



NO STANDARDS:

Defending Product Liability Claims When Compliance with Standards is Inadmissible

J. Michael Kunsch Sweeney & Sheehan

Most products are designed to meet or exceed industry consensus and/or mandatory government standards. While frequently characterized derisively by plaintiff's counsel as "minimum," these standards represent the balance between safety risks and benefits of using the product, show the state of the art, and may reflect the technological feasibility of alternate designs. Accordingly, when defending product liability claims, manufacturers seek to admit evidence of the standards and compliance with them as proof that a product is not defective. And plaintiffs are universally permitted to offer evidence that a product does not comply with standards as evidence of defect.

The overwhelming majority of jurisdictions in the United States deem evidence of compliance with voluntary industry and/or mandatory standards to be relevant and admissible in product liability cases, even if such compliance is not conclusive on the issue of defectiveness. But what happens when a Court decides that compliance with standards is irrelevant and inadmissible in a strict liability risk-utility claim, as the Pennsylvania Supreme Court recently did in *Sullivan v. Werner Co.*, 306 A.3d 846 (Pa. 2023)? This article analyzes *Sullivan*, explores evidentiary issues that are likely to arise from the decision, and offers practice

tips for defending design defect cases when compliance with standards is inadmissible.

PENNSYLVANIA PRODUCT LIABILITY LAW

In 1966, the Restatement (Second) of Torts §402A was adopted by the Pennsylvania Supreme Court as the law of strict product liability in *Webb v. Zern*, 220 A.2d 853 (Pa. 1966). Section 402A provides:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Accordingly, the focus in a §402A case is on the product and not the manufacturer's conduct. Based on that premise, the Pennsylvania Supreme Court held in 1987 that evidence of compliance with industry standards is inadmissible because that evidence goes to the reasonableness of a manufacturer's design choice, and improperly injects negligence principles into strict liability. *Lewis v. Coffing Hoist Div., Duff-Norton Co., Inc.*, 528 A.2d 590 (Pa. 1987).

In 2014, the Pennsylvania Supreme Court reaffirmed that Pennsylvania follows §402A in design defect cases. In so doing, however, the Court overruled longstanding precedent that purported to eliminate "negligence" concepts and reinforced that a plaintiff must prove that a product is in a "defective condition" that is "unreasonably dangerous." *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014). Going forward from *Tincher*, a plaintiff must establish the defective condition under one of two tests – consumer expectation and risk-utility. Under the consumer expectations test, "the product is in a defective condition if the danger is unknowable and unacceptable to the average or ordinary consumer." *Id.* at 387. 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. A plaintiff is permitted to pursue either or both theories.

Tincher offered manufacturers hope that *Lewis*, and its prohibition of evidence of compliance with standards in strict liability cases, would be reexamined, specifically stating that this seismic shift in Pennsylvania product liability law would necessarily require review of prior decisions regarding foundational issues such as proof of claims and defenses. However, the *Tincher* Court left those issues undecided. In the nine years following *Tincher*, considerable time and expense was spent litigating the admissibility of this evidence, with courts reaching different results. *See, e.g., Lehmann v. Louisville Ladder Inc.*, 610 F.Supp.3d 667 (E.D. Pa. 2022) (predicting the Pennsylvania Supreme Court would lift its categorical exclusion of industry standards evidence in strict liability actions); *Mercurio v. Louisville Ladder Inc.*, 2019 U.S. Dist. LEXIS 65560 (M.D. Pa. April 17, 2019) (precluding evidence of compliance with government/industry standards to show proof of non-defectiveness).

THE SULLIVAN COURT REAFFIRMS EXCLUSION OF COMPLIANCE WITH STANDARDS

The *Tincher* Court explained that under the consumer expectations test, 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 (e.g., a knife). The nature of the product, the identity of the user, the product’s intended use and intended user, and any express or implied representations by a manufacturer or other seller are among considerations relevant to assessing the reasonable consumer’s expectations.” *Tincher*, 104 A.3d at 387.

Regarding the “risk-utility” standard, the *Tincher* Court cited the following factors articulated by Dean Wade that are relevant to the manufacturer’s risk-utility calculus: “(1) the usefulness and desirability of the product - its utility to the user and to the public as a whole; (2) the safety aspects of the product - the likelihood that it will cause injury, and the probable seriousness of the injury; (3) the availability of a substitute product which would meet the same need and not be as unsafe; (4) the manufacturer’s ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; (5) the user’s ability to avoid danger by the exercise of care in the use of the product; (6) the user’s anticipated awareness of the dangers inherent in

the product and their availability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; (7) the feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.” *Id.* at 389-90 (citations omitted).

Evidence of compliance with standards appears directly relevant to the risk-utility test. Since *Tincher* explained that the risk-utility test offers courts an opportunity to analyze post hoc whether a manufacturer’s conduct in manufacturing or designing a product was reasonable, manufacturers argued that while evidence of industry standards is not controlling as to the existence of a defect in the product, it is certainly evidence of reasonableness of the design, the risks and utility of the product, and the other Wade factors.

The hope of *Tincher* came to a crashing halt in *Sullivan*, beset by time and changes in the composition of the Court. The plaintiff in *Sullivan* was injured when he fell off a rolling mobile scaffold. He contended that the deck pins which secured the scaffold platform to the frame were defective because they could be inadvertently rotated off the platform during use, allowing the platform to fall through the frame. The expert retained by the manufacturer and retailer opined that the scaffold met ANSI and OSHA requirements and that most manufacturers used the same type of deck pins. The Court of Common Pleas of Philadelphia County precluded the compliance evidence. After a jury found the scaffold defective and the Court entered judgment in favor of the plaintiff, the Superior Court affirmed the trial Court’s preclusion order.

Reaffirming *Lewis*, a three-justice plurality of the Supreme Court affirmed, holding that compliance evidence went to the conduct of the manufacturer in complying with the standard, and not the characteristics or attributes of the product which may render it defective. The Court also noted that the Restatement (Third) of Torts, Products Liability §4, which allows evidence of compliance, was rejected by the *Tincher* Court. The Court was not swayed by being an outlier on this issue, well out of the mainstream of thought that evidence of compliance is relevant and admissible even if not conclusive.

LOOKING BACK TOWARD THE FUTURE

Manufacturers defending strict liability risk utility claims in Pennsylvania must now look back to how they defended cases prior to *Tincher* to determine a path forward. One of the most absurd evidentiary contor-

tions under *Lewis* occurred when presenting the product to a Jury. While the case law said that the focus of the case was on the “whole” product, manufacturers were required to cover up labels on the product certifying compliance with industry standards, often ANSI standards, or mandatory governmental standards such as OSHA.

Also, while evidence of compliance with standards will not be admissible, it may still be possible to offer evidence of the goals of the standard that pertain to the characteristics of the product and its non-defectiveness. For example, fiberglass stepladders are designed to comply with ANSI A14.5, which sets forth both design specifications and performance testing criteria for evaluating the design. One or more of the 15 design verification tests specified in ANSI A14.5 may be relevant to rebut the failure mechanism and causation scenario posited by a plaintiff’s expert. During the defense presentation, the defense witness and/or expert may be permitted to describe the test and its purpose in the context of the ladder design to show the characteristics and performance of the ladder under loading conditions. Similar testimony may be permitted on other products. Making the consensus standard your design standard may offer a path to admissibility under the right circumstances.

Further, evidence of industry and government standards remains admissible when a plaintiff pursues a negligence theory and/or if the plaintiff “opens the door” by offering that evidence in their case.

Finally, remember that a plaintiff will be able to offer evidence of non-compliance during their case to establish defectiveness (and, potentially, punitive damages), so even if you can’t get evidence of compliance before the jury, complying with the requirements does eliminate that claim from their arsenal. You may need to be more creative about establishing the beneficial aspects of your product’s design, which can be even more persuasive to a jury than simply telling them that some third-party not in Court endorsed your design.



J. Michael Kunsch, a shareholder in the Philadelphia office of Sweeney & Sheehan, is an AV Preeminent-rated attorney with a primary focus in the defense of complex litigation involving product liability, retail and hospitality,

transportation, and commercial disputes. He is a graduate of the University of Arizona and the Villanova University School of Law and has been recognized from 2011-2024 as a Pennsylvania Super Lawyer®.