

Products Liability Law Daily Wrap Up, TOP STORY—CHEMICAL

PRODUCTS—S.D. Ind.: Injured workers' design defect claim against butter flavoring maker proceeds, failure to warn claim rejected, (Jun. 2, 2017)

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By Susan Lasser, J.D.

Only a design defect claim will continue against the manufacturer of butter flavoring in an action by workers at a microwave popcorn packaging facility who claimed that their exposure to the flavoring which contained diacetyl caused their respiratory injuries, a federal district court in Indiana determined. The court could not find as a matter of law that the worker safety program by the workers' employer was a superseding cause of their injuries. Additionally, the court found the sophisticate intermediary doctrine applied to defeat the workers' failure to warn claim (*Aregood v. Givaudan Flavors Corp.*, June 1, 2017).

The plaintiffs in the case worked in various capacities at a ConAgra Snack Foods Group (ConAgra) microwave popcorn packaging facility in Indiana. These workers alleged that their exposure to butter flavors that contained diacetyl, which were sold to ConAgra by Givaudan Flavors Corporation, caused them to develop respiratory injuries. The workers asserted four substantive claims: (1) strict liability for providing a product in a defective condition; (2) failure to warn as to the propensity of butter flavor to cause severe respiratory disease; (3) common law negligence; and (4) defective product design because the products were more dangerous than an ordinary consumer would expect when it was used as intended. Givaudan moved for summary judgment on all claims.

Strict liability defective condition. To state a claim for strict liability for a defective condition under the Indiana Product Liability Act (IPLA), a plaintiff must allege that the product was defectively manufactured or prepared. Instead, the workers argued that the product was unreasonably dangerous to the user or consumer because the workers were unaware that exposure to the product could cause them injury. The court noted, in fact, that the workers pleaded in their complaint that the defective condition was the failure to warn of the unreasonably dangerous condition. However, it was undisputed that there was no strict liability for either defective design or failure to warn claims under Indiana law. Therefore, the court held that Givaudan was entitled to summary judgment on the workers' claim of strict liability in tort for a defective condition/manufacture.

Failure to warn. The workers argued that Givaudan purposefully failed to warn them about the dangers of butter flavors when it withheld information on its Material Safety Data Sheets (MSDSs) regarding permanent lung damage that could occur if the workers did not use full-face respirators. Givaudan asserted that it was entitled to summary judgment on the failure to warn claim because it reasonably relied on the workers' employer, ConAgra, to protect its employees from any dangers associated with butter flavors used in ConAgra's plants. The court agreed with Givaudan that the sophisticated intermediary doctrine applied in this case and that the manufacturer was entitled to summary judgment on this claim.

Under Indiana law, a manufacturer has a duty to warn reasonably foreseeable users of latent dangers inherent in a product's use. This duty is breached when a manufacturer "fails to: (1) properly package or label the product to give reasonable warnings of danger about the product; or (2) give reasonably complete instructions on proper use of the product." While this duty is non-delegable, Indiana has established an exception to this general rule: the sophisticated intermediary doctrine. The doctrine is applicable if "(1) the product is sold to an intermediary with knowledge or sophistication equal to that of the manufacturer; (2) the manufacturer adequately warns the intermediary; and (3) the manufacturer can reasonably rely on the intermediary to warn the ultimate consumer." The purported reliance is deemed reasonable if the intermediary knows or should know of the product's dangers. In addition, there can be actual or constructive knowledge if either the supplier provided adequate explicit warning of the dangers or information of the product's dangers is available in the public domain. A court making

an analysis under the sophisticated intermediary doctrine must consider: "[T]he likelihood or unlikelihood that harm will occur if the [intermediary] does not pass on the warning to the ultimate user, the [] nature of the probable harm, the probability or improbability that the particular [intermediary] will not pass on the warning and the ease or burden of the giving of the warning by the manufacturer to the ultimate user." While the question of whether a manufacturer has discharged its duty under the doctrine is almost always for a jury, summary judgment can be appropriate as a matter of law.

The court ruled that summary judgment was appropriate under the sophisticated intermediary doctrine because the evidence of Givaudan's knowledge was insufficient. Neither Givaudan, nor its hired professionals, nor its trade association discovered any connection between respiratory problems at flavoring plants and diacetyl in the 1990s. The workers' evidence showed that Givaudan, based on its research, had identified diacetyl as a "potential problem." None of the research Givaudan did, however revealed any specific cause for its employees' health issues, however. Further, the maker's internal policies regarding handling diacetyl were related to the use of straight liquid diacetyl without other additives, and its procedures for handling mixtures of the material with other products or using powder formed from straight liquid diacetyl were no different than those it recommended for handling the mixtures it sold as butter flavors to ConAgra. Thus, there was no evidence to support the workers' assertion that Givaudan withheld known safety information from ConAgra.

In fact, the evidence showed that ConAgra knew as much if not more than Givaudan with respect to the danger of butter flavors as they were used by ConAgra in the plant where workers worked. It knew that butter flavors contained diacetyl, as well as other volatile organic compounds, since the early 1990s. More importantly, ConAgra knew at this time that ingredients in butter flavors were capable of irritating the respiratory tract. Furthermore, ConAgra, which the court called, "a large sophisticated company," had its own occupational health department responsible for the health and safety of its workers, and the court pointed to evidence indicating that there could be no dispute that "ConAgra was well-versed on the issues related to butter flavors and worker health." According to the court, the only reasonable inference based on the evidence presented was that ConAgra was well aware of the alleged threat to its employees' health from butter flavors and was taking steps to protect them from harm consistent with industry standards that were not set by Givaudan, but by the entire industry as well as state and local agencies. Therefore, the court ruled that a reasonable jury could only conclude that ConAgra was a sophisticated intermediary that was as knowledgeable as Givaudan about the potential health hazards of butter flavors and on which Givaudan could reasonably rely to protect workers at the Indiana plant. Consequently, the court granted summary judgment in favor of Givaudan on the failure to warn claim.

Design defect. Finally, the court denied summary judgement for Givaudan on the workers' design defect claim. The court stated that the claim that Givaudan's butter flavors were defectively designed turned on application of the doctrine of intervening or superseding causation. Givaudan again argued that ConAgra's actual knowledge of an association between diacetyl in butter flavors and lung diseases, and its complete control over its safety protocols to mitigate its workers' exposure to potentially hazardous substances, broke the causal chain between Givaudan's alleged defective design and the workers' alleged injuries. The workers contended that Givaudan's knowledge of the dangers of diacetyl in butter flavors was greater than that of ConAgra in their assertion that Givaudan caused them harm.

To the extent that the workers relied on a failure to warn theory for their design defect claim, the court said that its analysis of the application of the doctrine of a sophisticated intermediary applied. However, as to defective design of the butter flavors themselves, the court determined that neither party adequately addressed Indiana's superseding causation doctrine, which focuses on whether "the harm resulting from the intervening act could not have been reasonably foreseen by the original negligent actor." The court could not conclude as a matter of law that ConAgra's worker safety policy at the plant was an unforeseeable independent intervening "force" such that it could be considered a superseding cause. This was a question of whether ConAgra's use of the butter flavors and its worker protection program were unforeseeable by Givaudan, and the question was unanswered by the facts presented, the court said. Therefore, the court denied summary judgment on the workers' design defect

claim on this ground, but made no conclusion as to their evidence supporting the other elements of a design defect claim.

The case is No. [1:14-cv-00274-LJM-TAB](#).

Attorneys: Amy Van Ostrand-Fakehany (Allen Wellman McNew Harvey LLP) for Gregory Aregood, Jr. Dennis F. Cantrell (Cantrell, Strenski & Mehringer, LLP) for Givaudan Flavors Corp. f/k/a The Partnership Tastemaker f/k/a Givaudan-Roure Corp. f/k/a Givaudan-Roure Flavors Corp. f/k/a Tastemaker Corp. f/k/a Fries & Fries, Inc. f/k/a Mallinckrodt Flavor & Fragrances, Inc. f/k/a Mallinckrodt Foods & Flavors, Inc.

Companies: Givaudan Flavors Corp. f/k/a The Partnership Tastemaker f/k/a Givaudan-Roure Corp. f/k/a Givaudan-Roure Flavors Corp. f/k/a Tastemaker Corp. f/k/a Fries & Fries, Inc. f/k/a Mallinckrodt Flavor & Fragrances, Inc. f/k/a Mallinckrodt Foods & Flavors, Inc.

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