

Is your industry under fire? Targeting entire industries through enterprise liability

Lessening plaintiffs' burdens of proof are rendering more defendants responsible for the conduct of others

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By Timothy Kapshandy, Sherry Knutson, Daniel Spira

For decades, basic tort principles have required product liability plaintiffs to prove a causal link between their injuries and an individual defendant's conduct. Minor exceptions for alternative liability, enterprise liability and market share liability (in a minority of states) have left these bedrock principles largely unchanged. However, recent developments lessening plaintiffs' burdens of proof regarding causation and liability are rendering more defendants responsible for the conduct of others. Listed below are theories under which plaintiffs have attempted to expand liability, the industries impacted, and the mixed results with which plaintiffs' efforts have been met.

Duty to warn of others' products: In asbestos cases, plaintiffs have attempted to hold defendants liable for failure to warn about the dangers of others' asbestos-containing products used in conjunction with defendants' products. While several courts have rejected this theory, New York state courts have held that where a manufacturer has "a sufficiently significant role, interest, or influence in the type of component used with its product after it enters the stream of commerce, it may be held ... liable if that component causes injury to an end user of the product." The issue is pending before the New York Court of Appeals.

Innovator liability: Plaintiffs have similarly asserted claims against brand-name pharmaceutical manufacturers, despite ingesting generic drugs manufactured by others. Most courts have rejected this "innovator liability" theory, but some, such as the 6th Circuit in *Smith v. Wyeth, Inc.*, have permitted claims to proceed because a brand-name manufacturer "should reasonably perceive that there could be injurious reliance on its product information by a patient taking a generic" version of the drug.

Every molecule/fiber theories: In asbestos and chemical cases, plaintiffs have argued that because there is no proven safe level of exposure to a carcinogen, *any* exposure constitutes a legal "cause" of a plaintiff's disease. Given the impossible challenge for defendants to disprove any exposure, this theory can render a defendant responsible for *all* exposures a plaintiff ever had. This theory has been met with mixed results. A Texas court ruled in *Bostic v. Georgia-Pacific Corp.* that "proof of ... 'any exposure' alone will not suffice to establish causation," which requires that defendant's conduct was a "substantial factor" in causing plaintiff's injury, while the Northern District of Illinois said in *Schultz v. Keene Corp.* that "each inhalation of asbestos dust can result in additional damage to lung tissue," and "the court will not minimize the danger of even a relatively light exposure."

"Risk contribution" theory: Despite an inability to prove that any particular manufacturer was responsible for plaintiffs' injuries, some courts have permitted claims to proceed against multiple lead manufacturers under a "risk contribution" theory. Under this theory, "a plaintiff makes a prima facie showing that the manufacturer produced or marketed white lead carbonate pigment sometime

during [plaintiff's] house's existence," and "the burden is on each manufacturer to prove that it did not produce or market white lead carbonate pigment either during the house's existence or in the geographical market where the house is located."

Greenhouse gas emissions: Plaintiffs have asserted public nuisance and other claims against oil, energy and utility companies, alleging that greenhouse gas emissions have resulted in global warming and associated harm. Most of these claims have been rejected based on the "political question doctrine," preemption and standing, among other shortcomings.

In light of certain courts' acceptance of the above theories of causation and liability, plaintiffs will continue their efforts to extend these theories into additional industries. As traditional tort principles are abrogated, defendants will need to counter with equally innovative defenses.

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