A New Day in Products Liability The Defense Perspective on *Tincher*

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With the Pennsylvania Supreme Court's decision in *Tincher v. Omega Flex, Inc.*, 2014 Pa. LEXIS 3031 (Pa. 2014), the long established and long criticized law of strict products liability in Pennsylvania has been upended. In *Tincher,* the Court overruled *Azzarello v. Black Brothers*, scrapped decades of precedent, and adopted two tests for proving a design defect claim. The court outlined the elements of the consumer expectation test and the risk benefit test, but offered little guidance on a host of issues relating to their application. Accordingly, both the plaintiff and defense bar will struggle for some time to define the parameters of what the Court has wrought.

The essence of *Tincher* is that a plaintiff may prove that a product is in "defective condition", in a design case, by showing that either (1) the danger is "unknowable and unacceptable to the average or ordinary consumer" [the consumer expectation test] or (2) "that a reasonable person would conclude that the probability and seriousness of the harm caused by the product outweighed the burdens or costs of taking precautions" [risk-benefit test]. *Tincher*, at 2. The plaintiff can proceed under one or the other theory or both, assuming sufficient facts justifying the particular claim. The CE test articulates a standard from the perspective of the consumer and defines a "defective condition" as a "condition upon normal use dangerous beyond a reasonable consumer's contemplations." The risk utility test takes into account various design considerations in weighing a product's potential harms against its benefits.

Because it will take time for Pennsylvania courts to provide counsel with guidance on how this all will work, a significant point of reference will be the law of other states. *Tincher* itself makes frequent reference to decisions from California, Illinois, Alaska and other states that also use a combined consumer expectation/risk-benefit test. *See Tincher*, at 152, 157, 163. The way the states apply the test varies markedly.

While the Plaintiff may be the "master of the case in the first instance", *Tincher* at 208, he does not and should not always get his way in regard to which theory or theories (CE or RBT) may be submitted to the jury. The *Tincher* Court recognized that the composite approach must be applied in the appropriate factual context. *Id.*, at 191. The defendant can challenge the plaintiff's proposed theory, by way of appropriate motion, presumably a Motion for Summary Judgment or Motion *in Limine*. *Id*, at 208-209. Therefore, the threshold question for defense counsel is whether to challenge – and how to go about doing it – the theory or theories advanced by plaintiff.

In California and Illinois, the consumer expectation test is limited to products where the ordinary consumer, in his or her everyday knowledge and experience, can form a conclusion that the product's design violated minimum safety assumptions about how it would perform. The product must meet the safety expectations of the general public as represented by the ordinary or average consumer, not any special group. *See, e.g., Soule v. General Motors*, 882 P.2d 298, 306-307 (Cal. 1994); *Salerno v. Innovative Surveillance Tech., Inc.*, 932 N.E. 2d 101 (Ill App. Ct. 2010). Because the test is objective and not related to any particular category of user, expert testimony should not be permitted on the issue of what consumers expect. *Soule* at 567.

California courts recognize that while the plaintiff may wish to submit his case to the jury on a consumer expectation theory it is the function of the Court to determine whether a product can support that theory. If the facts will not permit an inference that the product's performance did not meet minimum safety expectations of the ordinary user – which is often the case with complex products – California courts require that a risk benefit analysis be employed so the jury can consider the manufacturer's evidence of competing design considerations. *Soule* at 562.

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Defense counsel might also want to consider the approach taken by the Illinois Supreme Court in *Mikolajczyk v. Ford Motor Co.*, 901 N.E. 2d 329 (Ill. 2008). Recognizing that the CE and RBT tests are merely methods of proving a defect, the Court noted that while a plaintiff may elect to use the consumer expectation test, he cannot foreclose the defendant from offering evidence that the product is not defective under a risk-benefit analysis. If the defendant chooses to introduce evidence relevant to the risk-benefit analysis, it is entitled to have the jury instructed on that theory along with the consumer expectations theory. In the event of inconsistent verdicts, the risk-benefit test, which subsumes consumer expectations, controls.

Determining the test most advantageous to the defense will depend on the facts of the case. For defendants with simpler products the CE test might actually be more defendant friendly. If a lighter produces a flame when used then it meets ordinary consumer expectations about its performance. However, in the case of a complex product, defendants should argue that the consumer expectation test cannot be applied. If that battle is lost, the defendant should argue the *Mikolajczyk* approach and attempt to introduce evidence of risk-benefit as part of its defense.

The *Tincher* Court passed on deciding the applicable burden of proof and various evidentiary issues. There is little dispute that if the plaintiff chooses to proceed by the consumer expectation theory, the plaintiff has the burden of proof. She must prove that the product, when used in an intended or reasonably foreseeable manner, failed to meet consumer expectations because its danger was unknowable or unacceptable to the ordinary consumer. *Barker*, 573 P.2d at 455-456. Under the RBT there is disagreement over how the burden applies. Plaintiffs will no doubt take the approach employed in California that the plaintiff need only introduce evidence that the product's design caused her injuries and the burden then shifts to the defendant to prove that the product's benefits outweigh its risks. *See Barker*, at 457-458. Defendants will want to advocate the Illinois approach, that the plaintiff retains the burden of proof on both tests. *See Asaf v. Cottrell*, 2012 U.S. Dist. LEXIS 133571 at * 7-8 (N.D. Ill. 2012) *citing Calles v. Scripto-Tokai Corp.*, 864 N.E.2d 249, 255 (Ill. 2007); *see also Jablonski v. Ford*, 955 N.E.2d 1138, 1157 (Ill. 2011).

The risk-benefit test raises questions about the use of certain types of evidence previously foreclosed to the defense. If, as part of its decision making process, the defendant considered industry or governmental standards or regulations, it would seem that evidence would now be relevant. *See, e.g., Hasan v. Cottrell*, 2014 U.S. Dist. LEXIS 116748 (N.D. Ill 2014). The same argument could be made with regard to the state of the art at the time the product was manufactured. Evidence of the absence of other accidents bearing directly on the usefulness and desirability of the product – its utility to users and the public as a whole – also should come in. *See, e.g., Sosnowski v. Wright Med. Tech.*, 2012 U.S. Dist. LEXIS 41303 (N.D. Ill 2012).

Tincher leaves the door open to new comparative fault defenses in products cases that were previously unavailable in Pennsylvania. *See Tincher*, at 217. Defendants should argue that with the combined CE/RBT test, Pennsylvania takes the rules on comparative fault in strict liability cases that are used in other states. A plaintiff's assumption of the risk should be the basis for a percentage reduction even if such conduct is not the sole cause of the accident. *See Coney v. JLG Industries*, 454 N.E. 2d 197 (Ill. 1983), Illinois Jury Instruction 400.03. In addition, defendants should argue that misuse of a product, especially if not reasonably foreseeable, is a basis for a percentage reduction even if not the sole cause of the accident. See *Torres v. Xomax Corp.*, 49 Cal. App 4th 1 (1996); *Caterpillar v. Beck*, 593 P.2d 298 (Alaska 1979). ♦

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