

No. 02-

In the Supreme Court of the United States

VOLKSWAGEN OF AMERICA, INC., ET AL.,

Petitioners,

v.

NATHANIEL TRULL, ET AL.,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under Federal Rule of Civil Procedure 49, a party waives its objection to the entry of judgment in a manner inconsistent with the jury's finding on a mixed question of law and fact by failing to note the inconsistency before the jury is discharged.

2. Whether, under Federal Rule of Civil Procedure 51, a defendant's failure to object to the submission of a case to the jury on multiple liability theories waives a subsequent argument that the jury's findings on those theories are inconsistent.

**PARTIES TO THE PROCEEDING AND STATEMENT
UNDER RULE 29.6**

The petitioners are Volkswagen of America, Inc. and Volkswagen, AG. The respondents are Nathaniel Trull, PPA David Trull and David Trull, Administrator of the Estate of Benjamin Trull.

Volkswagen of America, Inc., has a parent, Volkswagen Beteiligungs-Gesellschaft mbh, which is a wholly-owned subsidiary of Volkswagen, AG. No publicly held company owns ten percent or more of Volkswagen, AG's stock.

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PETITION FOR A WRIT OF CERTIORARI

Volkswagen of America, Inc. and Volkswagen, AG (“Volkswagen”) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the district court (App., *infra*, 19a-29a) is unreported. The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 320 F.3d 1.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2002. App., *infra*, 32a-33a. A timely petition for rehearing was denied on February 11, 2003. *Id.* at 30a-31a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves the construction of Rules 49 and 51 of the Federal Rules of Civil Procedure, which are reproduced at App., *infra*, 47a-48a.

STATEMENT

In this product liability action, plaintiffs’ claims under both their strict liability and negligence theories depended upon proof that Volkswagen had manufactured a vehicle that was defective in design. At the conclusion of the trial, the jury made an express and unequivocal finding in the “special verdict” forms that the vehicle did *not* have the claimed design defect. In contravention of the jury charge and the applicable law, however, the jury also found that Volkswagen had been negligent in manufacturing the vehicle. Rejecting Volkswagen’s argument that it could not be held liable under

any theory without proof of a design defect, the district court entered a \$10 million judgment against Volkswagen based on the negligence finding. The court of appeals refused to entertain Volkswagen's contention that the jury's findings were irreconcilably at odds, concluding that Volkswagen had waived its objections to the verdict inconsistency – first, by failing to object to the submission of overlapping liability theories to the jury and, second, by failing to note the inconsistencies within the verdict before the jury was discharged.

Both grounds for the First Circuit's waiver determination are the subject of persistent conflicts among the courts of appeals. Although Rule 49 verdict forms are commonly employed to lend clarity to the jury's determinations in complex cases, courts disagree about the most basic aspects of practice under the Rule, and these differences often determine the outcome of cases. Because it chose to apply a stringent waiver rule, the court below refused even to consider the effect of the jury's "no-defect" finding in this case, a dispositive event under New Hampshire law. But most other courts *would* have reached the merits of Volkswagen's challenge to the entry of judgment. These courts do *not* require defendants to object to the submission of alternative theories that may result in inconsistencies, nor do they insist that parties point out inconsistencies of this type before the jury is discharged.

The current treatment of Rule 49 frustrates the goal of national uniformity in federal practice. Unless this Court intervenes, a regular feature of federal jury trials will remain a source of confusion, inefficiency, and injustice. Review of the decision below clearly is warranted.

1. In February 1991, David and Elizabeth Trull and their two sons, Nathaniel and Benjamin, were driving in New Hampshire when their 1986 Volkswagen Vanagon slid on black ice and collided with another vehicle. Benjamin died, Elizabeth suffered severe brain injuries, and Nathaniel suffered a head injury. Nathaniel and Benjamin were seated in the rear middle

seat of the Vanagon, which was equipped with lap-only belts. The front seat, where Elizabeth was seated, had combination lap/shoulder belts. R. 620-625.

In January 1994, David Trull, on behalf of Benjamin's estate and Nathaniel, sued Volkswagen in the United States District Court for the District of New Hampshire, invoking the court's diversity jurisdiction. Plaintiffs contended that the 1986 Vanagon had been defectively designed because it was equipped with lap-only belts in the rear seats and that Nathaniel's and Benjamin's injuries were more severe than they would have been had their seats been equipped with combination lap/shoulder belts.

Following a trial, a jury returned verdicts for defendants, and the plaintiffs appealed. The court of appeals rejected plaintiffs' other challenges to the judgment, but it certified to the New Hampshire Supreme Court a question regarding which party bears the burden of apportioning the injuries attributable to the manufacturer in a crashworthiness case. *Trull v. Volkswagen of Am., Inc.*, 187 F.3d 88, 103 (1st Cir. 1999). After the New Hampshire Supreme Court ruled that the burden of apportioning injury shifts to the defendant after the plaintiff demonstrates that a design defect contributed to an increase in his or her injuries from a collision (*Trull v. Volkswagen of Am., Inc.*, 761 A.2d 477, 482 (N.H. 2000)), the First Circuit concluded that the district court's instructions on that issue were erroneous and remanded the case for a new trial. *Trull v. Volkswagen of Am., Inc.*, 229 F.3d 343 (1st Cir. 2000).

2. The second trial commenced on April 3, 2001. As the court of appeals later recognized, "[t]he evidence was essentially the same as to both theories of liability." App., *infra*, 2a. To establish both strict liability and negligence, plaintiffs relied on the testimony of their experts (strongly contested by defendants) that combination lap/shoulder belts in rear seats provide more safety in an accident than lap-only belts and that the availability of lap/shoulder belts in the rear seat

would have decreased the severity of the boys' injuries in this case.

The district court itself crafted the jury instructions. Consistent with plaintiffs' wishes and with state law establishing that "[a] strict liability action based upon a theory of defective design may be joined with an action grounded in negligence" (*Trull*, 761 A.2d at 481), the court instructed the jury on both theories of liability. In light of the New Hampshire Supreme Court's ruling *in this very case* a few months before trial that plaintiffs could rely on both theories (*ibid.*), and since asserting the contrary would be legally erroneous, Volkswagen did not object to this aspect of the instructions, which stated that the jury could find in favor of plaintiffs on strict liability *or* negligence. App., *infra*, 37a-38a. Volkswagen considered its interests to be protected by other parts of the jury charge, which made it clear that Volkswagen could not be held liable under *either* theory unless the jury concluded that the use of lap-only belts in the rear seats rendered the Vanagon defective in design.

For example, the instructions described plaintiffs' negligence claim as contending that defendants' lack of due care "resulted in *the claimed defect* in the vehicle; namely, the vehicle lacked lap/shoulder belts in the rear seating positions." *Id.* at 41a (emphasis added). In addition, the proximate cause instruction regarding negligence specified that "[i]f the injury would have occurred anyway without any defect in the design of the vehicle, then *the design defect* would not be a proximate cause of the injury." *Id.* at 43a (emphasis added).

Furthermore, the district court instructed the jury that "plaintiffs *both under their strict liability and negligence claims*, have the burden of proving by a preponderance of the evidence that *the claimed design defect* was a substantial factor in producing injuries over and above those which were probably caused as a result of the original collision." App., *infra*, 44a (emphasis added). Similarly, with respect to the order of proof, the court stated:

With respect to each plaintiff, first you will determine if the plaintiff has met his burden of proving by a preponderance of the evidence under his claim of strict liability or negligence that *the claimed design defect* was a substantial factor in producing injuries over and above those which were probably caused as a result of the original collision. If the plaintiff fails to meet his burden on both claims, you will conclude your deliberations.

Id. at 45a (emphasis added).¹

After giving the instructions, the district court submitted to the jury, for each plaintiff, a three-page document entitled “Special Verdict Form.” App., *infra*, 34a-36a. The verdict forms, like the jury instructions, were crafted by the court itself. Each form included the following seven questions:

Strict Liability

1. Do you find by a preponderance of the evidence that the 1986 Vanagon was defectively designed because it lacked lap/shoulder belts in the rear seating position?

(Yes or No)

(If you answered “Yes” to question 1, answer question 2.)

(If you answered “No” to question 1, go to question 3.)²

2. Do you find by a preponderance of the evidence that the defective condition caused, or substantially caused, injuries to Nathaniel Trull over and above those which were probably caused as a result of the original collision?

¹ Indeed, the instructions bearing on the negligence count include no fewer than 17 references to the concept of design defect. App., *infra*, 37a-46a.

² These directions on the verdict form appeared in much smaller type than the questions themselves.

(Yes or No)

Negligence

3. Do you find by a preponderance of the evidence that the defendant was negligent in designing and/or testing the 1986 Vanagon because it lacked lap/shoulder belts in the rear seating positions?

(Yes or No)

(If you answered “Yes” to question 3, answer question 4.)

(If you answered “No” to question 3, skip question 4 and go to the bottom of this page for further instructions.)

4. Do you find by a preponderance of the evidence that the defendant’s negligence in designing and testing the 1986 Vanagon caused or contributed to cause the injuries to Nathaniel Trull over and above those which were probably caused as a result of the original collision?

(Yes or No)

Further Instructions

If you have answered “Yes” to question 1 *and* question 2, and/or question 3 *and* question 4, then proceed to question 5.

Otherwise, conclude your deliberations.

Allocation of Injuries

5. Do you find that the defendant has proved by a preponderance of the evidence which injuries were attributable to the initial collision and which to the design defect?

(Yes or No)

Damages – Answer Question 6 or Question 7, as appropriate.

6. Assess the total amount of damages sustained by Nathaniel Trull as a result of the accident in question.

(Words, not figures.)

7. Assess the amount of damages sustained by Nathaniel Trull during the accident in question which are attributable to the design defect.

(Words, not figures.)

The jury returned its verdict on April 20, 2001, in a court session that lasted a total of ten minutes. The judge greeted the jurors, read the verdicts silently to himself, and then had the clerk read both special verdict forms aloud. R. 2502. On both verdict forms, the jury had answered “no” to Question 1; had not answered Question 2; had answered “yes” to Questions 3 and 4; and had answered “no” to question 5. In its answers to question 6, the jury indicated that as the result of the accident Nathaniel Trull sustained damages of \$8,917,335.27 and that Benjamin Trull’s estate sustained damages of \$1,290,980.70. The jury did not answer question 7, which asked the jury to specify the damages “which are attributable to the design defect.”

The district court then asked the jurors to confirm that the verdicts were unanimous and instructed the clerk “to enter judgment in accordance with the special findings of the jury.” R. 2505. Thereafter, without addressing counsel or granting them the time to consider the jury’s answers, the court thanked and dismissed the jurors and immediately left the courtroom. *Ibid.*

After having the opportunity to review and consider the verdicts, Volkswagen concluded that the jury’s “no” response to question 1 on the verdict form (the only question explicitly and directly asking the jury whether there was a design defect)

was inconsistent with the entry of judgment against Volkswagen. Under the instructions and New Hampshire law, the jury was not permitted to find Volkswagen liable under *either* strict liability *or* negligence unless it concluded that the vehicle had a design defect that exacerbated the plaintiffs' injuries. By giving a negative answer to question 1, the jury had made a factual finding that the 1986 Vanagon did *not* have a design defect. In these circumstances, the jury's finding in response to question 3 that Volkswagen was negligent in designing and/or testing the vehicle could not support the entry of judgment against Volkswagen, because the jury had already concluded that any lapse in due care *had not resulted in the creation of a defective vehicle*.³

Accordingly, Volkswagen filed a motion for judgment or a new trial. The district court denied the motion, concluding without any explanation whatsoever that the jury's responses to the questions were not inconsistent. App., *infra*, 20a. It also ruled that Volkswagen had waived its right to challenge any inconsistency in two ways – first, by failing “to object to the appropriateness of instructing the jury on the two theories of liability” (*id.* at 21a), and, second, by failing to bring the inconsistency to the court's attention before the jury was discharged. *Ibid.*

³ At the same time, the jury's finding that the vehicle did not have a design defect was *consistent* with its responses to questions 5, 6, and 7. The jury's conclusion that there was no defect would have precluded any finding in response to question 5 that Volkswagen had proven “which injuries were attributable to the initial collision and which to the design defect,” and would have made it impossible for the jury to answer question 7, which asked the jury to specify “the amount of damages sustained by [each boy] during the accident in question which are attributable to the design defect.” App., *infra*, 36a. But it would not have prevented the jury from assessing, in its answers to question 6, the “total amount of the damages sustained * * * as the result of the accident.” *Ibid.*

3. The First Circuit affirmed. The court of appeals first held that “VW’s failure to follow the applicable Rule of Civil Procedure bars its appeal.” App., *infra*, 4a. Ignoring the fact that the district court and the parties had repeatedly characterized the verdicts in this case as Rule 49(a) special verdicts, as well as the fact that no single question on the verdict form called for an ultimate finding of liability, the court of appeals concluded that questions 1 and 3 “were general verdict forms under Rule 49(b).” *Id.* at 5a. Citing its prior rulings that “under Rule 49(b), objections to the inconsistency of verdicts must be made after the verdict is read and before the jury is discharged” (*ibid.*), the court concluded that “VW forfeited its objection to the alleged inconsistency by failing to object at any time prior to the jury’s discharge.” *Ibid.*

The court of appeals also held that Volkswagen gave up its right to raise the inconsistency by failing to object to the jury instructions, which “made it clear that the jury was to be asked to decide the issue of liability on both the theory of strict liability and the theory of negligence.” App., *infra*, 6a. In the court’s view, “a failure to object as required by Rule 51 deprives the non-objecting party of review under Rule 61, either before the trial court on a post-trial motion or on appeal.” *Ibid.*

In a similar vein, the court of appeals concluded that, because Volkswagen “did not object to the verdict forms at any time prior to their submission to the jury,” it had “waived its right to object to any foreseeable combination of proper responses to the questions posed on the verdict forms.” App., *infra*, 4a. The court rejected Volkswagen’s argument that it should not have been required to object *before* the submission of the case to the jury because “the verdicts did not become inconsistent until after the jury had completed them.” *Id.* at 6a.

REASONS FOR GRANTING THE PETITION

General verdicts “simply ask the jury to answer the question ‘who won,’ and if the winning party is entitled to a monetary

award, to answer the question ‘how much.’” *Turyna v. Martam Constr. Co., Inc.*, 83 F.3d 178, 181 (7th Cir. 1996). To focus the jury’s attention on the key issues and elucidate its reasoning, federal district courts may employ two alternatives to the general verdict. Under Rule 49(a), the court may submit a “special verdict in the form of a special written finding upon each issue of fact.” Fed. R. Civ. P. 49(a). Alternatively, under Rule 49(b), the court may submit, “together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict.” Fed. R. Civ. P. 49(b).

When things go as intended, Rule 49 verdict forms can assist trial and appellate courts “in directing a comprehensive, final disposition to the case without infringing in the slightest upon the inviolate nature of the jury trial and resolution.” Hon. Brown, J., *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338, 347 (1967)). Sometimes, however, the jury’s answers to the questions on a verdict form conflict with one another and do not unequivocally support judgment for either party. Because such inconsistencies occur with some regularity, one would expect the federal courts to have developed clear rules for dealing with them. In fact, the courts appear to have given up hope of any kind of uniformity. The case law regarding verdict inconsistencies has become a minefield, riddled with conflicts and fraught with the risk of inadvertent waiver of substantive rights.

First, the courts of appeals disagree about what defendants must do to raise and preserve their objections to the jury’s inconsistent responses to verdict questions. There is a well-established conflict among the circuits concerning whether a party waives any objection based on verdict inconsistency unless it is raised *before* the jury is discharged. Because in many circuits the answer depends upon whether the verdict is governed by Rule 49(a) or Rule 49(b), that question raises a subsidiary, and even more fundamental, conflict: the circuits do not agree about which sorts of verdict forms are “special

verdicts” governed by Rule 49(a) and which are “general verdicts with interrogatories” governed by Rule 49(b).

Second, there exists a significant conflict regarding the obligation to object to the submission of multiple liability theories that may result in inconsistent verdicts. Several courts have ruled that the defendant must object to having the jury instructed on multiple, overlapping legal theories or waive its right to challenge inconsistencies in the jury’s findings on those theories. Other courts, however, have routinely addressed this common type of verdict inconsistency without imposing such an extraordinary waiver rule.

This case cleanly presents each of these conflicts. Despite the fact that they were labeled “special verdicts” and that the parties and the district court plainly regarded them as such, the court of appeals decided after the fact that the verdict forms were “general verdicts” governed by Rule 49(b). Having thus recharacterized the verdict forms, the court ruled that Volkswagen was required to point out the inconsistencies within the verdicts *before* the jury was discharged. Most other courts, however, treat similar verdict forms as “special verdicts” governed by Rule 49(a) and will consider objections to such verdicts that are raised *after* the jury is discharged.

The court of appeals also held that Volkswagen waived its right to challenge the inconsistency within the verdicts because it had not objected to the instruction of the jury on both strict liability and negligence theories. The court applied this waiver doctrine despite the fact that the submission of both counts was plainly permissible under New Hampshire law and that any objection not only would have been futile but would have relied on an incorrect assertion of applicable law. In so ruling, the court was in a distinct minority: only one other circuit places the burden on defendants to predict and seek to forestall verdict inconsistencies. Most federal courts recognize that, where state law gives the plaintiff the prerogative to submit overlapping theories to the jury, the *plaintiff* bears the risk that the jury’s findings on those theories will conflict. In contrast to the

decision below, these courts do not deprive defendants of their ability to challenge inconsistent verdicts merely because they acceded to the plaintiffs' permissible trial strategy.

The issues presented by this case are both significant and recurring. The confusion and disagreement regarding the proper characterization of Rule 49 verdicts and the timing of objections have plagued federal trial practice for years, creating substantial inefficiencies and leading frequently to the forfeiture of substantive rights. These issues have the potential to arise in every federal case in which a Rule 49 verdict form is used and have been addressed in scores of published decisions, which have nonetheless failed to resolve the confusion. It is clear by now that no degree of uniformity – a principal goal of the Federal Rules of Civil Procedure – will ever be achieved without this Court's intervention.

The conflict regarding the defendants' obligation to point out *possible* inconsistencies *before* the verdict is submitted also merits the Court's attention. Applying state law in diversity cases, most federal courts routinely permit plaintiffs to send their cases to the jury on overlapping theories such as strict liability, breach of warranty, and negligence. Requiring defendants to object to this practice, or sacrifice their right to object to any resulting inconsistencies, places federal procedure squarely at odds with state substantive law. Indeed, it forces defendants to make objections asserting incorrect statements of law – a burlesque that elevates mistaken form over substance. Moreover, the imposition by a few circuits of this harsh and demanding waiver rule makes the outcome of cases depend on where they have been filed. To correct this gross departure from uniformity in federal procedure, review of this case clearly is warranted.

I. THERE IS A CONFLICT IN THE CIRCUITS REGARDING WHETHER, AND UNDER WHAT CIRCUMSTANCES, A PARTY MUST OBJECT TO AN INCONSISTENCY IN A RULE 49 VERDICT BEFORE THE JURY IS DISCHARGED

As a leading treatise has noted, there has been “much litigation and disagreement among the circuit courts as to the prerequisites for preserving objections to inconsistencies” in a jury verdict. 9 JAMES WM. MOORE, ET AL., MOORE’S FEDERAL PRACTICE § 49.02[2][d] (3d ed. 1997). There is a mature split among the courts of appeals on the question whether a party seeking to challenge a verdict as inconsistent must do so before the jury is discharged. According to many courts, the rule differs depending on whether the verdict is characterized as a special verdict governed by Fed. R. Civ. P. 49(a) or as a general verdict with interrogatories governed by Fed. R. Civ. P. 49(b). See, e.g., *Simmons v. City of Phila.*, 947 F.2d 1042, 1057-1058 (3d Cir. 1991); *Bonin v. Tour W., Inc.*, 896 F.2d 1260, 1262-1263 (10th Cir. 1990). Yet distinguishing one type of verdict from the other also has confused and divided the courts. This case presents an opportunity for the Court to resolve these festering disagreements.

A. The Case Presents An Important And Recurring Issue Concerning The Distinction Between Rule 49(a) Special Verdicts And Rule 49(b) General Verdicts With Interrogatories, As To Which There Is A Conflict Among The Circuits

The procedures for handling inconsistencies in Rule 49 verdicts depend on whether they are governed by Rule 49(a) or Rule 49(b). When inconsistencies arise within a special verdict under Rule 49(a), this Court has explained that the court must attempt to harmonize the jury’s answers and enter judgment accordingly. See *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963) (“it is the duty of the courts to attempt to harmonize the answers”); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd.*, 369 U.S. 355, 364 (1962) (“[w]here there

is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way"). If harmonization is impossible, the court must order a new trial. See, e.g., *Brooks v. Brattleboro Mem'l Hosp.*, 958 F.2d 525, 529-530 (2d Cir. 1992); *Riley v. K Mart Corp.*, 864 F.2d 1049, 1054-1055 (3d Cir. 1988).

Unlike Rule 49(a), Rule 49(b) expressly prescribes the proper course when inconsistencies appear in a general verdict with interrogatories:

When the answers [to interrogatories] are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdicts or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

Fed. R. Civ. P. 49(b).

Thus, the proper manner of addressing inconsistencies depends in material respects on whether a special verdict or a general verdict with interrogatories is involved. Moreover, as noted above, in many circuits the form of the verdict determines *when* a party must object to any inconsistencies. If these rules are to be applied sensibly and predictably, both the district court and the parties obviously need to understand what type of verdict they are dealing with.

Nevertheless, the courts of appeals have admitted to a surprising degree of confusion about how to tell one sort of verdict from the other. See, e.g., *Mason v. Ford Motor Co.*, 307 F.3d 1271, 1274-1275 (11th Cir. 2002) ("Categorizing a verdict as a general verdict, or as a special verdict under Rule 49(a), or as a general verdict with special interrogatories under

Rule 49(b) should be – but too often seems not – a simple matter.”); *Turnya*, 83 F.3d at 179 (the “case was submitted to the jury on a form that wasn’t quite a general verdict form, but wasn’t special verdicts under Federal Rule of Civil Procedure 49(a) or a general verdict with interrogatories under Rule 49(b) either”); *Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 104 n.16 (3d Cir. 1993) (“as in many cases, it is not entirely clear whether the verdict is governed by Fed. R. Civ. P. 49(a) or 49(b)”); *Arachnid, Inc. v. Medalist Mktg. Corp.*, 972 F.2d 1300, 1303 n.3 (Fed. Cir. 1992) (“The distinction between special verdicts and special interrogatories is unclear.”); *Putnam Res. v. Pateman*, 958 F.2d 448, 455 (1st Cir. 1992) (“the record is unclear as to whether the case was given to the jury under Rule 49(a) or 49(b)”). Indeed, there is no agreement over whether even the most common sorts of verdict forms are governed by Rule 49(a) or Rule 49(b).

In particular, the issue of whether a series of mixed questions of law and fact is governed by Rule 49(a) or Rule 49(b) has confused and divided the courts of appeals. In conflict with the decision below, the Third, Fourth, Fifth and Tenth Circuits have determined that verdict forms that contain mixed questions of law and fact, but that do not ask the jury to make an ultimate finding of liability, are special verdicts governed by Rule 49(a). See, e.g., *Simmons*, 947 F.2d at 1057 (“special verdicts under Rule 49(a) may * * * constitute findings of fact that actually blend factual with legal conclusions”); *McCollum v. Stahl*, 579 F.2d 869, 870-871 (4th Cir. 1978) (concluding that questions asking jury to determine whether defendant discharged plaintiff “wrongfully” and whether the discharge was “maliciously, wantonly, or oppressively done” comprised a special verdict under Rule 49(a)); *Costilla v. Aluminum Co. of Am.*, 826 F.2d 1444, 1446, 1448 n.6 (5th Cir. 1987) (concluding that a series of questions asking the jury to make findings regarding design defect, negligence, proximate causation, and damages comprised a Rule 49(a) special verdict); *Alvarez v. J. Ray McDermott & Co., Inc.*, 674 F.2d 1037, 1039 & n.1 (5th Cir. 1982)

(interrogatories regarding negligence, unseaworthiness, causation and damages were submitted under Rule 49(a)); *Bonin*, 896 F.2d at 1262-1263 (questions regarding negligence, proximate causation, and damages submitted under Rule 49(a)). In contrast, the Second Circuit, like the First Circuit, has ruled that verdict forms such as the ones employed in this case are governed by Rule 49(b). See *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 56 (2d Cir.), cert. denied, 123 S. Ct. 539 (2002).

The decision below is a prime example of the complete unpredictability of decisions on this issue. Here, the verdict forms were labeled as “special verdicts,” and the parties and the district court all referred to them as such. Each verdict form contained seven mixed questions of law and fact pertinent to Volkswagen’s liability, but did not seek a general determination that Volkswagen was or was not liable. Accordingly, there was no question on either form that satisfied the widely accepted definition of “general verdict.” See BLACK’S LAW DICTIONARY 1555 (7th ed. 1999) (in rendering a general verdict, the jury simply “finds in favor of one party or another, as opposed to resolving specific fact questions”).

Ignoring the conventional understanding of the term – and giving no weight whatsoever to what the parties and the district court considered the forms to be – the First Circuit nevertheless concluded that questions 1 and 3 were “general verdicts” on strict liability and negligence, respectively. That conclusion is wholly mysterious. Those two questions asked for findings as to whether the vehicle had the claimed design defect and whether Volkswagen had been negligent in the design or testing of the vehicle; they did not address other elements of liability including, most crucially, whether the purported defect and/or negligence caused or exacerbated the plaintiffs’ injuries.⁴

⁴ As the district court explained in its instructions, Volkswagen could not be held liable in this “crashworthiness” case unless the jury concluded that “the claimed design defect was a substantial factor in producing injuries over and above those which were probably caused

Accordingly, affirmative answers to those questions were incapable, standing alone, of constituting findings that Volkswagen was liable and thus comprising “general verdicts.”

Moreover, the First Circuit’s decision, after the fact, to recharacterize what had been called “special verdicts” as “general verdicts” raises serious fairness concerns. In contrast, in determining whether Rule 49(a) or Rule 49(b) governs the proceedings, the Ninth Circuit has recognized that it is improper to recharacterize a verdict retroactively and has given great weight to what the district court and the parties *called* the verdict form. See *Floyd v. Laws*, 929 F.2d 1390, 1396 (9th Cir. 1991) (holding that the interrogatories to the jury “constituted a special verdict, simply because that is what the trial court declared them to be”). The First Circuit’s failure to recognize the importance of this factor provides an additional reason to review its decision.

B. This Case Presents The Issue Of Whether, And Under What Circumstances, A Party Must Point Out Inconsistencies In A Verdict Before The Jury Is Discharged

The First Circuit’s decision also exacerbates the well-established conflict among the circuits regarding the preservation of objections to verdict inconsistencies. Some circuits require that verdict inconsistencies be raised before the jury is discharged, but others do not. In some circuits, such an objection must be made when the verdict falls under Rule 49(b) – which expressly permits re-submission of the case to the jury in certain circumstances – but not when the verdict has been

as a result of the original collision.” App., *infra*, 44a. That key issue was addressed by separate questions 2 and 4. In deciding that questions 1 and 3 were general verdicts, the court of appeals seemed to ignore the very existence of these other questions. Indeed, the court below indicated that “there were no written interrogatories submitted to the jury.” *Id.* at 5a. It is unclear what importance, if any, the court assigned to questions 2, 4, 5, 6, and 7.

issued under Rule 49(a). See, e.g., *Bonin*, 896 F.2d at 1263. The waiver rule can be quite harsh, allowing entry of judgment *for the wrong side* because counsel did not object in the few moments after the verdict was read and before the jury was released. Such a rule, if appropriate, at least should be applied uniformly and consistently. Granting certiorari in this case would give the Court the opportunity to address this significant divergence in federal procedure.

When inconsistencies appear within a special verdict rendered under Rule 49(a), the Second, Third, Fourth, Fifth, Ninth, and Tenth Circuits have held that a party may seek relief without raising an objection before the jury is discharged. See *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 890-891 (2d Cir. 1988); *Simmons*, 947 F.2d at 1057; *Ladnier v. Murray*, 769 F.2d 195, 198 n.3 (4th Cir. 1985); *Alvarez*, 674 F.2d at 1040-1041; *Pierce v. Southern Pac. Transp. Co.*, 823 F.2d 1366, 1370 (9th Cir. 1987); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1545 (10th Cir. 1993). These courts apparently accept the view that “[t]he legal error resulting from the entry of a judgment based on inconsistent special interrogatories is one which undermines the validity and integrity of the judgment and may, in fact, run afoul of the Seventh Amendment by allowing the District Court to usurp the jury’s function.” *Mercer v. Long Mfg. N.C., Inc.*, 671 F.2d 946, 948 n.1 (5th Cir. 1982); see also *Ladnier*, 769 F.2d at 198 n.3 (citing *Mercer*); *Auwood*, 850 F.2d at 890-891 (“proper deference to the parties’ Seventh Amendment rights to a jury trial precludes entry of a judgment that disregards any material jury finding”).

On the other hand, the Eleventh Circuit requires that objections to inconsistencies in a Rule 49(a) special verdict be made before discharge of the jury. See, e.g., *Golub v. J.W. Gant & Assocs.*, 863 F.2d 1516, 1521 n.4 (11th Cir. 1989); *Mason*, 307 F.3d at 1274 n.4 (acknowledging conflict on this issue between pre-1981 Fifth Circuit precedent and later decisions of the Eleventh Circuit, but concluding that “we can leave to

another day the task of untangling these seemingly inconsistent special verdict precedents”). The First Circuit has required pre-discharge objections without distinguishing between Rule 49(a) and Rule 49(b) (see, e.g., *Skillin v. Kimball*, 643 F.2d 19, 20 (1st Cir. 1981)) and has imposed the waiver rule in a few cases involving Rule 49(a) (see, e.g., *Bonilla v. Yamaha Motor Corp.*, 955 F.2d 150, 152 n.2, 155-156 (1st Cir. 1992)). Nevertheless, the court below expressly tied its finding of waiver to its conclusion that the verdicts were governed by Rule 49(b) (App., *infra*, 4a-5a), suggesting that it might have decided the issue differently had it concluded that Rule 49(a) applied.

The balance of authority differs when a verdict is rendered under Rule 49(b). Most courts that have addressed the issue, including the First, Fourth, Fifth, Seventh and Tenth Circuits, have held that objections involving inconsistencies in Rule 49(b) verdicts must be raised before the discharge of the jury. See *Fernandez v. Chardon*, 681 F.2d 42, 58 (1st Cir. 1982), *aff'd* on other grounds, 462 U.S. 650 (1983); *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 726 (4th Cir. 1999); *Stancill v. McKenzie Tank Lines Ltd.*, 497 F.2d 529, 534-535 (5th Cir. 1974); *Cundiff v. Washburn*, 393 F.2d 505, 507 (7th Cir. 1968); *Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd.*, 791 F.2d 1416, 1422-1433 (10th Cir. 1986).

Other courts, however, have ruled that the obligation to address an inconsistency within a Rule 49(b) verdict is not contingent on any party’s objection. In *Los Angeles Nut House v. Holiday Hardware Corp.*, 825 F.2d 1351 (9th Cir. 1987), the Ninth Circuit found that a waiver rule – which “permits the party in whose favor the general verdict runs to prevail merely by remaining silent” (*id.* at 1354) – is “inconsistent with the language and structure of Rule 49(b).” *Ibid.* (internal citations omitted).⁵ The Second Circuit has similarly concluded that “the

⁵ As noted above, Rule 49(b) gives preference to specific over general findings: it allows the court to disregard a general verdict that contradicts the jury’s answers to interrogatories on issues of fact, but

terms of Rule 49(b) make it the responsibility of a trial judge to resolve the inconsistency even when no objection is made.” *Schaafsma v. Morin Vt. Corp.*, 802 F.2d 629, 634 (2d Cir. 1986) (internal citation and quotation marks omitted).

The decision below squarely frames this multi-faceted conflict. Some courts – including at least the Third, Fourth, Fifth and Tenth Circuits – would treat the verdict forms here as special verdicts submitted under Rule 49(a). Because these courts do not require inconsistencies in such verdicts to be raised before the jury is discharged, they would not have found that, by failing to make such an objection, Volkswagen waived its right to object to the entry of judgment for plaintiffs. The Ninth Circuit, similarly, does not require pre-discharge objections to the entry of judgment inconsistent with a factual finding by the jury. See *Pierce*, 823 F.2d at 1370 (Rule 49(a) “does not require objections before discharge of the jury”); *Los Angeles Nut House*, 825 F.2d at 1356 (waiver rule that would “permit the wrong party – the one favored by the jury’s general verdict – to obtain a judgment * * * is not a sensible reading of Rule 49(b)”). In contrast, because it appears to require pre-discharge objections to inconsistencies for *all* types of Rule 49 verdicts, the Eleventh Circuits might well have agreed with the First Circuit and found waiver in this case.

C. These Conflicts Recur Frequently And Create Substantial Inefficiencies

These conflicts in the application of Rule 49 are both significant and recurring. The issues at stake have the potential to arise in every jury trial in federal court, and they frequently determine the outcome of cases. The need for clear and consistent rules in this area is substantial.

First, the absence of uniformity regarding the obligation to raise objections to inconsistent verdicts creates great

does not authorize the entry of judgment in a manner that conflicts with one of the jury’s responses to factual interrogatories.

inefficiency. To avoid forfeiture of their clients' rights, attorneys practicing in federal courts across the country must learn and follow a multiplicity of different local constructions of Rule 49. Not only must they determine for each type of verdict whether an objection before jury discharge is necessary to preserve a claim of verdict inconsistency, but they also must research local decisions in an effort to discern whether a particular form of verdict will be deemed a special verdict or a general verdict with interrogatories. Even within some circuits, the decisions are so inconsistent that it is impossible to predict how a court will view a particular verdict form. Attorneys used to practicing in one jurisdiction may be surprised to learn – after the fact – that Rule 49 is construed differently in another jurisdiction. Extensive briefing often is required to resolve these seemingly basic questions. Needless to say, the drafters of the federal rules did not intend to create this sort of disarray. See Fed. R. Civ. P. 1 (the rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”).

Second, the confusion surrounding practice under Rule 49 diminishes the credibility of federal jury trials and leads to substantial injustice, by permitting the entry of judgment in a manner that ignores both the jury's findings on factual issues and the state law that the court is supposed to apply. This case is a good example. After a several-week trial in which plaintiffs sought to hold Volkswagen liable for manufacturing a defectively designed vehicle, the jury indicated in response to a straightforward factual interrogatory that the plaintiffs did not prove the existence of the claimed design defect. Volkswagen had a strong case to make under state law that the “no defect” finding entitled it to judgment in its favor, despite the fact that the jury also found Volkswagen to have been negligent. See, e.g., *Greenland v. Ford Motor Co.*, 347 A.2d 159, 163 (N.H. 1975).⁶ At the very least, Volkswagen had a powerful argument

⁶ See also RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998), reporter's note to comment n (plaintiff's “failure to meet the

that it was entitled to a new trial because the jury's findings were irreconcilably inconsistent. Moreover, the case involved what appeared to be (and was called) a "special verdict" under Rule 49(a), as to which, in most parts of the country, inconsistencies may be raised after the jury is discharged. After inexplicably recharacterizing the verdict as one under Rule 49(b) rather than Rule 49(a), however, the First Circuit upheld a verdict of more than \$10 million against Volkswagen, without addressing the merits of Volkswagen's argument that this outcome improperly ignored the jury's central factual determination. This resolution both "undermine[d] the validity and integrity of the judgment" and "usurp[ed] the jury's function" (*Mercer*, 671 F.2d at 948 n.1), raising concerns of constitutional magnitude.

requisites of § 2(a) [manufacturing defect], (b) [design defect], or (c) [inadequate warnings] will defeat a cause of action under either negligence, strict liability, or the implied warranty of merchantability." The law in many states is the same. See, e.g., *Garrett v. Hamilton Standard Controls, Inc.*, 850 F.2d 253, 257 (5th Cir. 1998) ("a manufacturer logically cannot be held liable for failing to exercise ordinary care when producing a product that is not defective"); *Sprinkle v. Bower Ammonia & Chem. Co.*, 824 F.2d 409, 413 (5th Cir. 1987) (by rejecting strict liability claim, jury necessarily rejected essential element of negligence); *Chestnut v. Ford Motor Co.*, 445 F.2d 967 (4th Cir. 1971) (to establish negligence, plaintiff must prove that the product was dangerously defective when it left the plaintiff's hands); *Lecy v. Bayliner Marine Corp.*, 973 P.2d 1110 (Wash. App. 1999), rev. denied, 994 P.2d 845 (Wash. 2000) (where design defect was focus of plaintiff's case, verdict finding no defect in product design established "as a matter of law" that manufacturer was not negligent); *Montez v. Ford Motor Co.*, 161 Cal. Rptr. 578, 581 (4th Dist. 1980) ("jury determination of the non-existence of any defect was fatal to the theory of recovery based on negligence or on strict liability"); *Masi v. R.A. Jones Co.*, 394 A.2d 888, 891 (App. Div. 1978) ("the determination by a jury that defendant was not liable on the theory of strict liability eliminated the possibility that defendant could be guilty of negligence").

Finally, the outcome here would have been entirely different had the court of appeals adhered to the approach of most other courts. For cases to turn on regional variations in the construction of the federal rules severely undermines their purpose. *Cf.* Fed. R. Civ. P. 83(a)(1) (local district court rules “shall be consistent with * * * Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075”).

The Court has on many occasions granted certiorari to address “threat[s] to the goal of uniformity of federal procedure.” *Hanna v. Plumer*, 380 U.S. 460, 463 (1965). See also *Weisgram v. Marley*, 528 U.S. 440, 446 (2000) (certiorari granted because “[c]ourts of [a]ppeals have divided on the question” of the authority of appellate courts to direct entry of judgment as a matter of law); *Schlagerhauf v. Holder*, 379 U.S. 104, 109 (1964) (“[w]e granted certiorari to review undecided questions regarding the validity and construction of Rule 35”); *Hickman v. Taylor*, 329 U.S. 495, 497 (1947) (“[t]his case presents an important problem under the Federal Rules of Civil Procedure”). It should do so here.

II. THERE IS A CONFLICT AMONG THE CIRCUITS REGARDING WHETHER, UNDER RULE 51, A DEFENDANT MUST OBJECT TO THE SUBMISSION TO THE JURY OF MULTIPLE THEORIES IN ORDER TO PRESERVE ITS RIGHT TO CHALLENGE AN INCONSISTENCY IN THE VERDICT

The First Circuit also rested its waiver determination on the fact that Volkswagen did not object to the submission of both strict liability and negligence theories to the jury. Despite the fact that it was plaintiffs’ prerogative under New Hampshire law to rely on both theories, the court of appeals held that Volkswagen was required to challenge this aspect of the jury instructions in order to preserve its right to object to any later inconsistency in the jury’s findings. App., *infra*, 6a. The court also stated that Volkswagen “waived its right to object to any foreseeable combination of proper responses to the questions

posed on the verdict forms.” *Id.* at 4a. In contrast, most other circuits sensibly evaluate the preservation of objections to inconsistencies by assessing the objecting party’s conduct *after* the inconsistent verdict is announced, rather than requiring the defendant to make fruitless objections to practices that are plainly permissible under state law. This case thus provides the Court with the opportunity to address another significant and recurring conflict among the courts of appeals.

1. The decision below follows another recent decision of the First Circuit, in which the court held that the defendant was precluded under Rule 51 from arguing that a verdict was inconsistent because it had not “objected to the submission to the jury of both * * * strict liability and negligence claims.” *Babcock v. General Motors Corp.*, 299 F.3d 60, 64 (1st Cir. 2002). Those rulings are consistent with several decisions of the Second Circuit. See *Jarvis*, 283 F.3d at 53-65; *Higgins v. Burleigh*, No. 96-7907, 1998 WL 433001, *1 (2d Cir. Apr. 22, 1998). The Eleventh Circuit, too, recently expressed apparent sympathy with this approach. *Mason*, 307 F.3d at 1276 n.7 (citing *Jarvis* and suggesting but not deciding that the defendant may need to alert the court to the possibility of potential inconsistency *before* the case is submitted to the jury).

The Third Circuit, however, has expressly rejected the contention that the failure to object under Rule 51 to jury instructions and interrogatories precludes a later argument that the verdict contains inconsistencies. See *Loughman*, 6 F.3d at 103 (“The question before us is not whether there was error in the instructions or the interrogatories, but the legal effect of the jury’s answers, and, more specifically, whether the jury’s answers can be reconciled.”). In the Third Circuit’s view, the issue of waiver is governed by the party’s conduct *after* the inconsistent verdict is returned. *Ibid.* The Sixth Circuit has reached a similar conclusion in an unpublished decision. See *Holloway v. McIntyre*, Nos. 86-1001, 86-1898, 1988 WL 7961, at *5 (6th Cir. Feb. 4, 1988) (rejecting argument that defendant waived objection to verdict inconsistency by failing to object to

jury charge; “We do not believe a party should be held to an onerous inconsistency merely because he was not prescient of upcoming events.”).

The Third Circuit’s view is reflected implicitly in decisions by many other courts, which have addressed the merits of inconsistencies within verdict forms that frame alternative liability theories without suggesting that the submission of the case to the jury on those theories was erroneous or that the objecting party should have challenged it. See, e.g., *Oja v. Howmedica, Inc.*, 111 F.3d 782, 791-792 (10th Cir. 1997) (entry of judgment for plaintiff on negligence was plain error in light of jury verdict for manufacturer on strict liability); *Bradley v. General Motors Corp.*, No. 96-8073, 1997 WL 354721, at *3 (10th Cir. June 26, 1997) (“when several causes of action are identical and defended on the same ground, a verdict for the plaintiff on one cause of action and for the defendant on another is inconsistent”) (internal quotation marks and citation omitted); *Tipton v. Michelin Tire Co.*, 101 F.3d 1145, 1150-1151 (6th Cir. 1996) (granting judgment for defendant after concluding that jury findings that the defendant was negligent but not strictly liable were inconsistent); *Romero v. International Harvester Co.*, 979 F.2d 1444, 1454 (10th Cir. 1992) (granting judgment to defendant after concluding that the jury’s findings for defendant on strict liability and negligent design theories precluded finding for plaintiff on negligent failure to retrofit theory); *Witt v. Norfe, Inc.*, 725 F.2d 1277, 1279-1280 (11th Cir. 1984) (granting new trial after concluding that the jury’s findings for defendant on implied warranty and strict liability theories were inconsistent with its finding that the defendant was negligent); *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 94-95 (3d Cir. 1983) (ordering new trial because verdicts on strict liability and breach of implied warranty theories were inconsistent); *Werner v. Upjohn Co.*, 628 F.2d 848, 860 (4th Cir. 1980) (concluding that the jury’s finding for the defendant on strict liability meant that its finding for the plaintiff on negligence was “obviously inconsistent and cannot stand”).

2. The waiver rule imposed by the decision below also is in tension with generally accepted trial practice. It is widely recognized that submitting a case to the jury on multiple legal grounds may offer plaintiffs some tactical advantages. See John E. Theuman, *Products Liability: Inconsistency of Verdicts on Separate Theories of Negligence, Breach of Warranty, or Strict Liability*, 41 A.L.R. 4th 9 (1985) (negligence, strict liability, and implied warranty theories “are not mutually exclusive, and, since each has its advantages and disadvantages for the plaintiff, a products liability action will frequently allege all of them as alternative grounds for recovery”) (footnote omitted). At the same time, it is understood that doing so creates the risk of inconsistent verdicts that may result in a new trial or the entry of judgment for the defendant. For example, a treatise on products liability observes:

Although alleging alternative theories of liability gives the plaintiff a fall-back position should proof on an element of one theory prove insufficient, it also poses a potential hazard, in that a jury asked to make separate verdicts or findings on each theory may hold for the defendant on one theory while holding for the plaintiff on another; if these verdicts cannot be reconciled, the plaintiffs’ victory may be thrown out by the trial or an appellate court.

AMERICAN LAW OF PRODUCTS LIABILITY 3D § 56.19 (2003). Despite these risks, submitting a case on multiple theories generally is viewed as the plaintiffs’ prerogative.

That certainly was true in this case. The First Circuit has expressly recognized that, under New Hampshire law, plaintiffs *may* submit multiple theories to the jury. See *Babcock*, 299 F.3d at 65 (although the practice is “frowned upon,” “New Hampshire law does not prohibit submitting both negligence and strict liability claims to the jury”); see also App., *infra*, 8a (citing *Babcock*); *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843, 849 (N.H. 1978). Indeed, the New Hampshire Supreme Court had reiterated *in this very case*, only a few months before trial, that plaintiffs were entitled to proceed on both theories.

Trull, 761 A.2d at 481. At the same time, the New Hampshire Supreme Court has observed that, in certain situations, “[h]aving found for the defendant on strict liability, a jury [may] not find for the plaintiffs on * * * negligence * * * except by disregarding their instructions.” *Greenland*, 347 A.2d at 163. That Court also has pointedly stated:

While we note that both counts are permitted, we do not recommend to plaintiffs that counts in both negligence and strict liability against the same defendant be submitted to the jury because of the confusion that is created.

Ibid.

Accordingly, *plaintiffs* assumed the risk that their decision to proceed on both counts would result in an untenable verdict. On the other hand, once the district court denied its motions during trial for judgment with respect to negligence on the basis that plaintiffs had not established any design defect (R. 1277-1283, 2358-2360), *Volkswagen* had no grounds to object to the submission of the case on both theories. Nor did Volkswagen have any reason to anticipate the inconsistency. As noted above, the jury was instructed that it could not rule against Volkswagen on *any* theory unless it found the presence of a design defect. Had the jury followed the instructions, it could not have answered “yes” to question 3 after answering “no” to question 1. In finding that defendants were negligent despite having concluded that plaintiffs did *not* prove the existence of a defect, the jury directly disobeyed that instruction.⁷ “The

⁷ Moreover, the verdicts here contained more than an *implicit* inconsistency between the jury’s findings on two legal theories – which has been deemed sufficient in many cases to preclude entry of judgment for the plaintiff. See, *e.g.*, *Tipton*, 101 F.3d at 1150 (granting judgment to defendant on plaintiff’s negligence claim because “[i]n answering ‘no’ to the interrogatory on strict liability, the jury necessarily found that Tipton’s tire was *not* in a ‘defective condition’”); *Witt*, 725 F.2d 1277 (granting new trial because the

theory under which jury instructions are given by trial courts and reviewed on appeal is that juries act in accordance with the instructions given them.” *City of L.A. v. Heller*, 475 U.S. 796, 798 (1986) (per curiam). Given that presumption, the court of appeals’ holding that Volkswagen waived its objection to the jury’s inconsistent findings by acceding to the instructions and the verdict form is entirely unjustified.

The fact that the verdict form (which was designed by the district court) invited the jury to respond to question 3 after answering “no” to question 1 should not alter this conclusion. True, it might have been preferable if the form had instructed the jury to end its deliberations if it answered question 1 in the negative. But the absence of that instruction did not “invite” the inconsistency: had the jury obeyed the court’s *other* instructions, a “no” answer to question 1 would necessarily have been followed by a “no” answer to question 3. See App., *infra*, 41a. Volkswagen’s failure to predict that the jury would disregard the instructions should not be deemed a waiver of its right to challenge a judgment that ignores the jury’s findings.

Indeed, plaintiffs, more so than Volkswagen, should have been alert to the possibility that the verdict forms created the possibility of inconsistency. As mentioned above, the New Hampshire Supreme Court has warned *plaintiffs* of just this outcome. *Thibault*, 385 A.2d at 843. Because the inconsistency was made possible by plaintiffs’ trial strategy – and either side might have brought the issue to the district court’s attention – it is unfair to allow plaintiffs “to prevail merely by remaining silent” (*Los Angeles Nut House*, 825 F.2d at 1354), in derogation of state law disallowing such a judgment. See also *Bradley*, 1997 WL 354721, at *4 (“if the plaintiffs had elected

jury’s implicit finding that product was not defective undermined finding that defendant was negligent). The jury made an *express* factual finding that the plaintiff had not proved “by a preponderance of the evidence that the defendant was negligent in designing and/or testing the 1986 Vanagon because it lacked lap/shoulder belts in the rear seating positions[.]” App., *infra*, 34a.

to proceed only on their theory of negligence, no inconsistency would exist with the findings of comparative fault”).

Finally, it must be noted that the right to have judgment entered in accordance with the jury’s findings implicates the Seventh Amendment’s right to trial by jury. See *Atlantic & Gulf Stevedores, Inc.*, 369 U.S. at 359. “Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady v. United States*, 397 U.S. 742, 756 (1970). The failure to object to parenthetical directions on a verdict form drafted by the court surely does not satisfy this standard.

3. In ruling that defendants may not challenge verdict inconsistencies unless they first predict and try to prevent them, the First Circuit has strayed far from the usual course. In the vast majority of cases, courts have determined whether a party has preserved its objections to inconsistencies by evaluating its conduct *after* the inconsistent verdicts are returned. The Third Circuit has stated expressly that this is the correct approach. So far as we are aware, only the First and Second Circuits have adopted the anomalous rule reflected in the decision below, under which the right to challenge a verdict inconsistency frequently is waived before the jury deliberations even begin.

The divergence among the courts of appeals regarding this frequently recurring issue will engender enormous confusion and inefficiency in the federal courts. To ensure that their rights are preserved, defendants will have to raise and press objections to a plaintiff’s submission of alternative liability theories, even when state law unequivocally provides that the plaintiff may proceed in this fashion. In such circumstances, the required objections either will be pointless or will lead the district court into error. Federal procedural rules should not be construed to require such counterproductive undertakings.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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