Products Liability Law Daily Wrap Up, SUPPLY CHAIN LIABILITY ISSUES—CHEMICAL PRODUCTS—E.D. Wis.: Risk-contribution theory still deemed applicable to lead-paint ingestion case, (Jul. 16, 2018)

Products Liability Law Daily Wrap Up

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By Georgia D. Koutouzos, J.D.

The Wisconsin federal court overseeing litigation against several paint manufacturers by individuals allegedly harmed by having ingested lead-based paint as children rejected yet another attempt by one of the paint makers to foreclose the injured individuals' use of the risk-contribution theory to establish liability. In the second ruling in as many months, the court denied Sherwin-Williams' motion for summary judgment on the injury victims' negligence and failure to warn claims, this time concluding that requiring the plaintiffs to demonstrate that they had tried and failed to identify the specific manufacturer that had harmed them would improve neither the integrity nor the outcome of the process outlined in Wisconsin Supreme Court precedent establishing the risk-contribution theory (*Burton v. American Cyanamid*, July 13, 2018, Adelman, L.).

Several individuals who allegedly had been harmed when, as children, they had ingested paint containing white lead carbonate (WLC) pigment filed suit in Wisconsin federal court against various paint manufacturers, asserting negligence and failure to warn claims against those companies. Because each of the individuals was unable to identify the manufacturer of the WLC that allegedly had harmed him or her, their substantive claims relied on the so-called risk-contribution theory of liability established in Wisconsin Supreme Court case precedent. This theory relaxes the traditional causation standard and requires a plaintiff to prove only that the defendants have "contributed to the risk of injury to the public, and, consequently, to the individual plaintiffs."

Sherwin-Williams, one of the paint manufacturer-defendants in the case, moved for summary judgment on the claims, initially asserting that the plaintiffs' use of the risk-contribution theory was barred by the Wisconsin statutory provision proscribing the use of that theory in cases involving WLC and many other consumer products. The court denied summary judgment favoring the company on that basis, after which Sherwin-Williams renewed its motion, this time arguing that the injured individuals were not entitled to proceed on the basis of the risk-contribution theory because that theory becomes available only when a plaintiff has produced admissible evidence showing that "insurmountable obstacles" had foreclosed his or her ability to identify the manufacturer of the product that caused the alleged harm.

Here, the injured individuals failed to meet that threshold burden because they did not produce evidence that they tried but were unable to identify the manufacturer of the WLC that harmed them, Sherwin-Williams argued, maintaining that certain scientific tests potentially could identify the manufacturer of the WLC in paint chips taken from individuals' residences, or at least could narrow the pool of potential manufacturers. The individuals should have availed themselves of those tests before proceeding on a risk-contribution theory, the paint maker contended.

Relevant case precedent. As a threshold matter, the cases cited by Sherwin-Williams as indicative of the existence of such a requirement were inapposite, the federal court found, noting that the issue in those cases was the extension of the risk-contribution theory to new categories of consumer products claims. In contrast, the instant case involved the application of the theory to a product for which its applicability already has been established by the Wisconsin Supreme Court, the federal court remarked. Thus, the grant of summary judgment to the defendants in the paint maker's cited cases could not be taken as an indication that an "insurmountable obstacle" was a required showing on a case-by-case basis, the federal court explained.

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Further, the state supreme court's recognition in the case establishing the risk-contribution theory that the plaintiff there faced "insurmountable obstacles" in identifying the manufacturer that had harmed her did not amount to a requirement that identification of the manufacturer be "impossible" for the plaintiff, the federal court held. Imposing such a requirement would be inconsistent with the risk-contribution method's burden-shifting mechanism, the court added.

Scientific testing. For similar reasons, it also would be illogical and repetitious to require the injured individuals to perform the kind of testing Sherwin-Williams described as a prerequisite to proceeding on the risk-contribution theory, the federal court advised. As the state high court had instructed, the basis for liability in risk-contribution cases is a showing that the defendant manufacturer "reasonably could have contributed in some way to the actual injury." To achieve that result, the supreme court crafted a process in which plaintiffs establish a *prima facie* case on the basis of a manufacturer's contribution to the risk to the public by manufacturing a defective product, and defendants may then exculpate themselves by establishing that their product could not in fact have caused the plaintiff's injury.

In the case at bar, requiring the injury victims to demonstrate that they had tried and failed to identify the manufacturer that harmed them would improve neither the integrity nor the outcome of that process, the federal court said, noting that the equities identified by Wisconsin state courts disfavor such a requirement. Accordingly, Sherwin-Williams' motion for summary judgment based on the injured individuals' failure to demonstrate a prerequisite need for the applicability of the risk-contribution theory was denied.

The case is Nos. 07-CV-0303, 07-CV-0441, and 10-CV-0075.

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Companies: American Cyanamid Co.; Armstrong Containers Inc.; E I Du Pont de Nemours and Co.

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