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MoFo Saws Off Multibillion-Dollar Suit Against Lumber Liquidators

By Jenna Greene

April 7, 2016

A team from Morrison & Foerster won a bench trial in California state court on behalf of Lumber Liquidators, which was accused of failing to warn consumers that 26 of its laminate flooring products contained cancer-causing formaldehyde.

The stakes were high: The plaintiffs sought multiple billions of dollars in civil penalties and an injunction to prohibit Lumber Liquidators from selling its laminate flooring products in California.

The company stipulated to the formaldehyde exposure, but MoFo lawyers led by James Schurz argued that consumers were adequately warned about it.

On April 4, Judge George Hernandez Jr. of Alameda County Superior Court found that the plaintiffs failed to make their case.

Global Community Monitor, a nonprofit environmental monitoring group, and Sunshine Park, which promotes awareness of toxic chemicals, sued Lumber Liquidators in 2014, accusing the company of failing to meet its disclosure obligation under California's Proposition 65. The law gives California residents the right "to be informed about exposures to chemicals that cause cancer, birth defects or other reproductive harm."

"People are being unwittingly exposed to formaldehyde through inhalation on a daily basis, particularly since flooring products often cover much of the floor area of a home, where children, adults and the elderly spend most of their time every day for decades," wrote plaintiffs counsel Richard Drury Michael Lozeau of Lozeau Drury in the complaint. "Lumber Liquidators has failed to provide individuals in the state of California with a 'clear and reasonable warning' before exposing those individuals to cancer-causing formaldehyde."

The MoFo lawyers countered that Proposition 65's regulations also "provide a number of 'safe harbor' methods and messages that are deemed clear and reasonable as a matter of law."

Since December 2010, they said, all Lumber Liquidator laminate flooring has included terms and conditions stating that the product contains chemicals "known by the state of California to cause cancer or reproductive harm." Starting in January 2013, customers had to sign the terms and conditions stating that they'd read and accepted them.

A year later, Lumber Liquidators supplemented the warnings with signs on the front doors of its stores, at the cash register and on the loading docks where consumers pick up their flooring purchases.

"Collectively, these facts establish that the current Lumber Liquidators' Proposition 65 warning program is 'clear and reasonable,'" Schurz wrote in a motion for judgment.

He also pointed out that the plaintiff's expert, Dr. Dale Griffin, "gathered no empirical evidence about Lumber Liquidators' customers' understanding of the warnings at issue. He did not conduct a consumer survey, interview Lumber Liquidators' customers, nor did he witness a sales transaction. Indeed, Dr. Griffin never set foot in a Lumber Liquidators' store to view the warnings in context."

In a two-page decision, Hernandez ruled that the plaintiff "failed to sustain its burden of proof to prove that Lumber Liquidators failed to provide 'clear and reasonable' warnings to California consumers."

In addition to Schurz, partner William Tarantino and of counsel Robin Stafford worked on the case.

According to the firm, MoFo lawyers have won every Proposition 65 case they've ever litigated to judgment, including *Environmental Law Foundation v. Beech-Nut*, the largest Proposition 65 food case to go to trial, and *Dowhal v. SmithKline*, the first and only California Supreme Court Proposition 65 decision favoring a defendant.

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