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ENVIRONMENTAL LAW

Can Bystanders Make Failure-to-Warn Claims in Toxic Tort Cases?

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Special to the Legal

A failure-to-warn claim is a staple of products liability litigation. The basic premise is that a manufacturer or seller failed to warn a consumer about an unreasonable risk of foreseeable harm associated with the use of a product.

Plaintiffs pursuing toxic tort cases have begun to rely on failure-to-warn claims outside the strict consumer/seller context. Specifically, several personal injury lawsuits relating to the emerging contaminant per- and polyfluoroalkyl substances (PFAS) have relied on failure-to-warn theories against manufacturers of PFAS. These lawsuits are distinct from many failure-to-warn cases in that the plaintiff is rarely a user or purchaser of the PFAS-containing product. Rather, the plaintiff is a mere bystander who, because of the conduct of the user of the product (the one the manufacturer allegedly failed to warn), was exposed to PFAS chemicals.

Federal courts dealing with these claims have had to address whether the manufacturers owe a duty to residents who did not purchase the PFAS-containing product but who live near where it was used.

STRICT LIABILITY OR NEGLIGENCE THEORY

Failure-to-warn claims may be brought under either strict products liability or negligence theories, although the distinction between the two theories is murky. The Pennsylvania Supreme Court, in the context of addressing product design defects, has instructed that the theory of strict products liability "overlaps in effect" with the theory of negligence, although the court has tried to maintain a distinction between the two theories, as in *Tincher v. Omega Flex,* 104 A.3d 328, 401 (Pa. 2014).

In Pennsylvania, under strict products liability, a plaintiff must show that the defendant's product was defective, the defect caused the plaintiff's injury and the defect existed at the time the product left the defendant's control, as in *Wright v. Ryobi Technologies,* 175 F. Supp. 3d 439, 449 (E.D. Pa. 2016). In a strict liability failure-to-warn case, the plaintiff establishes that a product is "defective" by showing that the defendant's warning of a "particular danger was either inadequate or altogether lacking," thereby making the product unreasonably dangerous. For a negligent failure-to-warn claim, a plaintiff must establish that: the defendant owed a duty to provide an adequate warning of a dangerous aspect of its product; the defendant breached that duty by either failing to warn or providing an inadequate warning; the absence or inadequacy of the warning was the proximate cause of the plaintiff's injury; and damages.

In either case, a failure-to-warn claim turns on the reasonableness of a manufacturer's conduct in framing its warnings. Whether strict liability or negligence, "inevitably the conduct of the defendant in a failure to warn case becomes the issue," see *Olsen v. Prosoco,* 522 N.W.2d 284, 289 (Iowa 1994). Several commentators have therefore concluded that "the strict liability action for failure to warn is substantially identical to its

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> *"Despite the similarities in the strict liability and negligent failure-to-warn theories, the court dismissed the strict liability claim but not the negligence claim."*

negligence-based counterpart." See, e.g., Kenneth M. Willner, "Failures to Warn and the Sophisticated User Defense," 74 Va. L. Rev. 579, 582-83 (1988).

'MENKES V. 3M'

PFAS compounds encompass a class of chemicals that have been used in hundreds of industrial processes and consumer products because of their resistance to heat, water and oil. Toxicity studies have identified links between PFAS chemicals and negative human health outcomes, but there remains uncertainty over how much PFAS exposure is safe for humans. The federal government has not yet set enforceable regulatory standards for PFAS, yet the number of PFAS-related lawsuits has exploded. Most of these lawsuits rely on traditional tort theories of liability, often including failure to warn.

One of these lawsuits, *Menkes v. 3M,* No. 17-0573, (E.D. Pa.), involves a lawsuit against the manufacturers of a fire-fighting foam that contained certain PFAS chemicals. The plaintiffs, a married couple that lives in Warminster, claim to have suffered various injuries as a result of the presence of PFAS in Warminster's public water supply. They claim that the manufacturers sold PFAS-containing fire-fighting foam to the U.S. Navy for use at two bases located in and near Warminster. The fire-fighting foam was used by the Navy to suppress fires on the ground and in aircraft hangars, which the plaintiffs allege caused PFAS chemicals to contaminate the soil and groundwater. The plaintiffs allege that the drinking water in the area surrounding the bases has been contaminated by PFAS chemicals.

The plaintiffs allege several causes of action against the manufacturers, including claims for failure to warn under both strict liability and negligence theories. Specifically, the plaintiffs allege that the manufacturers failed to warn the Navy, the users of the fire-fighting foam, about its harmful effects on human health and the environment. They claim that the failure to warn the Navy caused the plaintiffs to suffer their injuries. The manufacturers moved to dismiss both failure-to-warn claims.

Despite the similarities in the strict liability and negligent failure-to-warn theories, the court dismissed the strict liability claim but not the negligence claim. As to strict products liability, the court dismissed the claim because the plaintiffs were not the users or consumers of the fire-fighting foam. The court relied on Pennsylvania case law that supported the view that only "ultimate users or consumers" could recover for strict products liability. The court acknowledged that some Pennsylvania courts had allowed bystanders to pursue strict products liability claims, but the court distinguished these cases on the basis that all of them involved bystanders that were in "direct proximity" to the defective product. In contrast, the plaintiffs, residents in the general vicinity of the Navy's bases, were never present at the bases where the fire-fighting foam was used.

The court did not apply the same analysis in evaluating the plaintiffs' negligent failure-to-warn claim. The court acknowledged that "manufacturers already owe a duty to the consumers and users of their products to use reasonable care in manufacturing their products," yet it used this legal premise not to dismiss the plaintiffs' claim (as it had for strict products liability) but to support it. The court held that in the negligence context, a manufacturers' duty extended to "nonconsumers or users living near facilities where a manufacturer's products are used" because it was foreseeable that "toxic chemicals used at a particular facility will not necessarily remain confined to that facility."

OTHER CASES

Shortly after *Menkes* was decided, another federal court held that two manufacturers owed a duty to warn the purchasers of their PFAS-containing products in order to protect "people living near facilities operated by those purchasers and users." See *Wickenden v. Saint-Gobain Performance Plastics,* 1:17-CV-1056 (N.D.N.Y. June 21, 2018).

Yet the case law in this area continues to develop, and it has not been uniform. In yet another toxic tort case, one relating to a warehouse fire, a federal court in West Virginia dismissed a failure-to-warn claim against a manufacturer that was brought by neighboring residents that had not purchased or used the product at issue. See *Callihan v. Surnaik Holdings of West Virginia,* No. 2:17-cv-04386, (S.D. W.Va. Dec. 3, 2018). There, the defendants had sold allegedly hazardous materials to a warehouse that later caught fire, exposing the plaintiffs, neighboring residents, to allegedly harmful fallout. The court dismissed the plaintiffs' failure-to-warn claim against the sellers because the court held that the sellers owed a duty only to persons "who might be expected to use [their product]." The neighboring residents were not reasonably foreseeable users of the allegedly hazardous materials and they could not bring a claim on behalf of another party without a special relationship.

It will be interesting to monitor whether courts will follow the approach in *Menkes* or *Callihan* moving forward. •

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