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Mr. Lewis R. Freeman, Jr.
The Society of the Plastics
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1275 K Street, N.W.
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Re: New York Decision on Market-Share Liability

Dear Lew:

In April, the New York Court of Appeals, that state's highest court, issued a significant decision on market-share liability in a product liability suit involving diethylstilbestrol (DES). Although the court clearly limited its holding to DES, SPI and its members have faced allegations of market-share liability in the past, particularly in fire litigation concerning cellular foam plastics or polyvinylchloride (PVC). The New York decision also addressed the statute of limitations provision of the New York Toxic Tort Law which lists DES and PVC as substances allegedly producing latent injurious effects. The court upheld the constitutionality of the one year extension of the statute of limitations. This part of the decision will have no practical impact on PVC producers since no suits were filed during the extension period, but the New York decision is significant and should be of interest in a broad sense to SPI members.

Decision Analysis

In Hymowitz v. Eli Lilly & Co., No. 89-56 slip op. (N.Y. Apr. 4, 1989) (Hymowitz), the court held that where it is impossible to identify the manufacturer of the particular DES that injured the plaintiff, every manufacturer joined in the suit who produced DES for the use in which the plaintiff was

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engaged is severally liable for the plaintiff's damages. Liability is assessed pro rata among the manufacturers based upon their respective percentages of the national DES market (national-market share) at the time of the plaintiff's exposure to the drug.

What differentiates Hymowitz from other market share liability decisions like Sindell v. Abbott Laboratories, 163 Cal. Rptr. 132, 26 Cal. 3d 588, 607 P.2d 924, 2 A.L.R. 4th 1061 (Cal.), cert. denied 449 U.S. 912 (1980), the case where the theory was first recognized, is the court's determination that even manufacturers which prove conclusively that they did not manufacture the particular DES ingested by the plaintiff will not be exculpated from liability. A manufacturer may escape liability only if it proves that it did not distribute DES for use in the manner in which the plaintiff was injured. Liability is based upon the overall risk of harm created by the manufacturers, measured by their respective shares of the national DES market. The court concluded that it would be "merely a windfall" for a manufacturer to escape liability solely because it produced a more identifiable product or sold only to certain stores or in limited geographic areas. Because liability under the New York theory is several only, manufacturers are not required to compensate the plaintiff for the national market-shares of other DES manufacturers who are insolvent or over whom the court does not have jurisdiction. Therefore, in applying the theory in future New York DES cases, some plaintiffs may not recover 100% of their damages.

Of course, in those cases where the plaintiff is able to identify the particular manufacturer allegedly responsible for his injury, the causation nexus exists and traditional product liability theories should apply to the exclusion of the national market-share theory.

In adopting this theory, the New York court considered various versions of "industry-wide" liability theories embraced by other states. These theories effectively permit a plaintiff to ignore the traditional tort requirements of showing proof of a manufacturer's identity and/or proof of causation as a basis for recovery. The court expressly rejected the theories of "alternative liability" and "concert of action" as bases for recovery in DES cases. This is significant because SPI and its members also have faced these theories in past PVC and similar fire litigation. The concert of action theory is of particular concern to trade associations and their members because associations by nature seek to develop and implement the consensus positions of their members.

Under "alternative liability," tortfeasors are held jointly and severally liable for indivisible injuries to a

plaintiff where they are unable to prove their respective nonculpability. This requires that the defendants have better access to information concerning the cause of plaintiff's injury, and that all of the small number of possible defendants, each of whom breached a duty to the plaintiff, are before the court. However, in DES cases there is a great number of possible wrongdoers who entered and left the market at different times, some of which no longer exist. Also, the latent effects of DES render it nearly impossible to prove conclusively which manufacturer actually injured the plaintiff. Therefore, the Hymowitz court precluded the "alternative liability" theory because DES defendants are not in any better position than the plaintiffs to identify the specific manufacturer which caused the injury, nor is there any real hope of having all possible manufacturers before the court.

Similarly, the court precluded the "concert of action" theory in DES cases. Under this doctrine, all defendants having an express or tacit understanding to participate in a common plan to commit a tortious act are jointly and severally liable for the resulting injuries. However, the court found no such agreement by DES manufacturers to market their product without taking adequate safety precautions. Standing alone, the manufacturers' parallel activity in supplying the same or similar products to the marketplace is insufficient to support the "concert of action" theory.

The Hymowitz court also upheld the constitutionality of a provision of the New York Toxic Tort Law passed in June 1986 (L 1986, ch. 682, § 4) which extended for one (1) year, a time within which claims for injuries allegedly resulting from exposure to DES, asbestos, chlordane, tungsten carbide and PVC could be commenced. The statute revived until June 30, 1987, those toxic injury claims which otherwise would have been barred under the former exposure rule of action accrual. This revival complements the creation of a discovery rule of action accrual also contained in the Toxic Tort law (L 1986, ch. 682, § 2) which addresses the allegedly latent injurious effects of the enumerated substances. This provision, however, need not concern SPI because the extended period for claims has long since closed and no significant PVC litigation was commenced as a result of the statutory extension.

Implications for Plastics Product Liability Litigation

New York could conceivably apply this novel national market-share analysis to other types of product liability suits if the same policy considerations underlying Hymowitz are present, although the decision is specifically limited to DES. The DES and asbestos cases - cases where some of the novel industry-wide liability theories have been accepted - clearly

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illustrate the struggle of the courts to fashion some form of relief for innocent victims of products which undeniably caused their catastrophic injuries. Without such novel judicial remedies, the plaintiffs would have no recourse for those injuries. This important emotional consideration cannot be divorced from the remedial landscape for such cases.

PVC and other plastics products are clearly distinguishable from DES. PVC for example, is neither carcinogenic, nor more hazardous than competing materials. Thus, it should be much more difficult for PVC plaintiffs to prove that their injuries were caused by PVC. This would be particularly true in fire cases where an enormous variety of products and materials may be involved. This, in turn, should require the plaintiffs to pursue all other individuals and entities whose products or actions may have contributed to their injuries. Although this does not ease the plaintiffs' burden of identifying the culpable party, it arguably creates an atmosphere in which the PVC manufacturers should be allowed to exculpate themselves, contrary to the New York DES national market-share theory.

Accordingly, Hymowitz does not initially foreshadow a dramatic increase in product liability exposure for SPI or its members. PVC and other plastics products are sufficiently distinguishable from DES so that traditional tort theories of product liability should be the only avenues available to plaintiffs who allege injury resulting from exposure to such products.

Enclosed for your review, please find a copy of the Hymowitz decision and a copy of the revival statute. Please contact me at your convenience if you wish to discuss this matter further.

Sincerely,



Sheila A. Millar

cc: Larry Thomas
H. Pat Toner
Stan Mruk
Fran Lichtenberg
Roy T. Gottesman
Robert D. Luss (w/encl.)

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