Products Liability Law Daily Wrap Up, TOP STORY—CHEMICAL PRODUCTS—E.D. Wis.: $6M award by jury upheld in Milwaukee lead-poisoning case, (Sept. 20, 2019)

Products Liability Law Daily Wrap Up

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By Pamela C. Maloney, J.D.

Manufacturers of lead paint fail to persuade court that jury verdict should be set aside for public policy reasons.

Jury awards of $2 million each to three plaintiffs who had been injured because of toxic lead paint exposure during their childhood were upheld by the U.S. District Court for the Eastern District of Wisconsin, despite the manufacturers claim that the verdicts should be set aside for public policy reasons. The district court also denied two of the manufacturers motion for judgement as a matter of law based on the plaintiff's failure to prove to the jury that the white lead carbonate (WLC) pigment in the paint was a fungible product (*Burton v. American Cyanamid Co.*, September 19, 2019, Adelman, L.).

Several individuals who allegedly had been harmed when, as children, they had ingested paint containing white lead carbonate (WLC) pigment filed individual lawsuits in a Wisconsin federal court against various paint manufacturers, asserting negligence and failure to warn claims against those companies. Because each individual plaintiff was unable to identify the manufacturer of the WLC that allegedly caused his or her harm, the substantive claims relied on the so-called risk-contribution theory of liability established by the Wisconsin Supreme Court in *Thomas v. Mallett*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523. The consolidated cases were tried before a jury, which found the manufacturers Sherwin Williams, Armstrong Containers, and E. I. du Pont de Nemours and Co. liable, awarding each plaintiff $2,000,000 in damages (see *Products Liability Daily*'s June 4, 2019 analysis). The plaintiffs and the three manufacturers elected to settle, allocating 12.5 percent of the responsibility to National Lead—the company that controlled a large share of the market for WLC and WLC-based paints in Milwaukee—and allocating the remainder to the three remaining defendants on the basis of joint-and-several liability. Following the settlement, the manufacturers moved for judgment notwithstanding the verdict on the ground that liability was precluded by the various public policy factors that comprise the test for legal causation applied by Wisconsin courts. In addition, Sherwin William and Armstrong moved for judgment as a matter of law, arguing that the plaintiffs failed to prove that the risk contribution theory properly applied to the case at bar.

Public policy considerations. In order to determine whether judicial public policy precluded liability even though a plaintiff had proven the elements of negligence, Wisconsin courts rely on the six public policy factors: (1) whether the injury is too remote from the negligence; (2) whether the injury is wholly out of proportion to the culpability of the negligent tortfeasor; (3) whether, in retrospect, it appears too extraordinary that the negligence should have brought about the harm; (4) whether allowance of recovery would place an unreasonable burden on the negligent tortfeasor; (5) whether allowance of recovery would be too likely to open the door to fraudulent claims; or (6) whether allowance of recovery would enter a field that has no sensible or just stopping point. According to the court, none of these factors supported a finding that public policy precluded a finding of liability.

Proximity. The manufacturers' argument that the decades-long gap between their alleged negligence and the injury in this case was too long was misplaced. In prevailing on their product liability claim, the plaintiffs had proven to the satisfaction of the jury that the defective condition of the paint had existed while it was under the control of the manufacturer and that the paint was expected to and did reach the consumer without substantial change from the condition in which it was sold. In light of the jury's finding, which the court refused to displace, the issue of proximity could not serve to overrule the manufacturers' liability for the plaintiffs' injuries as a matter of law. Furthermore, any failure on the part of landlords or homeowners to ameliorate deteriorating lead

paint during the time between manufacturer and ingestion was not an intervening cause, but was a normal consequence of the manufacturer's negligence in manufacturing or marketing WLC for use in residential paint.

Proportion. The court also rejected the manufacturers' argument that the injuries were out of proportion to their culpability, noting that the manufacturers had given up their opportunity to present evidence of market share by settling the case before the allocation phase of the trial. Furthermore, once the jury determined that the manufacturers had breached a duty of care by manufacturing or marketing WLC pigment despite their awareness that children could ingest the pigment and be harmed the market share argument had no bearing on the proportionality because market share was a causation argument. Finally, the fact that WLC was specified by various levels of government for public use and that both Sherwin Williams and DuPont had played important roles in developing lead-free paint formulas did not diminish the jury's determination of culpability enough to warrant a complete bar to liability as a matter of law.

Extraordinariness. According to the manufacturers, this factor barred liability because the brain injuries the plaintiffs sustained were not recognized as a risk at the time WLC was manufactured. Although the cognitive impairments sustained by the plaintiffs in this case were more subtle forms of injury than the seizures and comas documented in the early 20th century, the basic narrative of ingestion of deteriorated paint leading to brain injury was the same as the more well-documented cases and the evidence showed that the manufacturers knew or should have known of the medical findings regarding the risks of brain injuries.

Unreasonable burden. Allowing liability in this case would not, according to the court, impose too great a burden on the manufacturers and the outcome did not make the manufacturers absolutely liable for products that were not maintained, as argued by the manufacturers. In the early 20th century, the manufacturers of paint pigment knew that the pigment they made would be used in residential properties and the jury's decision reflected its finding that the manufacturers were aware that inherent in this foreseeable use of pigment was the risk that children would ingest paint that had been allowed to degrade. Thus, allowing liability in this case did not translate into blanket liability any time a child improperly ingests a product. Rather, the court opined, liability in this case reflected these manufacturers' failure to reasonably act on their knowledge of a risk inherent in a foreseeable misuse of their product, an outcome consistent with existing tort law.

Fraudulent claims. The court also rejected the manufacturers' argument that recovery in this case would allow any child with a blood lead level above the CDC reference level to bring a claim. In light of the evidentiary support for the plaintiffs' injuries, their claims were far removed from the realm of speculation and future plaintiffs who successfully proved their claims for brain injury caused by lead in paint or water was a reflection of the lead problem not of widespread fraud, the court concluded.

Just or sensible stopping point. Similarly, allowing recovery in this case did not mean that any individual company or individual who marketed, promoted, specified, or recommended WLC or paint with WLC for residential used at any time could be found liable for injuries. It still remained the plaintiff's burden to prove that the defendant was negligent as the jury in this case had determined based on the legal standards on which it was instructed.

Application of risk contribution theory. Sherwin-Williams and Armstrong further argued that because the plaintiffs had failed to prove at trial that WLC was a fungible product for purposes of the risk contribution theory, the manufacturers were entitled to judgment as a matter of law or, in the alternative, a new trial. This argument was based on the manufacturers' contention that the question of fungibility was one for the jury and challenged the court's prior ruling on the plaintiffs' motions for summary judgment before trial that the Wisconsin Supreme Court in *Thomas* established that WLC was fungible as a matter of law (see *Products Liability Daily*'s October 10, 2018 analysis). Having closely examined the state's risk contribution case law, the court concluded that fungibility for risk contribution purposes was properly a question of law for resolution by the courts, and that WLC was fungible.

The court explained that for risk contribution purposes a product was fungible if any manufacturer's product might have caused the same or very similar harm, and if the different manufacturers' products were so similar to each other that the challenge of identifying the manufacturer was likely to prevent the plaintiff from obtaining

a remedy for his or her claim. The *Thomas* court had found that WLC met this definition of fungibility and, therefore, the court could exercise its constitutional power to craft a remedy for the plaintiffs, which took the form of an extension of risk contribution theory. If that determination were contingent on facts to be decided by the jury at the end of the case, parties could undergo years of litigation and complicated discovery on a theory that might turn out at the close of the case not to apply. An early determination of the fungibility question benefitted defendants as well as plaintiffs, the court added.

The court also rejected the manufacturers' argument that the pattern jury instructions indicated that fungibility was a jury question by requiring the jury to consider "the characteristic of the product's function at issue, the physical appearance of the product and the physical similarity of the product, and the risks posed by the products use and whether such products had substantially identical defects which pose a uniformity of risk" when answering the verdict question whether the defendant had manufactured the "type" of product that caused the plaintiff's harm. Contrary to the manufacturer's argument, the jury had not been asked to determine whether WLC was a fungible product, but whether the plaintiffs had provided sufficient evidence to prove that the named manufacturers had produced or marketed the type of WLC that each of them had ingested.

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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