that had rejected similar arguments by other plaintiffs. The court referenced the Pennsylvania Supreme Court case of *Rogers v. Max Azen, Inc.*, 16 A.2d 529 (Pa. 1940). There, the Supreme Court reasoned that, although a lesser degree of attention was required of customers in stores as compared to those walking along sidewalks, the general rule that a plaintiff must watch where he or she was walking still applied and that, where one is injured as a result of a failure on his or her part to observe and avoid an obvious condition, the claim fails.

Turning to the record before it, the court in *Thomas* ruled that the evidence revealed that the substance on the floor next to the broken glass posed an obvious condition such that its danger should have been readily apparent to a person exercising normal perception and judgment. Based on these findings, the court ruled that the defendant did not breach any duty of care to the plaintiff.

The court in *Thomas* went on to also find that the plaintiff's claim failed due to plaintiff's failure to show actual or constructive notice on the part of the defendant of the condition. The plaintiff's general assertion that the defendant was negligent based upon a lack of policies and procedures for maintenance and safety in the defendant's store was rejected as insufficient to show that the defendant had constructive notice of the spill.

The court additionally concluded that the plaintiff failed to provide any evidence as to how long the spill was on the floor. The court noted that an alleged failure to perform a safety sweep said nothing about how long the spill was actually present. As such, the defendant's motion for summary judgment was granted on this additional ground.

Anyone wishing to review of a copy of this case may click this LINK.

Dog Bite

In the case of ***Gallo v. Precise Moments Academy*, No. 904-Civil-2018 (C.P. Monroe Co. Jan. 4, 2019) (Harlacher Sibum, J.)**, Judge Jennifer Harlacher Sibum of the Monroe County Court of Common Pleas ruled that a landlord was not liable under state dog law or agency principles where a tenant's dog bit a child at a leased daycare facility. The court found that the plaintiffs failed to allege specific facts to support any claims of negligence or punitive damages against the landlord.

According to the opinion, the plaintiffs were parents of a minor child who attended a daycare facility. A dog owned by one of the tenants who ran the facility bit the minor child while she was at the daycare resulting injuries to the child's face.

In addition to suing the tenants, the plaintiffs sued the landlord who owned the property on which the daycare facility was located. The plaintiffs alleged that the landlord negligently and recklessly maintained dangerous dogs on the daycare premises despite the substantial risk of injury to children. The case came before the court by way of the landlord's preliminary objections.

Initially, the landlord asserted that the dog law in Pennsylvania did not apply given that the landlord was not an "owner" of the dog as required for the application of the statute which required dog owners to confine, secure or otherwise control their dogs.

The court agreed with the landowner defendant in this regard and noted that prior case law had held that a landlord out-of-possession, without more, was not considered the owner of a tenant's dog under that dog law. The court stated that the plaintiffs presented no other facts in support of its legal conclusion in the complaint that the landlord housed and kept the dog.

The court also agreed with the landlord defendant's argument that the plaintiffs' allegations of agency should be stricken because there were no facts to support allegations of vicarious liability. The court noted that the complaint did not identify any agency relationship between the landlord and its tenants.

Hills and Ridges Doctrine

In ***Padilla v. Moravian Development Corp.*, No. C-48-CV-2017-1007 (C.P. Northampt. Co. Jan. 23, 2019) (McFadden, J.)**, Judge F.P. Kimberly McFadden of the Northampton County Court of Common Pleas issued a detailed order denying a defendant's motion for summary judgment based on the hills and ridges doctrine.

The court recited the current status of the law of the hills and ridges doctrine and emphasized that the doctrine may only be applied in cases where the snow and ice complained of are a result of an entirely natural accumulation following a recent snowfall. The court noted that the hills and ridges doctrine does not apply if the ice was of artificial origin.

In this case, the plaintiff alleged that she fell on ice that accumulated as a result of prior attempts to clear the sidewalk.

The court found that material issues of fact remained in the case whether the plaintiff's fall was caused by natural accumulations of snow and ice during an ongoing weather event, or whether the plaintiff's fall was caused by a condition of the land created by human intervention.

Anyone wishing to review a copy of this detailed Order may click this LINK.

Hills and Ridges Doctrine

In ***Evans v. Simrell*, No. 14-CV-2483 (C.P. Lacka. Co. Oct. 4, 2018) (Nealon, J.)**, the court denied the defendant's motion for summary judgment after finding that genuine issues of material fact existed to be determined by a jury.

According to the opinion, the plaintiff alleged that he fell on ice that was in front of the defendant's home on the sidewalk. The defendants filed a motion for summary judgment asserting that the plaintiff could not sustain his burden of proving that he slipped and fell on hills and ridges of ice situated on the sidewalk.

According to the opinion, the plaintiff was walking down the sidewalk which was shoveled and free of any ice near the defendant's premises. However, as soon as the plaintiff stepped on the sidewalk in front of the defendant's property, he slipped and fell on ice. The plaintiff telephoned his mother who came to the scene and likewise observed that the nearby sidewalks were clear and free of snow or ice. The mother testified that, as soon as she reached the defendant's sidewalk, she started to slide on the ice and had to grab the hedges to prevent herself from falling to the ground.

The plaintiff's mother called 911 to request an ambulance. According to the information provided to the court, when the paramedics arrived, one of the paramedics also slid and fell on the subject sidewalk as well as the paramedics were also slipping on the ice.

In opposing the summary judgment motion, the plaintiff asserted that there was a genuine issue of material fact as to whether the plaintiff was caused to fall on a localized patch of ice as opposed to as a result of generally slippery conditions existing in the area.

The court concluded that there were triable issues of fact as to whether general slippery conditions existed throughout the community.

Judge Nealon ruled that it was within the sole province of the jury to resolve conflicting testimony and to determine the weight, if any, to be accorded to the varying accounts.

Given the issues of fact, the court denied the defendant's motion for summary judgment based upon the hills and ridges doctrine.

Hills and Ridges Doctrine - No Liability if Still Precipitation Falling

In the case of ***Rosatti v. McKinney Properties, Inc.*, No. 2017-0022 (C.P. Centre Co. Jan. 22, 2019) (Grine, J.)**, the court entered summary judgment in favor of a defendant and owner under the hills and ridges doctrine.

According to the opinion, when the plaintiff arrived at the property at around 4:00 p.m., freezing rain was falling outside. A few hours later, when the plaintiff decided to leave the premises at around 7:00 p.m., it was snowing with freezing rain. The plaintiff slipped and fell while leaving the property.

The defendant filed a motion for summary judgment under the hills and ridges doctrine. After reviewing the factors at issue under that doctrine, which required the plaintiff to show that the snow and ice had accumulated on the walkway in ridges or elevations in such size and character as to unreasonably obstruct travel and constitute a danger to pedestrian traveling thereon, the court entered summary judgment.

Judge Grine emphasized that under the prevailing case law "[A] landowner has

no obligation to correct the conditions until a reasonable time **after** the winter storm has ended." *Collins v. Phila. Sub. Dev. Corp.*, 179 A.3d 69, 75 (Pa. Super. 2018) (emphasis added in *Rosatti*).

The court additionally noted that "[a] property owner does not have a duty to clear ice or snow from walkways as soon as it forms or falls. *Citing*, *Tucker v. Bensalem Twp. School District*, 987 A.2d 198, 203 (Pa. Cmwlth. 2009).

Hills and Ridges Doctrine - No Liability if Still Snowing

In the Monroe County Court of Common Pleas case of ***Smith v. Riverside Rehab Center*, No. 1146 - CV -2017 (C.P. Monroe Co. Oct. 9, 2018) (Zulick, J.)**, the court found that the plaintiff failed to establish a *prima facie* case of negligence on the basis that the hills and ridges doctrine served to prevent the plaintiff's recovery and because the plaintiff provided no expert medical opinion on the issue of causation.

The plaintiff allegedly fell when he slipped while walking up a ramp to the entrance of the Riverside Rehabilitation Center.

After discovery, the defendants moved for summary judgment asserting, in part, that they were entitled to summary judgment based upon the hills and ridges doctrine.

The court reiterated general rule of law that, under the hills and ridges doctrine, landowners are protected from liability for generally slippery conditions resulting from snow and ice where the owner has not permitted the snow and ice to unreasonably accumulate in ridges or elevations.

Judge Zulick found that liability was not established under the hills and ridges doctrine. The record revealed that a severe snowstorm had begun as the plaintiff traveled to the Riverside Rehabilitation Center. Evidence presented to the court indicated that the snowstorm was continuing when the plaintiff arrived at the center and slipped and fell while going into the center.

As such, the court found that the record established that there was no evidence presented which otherwise indicated that any of the defendants allowed hills or ridges or snow or ice to unreasonably accumulate. To the contrary, the court found that the case presented as involving a slippery ramp created by an ongoing storm. As such, summary judgment was granted on this basis.

Hills and Ridges Doctrine - No Liability if Still Snowing

Another decision has been rendered whereby a trial court has granted summary judgment to a defendant under the hills and ridges doctrine in a case where the plaintiff allegedly slipped and fell during an active winter storm.

In ***Beauford v. Second Nature Landscaping & Construction, Inc.*, No. 2016-CV-8925 (C.P. Del. Co. Nov. 19, 2018) (Green, J.)**, the court held that a defendant landowner was not liable for alleged injuries suffered by a plaintiff in a slip and fall event that occurred during an active storm since the defendant had no obligation under Pennsylvania law to correct the conditions until reasonable time after the storm ended.

In its 1925 opinion in support of affirmance, the court noted that the facts pertaining to the weather conditions leading up to and after the plaintiff's event were uncontested. More specifically, the court found that there was no factual dispute that the plaintiff allegedly slipped and fell on an alleged ice puddle during an active weather event—that is, at a time when generally slippery conditions prevailed in the community.

The court noted that, under applicable Pennsylvania law, a landowner has no obligation to correct any wintry conditions until a reasonable time after a winter storm has ended. In this regard, the court cited *Collins v. Phila. Suburban Dev. Corp.*, 179 A.3d 69 (Pa.Super. 2018), in which the Superior Court held that there is no liability imposed on landowners for persons injured as a result of a fall that occurs while a winter weather event is still active.

LITIGATORS MAY NOW CITE TO UNPUBLISHED, NON-PRECEDENTIAL PENNSYLVANIA SUPERIOR COURT DECISIONS FOR PERSUASIVE VALUE

By Daniel E. Cummins, Esq., Foley, Comerford & Cummins

Pursuant to amendments to Pa.R.A.P. 126, effective May 1, 2019 and going forward, judges and litigators will be permitted to cite to all Pennsylvania Superior Court memorandum opinions as persuasive precedent on the issues presented.

As the amendments to Pa.R.A.P. 126 are not retroactive, previous memoranda opinions issued by the Pennsylvania Superior Court still cannot be cited as precedential.

As such it is important to remember to look at the date of any unpublished Superior Court opinions and to make sure that the date of the opinion is on or after May 1, 2019 in order to determine if it can be cited as a supporting legal authority.

The Rule provides that, if such an unpublished, non-precedential decision is cited, the litigator "shall" include a parenthetical immediately following the citation indicating the value of the decision, i.e., that it was an unpublished decision that was marked non-precedential. **See Pa.R.A.P. 126(a).**

The exact language for the suggested parenthetical is not provided in the amended Rule, but elsewhere in the Rule it is indicated that non-precedential decisions "may be cited for their persuasive value." **See Pa.R.A.P. 126(b)(2).**

The Rule also mandates that litigators "shall" attach to the filing a copy of any unpublished, non-precedential decisions cited within the filing. **Pa.R.A.P. 126(a).**

Under the Commentary to the Rule, it is indicated that litigators are encouraged to also cite to the Westlaw and/or Lexis citation for any unpublished opinions that are cited.

The Commentary additionally notes that opinions of the appellate courts are all posted online at http://www.pacourts.us. That website has search and filtering options to utilize in searching for relevant decisions of the appellate courts.

Commonwealth Court rules regarding citation to its unpublished opinions, which has been allowed by that court since as far back as 2008, were also formally adopted in these amendments and were not changed in any way.

The Commentary to the amended Pa.R.A.P. 126 also offers some interesting points. For example, the Commentary confirms that litigators and courts need only to cite to the national reporters and that parallel citations to local reporters are not required. That is, litigators need only to list the A., A.2d or A.3d citations and not the parallel Pa. or Pa. Super. citations as well.

Also, the Commentary notes that litigators are encouraged to cite to the specific pages in any decisions cited that are relevant to the legal point put forth.

I send thanks to Attorney Jim Beck of the Philadelphia office of the Reed Smith law firm for publicizing this notable development in Pennsylvania civil litigation practice.

POST-*KOKEN* UPDATE

By Daniel E. Cummins, Esq., Foley, Comerford & Cummins

Statute of Limitations for UIM Case
Judge James M. Munley of the Federal Middle District Court of Pennsylvania denied the carrier's motion for summary judgment based upon the applicable statute of limitations for an underinsured (UIM) motorist benefits claim in the case of *Legos v. Travelers Cas. Co.*, No. 3:16cv1917, 2018 U.S. Dist. LEXIS 174994 (M.D. Pa. Oct. 11, 2018).

Notably, the court held that the statute of limitations for a UIM claim is four (4) years from the date of the breach of the contract and not the date of the third party settlement.

According to the opinion, the third party case in this matter settled in March 2012. Over four (4) years later, Travelers sent correspondence to its insured indicating that it believed that the statute of limitations on the UIM claim had expired and that it was, therefore, closing its file.

The insured nevertheless filed a breach of contract complaint. Travelers eventually responded with a motion for summary judgment asserting that the four (4) year statute of limitations had expired once four (4) years from the March 2012 settlement of the case had run.

The plaintiff countered with the Pennsylvania Supreme Court case of *Erie Ins. Exch. v. Bristol*, 151 A.3d 1161 (Pa. Super. Ct. 2016), *rev'd*, 174 A.3d 578 (Pa. 2017) and asserted that the four (4) year statute of limitations actually commenced in 2016 when the carrier indicated that it was closing its file as that would have been the date of the alleged breach of contract. Travelers responded by asserting that the *Bristol* case only applied to uninsured (UM) motorists claims. Judge Munley disagreed and held that the *Bristol* case applied to both UM and UIM cases.

In a footnote, Judge Munley acknowledged the Third Circuit's 2007 prediction in *State Farm Mut. Auto. Ins. Co. v. Rosenthal*, 484 F.3d 251 (3d Cir. 2007), that the Pennsylvania Supreme Court would hold that the limitations period on a UIM claim begins to run when the insured party settles with an adverse party for less than the value of the insured's damages. However, Judge Munley ruled that the 2017 Pennsylvania Supreme Court decision in *Bristol* served to clarify state law in the manner held by him in the *Legos* case. As such, the court found that the UIM breach of contract claim in this matter was not barred by the statute of limitations. Consequently, the carrier's motion for summary judgment was denied.

Severance vs. Consolidation of Claims
In the case of *Martin v. Ochenduszko*, No. 17-CV-3912 (C.P. Lacka. Co. Jan. 16, 2019 Nealon, J.), Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas addressed the UIM carrier's motion to sever the plaintiffs' UIM claims from the tort claims asserted against the tortfeasor-defendant against whom punitive damages claims were pled given the tortfeasor-defendant's alleged operation of a vehicle under the influence of controlled substances at the time of the accident.

According to the opinion, the motion to sever was filed after an admission of liability by the tortfeasor-defendant for the accident and after his carrier had tendered its liability limits to the plaintiff in settlement of the tort claims, which settlement the plaintiff had not yet accepted. The plaintiff was apparently trying to strategically keep the tortfeasor-defendant in the case with the UIM carrier co-defendant. The motion filed by the UIM carrier sought to sever the UIM claims from the tort claims and to stay consideration of the UIM claims until the tort claims had been concluded.

Judge Nealon reviewed Pa.R.C.P. 213(b) regarding the severance of claims and noted that, while the compensatory damages claims that are recoverable from the tortfeasor and the UIM carrier involved the same evidence and issues, the plaintiffs' punitive damages claims are "irrelevant to the compensatory damages determinations, and proof of the motorist's illegal drug use could unfairly prejudice the UIM insurer by inflaming the jurors' passions or emotions and improperly influencing the compensatory damages awards." *See* Op. at 13. As such, although Judge Nealon noted that bifurcation of the compensatory damages and the punitive damages claims for trial appeared to be warranted under the circumstances presented, the court left that decision to be made by an assigned trial judge after discovery is completed and the case certified for trial.

In the meantime, the court found no legitimate basis for severing the tort and UIM claims during the course of pre-trial discovery. The court also found no basis for staying the litigation process with respect to the UIM claims as requested by the UIM carrier. Accordingly, the UIM carrier's motion to sever and stay relative to discovery and pre-trial purposes was denied and any ruling on a motion to bifurcate the trial was deferred to be decided by a later assigned trial judge.

Severance v. Consolidation of Claims
In the case of *Ali v. Erie Ins. Co.*, No. 2017-CV-03544 (C.P. Dauph. Co. March 1, 2019 Cherry, J.), the court denied a plaintiff's motion to consolidate a third party negligence claim with a companion UIM claim in a post-*Koken* motor vehicle accident matter.

In his detailed order, Judge John F. Cherry of the Dauphin County Court of Common Pleas held that the "consolidation of these matter[s] would not serve the interests of judicial efficiency, but rather, create confusion to the jury." *Ali*, No. 2017-CV-03544. The court additionally noted that the cases involved "separate and distinct causes of action" against the two (2) types of defendants, that is, a negligence claim for bodily injury against the defendant driver and owner and a separate contract claim against the UIM carrier.

Severance vs. Consolidation of Claims
In her recent order, in the case of *Albright v. Erie Insurance Exchange*, No. 3919-2018 (C.P. Luz. Co. Oct. 15, 2018 Gelb, J.), Judge Lesa Gelb of the Luzerne County Court of Common Pleas denied a defendant carrier's motion to sever and stay a statutory bad faith claim in a post-*Koken* matter.

Severance vs. Consolidation of Claims
In the Philadelphia County Court of Common Pleas case of *Leone v. Ellingberg and Allstate*, No. 180802705 (C.P. Phila. Co. Nov. 5, 2018 Younge, J.), the court denied the carrier's Motion to Sever the Plaintiff's negligence claims from the UIM breach of contract claims by Order only.

Severance vs. Consolidation of Claims
In the case of *Stoots v. Mut. Benefit Ins. Co.*, No. GD 16-024731 (C.P. Allegh. Co. Dec. 7, 2018 Colville, J.), the court granted a carrier's motion to sever and stay the bad faith portion of this post-*Koken* matter by Order only.

Severance vs. Consolidation of Claims
In the case of *Pastin v. Allstate Ins. Co.*, No. 17-CV-1503, 2018 U.S. Dist. LEXIS 203076 (W.D. Pa. Nov. 30, 2018), the court rejected an effort by a plaintiff to join her underlying state court negligence action against the tortfeasor in a motor vehicle accident case with her UIM bad faith and breach of contract action filed in the federal court against her own carrier.

According to the opinion, the tortfeasor-defendant in the state case and the plaintiff were insured by the same carrier. The court rejected the motion to join by the plaintiff, observing that the two (2) actions were separate and distinct. The court found no basis to join the underlying state action with the federal bad faith action simply because of the fortuity that the same carrier was involved in both claims.

Severance vs. Consolidation of Claims - Bad Faith
In the case of *Goldstein v. Am. States Ins. Co.*, No. 18-CV-3163, 2018 U.S. Dist. LEXIS 201100 (E.D. Pa. Nov. 28, 2018), the Eastern District Federal Court of Pennsylvania denied a defendant-carrier's motion to sever and stay the plaintiff's bad faith claim in a post-*Koken* litigation.

In this matter, the defense argued that the bad faith claim should be resolved through a bench trial in federal court and the breach of contract claim was to be tried in front of a jury. The defense additionally argued that the resolution of the breach of contract claim could serve to moot the bad faith claim. The defense additionally argued that each of the claims presented would require different types of evidence such that the defense would be prejudiced if the jury heard evidence on both the bad faith claims and the breach of contract UIM claim.

The court ultimately ruled that bifurcation would not serve the interests of judicial economy. The court further noted that it could address concerns of the jury considering irrelevant and/or prejudicial evidence when deciding the breach of contract claim through the use of appropriate jury instructions. In addition to the above-noted rationale, the court in this matter noted that the bad faith claim might not be rendered moot by a resolution of the breach of contract claim given that the claims of bad faith could arise for more than just the refusal to provide coverage.

It was noted that, in this matter, the plaintiff had additionally alleged bad faith conduct in the form of allegations that the defendant-carrier had failed to conduct a reasonable investigation of their claims, failed to adopt reasonable standards for prompt investigation, and otherwise breached other fiduciary duties owed to the plaintiff. As noted, in the end, the court denied the carrier's motion to sever and stay the bad faith claims.

Admissibility of Insurance Information at Post-*Koken* Trial
In the case of *Phillips v. Nat'l Gen. Assurance Co.*, No. 2016-959 (C.P. Susq. Co. Nov. 16, 2018 Legg, P.J.), President Judge Jason J. Legg of the Susquehanna County Court of Common Pleas granted a UIM carrier's motion in limine to exclude extraneous evidence relating to insurance.

In the detailed order, the court also directed the parties to prepare proposed jury instructions explaining the nature of the litigation to the jury that avoids referencing the extent of the coverage limits. In this regard, the judge cited with the signal "c.f." (which is a "compare" signal) Judge Terrence R. Nealon's decision in the case of *Kujawski v. Fogmeg*, 2015 WL 1726534 (C.P. Lacka. Co. 2015) (providing a jury instruction explaining the nature of UIM coverage and the insurance company's potential liability).

In rendering his decision, President Judge Legg, noted that there was no Pennsylvania state appellate court decisions on the issue of admissibility of insurance evidence at post-*Koken* trials. The judge pointed to recent Pennsylvania federal court decisions and, after a review of those cases, found that "there is very little, if any, probative value to the extraneous insurance contract evidence" in the *Phillips* case before him where there was no dispute regarding the existence of an insurance contract between the parties or the obligation of the carrier to provide UIM benefits, both of which issues had been conceded by the carrier. *See* Op. at n.1.

Accordingly, Judge Legg agreed with the reasoning that the extent of the coverage limits has no probative value as to the damages suffered by the plaintiffs and the prejudice to the defendant will be substantial as [such evidence would] provide the jury with an "anchor number" that may unduly influence the damage award. In this regard, the court cited, among other decisions, the following:

> *Lucca v. GEICO Insurance Company*, No. 15-4124, 2016 WL 3632717 (E.D. Pa. 2016).
>
> *Schmerling v. LM Gen. Ins. Co., Inc.*, No. 17-3659, 2018 WL 5848981 (E.D. Pa. 2018).
>
> *Ridolfi v. State Farm Mut. Auto. Ins. Co.*, 1:15-CV-859, 2017 WL 3198062 (M.D. Pa. 2017.) (Excluding evidence of premium payments in breach of contract action between insured and insurer).

To review more post-*Koken* decisions, consider visiting the post-*Koken* Scorecard on the Tort Talk Blog to review the split of authority amongst the trial courts across Pennsylvania on a variety of issues. To get to the Scorecard, go to Tort Talk at www.TortTalk.com, scroll down the right hand column until you see "Post-Koken Scorecard," and click on the date below that title.

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