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NO GOOD DEED GOES UNPUNISHED:

PLAINTIFFS' EFFORTS TO TURN PRODUCT STEWARDSHIP
AGAINST DEFENDANTS

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What is Product Stewardship?

- ❖ Voluntary concept developed by chemical manufacturers in recognition of need to provide safety, handling and disposal information concerning their products to their customers
- ❖ Grew out of an interest in seeing that customers use chemical products properly and safely
- ❖ Manufacturers offer knowledge and expertise as a service to customers for their protection
- ❖ Concern resulted in development of product safety literature and information to educate customers for safer workplace and environment



PRODUCT STEWARDSHIP WIDELY ADOPTED BY CHEMICAL INDUSTRY

- ❖ In the United States the Chemical Manufacturers Association (CMA)
 - developed Responsible Care® program (RC) in 1988 and
 - adopted **product stewardship** as one component of Responsible Care®
- ❖ The Canadian Chemical Producers Association (CCPA) adopted product stewardship program in 1988
- ❖ Responsible Care® implemented in Europe by the European Chemical Industry Council (CEFIC) with product stewardship as one element of program.
- ❖ Product Stewardship now followed in 52 countries around the world.



RESPONSIBLE CARE[®] PROGRAM

- ❖ Responsible Care[®] Companies are committed to implementing a set of goals and guidelines that go above and beyond federal regulations on **SAFETY, HEALTH AND ENVIRONMENTAL PROTECTION (SHE)**
- ❖ These companies strive to make SHE an integral part of the development, manufacture, handling and use of chemical products
- ❖ Known throughout industry as “**PRODUCT STEWARDSHIP**”



RESPONSIBLE CARE[®] COMPANIES

❖ AS PART OF PRODUCT STEWARDSHIP

- CONDUCT SYSTEMATIC AND RIGOROUS EVALUATIONS OF THEIR CHEMICAL PRODUCTS
 - to assure products deliver intended benefits
 - while protecting public health, the environment and security of our nation
- EVALUATIONS INCLUDE
 - characterizations of risk associated with use of products and
 - determination of risk management activities needed to address risk
- Openly go above and beyond government requirements
- Openly communicate their results to the public



Chemical Industry's Commitment to Product Stewardship and their Customers

- ❖ **The chemical industry supports Responsible Care® programs and the Commitment to better communication with customers in order to**
 - advise customers on product selection, performance, safe handling and end use.
 - address inquiries and resolve complaints.
 - improve products and services in concert with customers' needs, including updating and distributing product information and safety data sheets
 - work with suppliers, carriers, distributors, and customers to achieve similar product stewardship and
 - provide information and assistance to support their efforts to implement their own product stewardship.



CHEMICAL INDUSTRY'S PRODUCT RISK CHARACTERIZATION/ RISK MANAGEMENT EVALUATION INCLUDES

- ❖ Frequent review of a product's classification based on environment exposure and effects (both of existing or new products),
- ❖ Hazard evaluation to identify and evaluate physical safety and toxicological profile of product
- ❖ Product exposure evaluation— focuses on
 - product trail from manufacture through distribution and use/application by customer/consumer,
 - disposal and environmental fate,
 - reasonably foreseeable misuses,
 - emergency/accidental situation or sources of exposure at all stages,
 - exposures to customers' workers, consumers, public or environment and
 - likely routes of potential human exposure (e.g., skin, inhalation, ingestion).



CHEMICAL INDUSTRY'S PRODUCT RISK CHARACTERIZATION/ RISK MANAGEMENT EVALUATION ALSO INCLUDES

- ❖ **Product risk characterization**
 - Requires making professional judgments regarding
 - opportunity for adverse effects on humans or environment and
 - considers use of products and fitness of products for those uses, and
- ❖ **Assess Risk Management** -- includes among other actions
 - **Communicate Hazards and Risk** (e.g. MSDSs, labels, product bulletins, training tools, videos, and site visits) to those who use process, or dispose of the product or could be involved in product spills, releases or emergencies
 - **Decide whether to continue or discontinue sale of product to certain markets or end users**



How has this proactive, voluntary and well-intentioned program been used against the Chemical Industry?

Plaintiffs allege that the Industry Owes a Duty of Care to Its Customer's Employees



What Is the Potential Source of this Duty?

Plaintiffs allege duty arises from
PRODUCT STEWARDSHIP



Weist v. DuPont and First Chemical Corporation,
05-CV-0534A(Sr), W. Dist. N.Y.

Plaintiffs allege Defendants failed in their duty to:

- ❖ 1. evaluate the employer's handling of chemicals sold by chemical manufacturers to employer,
- ❖ 2. counsel employer on the safe use of the product, and
- ❖ 3. discontinue sale of the product to employer in order to prevent further unsafe exposure to the product and force the implementation of corrective action.



Plaintiff's Novel Theory: Duty Established by Manufacturer's Voluntary Product Stewardship Program

- ❖ *Weist* plaintiff alleges exposure from 1977 through 1990 while working at Goodyear's plant to ortho-toluidine sold by the defendants exclusively for industrial use.
- ❖ Claims the defendants as chemical manufacturers are liable under negligence theory analogous to **negligent entrustment of a chattel**.



NEGLIGENT ENTRUSTMENT

- ❖ Premised on Restatement (Second) of Torts § 390
 - One who supplies directly or through a third person
 - a chattel for the use of another
 - whom the supplier knows or has reason to know
 - to be likely because of youth, inexperience, or otherwise,
 - to use it in a manner involving unreasonable risk of physical harm to himself and others
 - whom the supplier should expect to share in or be endangered by its use
 - is subject to liability for physical harm resulting to them.

Restatement (Second) of Torts § 390 (1965).



Plaintiffs Argue New York Court of Appeals Opened Door to Negligent Entrustment:

- ❖ In *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 727 N.Y.S.2d 112 (2000), the Court of Appeals noted that the tort of negligent entrustment is “based on the degree of knowledge the supplier of a chattel has or should have concerning the entrustee’s propensity to use the chattel in an improper or dangerous fashion.” *Id.* at 237 (internal citations omitted).
- ❖ If such knowledge can be imputed, the supplier owes a duty to foreseeable parties to withhold the chattel from the entrustee. *Splawnik v. Di Caprio*, 146 A.D.2d 333, 335, 540 N.Y.S.2d 615 (3rd Dep’t. 1989) (internal citations omitted).
- ❖ *Weist* argues that defendants failure to cut off sales of the product to Goodyear when they knew Goodyear was not properly handling the material to prevent harmful exposure to Plaintiff amounts to negligent entrustment of a chattel that caused harm. *See Hamilton at 237.*

Plaintiffs argue Defendants' duty arises from:

- ❖ The Defendants' Failure to Adhere to their own Product Stewardship Program
 - Plaintiffs allege the defendants voluntarily assumed duty
 - to evaluate and counsel employer on handling of manufacturers' product,
 - to terminate the sales relationship, if necessary.
 - In 1988, CMA adopted **Responsible Care® program** that required members to
 - be pro-active in evaluating customer's handling of chemical products, and
 - determine if customers were actually handling products safely
 - work with customers to solve problem and terminate sales if no improvement.
- ❖ The defendants followed similar practices with customers even before adoption of Responsible Care® program
- ❖ Creates direct and intimate relationship between suppliers and customer to establish liability under negligent entrustment doctrine.

The Defense—No Such DUTY

- ❖ Under New York law **no legal duty** is imposed on a manufacturer
 - to “**counsel**” a customer on safe use of its product or
 - to **discontinue selling** its product to a particular customer in order to “**force the implementation of corrective action.**” *See id. at 232-33.*
- ❖ **Question of whether duty of care exists is policy decision reserved for judges.** *Palka v. Servicemaster Mgmt. Servs. Corp.*, 83 N.Y.2d 579, 586, 611 N.Y.S.2d 817 (1994).
- ❖ To prevail, plaintiffs must establish **more than a general duty owed to society**, but rather must prove that the defendants owed a **specific duty to the particular plaintiff**:
 - Without specific duty to particular injured person, no liability in damages
 - no matter how careless the conduct or
 - how foreseeable the harm. *Hamilton*, at 232.
 - **Foreseeability along does not establish the duty—** merely determines scope of duty once duty determined to exist. *Id.*



Duty based on actions of 3rd Party can arise only:

- ❖ **Where there is a relationship either**
 - between defendant and a third-person tortfeasor that encompasses defendant's actual control of third-person's actions, or
 - between defendant and plaintiff that requires defendant to protect plaintiff from the conduct of others. *Id.* at 233 (internal citations omitted).
- ❖ **Examples of such relationships include**
 - Master and servant
 - Parent and child
 - Common carriers and their passengers. *Id.*
- ❖ **“Key” consideration in determining existence of duty is whether**
 - “the defendant’s relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm.” *Id.*



Assumed duty of care:

- ❖ Under New York law, an **assumed duty of care may arise**
 - once a person undertakes a certain course of conduct
 - upon which another relies.

Tavarez v. Lelakis, 143 F.3d 744, 746 (2d Cir. 1998) (internal citations and quotations omitted).
- ❖ A **defendant owes an assumed duty of care**
 - when his conduct somehow places plaintiff in a more vulnerable position
 - than he would have been in had defendant never taken any action at all.

Id. at 746-47 (internal citation and quotations omitted).
- ❖ But an **assumed duty only arises** where
 - **Failure to exercise due care increases risk of harm** to plaintiff or
 - **Harm is suffered because of plaintiff's reliance** on the undertaking.

Id. at 747 (internal citations omitted).



Hamilton Holding Contrary to Plaintiffs' Interpretation:

- ❖ In *Hamilton*, on a question certified from the Second Circuit, the New York Court of Appeals:
 - refused to make manufacturers responsible for conduct of 3rd party, *Hamilton* at 232-33 (internal citations omitted);
 - refused to impose duty on gun manufacturers to exercise reasonable care in marketing and distribution of their products, *id.*;
 - was reluctant to extend liability to defendant for failure to control conduct of others, *id.*; and
 - rejected District Court's reasoning in finding existence of a protective duty on defendants because of status as product manufacturers. *Id.* at 234-36.
- ❖ **Reluctance grew out of practical concerns about**
 - Potentially limitless liability and
 - Unfairness of imposing liability for acts of another. *Id.*
- ❖ ***Hamilton* in accord with most jurisdictions** that have considered issue. See *id.* at fn. 6 (internal citations omitted).

Plaintiffs Cited No New York Case Law that:

- ❖ Establishes that **internal company policies give rise to tort liability in favor of third party**
- ❖ Establishes that **membership in CMA gives rise to voluntary assumption of duty**
 - to evaluate and counsel employer on its handling of the product and
 - if necessary to terminate sales relationship.
- ❖ **Only reported cases from other jurisdictions reject argument:**
 - *ES Robbins Corp. v. Eastman Chem. Co.*, 912 F.Supp. 1476, 1492-93 (N.D. Al. 1995) (rejecting plaintiffs' argument that defendant's participation in CMA Responsible Care® program created an industry standard, thereby imposing a duty on the manufacturer);
 - *Lescs v. William R. Hughes, Inc.*, 168 F.3d 482 (Table, 1999 WL 12913, *12 (4th Cir. 1999) (rejecting plaintiffs' theory that defendant had failed to meet industry standard based on CMA Responsible Care® progress report).

Effect of imposing such a Duty:

- ❖ **Precedential effect—limitless liability for product manufacturers in New York**
 - Court must “be mindful of precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree.” *Hamilton* at 231 (*internal quotation marks and citations omitted*).
- ❖ **Require every manufacturer to**
 - **audit** every customer to make highly subjective evaluation of whether **customer’s “handling” of product sufficient to protect against all harm** that could be sustained by downstream user, and
 - subjectively assess, based on **audit, whether or not to discontinue selling** its product to that customer. *Id.*
- ❖ **Result in “insurer-like liability” based solely on subjective standards. *Id.***
- ❖ **Would lead to proliferation of new claims**
 - To avoid subjecting defendants to limitless liability to indeterminate class of persons conceivably injured by negligence, the plaintiff must establish defendants owed him a specific duty running directly to him. *Id.* at 232.



Weist—stay tuned for Court's ruling.



Another interesting case raising Product Stewardship

- ❖ *Draper v. PPG Industries, Inc., et al.*, Cause No. 236-204940-04, In the 236th District Court of Tarrant County, Texas
 - Plaintiffs raise Negligence and Gross Negligence against Product Defendants based on occupational exposure to “benzene-containing” products and/or vapors



Draper Plaintiffs Allegations:

- ❖ Plaintiff could not know dangers to health from defendants' products.
- ❖ Product Defendants failed to:
 - provide adequate warnings or notices to Plaintiff with knowledge of dangers to health from products;
 - package benzene-containing products so Plaintiff would not come into direct and indirect contact with products and/vapors; and
 - warn Plaintiff, despite knowledge Plaintiff could not know of such dangers, how to adopt and implement plan to properly handle and use products.
- ❖ Resulted in atmosphere where Plaintiff believed products relatively safe to handle, contact and breathe.



Draper Plaintiffs Designated

- ❖ **Dr. Burton Z. Davidson**, Ph.D., P.E., Rutgers University
 - Will opine on whether Chemical Hazards Communication (CHC) modalities used by Product Defendants were adequate for Defendants' products used by Plaintiff occupationally from 1979 – 2002.
 - CHC modalities include:
 - Product Labels
 - MSDSs
 - Responsible Care®
 - Product Stewardship and
 - Employee Training.





Dr. Davidson's written report in *Draper* opines that:

- ❖ Product Defendants negligent because failed to actually practice safety procedures for safe handling, use and waste disposal practices set out in outstanding Product Stewardship programs (i.e., Dow's and Monsanto's);
- ❖ Product Stewardship meant to be proactive and preemptive in nature, a safety technique now practiced in cognate warnings (e.g., Asbestos bearing products);
- ❖ Product Defendants' "Product Stewardship programs" failed to anticipate and comprehend "gap" in "culture of chemical safety" between themselves and customers and to properly interface on timely basis with both employers and ultimate end-users like Plaintiff to properly close "gap."