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Federal Court Issues Split Ruling in Benzene Preemption Dispute

NEW ORLEANS -- A Louisiana federal court has dismissed a benzene plaintiff's failure to warn claims, ruling that, to the extent that they address the adequacy of the product's labels, they are preempted by the Federal Hazardous Substances Act. *Wagoner, et al. v. ExxonMobil, et al.*, No. 09-7257 (E.D. La.).

In the same June 3 opinion, however, the U.S. District Court for the Eastern District of Louisiana denied a motion to dismiss the plaintiff's non-warning claims, opining that the FHSA was not meant to reach beyond product labeling.

The plaintiffs filed the lawsuit on behalf of James Wagoner whose work as a drill pipe inspector for three years allegedly required him to clean drill pipe threads and thread protectors with benzene-containing products that were manufactured by Exxon, a defendant in the action.

Wagoner was also exposed to benzene-containing materials when he worked as mechanic in the 1970s, at which time he emptied, cleaned and de-greased engines, according to the lawsuit. Wagoner continued to work as a home mechanic from 1975 to 2008, the complaint says. As a result of this exposure, Wagoner allegedly developed multiple myeloma.

Among the products Wagoner allegedly used was Liquid Wrench, manufactured and distributed by Radiator Specialty Co. On March 15, however, Radiator Specialty moved for summary judgment, contending that the Federal Hazardous Substances Act preempted the underlying claims.

The plaintiffs opposed shortly thereafter, contending that the defendant did not carry its burden of proof of compliance with the CPSA and the FHSA.

In analyzing the motion, the court first discussed the applicability of the FHSA, finding that Liquid Wrench is controlled under the FHSA and its labeling preemption clause.

"Here, Plaintiff has not controverted Defendant's statement that Liquid Wrench was sold in retail stores," the district court said. "Nor has Plaintiff pointed to any evidence to show that the Liquid Wrench product was 'labeled as, and marketed solely, for industrial use.' The mere fact that the Liquid Wrench product is 'primarily for plumbers, mechanics and tradesmen' does not make it unforeseeable that Liquid Wrench 'may be brought into' dwellings and related structures, such as garages, especially if it was available in retail stores. Plaintiff therefore had not proffered sufficient evidence to sustain the finding that Liquid Wrench is left entirely unregulated by the FHSA. The court concludes that the FHSA's labeling preemption provision is applicable to this case."

The court did, however, reject Radiator Specialty's argument that the FHSA does not authorize a private cause of action. Instead, the court found that a plaintiff "may assert a state-law cause of action that adopts, as the applicable standard of care, compliance with the FHSA's labeling requirements.

"Clearly, [the plaintiff's] statements are sufficiently broad to be construed as asserting the claim that the Liquid Wrench product does not comply with the labeling standards of the FHSA," the court opined.

While the plaintiff's statements allege such noncompliance, the court ultimately found that there were no genuine issues of fact as to whether the label of the product complied with FHSA requirements.

After addressing the plaintiff's attacks on the product's statement of principal hazards, precautionary measures, instructions for handling, conspicuous warnings and disclaimers, the court concluded that the product complied with labeling standards.

"[A] careful review of the proffered evidence and of the FHSA and its implementing regulations demonstrates that the Liquid Wrench product complies with the labeling standards of the FHSA," the court said.

"Accordingly, to the extent that Plaintiff has asserted a state-law cause of action alleging noncompliance with those standards, that claim fails on the merits as a matter of law. To the extent that Plaintiff has alleged a state-law claim that seeks to impose different requirements than those under the FHSA, that is preempted under the express preemption provision of the statute. Defendant is therefore entitled to summary judgment with respect to Plaintiff's failure-to-warn claims."

While dismissing the failure-to-warn claims, the court opted not to dismiss the plaintiff's non-warning claims, opining that Radiator Specialty "has failed to clearly articulate the type of preemption that defeats Plaintiff's non-warning claims."

"Defendant's suggestion that the FHSA's labeling preemption provision is broad enough to encompass Plaintiff's non-warning claims is not persuasive," the court said, noting that the FHSA does not address questions relating to testing, design and manufacturing of products like Liquid Wrench.

"The FHSA's labeling preemption clause, by its own terms, does not reach beyond product labeling, and even if it could be reasonably understood to do so, the traditional presumption against preemption counsels in favor of adopting the narrower reading of the preemption clause," the court said. "The FHSA also does not impliedly preempt Plaintiff's non-warning claims. When viewed as a whole, the FHSA clearly indicates that Congress did not intend to oust the states from the field of hazardous substance regulation and that its central purpose was to ensure the adequacy of product labels. Accordingly, Defendant's motion as to Plaintiff's non-warning claims must be denied."

The plaintiffs are represented by L. Eric Williams Jr. of the Williams Law Office in Metairie, La.; and Amber E. Cisney of Richard J. Fernandez LLC, in Metairie, La.

Counsel for the defendant are Lynn Luker of Lynn Luker & Associates in New Orleans and James M. Riley Jr. of Coats, Rose, Yale, Ryman & Lee P.C., in Houston.

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