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MEMORANDUM

November 20, 1990
18371-1

TO: Sharon R. Burger

FROM: Lori J. Shapiro LJS

RE: Union Carbide-Warren: Burden of Proof in Identification of Products

Issues Presented

What is the status of Massachusetts law regarding the plaintiff's burden of proof in cases of exposure to vinyl chloride?

I. Who has the burden?

II. What is the extent of the burden?

Facts

The plaintiff, Alice Warren, administratix of the estate of John Warren, sued four suppliers of vinyl chloride. John Warren died of cancer allegedly as a result of his exposure to vinyl chloride in his workplace.

Discussion

I. As a general rule, the plaintiff carries the burden of proof.

The general rule in Massachusetts is that a plaintiff who sues a particular manufacturer for product liability must prove that the item causing the injury can be traced to that specific manufacturer. Mathers v. Midland-Ross Corp., 532 N.E.2d 46, 49 (Mass. 1989); Smith v. Ariens Co., 377 N.E.2d 954, 956 (Mass. 1978). The majority of courts in other jurisdictions follow this approach, as well, placing the burden of proof on the plaintiff to identify the manufacturer. See, e.g., Restatement (Second) of Torts §§402A, 433B (1965); Kinnet v. Mass. Gas & Elec. Supply Co., 716 F.Supp. 695, 697 (D.N.H. 1989); Pipon v. Burrough-Wellcome Co., 532 F.Supp. 637, 637-8 (D.N.J. 1982); Tidler v. Eli Lilly and Co., 95 F.R.D. 332, 334 (D.D.C. 1982); Morton v. Abbott Laboratories, 538 F.Supp. 593, 595 (M.D. Fla. 1982); Mizell v. Eli Lilly and Co., 526 F.Supp. 589, 596 (D.S.C. 1981); Gray v. United States, 445 F.Supp. 337, 338 (S.D. Tex. 1978); Cummins v. Firestone Tire & Rubber Co., 495 A.2d 963, 967-8 (Pa. Super. 1985).

There are several theories which are advanced to shift the burden of proof from the plaintiff to the defendant on this point. The most prominent of these in toxic tort cases is the theory of market share liability. Market share liability is a form of alternative liability which holds manufacturers responsible for injury in proportion to their share of the relevant market, unless they can prove that they did not sell the allegedly injurious product either in that market or to the injured individual. While a few courts have applied the market share theory in cases involving injuries to the daughters of women who allegedly ingested DES while pregnant, see, Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924, 163, Cal. Rptr. 132, cert. denied 449 U.S. 912 (1980); Abel v. Eli Lilly and Co., 94 Mich. App. 59, 289 N.W.2d 20, 23 (Ct. App. 1979), such theories have not been expanded to other areas of the law, and have not been accepted by the Massachusetts courts.

The issue of market share liability in Massachusetts was addressed in the early 1980s in the cases of Payton v. Abbott Laboratories, 386 Mass. 540 (1982), and McCormack v. Abbott Laboratories, 617 F.Supp. 1521 (D. Mass. 1985). Both of these cases involved the alleged ingestion of DES.

In Payton, the Supreme Judicial Court addressed, but refused to resolve, a question certified to it by the United

States District Court for the District of Massachusetts. The district court asked whether

> the defendant manufacturers, who probably supplied some of the DES ingested by the mothers ... [may] be held liable to members of the plaintiff class when neither the plaintiff nor the defendants could identify which manufacturer's DES was ingested by which mother.

Payton, at 570.

The court, while it did not reject outright the market share theory, held that it was inappropriate in the Payton case because it "fails adequately to protect . . . the interests served by the identification requirement." Payton, at 571. The court pointed out that the identification requirement both "separates wrongdoers from innocent actors" and "ensures that wrongdoers are held liable only for the harm that they have caused." Id. at 571.

The court qualified its objection to the market share theory, however, by stating that "on an adequate record, this court would recognize some relaxation of the traditional identification requirement." Id. at 574. The court would "in appropriate circumstances . . . allow recovery against a negligent defendant of that portion of a plaintiff's damages which is represented by that defendant's contribution of DES to the market in the relevant period of time." Id.

In the McCormack case, the United States District Court for the District of Massachusetts speculated on the probable outcome of a DES product liability suit in the Massachusetts courts on the basis of Payton. The McCormack case addressed motions to dismiss and summary judgment motions by the defendants, and used market share liability as a standard to evaluate these claims. The court accepted a form of market share liability where the plaintiff, who could not identify a particular manufacturer, must prove several elements by a preponderance of the evidence:

> (a) that plaintiff's mother ingested DES during the pregnancy which resulted in plaintiff's birth; (b) that DES caused plaintiff's subsequent injuries; (c) that the defendant or defendants produced or marketed the type of DES taken by plaintiff's mother; and (d) that the defendant or defendants acted negligently in producing or marketing the DES.

Id. at 1526. Once the plaintiff establishes these facts, the burden shifts to the defendants to exculpate themselves from liability.

While the district court asserted in 1985 that the Massachusetts courts would adopt this scheme, in the five years since the McCormack decision, no Massachusetts court has accepted this view or expanded market share liability in

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Massachusetts. In addition, the vast majority of other states have refused either to adopt a market share theory of liability or to expand the theory beyond DES litigation.

In the area of DES litigation, while the courts of California, New York and Michigan have indicated some acceptance of alternative (burden-shifting) or market share liability, see Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980) (market share liability); Bichler v. Eli Lilly and Co., 436 N.E.2d 182 (N.Y. 1982) (concerted action theory); Abel v. Eli Lilly and Co., 94 Mich. App. 59, 289 N.W.2d 20, 23 (Ct. App. 1979) (alternative liability theory), most courts will not apply these theories. See, e.g., Burnside v. Abbott Laboratories, 505 A.2d 973 (Pa. Super. 1985) (citing cases from Washington, Florida, New Jersey, Washington, D.C., South Carolina, Texas and Massachusetts (Payton) to support its view); Smith v. Eli Lilly and Co., CCH Prod. Liab. Rep. ¶12,590 (Ill. 1990); Mulcahy v. Eli Lilly and Co., 386 N.W.2d 67, CCH Prod. Liab. Rep. ¶10,982 (Iowa 1986).

In addition, the theory of market share liability has been rejected by the courts in the area of asbestos litigation. See, e.g., Bateman v. Johns - Manville Sales Corp., 781 F.2d

1132 (5th Cir. 1986) (applying Louisiana Law); Vigiolto v. Johns - Manville Corp., 643 F.Supp 1454 (W.D. Pa. 1982); Starling v. Seaboard Coast Line R. Co., 533 F.Supp. 183 (S.D. Ga. 1982); Goldman v. Johns - Manville Sales Corp., 514 N.E.2d 691 (Ohio 1987); Nutt v. A.C. & S. Co., Inc., 517 A.2d 690 (Del. 1986). Even the courts of California, New York and Michigan, which indicated some acceptance of market share liability in DES cases, do not espouse this theory in cases claiming asbestos exposure.

Surprisingly, the California courts, which absolutely adopted a market share theory of liability for DES cases in Sindell, reject market share liability in asbestos cases. In In Re Related Asbestos Cases, 543 F.Supp. 1152 (N.D.Cal 1982), the court, applying California law, refused to expand this burden-shifting theory to asbestos cases. The court concluded that "the market share liability theory was not intended to be applied in a context such as the one which is before the court." Id. at 1158.

In Johnson v. Celotex Corporation, CCH Prod. Liab. Rep. 12, 425 (2d Cir. 1990), the Second Circuit Court of Appeals applied New York law to uphold an identification requirement in asbestos cases. Id. at 36, 816 (citing Hymowitz v. Eli Lilly and Co., 539 N.E.2d 1069 (N.Y.), cert. denied 110 S. Ct. 350

(1989)). In Marshall v. Celotex Corporation, 651 F.Supp. 389 (E.D. Mich. 1987), the United States District Court for the Eastern District of Michigan rejected the market share theory of liability, stating that "an asbestos case is not a DES case, for asbestos in not like DES." Id. at 393, citing Hannon v. Waterman, 567 F.Supp. 90, 92 (E.D. La. 1983). The court went on to examine the policy reasons for rejecting the theory in this context, and concluded that "elimination of a causation requirement would render every manufacturer an insurer not only of its own products, but also of all generically similar products," and "could reduce the ability to spread losses by insurance and otherwise distribute risk." Id. at 393.

The case of vinyl chloride released into the air is more closely analogous to asbestos than DES litigation. DES litigation involves a drug allegedly ingested by a pregnant woman, while asbestos exposure involves the alleged intake of fibers through the air. Similarly, the plaintiff here alleges exposure to vinyl chloride through the air. Therefore, it would seen inappropriate to apply a burden-shifting theory such as market share liability to the case of vinyl chloride exposure.

As pointed out above, lowering the identification requirement to relieve the plaintiff of the burden of proof would be contrary to public policy, as well. Such a burden-shifting scheme would force every manufacturer to be an insurer of its own products and of all generically similar products. Marshall, 651 F.Supp. at 393; Blackston v. Shook & Fletcher Insulation Co., 764 F.2d 1480, 1483 (4th Cir. 1985) (citing Starling, 533 F.Supp. at 190). In addition, expanding culpability in this fashion could reduce the ability to distribute risk by insurance and through other methods. Id.

II. The plaintiff must prove regular and frequent exposure in close proximity to the manufacturer's product.

Under Massachusetts law, the identification requirement requires more than "mere proof" that the product and the injured person were simultaneously at the worksite. O'Connor v. Raymark Industries, Inc., 401 Mass. 586, 588 (1988). See also In Re Tire Workers Asbestos Litigation, 1989 W.L. 133650, p.2 (E.D. Pa 1989); Roberts v. Owens-Corning Fiberglas Corp., 726 F.Supp. 172, 174 (W.D. Mich. 1989). In O'Connor v. Raymark Industries, Inc., 401 Mass. 586 (1988), the Supreme Judicial Court of Massachusetts upheld jury instructions stating that the plaintiff "must prove more than just casual or minimal contact . . . with the product." Id. at 588. The plaintiff must demonstrate this exposure "on a regular basis over some period of time where . . . [the decedent] was actually working with the product himself or in proximity to where others were working with the product." Id.

In the O'Connor case, Ann O'Connor, the executrix of the estate of her husband, Richard O'Connor, filed suit against 17 manufacturers, alleging that Richard O'Connor's death was caused by his exposure to asbestos products at his workplace. Before the trial, she settled with 16 of the defendants, leaving only Raymark Industries, Inc. The jury determined that while Richard O'Connor was exposed to asbestos contained in Raymark's products, this exposure did not cause, or substantially contribute to causing, his mesothelioma, and it did not cause his death. The Supreme Judicial Court upheld the jury verdict, despite the plaintiff's objections to the jury instructions on the identification issue.

This holding is followed by several other jurisdictions. In Sholtis v. American Cyanamid Co., 568 A.2d 1196 (N.J. Super. A.D. 1989), the New Jersey court cited O'Connor to state that the plaintiff is required to "prove an exposure of sufficient frequency, with a regularity of contact, and with the product in close proximity." Id. at 1207. This "frequency, regularity and proximity" test was developed by the Fourth Circuit Court of Appeals in the case of Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1162-3 (4th Cir. 1986). See also Blackston v. Shook & Fletcher Insulation Co., 764 F.2d 1480, 1481 (4th Cir. 1985); Eckenrod v. GAF Corp., 544 A.2d 50, 52-3 (Pa. Super. 1988).

This requirement has been applied not only in asbestos cases, but also in cases involving other chemicals. In Davis v. DuPont, 729 F.Supp. 652 (E.D. Ark. 1989), the manufacturer of paint products could not be held liable for the plaintiff's liver disease because the plaintiff did not "come forward with any evidence that would establish a causal link between his injury and any product manufactured by the defendants." Id. at 655.

This "frequency, regularity and proximity" test should apply to the case of vinyl chloride exposure. It would be appropriate in this case, in satisfying the burden of the identification requirement, for the plaintiff to show not only that each defendant's product was present in the workplace, but also that John Warren worked in its vicinity on a regular basis over a period of time.

Conclusion

The plaintiff, in toxic tort cases, with the exception of a minority of DES litigation, carries the burden of proof. The plaintiff must identify the product causing the injury. The plaintiff must also show that the requirements of "frequency, regularity and proximity" are met with regard to his exposure to the toxic substance.

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