Products Liability Law Daily Wrap Up, TOP STORY—DESIGN AND MANUFACTURING DEFECTS—E.D. Pa.: Take-home liability for beryllium exposure injuries limited to spouses in negligence claims, (Mar. 26, 2014)

Products Liability Law Daily Wrap Up

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By Pamela C. Maloney, J.D.

Take-home liability for injuries to household members who were exposed to beryllium carried into the home on shoes and clothing of employees at beryllium products manufacturing facilities was limited to spouses bringing negligence claims against the manufacturing company, a federal district court in Pennsylvania determined, dismissing claims against one company and limiting claims against a second company to those injuries that occurred after the marriage. The court also limited strict products liability claims to those involving beryllium products sold by one company to another. (*Schwartz v. Accuratus Corp*, March 24, 2014, Schmehl, J.)

Background. Brenda Schwartz developed a variety of adverse health effects associated with chronic beryllium disease, which she developed allegedly as a result of exposure to beryllium carried home from work on the shoes and clothing of her husband and a third-party roommate. Her exposure had begun when she and her husband were dating and she spent a lot of time visiting him at the apartment he shared with a roommate. According to the complaint, Brenda was exposed to beryllium from two different beryllium products manufacturing companies where the men worked—Accuratus Corp. and Brush Inc. She also claimed exposure to beryllium in products sold by Brush to Accuratus. Brenda filed negligence, strict products liability, strict liability for abnormally dangerous activities and strict liability for ultrahazardous activities claims against both companies.

Conflict of law. The question of whether state law imposed a duty that would allow for “take-home” liability as espoused by Brenda, who was not employed by and had no direct relationship with the two companies, raised a choice-of-law question. New Jersey, the place where the manufacturing plants were located, has allowed take-home liability in asbestos claims. Pennsylvania, where Brenda, her husband, and the roommate resided, has no state court case precedent affirmatively providing for take-home liability and those cases that specifically denied the existence of such a duty under Pennsylvania law were not state court opinions. Assuming for the purpose of its analysis that New Jersey and Pennsylvania law actually differed on this point, the court determined that New Jersey’s interest in deterring dangerous conduct by these New Jersey-located companies was greater than Pennsylvania’s unstated “plaintiff-protecting” interest.

Take-home liability. The New Jersey Supreme Court had recognized that companies working with asbestos “owed a duty to spouses handling the workers’ unprotected work clothing based on the foreseeable risk of exposure from asbestos borne home on contaminated clothing.” However, this duty was fairly narrow and was tied to the facts of the case, the federal court noted, finding that the New Jersey high court’s rule of take-home liability for clothes-handling spouses could not be extended to cover either a non-spouse, non-connubial roommate or a non-cohabiting, unmarried romantic partner.

Strict products liability. Examining Brenda’s strict products liability claim, the court determined that there was no actual conflict between New Jersey and Pennsylvania law on this point. The court then explained that under Pennsylvania case law, §402A of the Restatement (Second) of Torts did not apply to an incomplete product that had not left the control of the manufacturer and entered the stream of commerce. Thus, Accuratus could not be found liable because none of the potential exposure came from any of its finished and sold products. Similarly, Brush’s liability was limited to exposure to beryllium that came off of finished Brush products that had been sold to Accuratus for further use during the latter’s manufacturing process.

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User or consumer. The court noted further that products liability under §402A extended only to a user or consumer. Brenda conceded that she did not qualify as a user or consumer, but argued that the court should apply the Third Restatement, which reformulated the standard, adopting the more flexible "liability for foreseeable risks of harm" standard. The court refused to dismiss the claim on the basis of the "user or consumer" requirement in light of the Pennsylvania Supreme Court's recent decision to review this issue in *Tincher v. Omega Flex*, 64 A.3d 624 (Pa. 2013).

Abnormally dangerous activity. With regard to Brenda's claims for strict liability for abnormally dangerous activities and strict liability for ultrahazardous activities, the court determined that the two claims did not state alternative theories but were, in fact, duplicative. Therefore, the court dismissed the ultrahazardous activity claims against the two companies, electing to proceed on the more modern abnormally dangerous activity claims as set forth in §§519 and 520 of the Restatement (Second) of Torts. Finding that the assessment of the factors prescribed in the Restatement for a determination of whether an activity was abnormally dangerous required further development of a factual record in this case, the court refused to dismiss the claim.

The case number is 12-6189.

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Companies: Accuratus Corp.; Materion Brush Inc.

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