

# COUNTERPOINT

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## PRODUCT LIABILITY UPDATE

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### EVIDENCE – OTHER ACCIDENTS/ SUBSTANTIAL SIMILARITY

**Granting of new trial affirmed where expert reports summarizing heavy truck accidents were improperly admitted to show manufacturer's "state of mind" because plaintiff failed to establish "substantial similarity of conditions" between the other accidents and the accident that injured plaintiff.**

*Hutchinson v. Penske Truck Leasing Co.*, 922 A.2d 890 (Pa. 2007)

On May 31, 2007, the Pennsylvania Superior Court's decision in *Hutchinson v. Penske Truck Leasing Co.*, 876 A.2d 978 (Pa. Super. 2005) was affirmed without opinion by Pennsylvania Supreme Court.

In a crashworthiness case, plaintiff sought to introduce expert reports detailing other heavy truck accidents. The trial court held that evidence of other accidents was inadmissible to prove a product defect because there was not a "substantial similarity" between those accidents and the one at issue. However, the trial court did allow the evidence of other accidents as evidence of the manufacturer's "state of mind," which was a relevant consideration on punitive damages.

The Superior Court reversed and granted a new trial, holding that the state of mind that plaintiff sought to prove was nothing more than the manufacturer's knowledge or notice of the alleged lack of crashworthiness of its cabs. As such, "substantial similarity" was necessary to prove a manufacturer's "state of mind," as well.<sup>1</sup>

**Manufacturer not entitled to summary judgment on punitive damages where "substantial similarity" test is on appeal.**

*Minick v. MTD Products, Inc.*, 81 Pa. D. & C.4th 36 (Lackawanna 2007)

Thirteen-year-old Melinda Minick was seriously injured when she was run over by a tractor lawn mower manufactured by MTD and operated by her mother. Plaintiffs sued MTD, alleging that the No Cut in Reverse (NCIR) feature of the tractor was defectively designed because it could easily be disabled by the consumer. 81 Pa. C. & D.4th at 37.

MTD moved for summary judgment to dismiss a number of issues, including punitive damages. In opposition, plaintiffs pointed to evidence of 200 prior accidents cited in a Consumer Product Safety Commission study of ride-on mowers covering the years 1983 through 1986. Plaintiffs argued that this study provided sufficient evidence of MTD's "state of mind" to withstand summary judgment on punitive damages. *Id.* at 37-38.

Relying on *Hutchinson v. Penske Truck Leasing Co.*, 876 A.2d 978 (Pa. Super. 2005), the court directed plaintiffs to conduct supplemental discovery to determine if the accidents cited in the CPSC study were "substantially similar" to the subject accident. Plaintiffs did not conduct any additional discovery, choosing instead to rely upon the record as it stood. *Id.* at 39.

While MTD's summary judgment motion was pending, *Hutchinson* was accepted for appeal to the Pennsylvania Supreme Court. In reviewing the dockets, the court noted that one of the issues on appeal was whether the Superior Court's decision in *Hutchinson* violated precedent and principles of relevance on the issue of punitive damages. This argument was similar to that advanced by plaintiffs in this case, who were arguing that a more general common law

approach to punitive damages was applicable, rather than the more stringent "substantial similarity" standard of *Hutchinson*. *Id.* at 42-43.

Ultimately, the court concluded that it would be inappropriate to grant summary judgment because the law on the issues was "in a state of flux and uncertain." Accordingly, MTD's motion for summary judgment was denied without prejudice to the right of the parties to revisit the issue once the Supreme Court issued its decision in *Hutchinson*. *Id.* at 43.

Three-and-a-half months after the Hon. Carmen D. Minora issued his ruling, the Pennsylvania Supreme Court affirmed *Hutchinson* without opinion. *Hutchinson v. Penske Truck Leasing Co.*, 922 A.2d 890 (Pa. 2007).

### FAILURE TO WARN/DEFECTIVE DESIGN

**Manufacturer entitled to summary judgment on failure to warn claim where warning advised of precise manner in which injury occurred. Summary judgment not warranted on design defect claim where factual issue exists as to whether compactor could have been designed more safely using "fail safe" technology to prevent safeguards from being overridden.**

*Makadji v. GPI Div. of Harmony Ent.*, 2006 WL 3498324 (E.D. Pa. 2006)

Plaintiff, Bakore Makadji, was working as a dishwasher at the Sonoma Restaurant in Philadelphia. Part of his responsibilities included compressing boxes in an industrial trash compactor which was manufactured by GPI and Harmony and was distributed by VerTech, Inc. When used as intended, the user would load boxes into the machine and shut

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the door. Closing the door engaged a safety switch that enabled the machine to operate. Once the safety switch was engaged, the user could push a button, which triggered the hydraulic plunger inside the machine, causing the plunger to descend and crush the boxes. 2006 WL 3498324, \*1.

Although the compactor possessed the necessary safeguard, which required that the outer door be closed before it could be operated, the switch was apparently not functioning properly on the day of the accident. Consequently, Makadji was able to load the compactor and begin the operation without closing the door to the machine. As the hydraulic plunger descended, boxes began to fall out. When Makadji reached over to prevent the boxes from falling, and pushed in, his right hand was crushed by the descending plunger. *Id.*

Plaintiffs' complaint alleged defendants failed to adequately warn of the dangers associated with the product and that it was defectively designed. Defendants moved for summary judgment.

The trash compactor contained a warning in large, black bolded capital letters that read: **CAUTION: TO AVOID INJURY KEEP HANDS CLEAR OF THE MACHINE WHILE IN OPERATION.** The warning was printed on a light-colored background and appeared twice on the machine, once on the interior and once on the exterior. Plaintiffs' expert opined that GPI should have provided specific warnings about not tampering with the interlock, as well as a warning not to operate the machine in the down mode with the door open. *Id.* at \*3.

"The determination of whether a warning is adequate and whether a product is 'defective' due to inadequate warnings are questions of law to be answered by the trial judge." *Id.* (quoting *Davis v. Berwind Corp.*, 690 A.2d 186, 190 (Pa. 1990)). The Hon. Berle M. Schiller, U.S.D.J. held that the warning on the trash compactor was adequate as a matter of law. The accident happened in precisely the manner predicted by the warning – Makadji's hand was crushed because it encountered the compactor while in operation. Had the warning been heeded, the accident would not have occurred. *Id.*

Judge Schiller held that the warnings suggested by plaintiffs were only useful if the existing warning was "blatantly ignored." *Id.* (quoting *Davis*, 690 A.2d at 190). Plaintiffs were "in effect suggesting that we require a manufacturer to warn against dangers that may arise if the stated warnings are not heeded." *Id.* (quoting *Davis*, 690 A.2d at 191). However, "the law presumes that warnings will be obeyed." *Id.* (quoting *Davis*, 690 A.2d at 191).

Judge Schiller rejected plaintiffs' claims that the warning should have employed a pictorial description of the hazard involved in operating the machine, given the likelihood that operators might be unskilled laborers who might not speak English, because plaintiffs failed to present any evidence that such a warning was required because of the special characteristics of the "intended user" of the trash compactor. *Id.* at \*4.

Judge Schiller also rejected plaintiffs' argument that the color scheme on the warning sign was not standard. Although the court did not dispute that the warning sign could have been designed in another way, the relevant inquiry was whether the warning was defective because it did not inform the user of the dangers inherent in the product. *Id.* (citing *Davis*, 690 A.2d at 190).

Turning to plaintiffs' design defect claim, Judge Schiller denied defendants' motions for summary judgment. In determining liability for defective design, a judge must first determine whether the product is unreasonably dangerous by deciding which party should bear the risk of the loss. In making this determination, the court conducts a utility, or social policy analysis. *Id.* at \*5 (citing *Riley v. Warren Mfg.*, 688 A.2d 221, 225 (Pa. Super. 1995)). The relevant factors in making this social policy analysis are: (1) the usefulness and desirability of the product; (2) the likelihood that the product will cause injury and the seriousness of that injury; (3) the availability of a substitute product which would meet the same need and not be unsafe; (4) the manufacturer's ability to eliminate the unsafe character of the product without making it too expensive to maintain its utility; (5) the user's ability to avoid danger by the exercise of care; (6) the user's anticipated awareness of the dangers inherent in the product and their avoidability; and (7) the feasibility of the manufacturer spreading

the loss by increasing the price of the product or carrying liability insurance. *Id.* (citing *Riley*, 688 A.2d at 225; *Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 1046 (3d Cir. 1997)).

Judge Schiller found that the compactor was indisputably broken. Although it was built with a safeguard that should have prevented the compactor from operating with an open door, the safety switch was not working. Defendants argued that the safety switch broke as a result of ordinary wear and tear or intentional bypass by Sonoma's employees. Plaintiffs argued that the compactor should have been designed in such a way that it could *never* operate with its outer door open. Thus, plaintiffs argued that the compactor was unreasonably dangerous because the interlocks should have been designed so that their failure would have disabled the machine. *Id.*

Judge Schiller noted that the plaintiffs had provided expert testimony in support of their allegation that the machine could have been designed more safely, while defendants had not produced any contradictory evidence, nor any evidence that would be relevant under the court's utility analysis to suggest that they should not bear the loss as a matter of law. Accordingly, Judge Schiller reserved judgment on whether the risk of loss should fall on defendants until all evidence was presented at trial. If the court determined at that time that the defendants should bear the risk of loss, the design defect claim would proceed to the jury for a determination of whether "the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature which renders it unsafe for its intended use." *Id.* at \*6 (quoting *Azzarello v. Black Bros. Co.*, 391 A.2d 1020, 1027 (Pa. 1978)).

Judge Schiller conceded that defendants may be correct that the defect in the compactor was the result of wear and tear or misuse, but that was a factual question for the jury. There was a genuine issue of material fact as to whether the employees of Sonoma had used cardboard to intentionally bypass the safety device on the compactor, thereby rendering summary judgment inappropriate. *Id.*

**Applying Moyer, industrial compactor held to be unreasonably dangerous, leaving jury to decide whether prod-**

**uct was safe for its intended use and whether design defects were the proximate cause of plaintiff's injuries.**

*Makadji v. GPI Div. of Harmony Ent.*, 2007 WL 1521221 (E.D. Pa. 2007)

Subsequent to Judge Schiller's Order granting in part and denying in part defendants' motions for summary judgment, the Third Circuit issued *Moyer v. United Dominion Industries*, 473 F.3d, 532 538 (3d Cir. 2007), which clarified that a court must make the legal determination of whether a product is "unreasonably dangerous" prior to trial. Accordingly, defendants filed a second motion for summary judgment, arguing that the compactor was not unreasonably dangerous. Defendants' previous motion did not raise that issue and, consequently, the Court reserved judgment. 2007 WL 1521221, \*1.

Because defendants' motion was filed six-and-a-half months after its due date, Judge Schiller denied it as untimely. However, in light of *Moyer*, the court revisited the issue of whether the product was unreasonably dangerous.

Applying the risk-utility factors from *Riley v. Warren Mfg.*, 688 A.2d 221, 225 (Pa. Super. 1995) and *Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 1046 (3d Cir. 1997)<sup>2</sup>, Judge Schiller determined that the compactor was unreasonably dangerous. The model M30STD downstroke baler was designed to compress paper and corrugated cardboard. The machine has an interlocking safety device that is designed to prevent it from operating when the door is open. Plaintiffs asserted two design defects with the interlocking device. First, the safety switch should have been designed to be "fail safe," such that if the safety switch fails, the machine becomes inoperable. Second, as a protective measure, the safety switch should have been designed to be less easily defeatable. In other words, it should not have been obvious to the lay user how to undermine or bypass the switch. In this case, the switch was allegedly bypassed by using a small piece of cardboard. *Id.* at \*3.

"Where the product has reached the consumer or the user with a substantial change or alteration the question becomes whether the manufacturer could have reasonably expected or foreseen such an alteration of its product." *Id.*, n. 5 (quoting *Davis v. Berwind Co.*, 547 Pa. 260, 690 A.2d 186, 190 (1997)).

Although Judge Schiller noted that *Davis* has been criticized for incorporating the concept of foreseeability into the law of strict liability, he also noted that the Supreme Court of Pennsylvania continues to acknowledge that manufacturers may be liable for reasonably foreseeable changes to an otherwise safe product. *Id.*, n. 5 (citing *Pa. Dept. of General Serv. v. United States Mineral Prods. Co.*, 587 Pa. 236, 898 A.2d 590, 601, n. 10 (Pa. 2006)).

Taking account of the utility factors and bearing in mind that the judicial inquiry focuses on allocation of loss, Judge Schiller determined that under plaintiffs' averment of facts, the industrial compactor at issue was unreasonably dangerous. Although there was a social utility in the machine, the means by which it performed its task created profound risks, in that the plunger descends with 10,600 to 18,380 pounds of force. Plaintiffs' expert had proposed a number of alternative designs that would have mitigated the problems identified with the safety switch. These alternative designs were in existence at the time the compactor was designed and were economically viable. There was no evidence that the alternatives were not feasible or were accompanied by different dangers that outweighed the benefits. *Id.* at \*3.

Finally, although the basic risk of operating the machine may have been obvious and avoidable with the exercise of due care, the severity of the possible injury may not have been obvious, especially where the safety switch on the compactor could be easily bypassed to enable the machine to operate with its door open.

Consequently, Judge Schiller held that the M30STD downstroke baler was unreasonably dangerous as a matter of law. Therefore, the jury must determine at trial: (1) whether the product was safe for its intended use; and (2) if not, whether the design defects associated with the machine were the proximate cause of plaintiff's injuries. *Id.* at \*4 (citing *Spino v. John S. Tilley Ladder Co.*, 548 Pa. 286, 696 A.2d 1169, 1172 (1997)).

### MALFUNCTION THEORY

**Manufacturer not liable under malfunction theory where evidence indicated that product functioned properly for 10 years prior to accident.**

*Barnish v. KWI Bldg. Co.*, 916 A.2d 642 (Pa. Super. 2007)

Plaintiffs were injured by an explosion and fire at a particle board manufacturing facility where they were employed. Plaintiffs alleged that three consecutive heat sensors malfunctioned by failing to alarm and douse with water a large, glowing ember in the particle board materials being moved on a conveyor belt in the facility, thereby resulting in the explosion and fire. Plaintiffs settled with all defendants but Gre-Con Electronics, Inc., the manufacturer of the spark detection sensors. 916 A.2d at 643-644. Gre-Con successfully moved summary judgment and plaintiffs appealed. *Id.* at 644-645.

Because the heat sensors had gone missing, plaintiffs were forced to proceed under the malfunction theory of liability. Normally, a plaintiff will present direct evidence of a defect. However, where the product has been destroyed or is missing, a plaintiff may rely on the malfunction theory to use circumstantial evidence to establish a defective product. *Id.* at 646 (citing *Wooding v. J.C. Penney Co., Inc.*, 427 Pa. Super. 488, 629 A.2d 974, 975-976 (1993)). "From the circumstantial evidence, a jury may be permitted to infer that the product was defective at the time of the sale." *Id.* (quoting *Dansak v. Cameron Coca-Cola Bottling Co.*, 703 A.2d, 489, 496 (Pa. Super. 1997)).

The malfunction theory "permits a plaintiff to prove a defect in a product with evidence of the occurrence of a malfunction and with evidence eliminating abnormal use or reasonable, secondary causes for the malfunction." *Id.* (quoting *Woodin*, 629 A.2d at 976). The Superior Court cautioned that plaintiff cannot establish a *prima facie* case if they failed to negate evidence of abnormal use or other reasonable, secondary causes that were introduced in *their own* case-in-chief. *Id.* (citing *Dansak*, 703 A.2d at 497). However, when "it is the *defendant* who hypothesizes or presents evidence to reasonable secondary causes, summary judgment is not warranted." *Id.* (Emphasis in original.)

Here, the Superior Court affirmed summary judgment because plaintiff conceded that the sensors functioned properly during the 10-year period that preceded the accident, and thus did not present a case-in-chief free of reasonable, secondary causes – such as wear and tear from prolonged use – which was necessary to establish a *prima facie* case.

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Consequently, “a jury could not reasonably infer that the defect existed at the time the sensor’s left GreCon’s hands, as any such inference would constitute mere speculation.” *Id.* at 648.

### OSHA REGULATIONS – PREEMPTION OF STATE LAW

#### OSHA regulations regarding warning devices on forklifts preempt state common law imposing duty upon manufacturers to install additional safety devices.

*Arnoldy v. Forklift L.P.*, 927 A.2d 257 (Pa. Super. 2007)

Plaintiff, Mark Arnoldy, was injured when he was struck while standing behind a forklift that his co-worker was operating in reverse. Plaintiffs brought suit against Forklift, L.P., the manufacturer of the forklift, and Industrial Materials Handling Systems, Inc., which leased the forklift to plaintiff’s employer. Plaintiffs alleged the forklift was unreasonably dangerous because it had only minimal safety devices and lacked a warning system when it was moving in reverse, such as an audible back-up alarm, rearview mirrors, or any form of beacon or strobe lighting. The defendants moved for summary judgment, arguing that OSHA regulations regarding forklifts preempts state tort law. The trial court granted summary judgment and plaintiff appealed. 927 A.2d at 260-261.

On appeal, plaintiff initially argued that the trial court erred in admitting evidence of OSHA regulations because consideration of industry standards is inadmissible in a strict liability case. Although the Superior Court agreed, it found no error because the complaint contained both negligence and strict liability claims and, consequently, consideration of evidence of industry standards does not constitute reversible error. *Id.* at 263 (citing *Leaphart v. Whiting Corp.*, 387 Pa. Super. 253, 564 A.2d 165, 171 (1989)). “[E]vidence of industry standards and regulations is generally relevant and admissible on the issue of negligence.” *Id.* (citing *Birt v. Firstenergy Corp.*, 891 A.2d 1281, 1290 (Pa. Super. 2006)).

Under Section 1910.178 of the OSHA Act, forklifts are required to meet the design and construction requirements established in the “American National

Standard for Power Industrial Trucks, Part II, ANSI B56.1-1969.” The applicable provision of that standard, 5.14 Warning Device stated:

When operating conditions dictate, the user should request the manufacturer to equip the trucks or tractors with visual warning devices such as lights or blinkers. Where noise levels are high, combination of these may be required to insure adequate warning.

The court held that OSHA required forklifts to meet the standards set forth in the 1993 version of B56.1 and not any subsequent versions. *Id.* at 265-266.

The principle of federal preemption of state law derives of the second clause of Article VI of the United States Constitution, the Supremacy Clause. Federal law may preempt state law in three ways: (1) express preemption, (2) field preemption, and (3) conflicts preemption. Conflicts preemption occurs: (a) when it is physically impossible to comply with both the state and the federal law, or (b) when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* at 263-264.

Here, plaintiff’s tort action was predicated on the claim that the forklift manufacturer failed to install additional safety devices. A state law imposing such a duty on manufacturers would require them “to install additional safety devices on all forklifts regardless of the existence of the standard incorporated by OSHA that places the responsibility on the determination of situation specific safety devices on the user of the equipment,” i.e. plaintiff’s employer. *Id.* at 266 (citing *Geier v. American Honda Motor Co.*, 529 U.S. 861, 881 (2000)). This would directly conflict with the purpose behind the OSHA regulation, “i.e. to protect employees by allowing the end users of the product to determine which safety device would be the most effective in its particular situation.” *Id.* It would also impose liability on manufacturers for complying with a federally-imposed option, allowing the user to request the appropriate safety device. Thus, state tort law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” and is therefore preempted. *Id.* (citing *Geier*, 529 U.S. at 873).

The Superior Court rejected Plaintiffs other issues as well. It held that OSHA’s

savings clause did not bar the ordinary working of conflict preemption principles, and that cases that refused to admit industry standards were distinguishable because they dealt solely with strict liability claims. *Id.* at 267. Finally, the Superior Court found no conflict with *Coleville v. Crown Corp.*, 785 A.2d 1023 (Pa. Super. 2001) (unpublished memorandum), because it was non-binding on the Court and it also dealt solely with a claim of strict liability, not, as was the case here, with both strict liability and negligence claims. *Id.* at 267.

Accordingly the Superior Court affirmed the grant of summary judgment in favor of the defendants.

### SELLER –TRADE-IN

#### Contractor who traded in a used skid steer loader is not a seller for purposes of strict liability, negligence, or breach of warranty when loader is subsequently sold “as is” to plaintiff’s employer.

*McAnany v. Case*, CCP Lawrence County, No. 10393 of 2006, C.A., (slip. op. March 9, 2007)

Plaintiff, Matthew McAnany, was severely injured while operating a Case Model 1845C skid steer loader. Prior to the accident, McAnany’s employer, Cade Paving, had purchased the skid loader “as is” from Southeastern Equipment Co. Prior to that, defendant, Youngstown Paving, Inc. had traded the skid loader into Southeastern for a new skid loader. Slip Op. at 2.

To be held strictly liable for a defective product, a defendant must be a seller engaged in the business of selling a product. *Id.* at 3 (citing *Restatement (Second) Torts*, § 402A). Although the court held that a seller of used equipment could be liable for selling defective products, that would only apply where the seller was actually in the business of selling such products. Here, Youngstown Paving was not a “seller” because it was not engaged in the business of selling skid loaders. Although Youngstown had made 12 transactions either selling or trading in equipment, it did not sell such equipment on a normal basis. It was in the business of paving. *Id.* at 5.

Similarly, the court held that Youngstown had no duty to plaintiff for purposes of a negligence claim. Youngstown sold the skid loader to Southeastern who, in turn, sold it “as is” to Cade Paving.

“These events removed any type of duty owned by Defendant to any subsequent purchasers.” *Id.* at 7.

The court rejected Plaintiff’s breach of express warranty claim because Youngstown was not a party to the transaction between Southeastern and Cade Paving, and thus could not make any affirmation or description regarding the condition or quality of the used skid loader. Moreover, Youngstown made no representations about the quality of the skid loader when it traded it in “as is” to Southeastern. *Id.* at 8.

Finally, the court rejected plaintiff’s breach of implied warranty claims under the UCC because the implied warranties of merchantability and fitness for a particular purpose only applied “if the seller is a merchant with respect to goods of that kind.” *Id.* (quoting 13 Pa.C.S.A. § 2314). The court noted that under the UCC, the term “merchant” is more narrowly defined than the term “seller” in the *Restatement (Second) Torts*, § 402A. *Id.* at 9 (citing *Gavula v. ARA Services, Inc.*, 756 A.2d 17 (Pa. Super. 2000)). Thus, Youngstown was not a “merchant” for purposes of the UCC.

Accordingly, the court granted Youngstown’s motion for summary judgment.

### SOPHISTICATED USER

**Supreme Court dismisses as improvidently granted an appeal from Superior Court where the Superior Court held defendant’s claim that the jury should have been charged on the sophisticated user doctrine was waived where the proposed points for charge were not made part of the certified record on appeal.**

*Straub v. Cherne Industries*, 589 Pa. 400, 909 A.2d 797 (2006)

In a products liability claim that had already been to the Pennsylvania Supreme Court once before, the court initially granted allowance of appeal limited to the issue of whether the sophisticated user doctrine is applicable in products liability actions based upon negligence. The court also requested briefing on the issue of whether proposed points for charge handed to a trial judge pursuant to Pa. R.C.P. 226 should be considered part of the certified record on appeal.<sup>3</sup>

The Supreme Court received briefs and heard argument on October 18, 2006.

However, the court ultimately dismissed the appeal as improvidently granted, thereby leaving unresolved the issues under consideration.

### STATUTE OF REPOSE/GARA

**Rolling provision of General Aviation Revitalization Act (GARA) does not apply to manufacturer and type certificate holder of original aircraft engine where manufacturer did not manufacture or supply allegedly defective replacement parts installed in aircraft engine within 18 years of accident.**

*Pridgen v. Parker Hanifin Corp.*, 916 A.2d 620 (Pa. 2007)

In *Pridgen v. Parker Hanifin Corp.*, 916 A.2d 620 (Pa. 2007) (“*Pridgen II*”), the Pennsylvania Supreme Court revisited on reargument the applicability of the so-called “rolling provision” of the General Aviation Revitalization Act (GARA), 49 U.S.C. 40101 *et seq.* In *Pridgen v. Parker Hanifin Corp.*, 588 Pa. 405, 905 A.2d 422 (2006) (“*Pridgen I*”), the Supreme Court held that the rolling provision of GARA, which restarts the statute of repose for replacement parts, did not apply to the manufacturer and type certificate holder of the original aircraft engine.

Pursuant to the GARA § 2(a), claims for death, injury, and property damage involving certain types of aircraft asserted against manufacturers are generally barred if the accident occurred more than 18 years after delivery of the aircraft to the first purchasers. *Pridgen I*, 588 Pa. at 408, 905 A.2d at 424. However, GARA contains a “rolling provision” which, “while preserving the approach of foreclosing causes of action against manufacturers related to potentially defective aircraft replacement components after eighteen years, prescribes that the eighteen-year period begins to run upon the date of installation of such parts.” *Id.* (citing GARA § 2(a)(2)).

This matter arose from a fatal plane crash in August 1999, in North Lima, Ohio, in which a 31-year old Piper PA-32-260 crashed on departure from a local airport. Representatives of the estates of the victims brought suit against a number of defendants, including Textron Lycoming Reciprocating Engine Division, Textron, Inc. and AVCO Corporation (“Engine Defendants”), who were described as the “designer, manufacturer, seller, supplier, overhauler, repairer,

maintainer, and product support servicer of the Lycoming engine installed on the [accident] aircraft. *Pridgen I*, 588 Pa. at 409, 905 A.2d at 425.

The Engine Defendants filed motions for summary judgment under GARA, arguing that more than 18 years had elapsed between the date the engine was installed and the accident, and that they did not manufacture or supply any of the allegedly defective parts that had been replaced within 18 years of the 1999 accident. By way of response, the plaintiffs argued that the Engine Defendants held the Federal Aviation Administration “type certificate” for the engine model that was installed on the accident aircraft, that they supplied specifications pursuant to which replacement components were selected and installed, and marketed the parts under their own classification system with a Textron parts number. Since these replacement parts were installed on the accident aircraft within 18 years after the accident, plaintiffs argued that the Engine Defendants were not entitled to GARA protection, pursuant to its rolling provision. *Id.* at 410, 905 A.2d at 425-426.

The trial court denied summary judgment and the Engine Defendants appealed. The bulk of the court’s opinion in *Pridgen I* dealt with whether the trial court’s denial of summary judgment was an appealable interlocutory order under the collateral order doctrine. Procedurally, this case involved multiple appeals and remands before the Supreme Court ultimately decided the issue once the jurisdictional issues were resolved.

Ultimately, the court in *Pridgen I* concluded that “the status of type certificate holder and/or designer fall under the umbrella of manufacturer conduct for purposes of GARA, [and] it would wholly undermine the general period of repose if original manufacturers were excepted from claims relief for replacement parts under the rolling provision by virtue of that status alone.” *Id.* at 427, 905 A.2d at 436.

The court also rejected plaintiffs’ arguments predicated on the *Restatement (Second) Torts* § 400. Under Section 400, an entity that supplies a product manufactured by another as its own is subject to liability as though it were the manufacturer. The court did not believe that Section 400 should be interpreted to displace GARA repose by preserving

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design-defect claims against a manufacturer that are associated with original design and/or type certification merely because the manufacturer maintains a store of replacement parts, unless there was a credible allegation that the components that allegedly caused the injury were actually supplied by defendant manufacturer and installed within the 18-year period. *Id.*

Noting that the plaintiffs had asserted numerous other grounds to avoid summary judgment, including misrepresentation, concealment, and withholding exception to GARA, the court remanded to the trial court to consider whether there were material facts in dispute with regard to those claims. *Id.* at 429, 905 A.2d at 437.

The plaintiffs then sought reargument, complaining that they had not been given the opportunity to make a full presentation on the substantive merits of the repose issue because the matter had originally been accepted for review by

the Supreme Court only on the collateral order doctrine. The Supreme Court granted reargument, and allowed the parties to fully brief the issues addressed in *Pridgen I. Pridgen II*, 916 A.2d at 621.

On reargument, the court again rejected plaintiffs' claim that it had adopted too narrow a reading of GARA's rolling provision. The court noted that the legislative history indicated that GARA was clearly designed to ameliorate the impact of long-tail liability on a declining American aviation industry. A key assumption in GARA was that "any design defects in aircraft components generally will be discovered with the eighteen year period preceding repose." *Id.* at 622. The legislative history also revealed that over the lifespan of general aviation aircraft, almost every major component would be replaced. *Id.* Accordingly, the court reaffirmed its original position that it would undermine the general period of repose if original manufacturers were held liable for defective replacement parts they did not manufacturer simply by virtue of their status as a type certificate holder and/or designer. *Id.*

The court also reaffirmed its original position regarding the *Restatement (Second) Torts*, § 400, stating that it would undermine the intent of Congress "to hold that GARA's rolling provision is triggered by the status of original aircraft manufacturer, type-certificate holder, and/or original designer alone." *Id.* at 623.

### ENDNOTES

<sup>1</sup>The Superior Court's decision in *Hutchinson* was discussed in greater detail by the authors in the July 2005 issue of *Counterpoint*.

<sup>2</sup>These risk-utility factors were first set forth in *Dambacher by Dambacher v. Mallis*, 336 Pa. Super. 22, 51, n. 5, 485 A.2d 408, 423, n. 5 (1984), appeal dismissed, 508 Pa. 643, 500 A.2d 428 (1985) (quoting John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-838 (1973)).

<sup>3</sup>The *Straub* case has been previously discussed by the authors at greater length in their *Product Liability Update* in the September 2006 issues of *Counterpoint*, and in their article, *The Future of Negligence Claims in Product Liability Cases After Phillips*, which appeared in the October 2004 issue of *Counterpoint*.

