

## **Products Liability Law Daily Wrap Up, CLASS ACTIONS AND MULTI-DISTRICT LITIGATION—HOUSEHOLD PRODUCTS—D. Colo.: Certification granted to class of Colorado homeowners alleging defectively designed heating hose, (Mar. 25, 2014)**

By Susan Lasser, J.D.

A class of Colorado homeowners alleging that a defect in a manufacturer's brand of rubber hose in their radiant heating systems resulted in leaks that caused damage to their homes was certified by a federal district court in Colorado. However, the court declined to grant certification to a similar class of homeowners from Wisconsin because that state's plaintiffs failed to meet the numerosity requirement for class certification ([Helmer v. The Goodyear Tire & Rubber Co.](#), March 21, Jackson, R.).

**Background.** Homeowners in Colorado and Wisconsin who used The Goodyear Tire & Rubber Company's Entran 3 brand of rubber hose in their radiant heating systems sought class certification of their strict liability for design defect claim against the manufacturer. They allege that Entran 3 tubing degrades and leaks, and this is caused by a defective design that will cause inevitable failure in all Entran 3 tubing. Entran 3 hose is a component of a radiant heating system, and is embedded in various parts of a home (the floor, walls, or driveways, for example) and conveys heated fluids through those areas, dispersing heat in the process. The hose is only part of the radiant heating system and, using clamps or adhesives, must be connected to a manifold that heats the fluid and pumps it through the hose. Goodyear has manufactured different versions of Entran hose. An earlier version, Entran II, was the subject of extensive litigation. The new design for Entran 3 includes an inner tube of EPDM rubber (a type of synthetic rubber) surrounded by an ethylene vinyl (EVOH) barrier designed to prevent oxygen transmission. The entire hose is encased in an EPDM outer cover.

**Arguments and testimony.** The homeowners defined the injury as the design defect common to all members of the putative class. Specifically, they identified two defects which they claimed would lead to inevitable failure resulting from ordinary use: (1) "the use of EPDM rubber in Entran 3 to carry hot liquid for the lifetime of homes where the product was installed," and (2) inconsistent thickness and bonding between the EVOH and EPDM layers of the Entran 3 hose. One of the plaintiffs, David Helmer, testified that the Entran 3 hoses in his home caused significant problems; that the hose is brittle and crispy; that black particles from the hose have ended up in other components of the heating system; and that he found fluid leaking from the system. In addition, Felicia and Michael Muftic asserted that they also had problems with their heating system; and that in June 2010, the Entran 3 hose in their home split and caused a massive leak resulting in damage to the flooring, walls, and fixtures. The purported class representatives offered the opinion of Dr. John E. Moalli in support of their arguments. According to Dr. Moalli, using EPDM rubber for use in radiant heating systems and attempting to bond a rigid layer of EVOH to a flexible hose were poor design choices which led to a product that was destined to fail under foreseeable use. He performed several tests to reach this conclusion.

Goodyear claimed that Dr. Moalli's analysis was limited to one section of hose which was destroyed after testing and was, therefore, unavailable to Goodyear's experts. Goodyear offered the competing expert opinion of Dr. Jorgen Bergstrom who performed additional laboratory tests on Entran 3 hose, including some joint testing with Dr. Moalli. His conclusion was that the hose was not defective, and any crispiness, embrittlement, or leakage of the hose would be due to improper installation. Goodyear also offered reports by a former chief chemist at Goodyear, Gary Thompson, who examined hose in the plaintiffs' homes and concluded that improper clamps and adhesives were used and that hoses were subject to excessive bending near the manifold connection.

The homeowners and their expert contended that the Goodyear expert's methods were incapable of capturing the "progressive degradation and embrittlement of the hose from the failing rubber," and that his testimony was based mostly on visual field inspections and little scientific testing. Finally, evidence from the home of an unnamed putative class member exhibited a leak in a hose that was otherwise installed correctly, thereby supporting a design defect theory and undermining Goodyear's argument that individualized factors contributed to injuries among the putative class.

**Class certification requirements.** Federal Rule of Civil Procedure 23 sets forth the requirements governing

class actions in federal courts. Plaintiffs must prove that (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. In addition, the putative class must fall into one of the categories listed in Rule 23(b). In the current case, the homeowners relied on the third category, which allows certification if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”

**Certification of Colorado class.** The court first determined that the Colorado class of homeowners met the numerosity requirement, *i.e.*, that the putative class is so numerous that joinder is impracticable. The homeowners identified 132 homes in Colorado that have Entran 3 installed. Based on the fact that Goodyear produced approximately 33 million feet of Entran 3 hose, the homeowners projected that many more homes in Colorado contain Entran 3. However, there were only 10 homes, combining both Colorado and Wisconsin plaintiffs, in which the Entran 3 hose was causing problems. Goodyear argued that relying on such a small number of allegedly problematic Entran 3 systems to demonstrate numerosity was impermissibly speculative. The court found, however, that the relevant inquiry for purposes of determining numerosity was who owns or owned property with Entran 3 installed, not who owns or owned property with presently malfunctioning Entran 3. The court cited the homeowners’ theory being that the design defects in the Entran 3 hose will lead to inevitable failure in a product designed to function indefinitely. Thus, as the homeowners had shown that at least 132 homes in Colorado contained the allegedly defective product, these were already ascertained members of the class, the court said. Moreover, the court noted that other unidentified members were relatively easily ascertainable because people with Entran 3 in their homes could objectively ascertain if they are class members by identifying the hose in their homes. In addition, the court determined that joinder of the group was impracticable. The court found that the relatively large size of the group and the geographic diversity of the members—who are scattered throughout relatively remote mountain towns in the state—suggested that joinder would be difficult to manage. Judicial economy and convenience to the parties supported a finding of numerosity for the Colorado class, the court determined.

The homeowners also satisfied the commonality prong of the class certification requirements. They claimed that Goodyear designed a defective product, they identified two alleged defects, and they provided scientific and technical evidence to support their theory. The court noted that factual differences between class members’ claims did not defeat certification where common questions of law existed. Although Goodyear argued that recent U.S. Supreme Court decisions had made it harder to certify a class, particularly the commonality requirement, the court found that the potential class members in the current case were exposed to the same injury regardless of the factual differences between them—the allegedly inevitable degradation of a product embedded in concrete that was designed to function appropriately for a long time. Further, the court observed that to require absolute homogeneity of factual and legal circumstances among a putative class would grant defendants in products liability actions “a trump card of sorts.” It was not necessary for the plaintiffs to pick a perfect plaintiff who could demonstrate at the class certification stage that he could prove each element of the claim and was subject to no defenses.

The court additionally found that the named homeowners were typical of the putative class. The homeowners demonstrated that in homes where the installation was proper—even by Goodyear’s estimation—similar cracking and rupturing could occur and did occur. They also offered persuasive evidence in rebuttal to Goodyear’s expert’s conclusions that the EPDM rubber was sufficient for its intended purpose. Moreover, the named plaintiffs did more than offer unsubstantiated evidence of inevitable failure—they demonstrated that failure occurred in several homes owned by named plaintiffs and showed that Goodyear’s expert’s conclusions did not fully explain the failure of the Entran 3 hose.

Also required is that the plaintiffs adequately represent the class, incorporating many of the same factors analyzed in the commonality and typicality assessments. In support of this requirement the court found that Goodyear offered no evidence supporting the assertion that there were conflicts between members of the class or class counsel. The court also determined that the named class members and their counsel demonstrated vigorous prosecution of the case.

Finally, the court found that Goodyear failed to demonstrate a fatal dissimilarity that would defeat the plaintiffs' showing of predominance. Under Colorado law, proof of a design defect requires proof of causation. In spite of Goodyear's argument that incorrect installation caused the named plaintiffs' injuries, none of the manufacturer's evidence changed the facts in support of certification. The type of malfunction did not seem to vary from plaintiff to plaintiff, according to the court. The court stated that the range of facts looked like "the typical, normal range of installations that all purchasers of the tubing would employ." Therefore, the court concluded that a class directed at answering the question of whether the rubber was bound to degrade and the EVOH was improperly bonded would generate common answers rather than require an individualized inquiry in each case. Moreover, the court said that if the homeowners could not show that the alleged defects existed and caused the injury, then the entire class will lose on the merits. However, the facts did not suggest to the court that individual questions would predominate.

**Putative Wisconsin class.** The homeowners identified only 6 homes in Wisconsin that had Entran 3 hose installed. The court stated that this was a far smaller group than the Colorado class. While the court said that there probably were additional homes in the state with Entran 3 hose, the Wisconsin homeowners were starting with a very small number. Applying the "rigorous analysis" standard, and holding the plaintiffs strictly to their burden to support certification, the court could not conclude that joinder of the Wisconsin class would be impracticable. Instead, the court determined that the Wisconsin homeowners failed to meet the numerosity requirement for class certification.

The case number is 12-cv-00685-RBJ-MEH.

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Companies: The Goodyear Tire & Rubber Co.

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