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Front Page Feature

1st Circuit opens door to 'future harm' standing

But says chance of fire pit igniting 'too speculative'

By Eric T. Berkman

Despite finding that a homeowner lacked standing to bring a products liability claim against the manufacturer of tubing based on the risk that the tubing could start a fire in the event of a lightning strike, the 1st U.S. Circuit Court of Appeals said it might rule otherwise in some circumstances.

While the plaintiff homeowner did not claim he had suffered any harm from the vulnerability of the corrugated stainless steel tubing, or CSST, which delivered gas to his fire pit, he sought damages based on his alleged overpayment for a defective product and for the cost of remedying a purported safety issue.

A U.S. District Court judge had granted the defendant manufacturer's motion to dismiss, finding that the homeowner's injury was too speculative for him to have standing to sue.

Though the 1st Circuit affirmed, it noted that it was not holding "that increased risk of harm from product vulnerability to lightning strikes can never give rise to standing," as suggested by the trial judge.

"But in this case, [the plaintiff] fails to allege either facts sufficient to assess the probability of future injury or instances of actual damage where the cause is clear, and concedes that CSST meets applicable regulatory standards specifically addressing the risk," 1st Circuit Chief Judge Sandra L. Lynch wrote for the court.

The 15-page decision is *Kerin v. Titeflex Corporation*, Lawyers Weekly No. 01-284-14. The full text of the ruling can be found at masslawyers-weekly.com.

Higher burden

Plaintiff's counsel, Kevin T. Peters of Arrowood Peters in Boston, said even though the court did not recognize his client's purported injury, the decision reflects a significant development in tort law.

"For the first time, the 1st Circuit recognized that exposure to an increased risk of injury can constitute an injury in fact," he said.


John G. Papianou

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Meanwhile, Philadelphia attorney John G. Papianou, who argued the case for the defendant, hailed the ruling for confirming that a plaintiff who claims a product is defective even though it has not malfunctioned has a higher burden of establishing standing and the right to bring suit.

"It's not enough just to say, 'My product is defective and therefore the case should proceed,' without any meaningful allegations of substantial likelihood that the product will fail," he said.

That is particularly true in a case such as *Kerin*, in which the relevant regulatory bodies affirmatively approved the product as being safe for sale," added Papianou's co-counsel, Jeffrey E. Poindexter of Bulkley, Richardson & Gelinas in Springfield.

David A. Barry, a Boston litigator who handles products liability cases, said with society's increasing awareness of the enhanced risk of future injury in a variety of contexts, claims such as the one in *Kerin* are more and more common.

For example, Barry said, plaintiffs who have been exposed to asbestos may seek the cost of medical monitoring for an increased risk of mesothelioma. Similarly, many mass torts and claims arising out of product recalls are premised on the notion of an enhanced risk of future injury from a defective product.

Such claims are viable only as class actions, since the damages for one individual typically are not substantial enough to justify a lawsuit, said Barry, who practices at Sugarman, Rogers, Barshak & Cohen.

He added that if courts were to allow the type of claim that was made in *Kerin*, manufacturers might be discouraged from conducting recalls on the theory that doing so would lead to an onslaught of speculative claims by product owners for enhanced risk of future injury.

Boston's Eric J. Parker noted that even though the court in *Kerin* acknowledged that the future risk alleged by the plaintiff could, in fact, be severe, and that even a small probability of great harm might be enough to overcome the speculative nature of the risk, it still found that the plaintiff had not met his burden.

"Needless to say, from the plaintiff's perspective, evidence of a relevant statutory or regulatory breach would certainly have come in handy," Parker said.

Alleged defect

Plaintiff Tim Kerin had Gastite CSST installed in his Florida home to provide gas for an

outdoor fire pit. Defendant Titeflex Corp., a Massachusetts company, manufactured the tubing.

At some point it was discovered that CSST, which has been used in home and commercial structures across the country since the 1980s, can fail when exposed to "electrical insult," such as that caused by lightning.

Specifically, both direct and indirect lightning strikes can cause an electrical arc that can puncture CSST, igniting the natural gas within.

Despite those known risks, Massachusetts regulations specifically allow the use of CSST. Meanwhile, the National Fuel Gas Code, a model code co-sponsored by the American Gas Association and the National Fire Protection Association, permits the installation of CSST with bonding and grounding to mitigate lightning risk.

In July 2013, Kerin sued Titeflex in U.S. District Court in Massachusetts based on the risks. In his complaint, the plaintiff alleged that Titeflex was strictly liable for design and manufacturing defects. He also alleged that Titeflex negligently designed the product, failed to properly test it, and failed to warn.

While Kerin did not claim the product harmed him or his home in any way, he sought damages based on overpayment for a defective product or, alternatively, based on the cost of remedying the safety issue.

Judge Michael A. Ponsor dismissed the plaintiff's claim for lack of standing, reasoning that the "strand of conjecture" — requiring both a lightning strike and a puncture in the CSST — was too attenuated to bestow standing on the plaintiff.

Kerin appealed.

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The plaintiff homeowner sued the manufacturer of corrugated stainless steel tubing, which can fail when struck by lightning.

Lack of standing

The 1st Circuit stated at the outset that it was not adopting Ponsor's reasoning "to the extent it relies on the proposition that lightning strikes present a textbook example of speculative risk and remote possibilities which are simply insufficient for injury in fact."

In fact, Lynch said, the law of probabilistic standing is evolving and the vulnerability of a product to lightning might, in some circumstances, constitute injury.

But *Kerin* was not such a case, the judge said.

"We agree with [the plaintiff] that the risked harm, if actualized, could be severe. But whether a risk is speculative also depends on the chances that the risked harm will occur," Lynch said. "Although a small probability of a great harm may be sufficient, [the plaintiff] has failed to meet his burden of pleading that the risk of CSST causing a lightning fire in his home is anything but remote."

First, while the plaintiff alleged that there were 141 reported fires involving lightning and CSST as of 2011, he gave no information regarding the frequency of lightning strikes, the proportion of homes struck by lightning, or the likelihood of lightning fires in homes without CSST.

"And to the extent that he does cite numbers, they suggest an exceedingly low probability," Lynch said, noting that CSST is present in more than 5 million American homes.

Additionally, she observed, even in those instances in which the plaintiff claimed there had been "actual damage," it was not clear that CSST was the source.

"This distinguishes [the plaintiff's] case from others in which courts found enhanced risk from product defects sufficient for standing," she said, pointing to *Cole v. General Motors Corp.*, a 2007 decision from the 5th Circuit in which the court found standing based on an enhanced risk that side airbags in cars might deploy unexpectedly. Because there were recorded instances in which airbags had deployed without a crash, there was no doubt the airbags were defective and had caused actual damage.

Finally, Lynch said, political branches have given broad regulatory approval to CSST, determining that the particular risk cited by the plaintiff is both permissible and manageable.

While not dispositive, that consideration "carries particular weight," the judge stated. MLW

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