

User's Gross Mishandling of Product Does Not Entitle Defendant Manufacturer to Summary Judgment in New York

By Cathleen B. Clark, Esq. and William D. Yoquinto, Esq.

Under the federal rule, a defendant is entitled to summary judgment if he successfully establishes that the plaintiff has failed to make a showing sufficient to establish the existence of an element essential to the plaintiff's case, and on which the plaintiff bears the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317 (U.S. 1986) citing Fed. R. Civ. P. 56(c). In a recent products liability case, the New York Court of Appeals, the state's highest court, reminded and cautioned product liability litigants moving for summary judgment in the Empire State of a unique burden they face in New York, which does not follow the federal rule. Yun Tung Chow v. Reckitt & Colman, Inc., 2011 NY Slip Op 3888, 6 (N.Y. May 10, 2011). It now seems clear that in New York, even if the sole proximate cause of the plaintiff's injury was a failure to follow product warnings and instructions, a defendant manufacturer must affirmatively establish that its product was reasonably safe for its intended use to gain summary judgment. Chow, 2011 NY Slip Op 3888.

The plaintiff in Chow was injured when using Lewis Red Devil Lye ("RDL") to unclog a floor drain in the kitchen of the restaurant where he worked. RDL is 100% Sodium hydroxide, commonly known as lye. The RDL bottle was marked with a skull and cross bones and contained explicit instructions and warnings, including warnings of the possibility of splash back and the possibility of serious injury if the product is not used as directed. Under the label's directions, users were instructed to wear protective eye wear and rubber gloves and were warned never to pour the lye directly from the container into the drain. Rather, users were instructed to use a plastic spoon to scoop out one tablespoon of lye and pour the RDL into the drain. Users were also cautioned to keep RDL away from aluminum utensils. After waiting thirty (30) minutes, according to the instructions on the RDL label, users could pour several cups of cold water down the drain to clear it.

Mr. Chow, who could not read English, testified that he did not read the label or ask anyone to interpret the directions for him. He learned how to handle the RDL by watching his co-workers use the product. In violation of the product use instructions, Mr. Chow put three spoonfuls of the lye into a dry aluminum container and then mixed it with approximately three cups of cold water. The plaintiff then poured the combined mixture down the drain. Immediately

thereafter, a back splash occurred and the mixture sprayed Mr. Chow's face causing serious injury to him, eventually resulting in the loss of his vision in one eye. At the time of the incident, the plaintiff was not wearing any protective gear.

As a result of this incident, Mr. Chow and his wife sued the defendant entities responsible for the manufacture, distribution and package design of RDL, bringing negligence and strict liability claims based on theories of inadequate warning and design defect. See Chow, 2011 NY Slip Op 3888, 1. In New York, a defectively designed product is defined as one which, "at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce." Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102, 107 (N.Y. 1983) quoting Robinson v. Reed-Prentice Div. of Package Mach. Co., 49 N.Y.2d 471, 479 (N.Y. 1980).



In order for a plaintiff in New York to establish a prima facie case for defective product design, the plaintiff must demonstrate that: (1) the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe; and (2) that the defective design was a substantial factor in causing the plaintiff's injury. Id. at 107. In order to show that a product was not "reasonably safe," a plaintiff bringing a design defect claim in New York must produce evidence that there was a "substantial likelihood of harm" associated with the use of the product and it was "feasible to design the product in a safer manner." Id. at 108. In opposition, the defendant may present evidence that the product was safe, meaning its utility outweighed its risks when the product was designed, such that the risks were reduced to the "greatest extent possible while retaining the product's inherent usefulness at an acceptable cost." Id.

The Chows' complaint was originally dismissed by the Supreme Court, Bronx County, which granted the defendants' motion for summary judgment. Yun Tung Chow v. Reckitt & Colman, Inc., 2010 NY Slip Op 13, 1 (N.Y. App. Div. 1st Dep't 2010). On appeal, the Appellate Division, First Department, unanimously upheld the dismissal of the plaintiffs' inadequate warning claims, noting that Mr. Chow

had made no attempt to read, or obtain assistance in reading, the RDL label. *Id.* The court, in a divided decision, ultimately also upheld the dismissal of the plaintiffs' design defect claim, finding that the defendants had met their summary judgment burden by making a prima facie showing that Mr. Chow's failure to follow the label's warning and instructions was the sole proximate cause of the accident. *Id.* at 2. The court cited two other New York Appellate Division cases with nearly identical facts wherein the plaintiffs' product liability claims were dismissed because the evidence established that the plaintiffs' failure to follow packaging instructions on drain cleaners was the cause of the plaintiffs' injuries. *Chow*, 2010 NY Slip Op 13, 2 citing *Sabbatino v. Rosin & Sons Hardware & Paint*, 253 A.D.2d 417 (N.Y. App. Div. 2nd Dep't 1998) (finding plaintiff's failure to follow label's instruction to cover drain after using drain cleaner was cause of plaintiff's injury when product back splashed); *Guadalupe v. Drackett Prods.*, 253 A.D.2d 378 (N.Y. App. Div. 1st Dep't 1998) (concluding any labeling or design defects were not proximate cause of plaintiff's accident where plaintiff made no attempt to read label on drain cleaner or obtain assistance with product before use). In addition to finding that Mr. Chow's misuse of the RDL was the "sole proximate cause of the accident", the Appellate Division also found that the plaintiffs had not successfully met their burden in establishing that RDL was unreasonably dangerous for its intended use, or that a safer alternative was feasible. *Chow*, 2010 NY Slip Op 13 at 2 - 3.

The Chows appealed the Appellate Division's decision and the Court of Appeals heard oral arguments on the case on March 24, 2011.² At oral argument, plaintiffs' counsel urged that the plaintiffs had established, through their expert's affidavit, that there was a reasonably safer way to design RDL (mainly through dilution) and that the defendants had never established that 100% Sodium hydroxide (NaOH) was the only way to clear a clogged drain. Plaintiffs' counsel further argued that the defendants' summary judgment argument was centered upon the claim that Mr. Chow's actions were the sole proximate cause of his injuries but, in order to meet their summary judgment burden, the defendants should have produced evidence from an expert establishing that it was not feasible to design RDL in a safer manner.

Defense counsel countered that the defendants had successfully established that Mr. Chow's mishandling of the RDL was the sole proximate cause of his injuries and, under the holdings of *Guadalupe* and *Sabbatino*, a plaintiff's defective design claim is defeated where the plaintiff's misuse of a product is found to be the sole proximate cause of the plaintiff's injuries. Defendants also claimed that "lye is

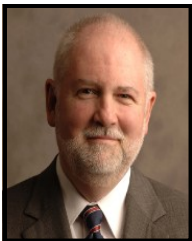
what it is" and diluting it (as plaintiffs suggested) would not be a "safer alternative," but rather an entirely different product. Defendants also pointed out that NaOH, a chemical compound, was not "designed" for purposes of a product liability analysis, and in any event NaOH is known to be inherently dangerous. At oral argument, the Court of Appeals made note of the fact that the defendants had not supported their claim that there was no safer alternative to their product with an expert affidavit.

In its decision, however, the Court of Appeals ultimately rejected the defendants' arguments. *Chow*, 2011 NY Slip Op 3888. As an initial matter, the Court of Appeals concluded that the defendants failed to show that Mr. Chow's handling of RDL constituted the sole proximate cause of his injuries "because a factfinder could conclude...that the product was so inherently dangerous that it should never have found its way into the stream of commerce as packaged and marketed." *Id.* at 4, citing *Voss*, 59 NY2d at 107. In concluding that a jury could find that RDL was "so inherently dangerous" it never should have entered the stream of commerce as packaged and marketed, the Court did not explain how RDL, as a drain cleaner, differed from the drain cleaning products at issue in *Guadalupe* or *Sabbatino*. In those cases the courts found that each user's failure to read the drain cleaning product label was the proximate cause of his injuries, as opposed to the design of the drain cleaning product itself. See *supra* *Sabbatino*, 253 A.D.2d 417; *Guadalupe*, 253 A.D.2d 378.

In *Chow*, the Court of Appeals noted that the defendants' claim that lye is inherently dangerous only "begs the question at the heart of the merits of [plaintiffs'] defective design claim: knowing how dangerous lye is, was it reasonable for defendants to place it into the stream of commerce as a drain cleaning product for use by a layperson?" *Chow*, 2011 NY Slip Op 3888 at 3. To this question, the Court of Appeals stated the defendants offered no answer and the assertions made in their attorney affirmation that RDL is inherently dangerous, its danger is well known, and RDL's label explicitly warned of its danger were insufficient to establish the defendants' entitlement to summary judgment. *Id.* at 2 - 3. Rather, to prevail on summary judgment, the defendants were required to show that RDL was "reasonably safe for its intended use," meaning that the utility of RDL as a drain cleaner outweighed its inherent danger. *Id.* at 2. Fatal to the defendants' summary judgment argument was the absence of an expert affidavit establishing that RDL was reasonably safe for its intended use. *Id.* See also *Voss*, 59 N.Y.2d at 108. In a concurring opinion, Judge Smith further explained that the Court's conclusion was the "result not of the merit of the plaintiff's case," but of the fact that parties in New York moving for sum-

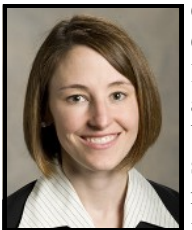
mary judgment in a products liability case in New York State, might have been falsely reassured by the case law in New York that, as a matter of law, they would be entitled to summary judgment upon a showing that the plaintiff's misuse of their product was the sole proximate cause of the plaintiff's injuries. See e.g. *supra* Sabbatino, 253 A.D.2d 417; Guadalupe, 253 A.D.2d 378. However, the Court of Appeals decision in Chow has clarified the burden defendants must meet in defeating a products liability claim in New York at the summary judgment phase. As explained in Chow, even evidence of a plaintiff's gross misuse of a product will not defeat the plaintiff's defective design claim - defendants moving for summary judgment against a defective design claim must also establish, through an expert affidavit, that their product was reasonably safe for its intended use. Chow, 2011 NY Slip Op 3888. This procedural distinction, which seems unique to New York practice, can be added to the list of reasons for defendants to consider removal to Federal Court when faced with a product liability action brought in New York.

¹A video of the oral argument before the Court of Appeals is available on the New York Court of Appeals website at http://www.courts.state.ny.us/CTAPPS/arguments/2011/Mar11/Mar11_OA.htm.



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“Greenwashing” Claims, A Pitfall to Those Marketing Products as Environmentally Friendly

By Geron J. Bird

You are likely familiar with the old phrase “whitewashing the truth.” However, you may not yet be familiar with the term “greenwashing.” This is a term that is growing in recognition and can create liability for your clients who manufacture or sell consumer products. There can be little doubt that branding one's product as environmentally friendly can make it more appealing in our ever greening society. Thus, a substantial trend in marketing is to classify a product – whether a cleaning product or a shirt – as being “green.” Being green can mean many different things in our modern lexicon. Green may refer to the sort of materials used in manufacturing, explain how the product was manufactured, describe characteristics of how the product operates, or communicates the product's use. The common denominator is that there is some claim about the product, extolling some particular aspect of it as beneficial to the environment.

Many consumers make purchasing decisions based upon the perceived, environmental friendliness of the product they are purchasing. As a result, there is growing scrutiny of the veracity of environmental claims about products. The term “greenwashing” refers to false or exaggerated claims about the eco-friendly characteristics of products. Regulators, consumer protection groups, environmental groups and individuals are all players in this rising area of exposure for manufacturers, distributors and sellers of products.

State Consumer Protection Statutes

Cases for greenwashing have been popping up around the country in the sphere of consumer protection litigation. This can be readily seen in California, where actions have been brought under that state's various consumer protection statutes. Recently, for example, a lawsuit was brought against S.C. Johnson & Sons, Inc., alleging that certain products falsely represent that they are environmentally friendly or certified when they are not.¹ The plaintiff alleged the product's labeling strategy was calculated to justify a premium price and take market share from competitors that do not make environmental claims. This case is a prime example of how state consumer statutes can be a vehicle for claims against manufacturers for exaggerated or false claims of environmentally friendly product characteristics.