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ATTORNEYS AT LAW

PRODUCTS LIABILITY PRACTICE GROUP
FLORIDA CASE OF THE MONTH

E.I. Du Pont Nemours and Company v. Desarrollo Industrial Bioacuatico S.A.,
2003 WL 22135969 (Fla. 4th DCA 2003)

$10 MILLION VERDICT AGAINST DU PONT REVERSED

The Fourth District Court of Appeal (West Palm Beach) reversed a $10 million final judgment against Du Pont and in favor of Desarrollo Industrial Bioacuatico S.A. ("DIBSA"). DIBSA accused Du Pont of being responsible for the deaths of shrimp at its Ecuadorian shrimp farm.

DIBSA owns and operates a shrimp farm down river from banana farms. In 1992, banana farmers were combating the Black Sigatoka fungus with the application of Du Pont's fungicide, Benlate®. Around the time the banana farmers began applying Benlate®, DIBSA's shrimp began dying rapidly. Some of the chemicals were toxic to shrimp, so DIBSA filed suit against Du Pont, alleging numerous ways in which Du Pont was negligent.

DIBSA, however, failed to allege negligent failure to warn. Such a claim would, in essence, be that Du Pont used deficient warning labels for Benlate®. DIBSA did not make this allegation because federal law precludes suits against fungicide companies (the court referred to "pesticide" companies) for deficient warning labels, where the warnings comply with the requirements of the Environmental Protection Agency. Du Pont filed a motion for summary judgment arguing the case was a "pure and simple failure to warn" case preempted by federal law. DIBSA denied that it was a failure to warn case, and the court denied Du Pont's motion. Du Pont then filed a motion to exclude the failure to warn evidence. At the hearing on the motion held a few days prior to trial, DIBSA reversed its position and argued that a failure to warn claim *was* included in the complaint. The court denied Du Pont's motion, finding that allegations of negligence "'would include failure to warn.'"

At trial, failure to warn was one of the principal issues presented to the jury by the plaintiff. In closing argument, DIBSA spent considerable time on the failure to warn evidence. The jury returned a verdict against Du Pont in excess of $10 million for failure to warn. Du Pont moved for a judgment notwithstanding the verdict because the jury found against it only on an unpled claim. This motion was denied.

The Fourth DCA reversed, recognizing this case was controlled by the Florida Supreme Court's decision in *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So.2d 561 (Fla. 1988). The Florida Supreme Court in *Arky, Freed* held that litigants at the beginning of a suit must provide sufficient information in their pleadings for a defense to be prepared. The Supreme Court also noted that by objecting to the introduction of evidence of an unpled claim prior to trial, a party calls the court's attention to the fact that the evidence on that claim was not being tried with the objecting party's consent. The Fourth DCA recognized that "the failure to warn claim was not pled, and it was strenuously objected to prior to trial."

Comments: The Fourth DCA underscored the policy in Florida that pleadings are meant to inform the opposing party of the allegations being made against it, so a proper defense can be mounted. Complaints must be carefully drafted and evidence and arguments at trial may be limited if a particular allegation is not pled. This decision also provides a roadmap for parties defending claims, indicating that they should object to

evidence of unpled claims before trial and remind the court throughout trial of their objection. Although Florida generally is a "notice pleading" state, this decision reminds attorneys that more may often be required than merely a short and plain statement.