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Plaintiffs Regain Edge In Defective Design Cases In Fla.

By **Carolina Bolado**

Law360, Miami (November 20, 2015, 10:35 PM ET) -- The Florida Supreme Court's recent decision reinstating a $6.6 million jury verdict in a Union Carbide Corp. asbestos case should make it easier for plaintiffs to bring defective design claims now that the court has clarified that they do not need to propose reasonable alternative designs to prevail.

In a **5-2 ruling issued Oct. 29** in the closely watched Union Carbide v. Aubin, the state's high court rejected the Third District Court of Appeal's application of the "risk utility test" for design defect claims, which adds a burden on plaintiffs to prove a reasonable alternative design.

The decision returned the status quo in the state to the "consumer expectations test" after confusion following the Third District's conflicting decision and eases the burden on plaintiffs trying to prove design defects, according to trial attorney Eric Rosen of Kelley Uustal.

"Traditionally in Florida the test you use is 'It's a failed design because it failed to perform as the consumer expects,'" Rosen said. "It focuses on what the manufacturer is doing and says the manufacturer plays a crucial role in the expectations of performance by consumers."

The state's position on the consumer expectation test had been established by the Florida Supreme Court in 1976 in West v. Caterpillar and continued in 2006 by the Fourth District in McConnell v. Union Carbide Corp.

Deviating from the West ruling would contradict the policy reasons behind the adoption of the test, namely to ensure that it is the manufacturer of a product and not the injured consumer that should bear the risks of the product, the Supreme Court said.

"The important aspect of strict products liability that led to our adoption in West remains true today: the burden of compensating victims of unreasonably dangerous products is placed on the manufacturers, who are most able to protect against the risk of harm, and not on the consumer injured by the product," the Supreme Court said.

Rosen said that under the ruling, the alternative design defense is still available to a manufacturer, and a plaintiff can still propose such an argument.

"The manufacturer can continue to say 'There was no other way to make this,' under Union Carbide, but the burden isn't on the plaintiff," Rosen said. "A defense could be, 'this is a state-of-the-art design and there is no safer alternative design,' and a plaintiff may come forward and propose a safer alternative design, but it's not a requirement to prove your case."

The Third District's decision in Aubin had given defense attorneys hope that courts might move toward the more defense-friendly risk utility test. Under that test, plaintiffs have to show that a safer alternative design exists that the manufacturer could have used.

"The Third District's ruling was a huge win for the defense bar, only to be nullified by the Florida Supreme Court in a very impactful way," Chris Kolos of Holland & Knight LLP said.

The case of William Aubin is based on his use — as a home builder in the 1970s — of a Georgia-Pacific spray product made in part from SG-210 Calidria, which contained processed asbestos mined by Union Carbide. The trial court awarded him an apportioned amount, based on Union Carbide's assessed responsibility, of a $14.2 million jury award for damages before the appeals panel reversed and remanded the case.

The SG-210 Calidria was processed in a way to yield an asbestos fiber that had a unique shape and structure, according to the ruling. The fibers were pulled apart, which increased the efficiency of the product but also made it more likely to create respirable dust that causes asbestosis and mesothelioma, according to the opinion.

"In this case you have a manufacturer that took an inherently dangerous product and made it more dangerous," Rosen said. "It's similar to tobacco cases, where smoking is inherently dangerous, but what the manufacturer does to the product with additives to make it more addictive increases the danger of the product."

In the ruling, the Supreme Court also addressed the manufacturer's duty to warn and the learned intermediary doctrine, which Kolos said is insightful guidance for future product liability cases.

Union Carbide had provided its asbestos product to intermediary manufacturers, which used the asbestos to make the final products bought by consumers. But there was a question as to how far the manufacturer's duty to warn extends. Aubin requested that the trial court instruct jurors that Union Carbide had a duty to warn the end user, while the manufacturer said it was entitled to the learned intermediary defense, which states that a manufacturer has fulfilled its duty of care by warning an intermediary and not the consumer.

Kolos said the Supreme Court clarified the law on this issue by ruling that a jury has to be given an opportunity to assess whether a manufacturer adequately warned of its product's risks.

"The Supreme Court is saying no, that's not a complete defense, and there's a lot of factual analysis that goes into that," Kolos said.

Union Carbide is represented by Matthew J. Conigliaro and Dean A. Morande of Carlton Fields Jorden Burt PA.

Aubin is represented by James Louis Ferraro, Melissa D. Visconti and Juan P. Bauta of The Ferraro Law Firm.

The case is Aubin v. Union Carbide Corp., case number SC12-2075, in the Supreme Court of Florida.

--Additional reporting by Nathan Hale. Editing by John Quinn and Kelly Duncan.