

1989

Seventh Circuit Construes Section 23(a) of the Consumer Product Safety Act to Limit Liability Imposed on Manufacturers and Sellers

Rox Anne Joyce

Follow this and additional works at: <http://lawcommons.luc.edu/lclr>

 Part of the [Consumer Protection Law Commons](#)

Recommended Citation

Rox A. Joyce *Seventh Circuit Construes Section 23(a) of the Consumer Product Safety Act to Limit Liability Imposed on Manufacturers and Sellers*, 1 Loy. Consumer L. Rev. 77 (1989).

Available at: <http://lawcommons.luc.edu/lclr/vol1/iss3/6>

This Recent Case is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

SEVENTH CIRCUIT CONSTRUES SECTION 23(a) OF THE CONSUMER PRODUCT SAFETY ACT TO LIMIT LIABILITY IMPOSED ON MANUFACTURERS AND SELLERS

The United States Court of Appeals for the Seventh Circuit recently interpreted § 23(a) of the Consumer Product Safety Act (“the CPSA”), 15 U.S.C. § 2072(a) (1982), to limit liability imposed on manufacturers or sellers. Section 23(a) provides a private right of action for consumers injured “by reason of” a manufacturer’s or seller’s violation of a “consumer product safety rule or any other rule or order” issued by the Commissioner of the Consumer Product Safety Commission (“the Commission”). In *Zepik v. Tidewater Midwest, Inc.*, 856 F.2d 936 (7th Cir. 1988), the court decided that § 23(a) liability does not extend to a manufacturer’s or a seller’s violation of certain reporting rules promulgated by the Commission.

Factual Background

On June 30, 1983, Ronald Zepik dove into the shallow end of a swimming pool and struck his head on the bottom. The accident left him a quadriplegic. Zepik brought an action under § 23(a) of the CPSA against five manufacturers and sellers of component parts of the pool, including the defendant, Tidewater Midwest, Inc. (“Tidewater”). Pleasure Industries, Inc., (“Pleasure”) manufactured the pipes of the pool and provided a manual that was consulted during the pool’s construction; Loren’s Pool and Supply, Inc. (“Loren’s”), sold supplies and constructed the pool, excavated the hole, and provided technical assistance; the Frost Company (“Frost”) sold the ladder for the pool; and Polynesian, Inc. (“Polynesian”), manufactured the wall and coping tiles.

Section 23(a) provides that anyone who is injured may sue if the injury is sustained “by reason of any knowing (including willful) violation of a consumer product safety rule or any other rule, or order issued by the Commissioner.” 15 U.S.C. § 2072(a) (1982). Zepik alleged that the defendants failed to comply with the regulatory reporting requirement of Part 1115 of

the reporting rules promulgated by the Commission. 16 C.F.R. pt. 1115 (1989). Specifically, Zepik contended that the defendants’ failure to notify the Commission of the dangers posed by diving into the shallow waters of the pool constituted a violation of the Commission rule. In addition, Zepik claimed relief based on several state law theories of recovery, including strict liability, negligence, willful and wanton misconduct and breach of express and implied warranties.

Procedural Background

In the district court, the defendants brought several pretrial motions to dismiss as well as motions for summary judgment. The court dismissed with prejudice the claim against Tidewater Midwest. The court also granted motions for summary judgment in favor of Pleasure, Frost, and Polynesian. The court reasoned that the Part 1115 reporting requirements do not require a manufacturer of component parts to report a potential defect in the final product, the completed pool.

Loren’s sought dismissal of the complaint on the ground that a recent Eighth Circuit case, *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986), held that § 23(a) does not extend to violations of reporting requirements because such rules are interpretive rather than legislative. The district court agreed, and granted Loren’s motion to dismiss the CPSA claims.

Seventh Circuit Interprets “Any Other Rule” as Used in Section 23(a)

The issue on appeal was whether the district court erred in granting summary judgment in favor of defendants Pleasure, Frost and Polynesian and whether it properly granted Loren’s motion to dismiss. The dismissal order entered in favor of Tidewater was not challenged. To decide these matters, the court was required to interpret the phrase “any other rule” as used in § 23(a).

Zepik argued that under *Butcher v. Robertshaw Controls, Co.*, 550 F. Supp. 692 (D. Md. 1981) and its progeny, the phrase “any other rule” is to be given its plain and ordinary meaning. According to *Butcher*, “any other rule” is not limited to consumer product safety rules and does not distinguish between legislative and

(continued on page 78)

CONSUMER PRODUCT SAFETY ACT (from page 77)

interpretive rules. Rather, “any other rule” means any rule promulgated by the Commission. Section 23(a), therefore, encompasses coverage for injuries sustained by virtue of a manufacturer or seller violating reporting requirements.

Part 1115 of the Commission’s rules mandates that a manufacturer or seller must report known product defects to the Commission. Zepik contended that the defendants violated Part 1115 because they failed to report the dangers of diving into shallow waters. Zepik argued that he could maintain a private right of action against the defendants because the Commission’s reporting rules, encompassing Part 1115, fell within the scope of “any other rule” under § 23(a).

The defendants, however, urged the court to adopt the Eighth Circuit’s approach in *Drake*. *Drake* was decided while the defendants’ motions attacking Zepik’s complaint were pending in the lower court. In *Drake*, the court reasoned that the reporting requirements of Part 1115 are interpretive, and that relief is not available under § 23(a) for alleged violations of interpretive rules.

Seventh Circuit Construes “By Reason Of” Narrowly

Looking to the language of § 23(a), the Seventh Circuit first noted, as the Eighth Circuit had in *Drake*, that Congress did not intend to include relief under § 23(a) for violations of interpretive rules. Interpretive rules serve merely to clarify statutory provisions. The court concluded that the Part 1115 reporting rules, being interpretive, do not fall within the ambit of § 23(a) relief. In further support of this conclusion, the court analyzed the “by reason of” provision of § 23(a). By using the phrase “by reason of,” Congress envisioned availability of a private right of action only upon a showing of causation similar to that required under common law tort liability. Accordingly, in order to recover under § 23(a), there must be a direct and proximate causal connection between a consumer’s injury and the defendant’s violation of a Commission rule.

The court stated that to establish the causation requirement, the plaintiff must show that: 1) the failure to inform the Commission that diving

into the pool could be hazardous “reasonably supported” a conclusion that the product was defective, and that the defendant deprived the Commission of information otherwise not available to it; 2) if the information had been reported to the Commission, the Commission would have found an existing product defect and would have required that curative steps be taken; 3) the Commission’s response would have been fully implemented in time to prevent the plaintiff’s injury; and 4) the curative steps taken at the direction of the Commission would have actually prevented the plaintiff’s injuries.

The court determined that Zepik’s injuries were too remote to meet the causation requirement of § 23(a). To hold otherwise would have the effect of imposing broader liability, similar to enterprise liability, upon any manufacturer or seller of the subject product. The court stated that this was not Congress’ intent:

If Congress had intended to bring about such a radical expansion of products liability...it certainly could have done so...[W]e see no indication in the legislative history or the structure of the CPSCA that section 23(a)’s ‘by reason of’ language was intended to be construed so broadly...

Zepik, 856 F.2d at 944. Enterprise liability relaxes traditional causation requirements when the injured plaintiff is unable to accurately identify the manufacturer or seller of the allegedly defective product. Here, Zepik was able to identify the manufacturers and sellers involved in the construction of the pool.

The Seventh Circuit affirmed the district court’s dismissal of Zepik’s claim against Loren’s and the orders granting summary judgment in favor of Pleasure, Polynesian and Frost. The court remanded the case to the district court to determine, whether, absent the § 23(a) claim, the exercise of pendent jurisdiction over the state claims for strict liability, negligence, willful and wanton misconduct and breach of express and implied warranties was appropriate. As a result of the court’s decision, an injured consumer must now establish a direct and proximate causal connection between the alleged violation of a Commission rule and the injury sustained.

RoxAnne Joyce