Evidence Still Matters in First Circuit

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Late last year the First Circuit affirmed the entry of summary judgment for defendants in a product liability case brought by the Town of Westport, Massachusetts. *See Town of Westport v. Monsanto Co*., 2017 WL 6205273 (1st Cir. Dec. 8, 2017). Westport sued Monsanto Company, Solutia, Inc., and Pharmacia Corporation to recover remediation costs after polychlorinated biphenyls (PCBs)—chemicals that are hazardous above certain concentrations—were found in the town's middle school.

The contractor, a non-defendant, used caulk containing PCBs when building the school in 1969. Monsanto did not make the caulk at issue, but it sold plasticizers—a component of caulk—to the third-party manufacturer who did. Westport alleged that the defendants were liable for property damage caused by the PCB contamination at the school.

The district court entered summary judgement against Westport on all counts of alleged liability. On appeal, Westport challenged only the district court's rulings regarding (i) breach of warranty and (ii) negligent marketing.

Background

Monsanto began to manufacture and sell PCB mixtures, called Aroclors, in 1935. Aroclors were a popular plasticizer—an additive used in building materials to increase fluidity—because they were viscous, thermally stable, and non-flammable. By August of 1970, however, Monsanto pulled its PCB-containing plasticizers from the market because of their environmental impact.

Beginning in 1937, Monsanto warned customers that experimental animal studies showed that prolonged exposure to Aroclor vapors at high temperatures or by repeated oral ingestion would lead to "systemic toxic effects." And in the 1950s, following paint studies analyzing the volatilization, or evaporation, of PCB at room temperatures, Monsanto recommended discontinuing the sale of Aroclors for use in the manufacture of all paints. By August of 1970, Monsanto explicitly advised against using Aroclors in certain paints and swimming pool sealants. But no study has ever established that PCBs volatilize from caulk at levels harmful to human health.

Six years later, Congress prohibited the manufacture and distribution of PCBs under the Toxic Substances Control Act (TSCA), which authorized the Environmental Protection Agency (EPA) to implement specific regulations regarding PCB use and its removal. When Westport Middle School was built in 1969, however, Congress had not yet passed the TSCA, the EPA did not exist, and Aroclors were still on the market. In 2010, Westport embarked on a multi-million dollar remediation project to remove PCBs from the school's window glazing, exterior window caulking, and interior door caulking.

In 2014, Westport brought seven counts of tort liability against the defendants; four were dismissed. The defendants won summary judgment on the remaining three, and Westport appealed as to two of them: breach of implied warranty of merchantability for failure to warn and negligence.

The Decision

Reviewing the district court's decision *de novo*, the First Circuit affirmed the entry of summary judgment. Westport had failed to raise a genuine dispute as to the merits of either claim.

To establish a breach of the implied warranty under Massachusetts law, a plaintiff must demonstrate that the product was defective and unreasonably dangerous for its ordinary purpose at the time it left the supplier's hands. And a product can be unreasonably dangerous if a supplier fails to warn of the products foreseeable risks.

First, because remediation is unnecessary unless the PCB contamination in a building poses an actual health risk—otherwise there'd be no property damage—Westport had to prove that Monsanto should have reasonably known, in 1969, that there was a risk PCBs would volatilize out of caulk at levels harmful to human health. But it failed to do so because, to date, no scientific literature has shown that PCBs evaporate from caulk at harmful concentrations when inhaled. In other words, Monsanto could not have known in 1969 what is not yet known today. Moreover, according to the First Circuit, it does not follow that because PCBs were known to volatilize from *paints and resins* at elevated levels in 1969, it should have been reasonably foreseeable then that there was a risk they would volatilize from *caulk* at harmful levels. Even Westport's expert admitted that there was no support for extrapolating volatilization rates from one product to another.

Second, the district court had already entered summary judgment against Westport's claim regarding design defects. And, in applying Massachusetts law, no court has ever explicitly held that a negligent marketing claim can be maintained independent of a design defect claim. The closest the Commonwealth's courts have come is stating that liability *might* attach if the product was directly marketed to children. But Aroclors, *i.e.*, additives in building materials, are clearly not marketed in a manner to "induce direct purchases by children." So, the First Circuit declined to make this case the first instance in which a negligent marketing claim was allowed to proceed absent a valid claim for defective design.

Conclusion

Sometimes the evidence (or lack thereof) can be your best friend. While the industry and Congress have come to understand that PCBs may pose risks under certain circumstances, no study has ever demonstrated that PCBs volatilize from caulk at levels that are harmful for human consumption. There's just no there, there.

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