

I. IN GENERAL

FACTUAL BACKGROUND

Client, a 55-year-old construction foreman for a carpentry contractor was injured at a construction site while working without protective equipment in a large, partially enclosed metal vessel when employees of the paint contractor, who were wearing respirators and protective clothing, began spraying the stainless steel surface of the interior of the vessel with an industrial sealant that contained three potentially toxic chemicals. On inhaling the fumes, the client lost consciousness and was pulled to safety by a coworker. The client was immediately hospitalized, but suffered severe and disabling pulmonary injury. He was granted permanent disability benefits under the state workers' compensation law, and his compensation lawyer has referred the client to counsel for a possible third-party liability action for personal injuries against the owner of the premises where the work was in progress, the general contractor and site manager, the paint subcontractor, and the manufacturer and seller of the industrial sealant that was being sprayed when the client was injured.

§ 1 Introduction

◆ **Note** For a general discussion of toxic tort litigation, see *Handling Toxic Tort Litigation*, 57 Am. Jur. Trials 395.

There are many sources of poisons and emissions that are capable of polluting the environment¹ and even killing and injuring citizens in the workplace, including industrial carcinogens (cancer-causing agents) such as beryllium² and asbestos.³ There are also a host of industrial products which can cause injury or death, such as cadmium, lead, germanium,

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¹Handling the Air Pollution Damage Case, 24 Am. Jur. Trials 243.

²Beryllium Poisoning, 48 Am. Jur. Proof of Facts 2d 401.

³Beryllium Poisoning, 48 Am. Jur. Proof of Facts 2d 401.

antimony, tellurium, and a form of beryllium called nickel carbon. Cancer may result from exposure to some of these items as well as from arsenic and selenium. Cadmium and lead, nickel from burning coal, oil, and diesel fuel, antimony and beryllium from coal may result from the pollution found in many cities. Mercury is also capable of causing significant toxicity and death. Deaths from heart disease have been related to vanadium, while high blood pressure and cancer of the digestive system have been related to nickel and vanadium. Cancer of the lung is related to titanium in the air. Airborne arsenic, tin, and lead can cause serious health problems.

Other sources of harmful pollution include factories and mines that emit wastes of cyanides, copper, arsenic, lead, and cadmium. These wastes have a harmful effect on every living thing with which they come in contact. Some of the acids, alkalis and cadmium salts from tanning and electrical plating, cyanides, phenols, sulfates, tar, acids, ammonia, copper, lead, and perhaps zinc from mine dumps have been dumped indiscriminately in rivers already polluted by sewage. Oil films prevent the water from absorbing oxygen from the air and detergents cover the rivers with foam producing aquatic deserts and silent streams.

One of the most harmful pollutants is lead, which can find its way into the air we breathe and the food we eat.⁴ We absorb about 10 percent of the lead we eat and about half of what we breathe. Workers such as painters who do not wear protective clothing or devices can get colic and paralysis. Spring and lake water can dissolve lead from pipes and cause lead poisoning to those who use the water. When oil is burned, 25 percent of the lead goes into the atmosphere. Lead has been found in lobsters, geese, rice, and breakfast cereal. The lead added to gasoline can pollute our bodies.

Within this toxic environment, many construction workers are exposed to hazardous substances, such as industrial chemicals which can cause cancers, brain injury, liver damage, skin damage, and insult to the lungs and the heart.⁵ Such workers are also exposed to products that become hazardous if carelessly handled or applied. This article explores and suggests solutions to the problems presented in litigating a case involv-

⁴Lead Poisoning, 46 Am. Jur. Proof of Facts 2d 145.

⁵1 Philo, Lawyers Desk Reference (7th ed.) § 9:16.

ing the exposure of a construction worker to hazardous chemicals.⁶

§ 2 Scope of the article

The scope of this article is limited to a discussion of the third-party liability aspects of an injury to a construction carpenter who was exposed to toxic fumes from an industrial sealant caused by the negligence of employees of a painting contractor in the application of the substance at a worksite. Although such cases frequently involve the owner of the property under construction,⁷ the general contractor, and a supervising architect or site manager,⁸ the liability under consideration in this article principally concerns the negligence of the painting contractor, with some additional consideration given to the product liability of the manufacturer of the solvent involved in the occurrence. While the article deals with a worker's exposure to a hazardous chemical, it is not intended to be a vehicle for a general discussion of occupational health and safety or of the vast area of toxic tort litigation.⁹

As indicated above this article presents its subject from the perspective of a plaintiff's lawyer whose client has been exposed to a toxic chemical at a construction worksite, suffering severe and disabling pulmonary disease as a result of the exposure, and is limited to the third-party liability aspects of

⁶Exposure to toxic chemicals usually occurs from inhaling vapors or fumes, ingesting the chemicals, or absorbing them through the skin. Hawes & Chu, *Proximate Cause in Toxic-Tort Cases*, 23 *Trial* 68 (Oct 1987).

⁷See § 10.

⁸See § 11.

⁹See bibliographic appendix in §§ 107–115 for numerous legal, technical and medical references in the field of toxic tort and hazardous chemical litigation.

For a general treatise on toxic tort litigation, see G. Nothstein, ed., *Toxic Torts: Litigation of Hazardous Substance Cases* (Shepard's/McGraw Hill, 1984).

the client's injury;¹⁰ it does not treat the handling of a workers' compensation claim for such an injured worker.¹¹

Following the division setting forth the illustrative fact situation¹² and the legal background material,¹³ the article discusses the handling of a third-party liability action involving the exposure of a worker to a hazardous chemical from case intake,¹⁴ through investigation,¹⁵ pleadings,¹⁶ discovery,¹⁷ through trial preparation¹⁸ and trial.¹⁹ The article also provides the reader with a list of expert witnesses in industrial hygiene and toxicology²⁰ and a bibliography of selected legal, medical, technical and scientific references in the fields of occupational health and safety and toxic tort litigation.²¹

§ 2.5 Federal pre-emption of labeling defect claims

Cases

Products liability claims under state law seeking labels for hazardous substances which are more elaborate or different from those required under the Federal Hazardous Substances Act, 15 U.S.C.A. § 1261(p)(1)(F), are preempted by FHSA. *Moss v Parks Corp.* (1993, CA4 Va) 985 F2d 736, CCH Prod Liab Rep ¶ 13397, 23 ELR 20903, amd (CA4 SC) slip op and cert den (US) 125 L Ed 2d 693, 113 S Ct 2999.

¹⁰See 1 Philo, *Lawyers Desk Reference* (7th ed.) § 9:16 for discussion of third-party liability litigation exposure to toxic chemicals in the workplace.

Failure To Provide Safe Place To Work, 2 Am. Jur. Proof of Facts 2d 517.

For a concise discussion of third-party liability in toxic exposure cases with a checklist of inquiries concerning liability, see Hawes & Chu, *Proximate Cause in Toxic-Tort Cases*, 23 Trial 68, 71 (Oct 1987).

¹¹On handling workers' compensations claims generally, see *Workmen's Compensation—Back Injuries*, 10 Am. Jur. Trials 589; *Workmen's Compensation—Employment Party Injury Litigation*, 26 Am. Jur. Trials 645.

Workers' Compensation: Disability Resulting from Mental Stress, 25 Am. Jur. Proof of Facts 2d 1; *Workers' Compensation: Injury Occurring during Social, Recreational, or Athletic Activity*, 42 Am. Jur. Proof of Facts 2d 48; *Workers' Compensation: Special Mission Exception to Going-and-Coming Rule*, 32 Am. Jur. Proof of Facts 2d 199.

¹²See §§ 3–8.

¹³See §§ 9–22.

¹⁴See §§ 23–29.

¹⁵See §§ 30–44.

¹⁶See §§ 45–48.

¹⁷See §§ 49–75.

¹⁸See §§ 76–83.

¹⁹See §§ 84–106.

²⁰See § 108.

²¹See §§ 109–115.

FIFRA, 7 U.S.C.A. § 136v(b), prohibits any state requirement in addition to or different from federal requirements for warnings label and dictates preemption of any state common law cause of action resting on alleged failure to warn or communicate information about product through its labeling. However, claims of negligent testing, manufacturing and formulating are not preempted. *Worm v American Cyanamid Co.* (1993, CA4 Md) 5 F3d 744, CCH Prod Liab Rep ¶ 13651, 24 ELR 20120.

Defense motions for summary judgment were granted as to claims brought by nurse who alleged that she had suffered personal injury as result of using hospital disinfectants containing chemical glutaraldehyde. Crux of complaint involved inadequate warnings as to use of and exposure to glutaraldehyde solution products which were “pesticides” within meaning of Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) and which were registered under FIFRA. Plaintiff’s claims of negligence, strict liability, and breach of implied warranty were preempted under FIFRA; this pre-emption extended not only to labeling of products, but also to claims based on documents and statements not attached to or enclosed with products, such as material safety data sheets or advertising and promotional material. Further, although FIFRA did not pre-empt plaintiff’s breach-of-express-warranty claims, summary judgment was nonetheless required as to those claims as well, since existence of express warranty was not established. Labels on hospital disinfectants were required under federal law and were not directed at consumers; inducing purchases was not their purpose. They were, therefore, not part of basis of bargain between manufacturers and potential buyers. Moreover, none of statements in any of defendants’ material safety data sheets or promotional materials could be construed as constituting express warranty as to product safety. *Sowers v Johnson & Johnson Medical* (1994, ED Pa) 867 F Supp 306, CCH Prod Liab Rep ¶ 14092.

State common law tort claims for inadequate labeling of herbicide were neither expressly nor impliedly preempted by FIFRA (7 U.S.C.A. §§ 136 et seq.). Defendant manufacturer failed to overcome strong presumption that Congress intended to leave intact state’s ability to compensate its citizens for injuries resulting from the use of pesticides and herbicides. Congress has not occupied field of regulation so pervasively as to leave no room for states to act in field of tort compensation. Thus there was no conflict between determination by Environmental Protection Agency that defendant’s label was adequate for purposes of FIFRA and jury determination in instant case that label did not meet warning standards of state tort law. *Ciba-Geigy Corp. v Alter* (1992) 309 Ark 426, 834 SW2d 136, CCH Prod Liab Rep ¶ 13307.

Common law action for failure to warn may be brought for manufacturer’s noncompliance with Federal Hazardous Substances Act (FHSA) requirements; requirement that manufacturer provide warning label which is reasonably adequate under circumstances to inform users of risks involved and steps to be taken to avoid those risks can be characterized as “identical to” labeling requirements established in FHSA and is therefore not preempted by FHSA. *Jenkins v James B. Day & Co.* (1994) 69 Ohio St 3d 541, 634 NE2d 998, CCH Prod Liab Rep ¶ 14027.

A products liability action for inadequate labeling of a hazardous

substance covered by the Federal Hazardous Substance Act (FHSA) brought pursuant to state law that imposes labeling requirements identical to the requirements of the FHSA is not preempted, where decedent died as the result of inhaling fumes from a paint stripping product, and her estate brought a state products liability action contending that the product was improperly labeled under the FHSA, because the FHSA provides a limited preemption of state law in the area of labeling of hazardous substances. *Jenkins v James B. Day & Co.*, 69 Ohio St 3d 541, 634 NE2d 998.

State law claim that pesticide manufacturer had failed to comply with Environmental Protection Agency (EPA) requirements, in that it had negligently or fraudulently tested pesticide at time of registration process under Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and that adequate testing and proper design would have caused manufacturer to alter pesticide so it would be safe, was not preempted by FIFRA; claim not only alleged that label was inadequate, based on information given during application process, but also sought to enforce FIFRA requirement of adequate testing prior to EPA approval. U.S.C.A. Const. Art. 6, cl. 2; Federal Insecticide, Fungicide, and Rodenticide Act, § 24, as amended, 7 U.S.C.A. § 136v. *Romah v. Hygienic Sanitation Co.*, 705 A.2d 841 (Pa. Super. Ct. 1997).

FIFRA did not preempt farmers' claims arising out of damages to crops from neighbor's application of herbicide, where neighbor purchased herbicide from retail supplier and provided it to aerial applicator, and thus was consumer, not supplier, and where farmers did not complain that labeling was inadequate on herbicide; rather, farmers alleged that labeling demonstrated that neighbor and aerial applicator were negligent in applying herbicide. Federal Insecticide, Fungicide, and Rodenticide Act, §§ 2 et seq., as amended, 7 U.S.C.A. §§ 136 et seq. *Foust v. Estate of Walters ex rel. Walters*, 21 S.W.3d 495 (Tex. App. San Antonio 2000); West's Key Number Digest, Agriculture ¶9.13.