Products Liability Law Daily Wrap Up, EVIDENTIARY ISSUES—CHEMICAL PRODUCTS—W.D. Mo.: $20.6 million jury award in Missouri TCE-exposure case stands as new trial rejected, (Jul. 14, 2016)

Products Liability Law Daily Wrap Up

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By Susan Lasser, J.D.

A request for a new trial by a ball and roller bearings manufacturer after a jury determined the company was liable to a woman who alleged that her development of autoimmune hepatitis (AIH), and other serious illnesses, was caused by the manufacturer's release of trichloroethylene (TCE) into the environment near the woman's childhood home was rejected by a federal district court in Missouri. After a three-week trial, the jury found that the TCE released by the manufacturer caused the woman's AIH, and it awarded her $20.6 million in compensatory and punitive damages (*Kirk v. Schaeffler Group USA, Inc.*, July 13, 2016, Kays, G.).

FAG Bearings Corporation, which became defendant FAG Bearings LLC (FAG Bearings) on January 6, 2005, operated a manufacturing plant in Joplin, Missouri, until at least June 6, 2005. FAG Bearings used a TCE vapor degreasing system in its manufacturing process until 1983, in which TCE was used as a solvent for removing grease from metal parts. It released thousands of gallons of TCE into the environment in a number of ways: through waste, spills, leaks, overflowing tanks, incidental use of TCE, and certain dumping into the ground at its facility. FAG Bearings' experts and employees opined that vapors could be released in a TCE vapor recovery system which could malfunction. When condensed, the vapors returned to the soil on the maker's property. These TCE releases were predictable and foreseeable. During investigations from 1991 to 1996, TCE or TCE-related chemicals were detected in at least 36 different locations across the facility. Additionally, FAG Bearings employees occasionally dumped or pumped TCE directly into the ground. FAG Bearings also released TCE from its manufacturing plant into the soil and surrounding groundwater. The "trail," or plume, of TCE contamination ran directly from these locations to residential wells located south of FAG Bearings' property. Thus, FAG Bearings was wholly responsible for the TCE contamination on its property and in certain nearby towns.

The plaintiff in the current case alleged that the company's conduct in pouring, pumping, spilling, or otherwise introducing TCE into FAG Bearings' real property and in allowing TCE to contaminate the groundwater was negligent or intentional.

New trial. The court rejected the arguments put forward by FAG Bearings in support of its motion for a new trial. First, the court found that it did not err in admitting government reports referencing TCE standards—the U.S. Environmental Protection Agency's Toxicological Review of TCE and a Minnesota Department of Health report setting recommended levels of TCE in drinking water. The manufacturer argued that the jury wrongly used the standards referenced in the reports to determine causation, and it objected to the plaintiff's counsel's use of the reports to argue to the jury that TCE caused the plaintiff's AIH, despite his assurances that he would not do so. The maker claimed that the unfair prejudice resulting from the introduction of the reports outweighed any probative value they had. The court noted, however, that the Eighth Circuit has upheld the admission of similar government reports under the public records exception in Federal Rules of Evidence. Also, the reports' probative value outweighed the danger of unfair prejudice, confusion of the issues, or misleading the jury. At trial, while the court allowed the jury to consider the reports in determining causation, it repeatedly instructed the jury that the reports did not establish causation, and it gave a curative instruction accurately stating Eighth Circuit law. The court also found that the impact of plaintiff's counsel's attempt to use the reports for an impermissible purpose was negligible. The court determined that the plaintiff's evidence was more persuasive than the manufacturer's evidence, and a new trial would not likely lead to a different result.

Expert and witness testimony. The court disagreed with the manufacturer's contention that it had improperly excluded factual testimony from a Missouri Department of Natural Resources project manager. The company wanted him to testify as to the quality and reliability of well-water testing done in the area at issue, as well as on the question of whether the plaintiff's 19 alleged exposure locations were within the plume of TCE contamination. FAG Bearings maintained that these subjects did not require the manager to render an opinion or an expert opinion. The court found the argument was without merit. No lay person would know whether a given set of well-water testing was reliable or not, the court said. Thus, this determination required expert knowledge of the protocols for well-water testing. Moreover, the manager's proposed testimony that the 19 alleged exposure locations were outside of the plume implicitly rested on an expert opinion about where the plume of TCE contamination ran through the plaintiff's childhood town. This required expert knowledge of hydrology and other disciplines. Thus, the court did not err in excluding portions of the manager's testimony, and even if it did, the court stated that given the amount of other evidence in the record supporting the verdict, a new trial would not result in a different outcome.

Compensatory damages instruction and verdict form. The court rejected the argument that the damages instruction and verdict form used in the first phase of the trial violated the maker's due process rights by failing to explain that the jury's award was limited to compensatory damages. The jury instruction language was almost identical to that used in a Missouri Approved Instruction and to that proposed by the manufacturer.

In addition, the court ruled that the verdict form used during phase one of the trial was innocuous, and the court's guidance to the jury was clear—that the jury must award the plaintiff an amount that would fairy and justly compensate her for the damages she sustained and was reasonably certain to sustain in the future. Thus, the instructions contained no errors that warranted holding a new trial.

Damages. Finally, the court held that the jury's damages award was not excessive. The manufacturer argued that the "award was excessive … and likely the result of bias and prejudice" because the $7.6 million in actual damages was more than twice that calculated by the plaintiff's damages expert.

State law governs whether an award is excessive, and under Missouri law an excessive verdict can result from an "honest mistake" by the jury in assessing damages or from trial error that causes bias and prejudice by the jury. In determining whether an award is excessive, a court must be mindful that a jury award should fairly and reasonably compensate the plaintiff for her injuries. The court stated that the flaw in the manufacturer's argument was that the plaintiff's compensatory damages encompassed both economic *and* non-economic losses. Her experts demonstrated that she suffered $3 million in economic damages. For the non-economic damages, the court found that several credible witnesses testified about the pain, suffering, and humiliation the plaintiff's autoimmune hepatitis—and its attendant treatment—had caused her and will cause her in the future. It also severely impacted her lifestyle, including possibly taking a drug for the rest of her life to prevent her immune system from attacking her liver. The drug also increased her risk of developing cancer. And she faced the dilemma of having to choose between remaining on the drug and never becoming pregnant or discontinuing the drug to become pregnant, but risk dying from discontinuing the medicine. Thus, the court found that while the plaintiff's non-economic damages were considerable, a $4 million award for non-economic damages was not excessive or disproportionate in her case. The court concluded that a total compensatory damage award of $7.6 million was not excessive or disproportionate.

The case is No. 3:13-cv-5032-DGK.

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Companies: Schaeffler Group USA, Inc.; Fag Holding, LLC; Fag Bearings, LLC

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