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Home Depot in the middle of sealant suits

Company blamed for selling dangerous product; says vendor verified its safety

By R. Robin McDonald, Staff Reporter

WHEN GWINNETT COUNTY resident James Flynn bought a spray can of grout sealer from his neighborhood Home Depot in July 2005, he could not have imagined that his purchase would land him in the hospital and cost him the use of a lung.

But Flynn's Atlanta attorney, Frank Ilardi, said that when his client bought Tile Perfect Stand 'N Seal Spray-On Grout Sealer, its manufacturer had been fielding complaints for more than a month about potentially devastating effects associated with its use.

Flynn is now one of more than 160 people across the country who have brought 31 product liability suits against The Home Depot and five companies tied to the manufacture and distribution of Stand 'N Seal, claiming that using the product permanently damaged their health.

According to Ilardi, Stand 'N Seal is an aerosol chemical spray containing Flexipel—an ingredient that should never have been produced in aerosol form. Two people have died after exposure to Stand 'N Seal, Ilardi said. Others, like Flynn, were hospitalized and left with permanent lung damage.

"Jay was in the hospital for quite a while," Ilardi said. "He has what we believe is a permanent lung injury. He is essentially breathing with one lung."

The suits, which will be tried individually after joint discovery, have yet to place a dollar amount on the damages claimed.

U.S. District Judge Thomas W. Thrash Jr. of Atlanta is presiding over the multi-district litigation. Ilardi, of Atlanta's Houck, Ilardi & Regas, is sharing lead counsel duties with Texas attorney William J. Maiberger Jr., of the Watts Law Firm in San Antonio in those cases.

Home Depot and its codefendants are fighting the claims vigorously, attempting to shift responsibility away from themselves while suggesting that any alleged harm to customers was caused by the product's misuse.

Ilardi said the serious health problems resulting from the grout sealer's use were compounded by Stand 'N Seal's manufacturer, the Illinois-based Roanoke Companies Group, doing business as Tile Perfect, which manufactured Stand 'N Seal exclusively for Home Depot.

Once alerted that users of Stand 'N Seal "were reporting to emergency rooms all over the country," Ilardi said Tile Perfect—while doing its own quiet internal investigation—delayed notifying the U.S. Consumer Product Safety Commission and continued to sell the product.

When the commission was finally alerted, Ilardi said Tile Perfect withheld critical information and listed the recall on its Web site as voluntary rather than mandatory.

Home Depot and Tile Perfect finally stopped selling Stand 'N Seal in March of this year—19 months after the commission issued a product recall for 300,000 cans of Stand 'N Seal, according to plaintiffs' court pleadings.

"One of our contentions is that as soon as they [the defendants] knew that this problem was so widespread, the responsible thing to do was to pull the product from the shelf and then figure out what went wrong," Ilardi said.

"Jay and others around the country probably shouldn't have even had the chance to buy that product. ... It's a very sinister case."

Home Depot attorney John P. MacNaughton of Morris, Manning & Martin said his client "places the highest priority on the

safety and security of its customers” and requires its vendors not only to adhere to industry codes and regulations but “immediately inform us of any difficulties with any of the products.” But with the sheer volume of products sold at Home Depot stores nationwide, MacNaughton said the company relies heavily on its vendors to monitor product recalls.

MacNaughton said that in late 2005, Tile Perfect notified Home Depot that it was voluntarily recalling “certain batches” of Stand 'N Seal. Tile Perfect employees subsequently removed those problem batches from Home Depot stores, MacNaughton said, and replaced them with other Stand 'N Seal product, assuring Home Depot it was safe.

As a result, Home Depot continued to sell Stand 'N Seal until March when MacNaughton said the company learned there were more batches of Stand 'N Seal that were “problematical.” At that point, he said, Home Depot removed Stand 'N Seal from all its stores.

Edward B. Ruff III, of Pretzel & Stouffer in Chicago, who is defending Tile Perfect, could not be reached for comment. But in court pleadings Tile Perfect, like Home Depot, has sought to shift the blame to other defendants, arguing that it acted as a corporate middleman that neither manufactured nor actually distributed Stand 'N Seal.

Tile Perfect lawyers also argued in court pleadings that any harm to customers may have been caused by misuse of the chemical if they ignored printed warnings and instructions on the Stand 'N Seal package.

Ilardi acknowledges that Stand 'N Seal wasn't always as hazardous as the product that Jay Flynn bought. It had been on the market for more than two years without any ill effects associated with its use, the lawyer said. The sealer was canned as an aerosol spray by Aerofil Technology Inc., a Missouri-based firm that is also a defendant in the case.

But in April 2005, Tile Perfect and an Arizona firm, SLR Inc., which produced the grout sealer for Tile Perfect, replaced one of its ingredients—a DuPont chemical called Zonyl—with Flexipel, a chemical they obtained from Georgia-based Innovative Chemical Technologies, Ilardi said.

Innovative Chemical Technologies, or ICT, in turn, commissioned South Carolina-based Ortec Inc. to produce Flexipel based on ICT's formula and specific mixing instructions and with raw materials it supplied, according to Ortec pleadings in the case.

The problem with the formula change was that the material data safety sheet associated with Flexipel that ICT provided “expressly says not to aerosolize” Flexipel, Ilardi said. “But Tile Perfect continued to contract with Aerofil to produce it as an aerosol spray.”

Roanoke claims that SLR never consulted it about the change in chemicals, according to Ilardi. “If you believe Roanoke, the decision was made by SLR and Innovative Chemical,” he said.

“Once the production batches that had the Flexipel in it hit the market, complaints started coming in from all over the country. ... People who were buying the product and using it were reporting to emergency rooms all over the country,” he said.

Tile Perfect initiated an internal investigation, Ilardi said. But it continued to sell Stand 'N Seal. Eventually, Tile Perfect alerted Home Depot to the hazards associated with the grout sealer. Ilardi said Home Depot's response was to tell Tile Perfect that “it was their product, [and] they could come pull it from the shelves.”

Albert H. Parnell of Atlanta's Hawkins & Parnell, who is defending Innovative Chemical Technologies, and Charles M. McGivney of McGivney & Kluger in New Jersey, who is defending SLR, could not be reached to discuss the case.

But in court pleadings, Innovative Chemical Technologies has denied the plaintiffs' allegations, while claiming it did not manufacture the grout sealer as an aerosol. The company's lawyers also noted that the firm provided the material safety data sheet for Flexipel to SLR and that the chemical, when used in accordance with those instructions, is safe.

In court pleadings, SLR blamed the plaintiffs, and by implication, its co-defendants as well, arguing in court pleadings that any injuries were caused by “the unauthorized, unintended and improper use of Stand 'N Seal.” SLR also demanded that it be indemnified by the other defendants in the case.

Ortec lawyers also have denied any liability on Ortec's part. But they have also filed a cross-claim against Innovative Chemical Technologies. In that cross-claim, Ortec asserts that it produced Flexipel according to ICT's formula and shipped the chemical directly to Aerofil under the SLR brand with labels supplied by ICT. Ortec lawyers also claimed that ICT never

informed Ortec of the intended use of the Flexipel solvent.

Ortec is being defended by Scott David Huray and Timothy J. Gardner of Atlanta's Carolock Copeland Semler & Stair. "We were only recently added to this litigation and don't believe there is any legitimate reason for us to be involved," Huray said. "We provided a service to one of our clients using their proprietary technology, and that was the extent of our involvement with the product."

Aerofil, likewise, has denied the allegations and sought to shift any blame to Stand 'N Seal's manufacturer. Aerofil attorney Thomas H. Terry III, of Sutter, O'Connell and Farchione in Cleveland, said that Aerofil's mixing and canning of Stand 'N Seal was within the standard of care for the industry and that Zonyl, the product it replaced, carried similar, if not identical warnings.

Terry also argued that the amount of Flexipel in each can of Stand 'N Seal was sufficiently small (about one-third of an ounce per 15-ounce can) and the pressure under which it was canned was sufficiently low that its use did not produce particles small enough to be inhaled into the lung itself, he said.

Warnings on the manufacturers safety data sheet that Flexipel should not be aerosolized referred to its pure, not diluted form and do not apply to its use in spray cans, he said. "We're certainly not talking about the Stand 'N Seal product. We're talking about a pure form of the active ingredient."

Ilardi said he has some evidence that suggests that as complaints about Stand 'N Seal mounted, Tile Perfect sent employees out to Home Depot stores across the country to remove Stand 'N Seal from the shelves. But, in some cases, before the sealer could be shipped back to the manufacturer, Home Depot employees reshelfed the sealer for sale.

"Home Depot failed to take any action to prevent a product they knew was defective and was pulled from the shelves from being put back out there," Ilardi said.

"I can say that Home Depot certainly did not and would not just turn around to a vendor or a distributor and say it was their problem with respect to any problem that was deemed to present any type of risk or danger to its customers," MacNaughton said.

"Home Depot never knowingly sold any recalled can," he added. "Our understanding was that they were removed from the shelves and replaced with the original formulation."

After the recall, Tile Perfect began placing labels on aerosol cans of Stand 'N Seal, Ilardi said. But the merchandising displays promoting Stand 'N Seal included a photo of a man, without a mask, standing in a bathroom with glass block windows and no apparent ventilation generously spraying the sealer.

"All the can said was avoid breathing vapors," Ilardi said. "But the display they sold it on showed people they really didn't have to take any precautions. They could just walk into a bathroom with no ventilation and start spraying the stuff."

Meanwhile, Tile Perfect and SLR didn't immediately eliminate Flexipel from the sealer formula, Ilardi said. Instead, the firms decided to add a chemical that would give the unscented sealer a more pungent odor and prompt users to ventilate the area in which it was sprayed.

But, with complaints still rolling in, Tile Perfect "eventually accepted the fact that Flexipel was the culprit, and they reverted back, we believe, to Zonyl," Ilardi said. "We don't know when that happened." Last March, with suits mounting, Tile Perfect and Home Depot stopped selling Stand 'N Seal.

Ilardi said that all of defendants, except for Innovative Chemical Technologies, have already paid claims to dozens of customers. "I've settled 10 of these cases on behalf of people not as seriously injured as Jay Flynn," he said. "We gave the defendants an opportunity to resolve this case before we filed the lawsuit. They didn't respond."

The case is *In Re Stand 'N Seal, Products Liability Litigation*, No. 1:07-mdl-01804, (N.D. Ga.).