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WELDING FUMES

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The Return of Privity as a Barrier to Warranty Claims in Welding Rod Exposure Cases

By Patrick S. Schoenburg, Esq.

By definition, most welding rod claims are occupational exposure cases. A common fact pattern involves a welder allegedly suffering bodily injury due to exposure to welding rod fumes at his or her place of employment. In this scenario, the manufacturers and suppliers of welding consumables, welding equipment and safety gear — all potential defendants — sell or supply their products to the welder's employer. The employer, in turn, provides these products to the welder to use in the course and scope of his or her employment. The welder is never part of the sales transaction between the employer and the product manufacturers and suppliers. This creates a potential barrier to the welder filing suit against these entities based upon a warranty theory.

Because warranties are contractual in nature, third parties to the transactions, such as the allegedly injured welder, are generally barred from asserting warranty claims. See *Windham at Carmel Mountain Ranch Assn. v. Superior Court* (2003) 109 Cal. App. 4th 1162, 1169-1170 ("The general rule is that privity of contract is required in an action for breach of either express or implied warranty and that there is no privity between the original seller and a subsequent purchaser who is [not] a party to the original sale.") Prior to the development of the doctrine of

strict products liability, the privity requirement created a potential barrier to an injured worker seeking redress for bodily injuries.

To address this situation, in California, exceptions to the privity requirement were established in cases involving food, drugs and pesticides. An expansion of the privity concept has also been created to allow certain employees who are injured while using dangerous products purchased by their employers to assert warranty claims. (*Windham at Carmel*, 109 Cal.App. 4th at 1169). Other states have created similar exceptions to the privity requirement in cases involving food (*Crystal Coca Cola Bottling Co. v. Cathey*) [1957] 83 Ariz. 163, 317 P.2d 1094), food containers (*Nichols v. Nold* [1953] 174 Kan. 613, 258 P.2d 317) and where the implied warranty is based upon a public policy (*Graham v. Bottenfield's Inc.* [1954] 176 Kan. 68, 269 P.2d 413).

The role of warranties in welding rod claims was recently raised in the coordinated proceedings which have been instituted to handle all welding rod cases in California, *Welding Product Cases*, Judicial Council Coordination Proceeding No. 4368. In that matter, plaintiffs filed a Master Complaint which, among numerous other

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causes of action, stated claims for breach of express and implied warranties against a group described as "welding defendants." These entities are defined as those selling, distributing or manufacturing welding rods or welding products.

A demurrer was filed in response to the Master Complaint, challenging the warranty claims based upon a lack of privity between the plaintiffs and the so-called welding defendants. After extensive briefing and oral argument, the Hon. Ronald M. Sabraw sustained the demurrers without leave to amend on July 15, effectively dismissing these claims.

This ruling is significant for several reasons. In addition to its narrowing of the remedies available to welding rod plaintiffs in California, Judge Sabraw directly confronted the numerous exceptions to the privity requirement in California, such as those created to address cases involving food, drugs and "dangerous products." Although the Court found that welding rods did not fall directly within these exceptions, Judge Sabraw also questioned the exceptions continuing viability. The Court noted that (in footnote 7 at page 1169), the *Windham* decision states that "(t)hese exceptions generally were created by courts before the establishment of, and possibly as a precursor to, the doctrine of strict liability in tort."

The Court then noted the development of the doctrine of strict products liability and its relationship to warranty claims in cases such as (*Greenman v. Yuba Power Products Inc.* [1963] 59 Cal.2d 57, 63) and (*Seely v. White Motor Co.* [1965] 63 Cal. 2d 9). *Greenman*, which is recognized as creating the doctrine of strict products liability, notes that warranties were developed to meet the needs of commercial transactions. *Seely* furthered the distinction between strict products liability and warranties, stating that the strict liability in tort theory applies where a product causes injury to person or property, but is not available to address injury to eco-

nomical interests. Accordingly, Judge Sabraw found that personal and property damage claims may rely on strict liability in tort, whereas economic loss claims must rely on warranty theories:

"[R]ather than torturing the concept of a contractual warranty claim with exceptions to the privity requirement so that plaintiffs can bring warranty claims for their personal injuries, the better course is to limit the warranty claims to their commercial context and acknowledge that plaintiffs can obtain an equivalent remedy through their strict liability claim."

(Order on Demurrers and Motions to Strike [July 15, 2005], p. 8)

In other words, Judge Sabraw found that those allegedly injured by occupational exposure to welding rod fumes had an adequate remedy in the doctrine of strict products liability. Warranty claims should return to their intended purpose, providing a remedy for economic loss in commercial transactions.

When the need to address liability for personal injury from mass-produced products arose, courts first attempted to modify the law of warranty to address that need. To do so, exceptions to the privity requirement were created to allow a greater number of

plaintiffs into court. But it was an imperfect fit. Exceptions became so numerous that they swallowed the rule. More importantly, as pointed out by Judge Sabraw, the exceptions are no longer needed. With the availability of the modern doctrine of strict products liability, there is no longer a need to "torture" the concept of contractual warranties so plaintiffs can bring claims against product manufacturers and suppliers.

California courts led the development of the doctrine of strict products liability. Although the decision by Judge Sabraw dismissing the plaintiffs' warranty claims is just a trial court order, it was issued in a coordinated proceeding and may have more influence than other rulings by trial judges. The reasoning behind the decision is certainly sound. If Judge Sabraw is correct that strict liability is an equivalent remedy, plaintiffs are not deprived of potential damages by dismissing warranty claims and all parties benefit from the streamlining of cases.

The privity requirement was the means by which warranty claims were traditionally limited to the commercial context. It was thought to have become a relic. However, if other courts determine that strict products liability has eliminated the need for warranty claims to address bodily injuries, the concept of privity may return and play a role in determining the viability of causes of action asserted in welding rod and other occupational exposure cases.



About the Author

Patrick S. Schoenburg is a partner with the firm of Wood, Smith, Henning & Berman and manages its central California office. Patrick received his undergraduate degree with high honors from the University of California, Santa Barbara, and his law degree from the University of Southern California, where he was a member of the Southern California Law Review. He is a former law clerk to U.S. District Judge A. Andrew Hauk. His current practice focuses on occupational exposure, mass torts and commercial litigation. Patrick has written a number of articles and lectured in the areas of mass torts and environmental exposure cases, and has served as a consultant to clients across the nation who are faced with the emerging problem of mold exposure claims.