

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY ANTHONY,)	
On behalf of Himself and Others)	Civil Action
Similarly Situated,)	No. 06-CV-4419
)	
Plaintiff)	
)	
vs.)	
)	
SMALL TUBE MANUFACTURING)	
CORP., doing business as)	
SMALL TUBE PRODUCTS CORP., INC.;)	
ADMIRAL METALS, INC.;)	
TUBE METHODS, INC., and)	
CABOT CORPORATION,)	
Individually and as Successor in)	
Interest to Cabot Berylco, Inc.,)	
Kawecki Berylco Industries, Inc.)	
and the Beryllium Corporation)	
c/o C.T. Corporation Systems,)	
)	
Defendants)	
)	
and)	
)	
AMETEK, INC.;)	
BRUSH WELLMAN, INC.; and)	
MILLENNIUM PETROCHEMICALS, INC.,)	
formerly known as)	
National Distillers and)	
Chemical Corporation,)	
)	
Third-Party Defendants)	

O R D E R

NOW, this 28th day of September, 2007, upon consideration of the Motion of Defendant Brush Wellman Inc. to Dismiss Amended Third-Party Complaint, which motion was filed January 26, 2007; upon consideration of Tube Methods, Inc.'s Response to Motion to Dismiss of Defendant Brush Wellman, Inc. to Dismiss Amended Third-Party Complaint, which response was filed

February 15, 2007; upon consideration of the Reply of Third-Party Defendant Brush Wellman Inc. to Tube Methods, Inc.'s Response to Motion to Dismiss Amended Third-Party Complaint, which reply brief was filed February 23, 2007; upon consideration of the memoranda of law filed by the parties; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that the Motion of Defendant Brush Wellman Inc. to Dismiss Amended Third-Party Complaint is denied.

IT IS FURTHER ORDERED that third-party defendant Brush Wellman Inc. shall have until October 19, 2007 to file an answer to Tube Methods, Inc.'s Amended Third-Party Complaint.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge

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)	
Third-Party Defendants)	

* * *

APPEARANCES:

RUBEN HONIK, ESQUIRE and
STEPHAN MATANOVIC, ESQUIRE
On behalf of Plaintiff

JOSEPH G. LITVIN, ESQUIRE and
KENNETH J. WARREN, ESQUIRE

On behalf of Defendant
Small Tube Manufacturing Corporation

ROCHELLE M. FEDULLO, ESQUIRE
On behalf of Defendant
Admiral Metals Inc.

DAVID C. ONORATO, ESQUIRE
GREGORY W. FOX, ESQUIRE and
STEPHEN M. HLADIK, ESQUIRE
On behalf of Defendant
Tube Methods, Inc.

NEIL S. WITKES, ESQUIRE
On behalf of Defendant
Cabot Corporation

KEVIN M. DONOVAN, ESQUIRE
On behalf of Third-Party Defendant
Ametek, Inc.

MORTON F. DALLER, ESQUIRE
On behalf of Third-Party Defendant
Brush Wellman, Inc.

JOSEPH M. PROFY, ESQUIRE
On behalf of Third-Party Defendant
Millenium Petrochemicals, Inc.

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on the Motion of Defendant Brush Wellman Inc. to Dismiss Amended Third-Party Complaint, which motion was filed January 26, 2007¹. The motion

¹ On February 15, 2007 Tube Methods, Inc.'s Response to Motion to Dismiss of Defendant Brush Wellman, Inc. to Dismiss Amended Third-Party Complaint was filed.

On January 25, 2007 the Memorandum of Law in support of Defendant Brush Wellman Inc.'s Motion to Dismiss Amended Third-Party Complaint was

seeks to dismiss Tube Methods, Inc.'s Amended Third-Party Complaint. For the reasons expressed below, I deny defendant Brush Wellman Inc.'s motion to dismiss the third-party complaint.

JURISDICTION

Jurisdiction is based upon diversity jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A). This court has supplemental jurisdiction over the third-party state law claims pursuant to 28 U.S.C. § 1367.

VENUE

Venue is proper pursuant to 28 U.S.C. § 1391(b) because the events giving rise to plaintiff's claims allegedly occurred in Sellersville, Berks County, Pennsylvania, which is located in this judicial district.

BACKGROUND

This matter is before the court on the motion of third-party defendant Brush Wellman Inc. ("Brush Wellman") to dismiss

filed.

(Footnote 1 continued):

(Continuation of footnote 1):

On February 15, 2007 Tube Methods, Inc.'s Memorandum of Law in Opposition to Motion of Defendant Brush Wellman, Inc. to Dismiss Amended Third-Party Complaint was filed.

On February 23, 2007 the Reply of Third-Party Defendant Brush Wellman Inc. to Tube Method[s], Inc.'s Response to Motion to Dismiss Amended Third-Party Complaint was filed.

the third-party complaint asserted against it by defendant (third-party plaintiff) Tube Methods, Inc. ("Tube Methods"). Brush Wellman's motion to dismiss asserts defenses based on lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted pursuant to both Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

The underlying Class Action Complaint in this case asserts a single claim for negligence on behalf of a single class representative, Gary Anthony, individually and on behalf of a putative class of employees and former employees of the U.S. Gauge facility² located in Sellersville, Pennsylvania. The Class Action Complaint alleges that the members of the proposed class were exposed to airborne beryllium (a toxic substance) while employed at the plant. The lawsuit seeks as damages the costs of medical monitoring of the exposed employees. The complaint avers that defendant Tube Methods, among others, sold, machined, assembled and distributed beryllium and beryllium-containing products which were used at the facility.

Tube Methods has disclaimed any liability in the underlying action. However, Tube Methods has filed a two-count third-party complaint against third-party defendant Brush Wellman. Tube Methods contends that this court has supplemental

² According to paragraph 13 of the Class Action Complaint, from at least 1972 to the present, non-party U.S. Gauge owned and operated a plant in Sellersville, Pennsylvania, which processed beryllium and beryllium-containing products.

jurisdiction over its third-party complaint pursuant to 28 U.S.C. § 1367.

THIRD-PARTY COMPLAINT

Tube Methods' third-party complaint asserts claims for indemnity and contribution against Brush Wellman pursuant to the law of the Commonwealth of Pennsylvania. Tube Methods' third-party complaint against Brush Wellman incorporates the allegations of the underlying Class Action Complaint. The third-party complaint specifically alleges that Tube Methods did not provide any beryllium or beryllium-containing material to the Sellersville facility.

Tube Methods asserts that it altered beryllium or beryllium-containing materials at the request of the facility owner. Tube Methods alleges it "worked on" the beryllium-containing materials and returned the materials at no charge. Moreover, Tube Methods asserts that all beryllium and beryllium-containing materials on which it worked were originally provided to the Sellersville facility by Brush Wellman.

With regard to indemnity, the third-party complaint asserts that to the extent Tube Methods is found liable to the plaintiff, Tube Methods' liability is passive and secondary to the liability of Brush Wellman. Tube Methods contends that the duties owed to plaintiff by Tube Methods and Brush Wellman are disproportionate. Tube Methods avers that Brush Wellman owed

plaintiff a duty to provide materials in a safe manner, including providing warnings of dangers and hazards.

However, in contrast, Tube Methods alleges that it owed only two possible duties to plaintiff: (1) a duty not to work on beryllium-containing materials in a manner so as to make them more hazardous than they already were; and (2) (if Tube Methods did make materials more hazardous), a duty to provide further warnings and advise plaintiff of the increased hazards and necessary safeguards for using the material.

Tube Methods asserts that the underlying lawsuit does not allege that Tube Methods made any materials more hazardous. Therefore, Tube Methods argues that to the extent it is held liable, it will be without active fault on its part and that any underlying liability would be the result of the negligence of Brush Wellman.

With regard to contribution, the third-party complaint asserts that, to the extent Tube Methods is found liable to plaintiff, the independent acts of Brush Wellman, a joint tortfeasor, combined with those of Tube Methods to cause plaintiff's injury. Tube Methods alleges that Brush Wellman is jointly and severally liable in tort for the injuries to plaintiff. To the extent it is found liable, Tube Methods contends it would be compelled to pay more than its pro rata share because Brush Wellman has not been named in the underlying

complaint.

CONTENTIONS OF THE PARTIES

Brush Wellman Contentions

Brush Wellman argues that this court lacks subject matter jurisdiction over Tube Methods' third-party complaint and that the complaint must be dismissed. Based on Tube Methods' own averments, Brush Wellman contends that Tube Methods cannot show that Brush Wellman is directly liable to Tube Methods. Brush Wellman argues that without direct liability this court cannot exercise supplemental jurisdiction over a third party.

Brush Wellman asserts that Tube Methods has disclaimed all liability and claims that Brush Wellman is the sole responsible party for the underlying failure-to-warn claims. Pointing to Tube Methods' contention that it never sold any beryllium-containing material of any kind, Brush Wellman avers that Tube Methods claims it merely provided a service and was not part of the chain of distribution. Thus, Brush Wellman asserts that Tube Methods has alleged no liability exposure to the plaintiff and therefore has no foundation for impleader.

Brush Wellman also contends that Tube Methods' indemnity claim is deficient because it fails to set forth a claim of secondary liability. Brush Wellman avers that Tube Methods has not pled any relationship between itself and Brush Wellman. Brush Wellman contends that Tube Methods has failed to

allege a preexisting relationship beginning before the alleged tortious conduct, as a basis for secondary liability.

Furthermore, Brush Wellman avers that Tube Methods has not alleged any relationship that is equivalent to the relationship between a retailer and manufacturer. Thus, Brush Wellman asserts that Tube Methods cannot seek indemnification because Tube Methods has disclaimed all liability and avers it was not in the chain of distribution as a service provider.

Brush Wellman further argues that, even if the court concludes that it has jurisdiction over Tube Methods' claims, the third-party complaint should be dismissed on the alternative ground that Tube Methods failed to state a claim upon which relief can be granted. Brush Wellman contends that Tube Methods has only offered conclusory allegations that Brush Wellman is liable to it for indemnity and contribution and has not pled sufficient factual information to support either claim.

Brush Wellman also asserts that Tube Methods cannot rely on the factual allegations of the underlying Class Action Complaint without specifying the particular paragraph of the complaint on which it relies. Moreover, Brush Wellman argues that Tube Methods has not identified any specific duties that Tube Methods owed to plaintiff or any injuries that Tube Methods caused plaintiff as a result of the breach of its duties. Thus, Brush Wellman contends that the third-party complaint does not

allege that Tube Methods has committed any tort which could be the basis for indemnity or contribution.

Finally, Brush Wellman contends that, unlike its argument pursuant to Rule 12(b)(6), its argument for dismissal pursuant to Rule 12(b)(1) is not disfavored in the law. Brush Wellman asserts that in a Rule 12(b)(1) motion the burden of persuasion shifts to plaintiff to demonstrate that the court has jurisdiction. Brush Wellman avers that the court should consider the merits of its Rule 12(b)(1) argument prior to its 12(b)(6) argument because a jurisdictional attack is a logical prerequisite to an attack on the merits.

Tube Methods Contentions

Tube Methods disputes Brush Wellman's contentions and argues that its third-party complaint adequately sets forth claims for indemnification and contribution. Tube Methods contends that the sole matter before the court is whether it has adequately stated claims for indemnity and contribution.

Tube Methods asserts that a determination of the merits of Brush Wellman's 12(b)(6) motion to dismiss also resolves Brush Wellman's 12(b)(1) motion to dismiss because of the inter-relationship between the arguments. First, Tube Methods avers that Brush Wellman's sole argument regarding jurisdiction is based upon its contention that the third-party complaint fails to state a claim against Brush Wellman for secondary liability.

Second, Tube Methods argues that claims for indemnification and contribution are always premised upon secondary liability. Thus, Tube Methods contends that if it has properly pled its claims, it has stated claims for secondary liability.

Tube Methods avers it has stated a valid claim for indemnification because the direct allegations and permissible inferences in its third-party complaint satisfy the requirements of indemnity under Pennsylvania law. Tube Methods contends that it may be compelled to pay damages in the underlying action to the extent it is found liable to plaintiff because of a court order against it (a legal obligation).

However, Tube Methods asserts that this obligation would be imposed notwithstanding the fact that it is without active fault on its own part because it did not provide any beryllium to the Sellersville facility. Tube Methods avers that any obligation to pay damages it may incur would be the result of the initial negligence of Brush Wellman because Brush Wellman originally provided the beryllium-containing material to the Sellersville facility. Moreover, Tube Methods further asserts that any liability which it may face would be the result of its failure to discover or correct a defect, or remedy a dangerous condition in the beryllium-containing material, caused by Brush Wellman.

Tube Methods also contends that it has stated a valid claim for contribution. Tube Methods asserts that the direct allegations and reasonable inferences to be drawn therefrom, in its third-party complaint, establish that Tube Methods is seeking contribution from Brush Wellman as a joint tortfeasor who is responsible for the negligent acts alleged by plaintiff in the underlying action. Thus, Tube Methods argues that, for the purpose of liberal notice pleading, it has sufficiently stated its contribution claim.

Finally, Tube Methods contends that because it has sufficiently stated claims against Brush Wellman for indemnity and contribution, it has necessarily set forth permissible third-party claims permitted by Federal Rule of Civil Procedure 14. Tube Methods asserts that this court can exercise supplemental jurisdiction over these claims pursuant to 28 U.S.C. § 1367 because they form part of the same case or controversy as the claims in the underlying action.

STANDARD OF REVIEW

Rule 12(b)(1) Motion to Dismiss

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a party may assert either a facial or factual challenge concerning whether the District Court properly has subject matter jurisdiction over the matter. Gould Electronics Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000). A challenge to a

complaint for failure to allege subject matter jurisdiction is known as a "facial" challenge. When a defendant's motion presents a facial challenge, the court must treat the allegations of the complaint as true and draw all inferences favorable to the plaintiff. NE Hub Partners, L.P. v. CNG Transmission Corporation, 239 F.3d 333, 342 (3d Cir. 2001); see also Fed.R.Civ.P. 8(f).

Dismissal pursuant to a 12(b)(1) facial challenge is proper only where the court concludes that the claims clearly appear to be immaterial and made solely for the purpose of obtaining jurisdiction, or are wholly insubstantial and frivolous. In other words, the claims must be "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1408-1409 (3d Cir. 1991) (internal citations omitted).

Because a court need not find a claim wholly frivolous or insubstantial in order to dismiss it under Rule 12(b)(6), the threshold to withstand a Rule 12(b)(1) motion to dismiss is significantly lower than that under Rule 12(b)(6). Kehr Packages, Inc., 926 F.2d at 1409 (citing Lunderstadt v. Colafella, 885 F.2d 66, 70 (3d Cir. 1989)). However, this lower threshold does not relieve plaintiff (as the party invoking

jurisdiction) of its burden to demonstrate that this action is properly in federal court. Samuel-Bassett v. Kia Motors America, Inc., 357 F.3d 392, 396 (3d Cir. 2004).

Rule 12(b)(6) Motion to Dismiss

A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted". A 12(b)(6) motion requires the court to examine the sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957) (abrogated in other respects by Bell Atlantic Corporation v. Twombly, ___ U.S. ___, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

Except as provided in Rule 9 of the Federal Rules of Civil Procedure, a complaint is sufficient if it complies with Rule 8(a)(2). That rule requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. Twombly, ___ U.S. at ___, 127 S.Ct. at 1964, 167 L.Ed.2d at 940.

Additionally, in determining the sufficiency of a complaint, the court must accept as true all well-pled factual allegations and draw all reasonable inferences therefrom in the light most favorable to the non-moving party. Worldcom, Inc. v. Graphnet, Inc., 343 F.3d 651, 653 (3d Cir. 2003). Nevertheless, a court need not credit "bald assertions" or "legal conclusions"

when deciding a motion to dismiss. In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1429-1430 (3d Cir. 1997).

In considering whether the complaint survives a motion to dismiss, both the District Court and the Court of Appeals review whether it "contain[s] either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory." Twombly, ___ U.S. at ___, 127 S.Ct. at 1969, 167 L.Ed.2d at 945 (quoting Car Carriers, Inc. v. Ford Motor Company, 745 F.2d 1101, 1106 (7th Cir. 1984)) (emphasis in original); Maspel v. State Farm Mutual Auto Insurance Company, Civ.A.No. 06-3716, 2007 WL 2030272, at *1 (3d Cir. July 16, 2007).

DISCUSSION

Supplemental Subject Matter Jurisdiction

According to Federal Rule of Civil Procedure 14(a), "a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." A court may exercise supplemental jurisdiction over a proper third-party complaint without regard to whether there is an independent basis of jurisdiction. Morris v. Lenihan, 192 F.R.D. 484, 486-487 (E.D.Pa. 2000).

However, in order to have jurisdiction, the third-party plaintiff must allege that a direct line of liability exists between itself and the third-party defendant. Morris, 192 F.R.D. at 488. The third-party plaintiff may not join a party who is, or may be, liable solely to the plaintiff. Foulke v. Dugan, 212 F.R.D. 265, 269 (E.D.Pa. 2002).

Negligent Failure to Warn³

The Supreme Court of Pennsylvania has set forth the elements of common law negligence as follows:

- (1) A duty or obligation recognized by the law, requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks;
- (2) A failure to conform to the standard required;
- (3) A causal connection between the conduct and the resulting injury; and
- (4) Actual loss or damage resulting to the interests of another.

³ In his underlying Class Action Complaint, plaintiff has asserted a single negligence claim premised on defendants' failure to warn users of the dangerousness of its product (a "defective warning" claim). However, I note that the Supreme Court of Pennsylvania has adopted section 402A of the Restatement (Second) of Torts and the doctrine of strict products liability as the law of Pennsylvania. Webb v. Zern, 42 Pa. 424, 220 A.2d 853 (1966). The Supreme Court of Pennsylvania "has attempted to insulate the concepts and vocabulary of negligence from those of strict liability." Griggs v. BIC Corporation, 981 F.2d 1489, 1435 (3d Cir. 1992). Therefore, I only discuss the negligence law of the Commonwealth of Pennsylvania.

Morena v. South Hills Health System, 501 Pa. 634, 642 n.5, 462 A.2d 680, 684 n.5 (1983).

Thus, in a products liability suit based on negligence, plaintiff must prove that defendant owed a duty to plaintiff; the defendant breached that duty; and such breach was the proximate cause of plaintiff's injuries. Dauphin Deposit Bank and Trust Company v. Toyota Motor Corporation, 408 Pa.Super. 256, 266, 596 A.2d 845, 849-850 (Pa.Super. 1991).

Regarding the establishment of liability of those in the chain of distribution in cases involving a negligent failure to warn, the Supreme Court of Pennsylvania has adopted section 388 of the Restatement (Second) of Torts. Incollingo v. Ewing, 444 Pa. 263, 288 n.8, 282 A.2d 206, 220 n.8 (1971); Kriscuinas v. Union Underwear Company, Civ.A.No. 93-4216, 1994 WL 5232046, at *5 (E.D.Pa. Sept. 27, 1994)(Padova, J.). Section 388 provides that:

[O]ne who supplies...a chattel for another to use is subject to liability...for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier:

- (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied; and
- (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

- (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Restatement (Second) of Torts § 388 (1965).

Comment k to section 388 interprets the duty requirement of subsection (b) as follows:

One who supplies a chattel to others to use for any purpose is under a duty to exercise reasonable care to inform them of its dangerous character in so far as it is known to him, or of facts which to his knowledge make it likely to be dangerous, if, but only if, he has no reason to expect that those for whose use the chattel is supplied will discover its condition and realize the danger involved.

Dauphin Deposit Bank and Trust Co. v. Toyota Motor Corporation, 408 Pa.Super. at 266-267, 596 A.2d 845 at 849-850 (quoting comment k).

Indemnification

The right of indemnity arises when a person or entity secondarily liable has been compelled, by reason of some legal obligation, to pay damages occasioned by the negligence of the party which should be primarily liable and the party who is secondarily liable is without active fault.⁴ Morris v. Lenhian,

⁴ The Supreme Court of Pennsylvania has consistently reaffirmed its prior decisions concerning indemnification. See Walton v. Avco Corporation, 530 Pa. 568, 579-581, 610 A.2d 454, 460-461 (1992). In these decisions, the Court has observed:

[U]nlike comparative negligence and contribution, the common law right of indemnity is not a fault sharing mechanism

(Footnote 4 continued):

supra, 192 F.R.D. at 488. The right accrues only to those who are secondarily or vicariously liable against those who bear primary responsibility. In re One Meridian Plaza Fire Litigation, 820 F.Supp. 1492, 1496 (E.D.Pa. 1993). If two parties are concurrently or jointly liable tortfeasors, there is no right to indemnification. Walton v. Avco Corporation, 530 Pa. 568, 579-580, 610 A.2d 454, 460 (1992).

Primary liability can only rest upon a fault by the entity primarily responsible for a defect or a dangerous condition in a product. Builders Supply Company v. McCabe, 366 Pa. 322, 88 A.2d 368 (1951). In contrast, secondary liability only exists where:

[The] liability rests upon a fault that is imputed or constructive only, being based upon some legal relation between the parties or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible.

Vattimo v. Lower Bucks Hospital, Inc., 502 Pa. 241, 251, 465 A.2d 1231, 1236 (1983).

(Continuation of footnote 4):

between one who was predominantly responsible for an accident and one whose negligence was relatively minor. Rather it is a fault shifting mechanism, operable only when a defendant who has been held liable to a plaintiff solely by operation of law...seeks to recover his loss from a defendant who was actually responsible for the accident which occasioned the loss.

Siriani v. Nugent Bros., Inc., 509 Pa. 564, 506 A.2d 868 (1986).

To determine whether particular liability is primary or secondary Pennsylvania courts focus upon such factors as:

(1) active or passive negligence; and (2) knowledge or opportunity to discover or prevent the harm. Kriscuinas, supra, 1994 WL 5232046, at *10.

In Pennsylvania the general rule is that a seller of a defective product is entitled to indemnification from the manufacturer of the product as the party primarily responsible for the defect. Estate of Moran v. G. & W.H. Corson, Inc., 402 Pa.Super. 101, 123-125, 586 A.2d 416, 427-428 (Pa.Super. 1991).

However, in chain of distribution cases, where there are many levels of contact with a product, and thus several possible degrees of liability, Pennsylvania courts engage in a fact-sensitive analysis of primary and secondary liability. Estate of Moran, 402 Pa.Super. at 123-125, 586 A.2d at 427-429 (looking to the Restatement of Restitution § 95 (1936)). This analysis focuses on whether the party had an opportunity to discover, or had actual knowledge of, the defective condition and the relative burdens of correcting the defect. Burch v. Sears, Roebuck and Company, 320 Pa.Super. 444, 456-459, 467 A.2d 615, 621-621 (Pa.Super. 1983).

Contribution

The right to contribution under Pennsylvania law arises statutorily and only among joint tortfeasors. See 42 Pa.C.S.A. §§ 8321-8327, 8342. Joint tortfeasors are defined as "two or more persons jointly or severally liable in tort for the same injury to persons or property, whether or not judgment has been recovered against all or some of them." 42 Pa.C.S.A. § 8322.

Under Pennsylvania law, two actors are joint tortfeasors if: (1) they could have guarded against each other's conduct; or (2) their conduct causes a single harm which cannot be apportioned. Rabatin v. Columbus Lines, Inc., 790 F.2d 22, 25 (3d Cir. 1986).

In order to determine whether parties are jointly liable, the following factors must be considered:

the identity of the cause of action against two or more defendants; the existence of a common or like duty; whether the same evidence will support an action against each; the single, indivisible nature of the injury to the plaintiffs; identity of the facts as to the time, place or result; whether the injury is direct and immediate, rather than consequential; responsibility of the defendants for the same injuria as distinguished from damnum.

In re One Meridian Plaza Fire Litigation, supra, 820 F.Supp. at 1497 (internal citations omitted).

An action for contribution is an equitable action based on a common liability to the plaintiff. Walton v. Avco Corporation, 530 Pa. at 581, 610 A.2d at 461. It may be asserted

where: "(1) the parties combined to produce the plaintiff's injury; (2) the parties are each liable in tort to the plaintiff; and (3) a tortfeasor has discharged the common liability by paying more than his pro rata share." U.S. Small Business Administration v. Progress Bank, Civ.A.No. 03-3461, 2004 WL 2980412, at *10 (E.D.Pa. December 22, 2004)(Giles, C.J.)(citing Mattia v. Sears, Roebuck & Company, 366 Pa.Super. 504, 507, 531 A.2d 789, 791 (Pa.Super. 1987)); see also 42 Pa.C.S.A. § 8324(a) and (b).

Analysis

I first consider the merits of Brush Wellman's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). A resolution of the Rule 12(b)(6) defense in favor of Tube Methods necessarily results in satisfaction of Tube Methods' burden under Rule 12(b)(1) because a more stringent standard applies to a Rule 12(b)(6) challenge, and the Rule 12(b)(1) facial challenge does not require consideration of facts beyond the pleadings.⁵

At this stage of the litigation, and under the standards governing both the Rule 12(b)(1) and 12(b)(6) arguments to dismiss, I must construe the facts in favor of Tube Methods as

⁵ For these reasons, I reject the contention of Brush Wellman, noted above, that the court should consider the merits of Brush Wellman's Rule 12(b)(1) argument prior to its 12(b)(6) argument because a jurisdictional attack is a logical prerequisite to an attack on the merits.

the non-movant. Although the construction of facts in favor of non-movant generally entails an assumption that the non-movant does not have liability, in this action I must first determine whether Tube Methods could be liable to plaintiff in the underlying action. Tube Methods' liability to plaintiff is a prerequisite to its ability to maintain its third-party complaint.

At this early juncture it cannot be determined whether Tube Methods will ultimately be held liable for any negligence to plaintiff. However, for purposes of determining whether its claims against Brush Wellman are sufficient, I find that Tube Methods could be found liable for negligence in the underlying action.

Applying the relevant Pennsylvania law, I conclude that Tube Methods may face liability for failing to supply, correct or modify a defective warning under the facts it has alleged. In addition, Tube Methods may face liability for failing to warn to the extent it has "worked on" beryllium-containing products and made them more dangerous for the intended users.

From the allegations contained in the third-party complaint, one may infer that Tube Methods was in the business of processing or handling beryllium or beryllium-containing products. As such, it would have known or had reason to know that beryllium is a dangerous toxic substance, and likely had

reason to know the use for which it was being supplied to the Sellersville facility. Moreover, it can also be inferred that the dangerous condition of the beryllium-containing materials would not have been obvious to the employees of the facility.

There are no allegations regarding warnings in the third-party complaint. No warnings are alleged to have been affixed to the beryllium-containing materials themselves, nor are there averments concerning warnings which were offered orally or in written form from any source. However, Tube Methods is alleged to have "worked on" beryllium-containing materials. Construing this silence regarding warnings in conjunction with the alleged conduct in favor of Tube Methods, one may infer that no warnings were ever provided to any person or entity regarding the beryllium-containing materials processed by Tube Methods. Thus, if there were a duty to warn, such a duty was breached.

Moreover, although Tube Methods contends, for the purpose of underlying liability, it merely "worked on" beryllium-containing products (and may claim its conduct was in the nature of a service and thus not a part of the chain of distribution), these acts can also be construed as placing it in the chain of distribution as a secondary manufacturer. Notwithstanding the fact that the materials were allegedly returned to the Sellersville facility without charge, Tube Methods' alleged

conduct could be construed as involvement in the manufacture and sale of beryllium-containing products.

Accordingly, accepting the allegations of the third-party complaint as true, drawing all reasonable inferences therefrom, and construing them in the light most favorable to the non-movant, I conclude that Tube Methods could be found negligent for failing to provide a warning or failing to provide a sufficient warning on the beryllium-containing material it allegedly processed.

Because Tube Methods could be found negligent for failing to warn users about the dangers of the beryllium-containing products which it "worked on", it can pursue third-party claims against Brush Wellman under fault-shifting and fault-sharing theories of liability. However, as in all claims, it must properly plead each claim individually.

As stated above, Tube Methods may be held liable to plaintiff because it should have known about the danger posed by the beryllium-containing material on which it asserts it worked, had a duty to warn employees of the Sellersville facility of this danger, and breached that duty by not providing a warning.

In such a scenario, the allegations of the third-party complaint and reasonable inferences therefrom support a claim that Tube Methods' conduct can be characterized as passive negligence. Its failure was limited to not discovering or

correcting a defect (presuming it did not know the materials contained a defective warning) or, alternatively, failed to correct a dangerous condition (toxic materials with defective warnings) caused by Brush Wellman's failure to include a warning or an adequate warning.

Thus, Tube Methods' role was limited to distributing beryllium-containing material which was missing a warning that ought to have been supplied by Brush Wellman, the party that originally placed the material into the stream of commerce. Moreover, Tube Methods may not have had any actual knowledge of the danger (though it may have had reason to know of the danger). Additionally, Tube Methods may have had only a limited opportunity to discover or prevent the harm, depending on the nature and extent of the alterations it performed on the beryllium-containing material.

Accordingly, accepting the allegations of the third-party complaint as true and construing them in favor the non-movant, Tube Methods has stated a viable claim against Brush Wellman for indemnification.

Notwithstanding the construction of Tube Methods' liability as secondary or passive, the allegations of the third-party complaint also support an alternative finding that Tube Methods had a greater degree of culpability. The allegations support a determination that Tube Methods had control of the

beryllium-containing materials, and could have guarded against Brush Wellman's failure to warn by providing its own warning.

In altering the size and shape of the beryllium-containing materials, Tube Methods may have made the materials more hazardous. In making the materials more hazardous, Tube Methods may have created an increased duty to provide adequate warnings to potential users of the materials.

Construing the fact of beryllium exposure in Tube Methods' favor, it can be inferred that airborne beryllium exposure is a single harm which cannot be readily apportioned. Moreover, if the parties had a joint duty to warn plaintiff, this harm is the result of both parties' combined negligence. The negligence of both parties would have combined to produce a single injury and each party would face liability for its negligence.

Therefore, if Tube Methods is held jointly and severally liable in negligence for plaintiff's damages and is forced to pay such damages, it has discharged the parties' common liability. In this circumstance, because Brush Wellman is not a defendant in the underlying action, Tube Methods will by necessity pay more than its pro rata share (assuming no other defendants are found liable).

Accordingly, accepting the allegations of the third-party complaint as true and construing them in favor the non-

movant, Tube Methods has stated a viable cause of action against Brush Wellman for contribution.

With regard to Brush Wellman's Rule 12(b)(1) argument in its motion to dismiss, I must consider whether these claims are proper (directly against Brush Wellman), whether the claims are immaterial and made solely for the purpose of obtaining jurisdiction, and whether they are wholly insubstantial and frivolous. Recognizing that these overlapping considerations are somewhat circular, I synthesize this analysis by focusing on the viability and basis of Tube Methods' claims.

If Tube Methods has properly asserted claims for indemnity and contribution against Brush Wellman, those claims are direct, and supplemental jurisdiction applies. Although the burden shifts from Brush Wellman to Tube Methods for purposes of a Rule 12(b)(1) motion, Tube Methods satisfies its burden to show subject matter jurisdiction by demonstrating that it has stated viable claims for relief.

Accepting the allegations of the third-party complaint as true and construing them in Tube Methods' favor for the purpose the within Rule 12(b)(1) motion, Tube Methods' claims for both indemnification and contribution establish a direct line of liability from Brush Wellman to Tube Methods. These claims are not premised on Brush Wellman's liability to plaintiff. The claims state viable causes of action against Brush Wellman which

will be essentially "triggered" if Tube Methods is ultimately found liable to plaintiff for negligence. Therefore, these claims are properly before this court because there is supplemental subject matter jurisdiction.

Moreover, for the same reasons that the indemnification and contribution claims survive scrutiny under Rule 12(b)(6), I conclude that Tube Methods' claims for indemnification and contribution against Brush Wellman are not immaterial and made solely for the purpose of obtaining jurisdiction, nor are they wholly insubstantial and frivolous. Accordingly, Brush Wellman's motion to dismiss pursuant to Rule 12(b)(1) is without merit.

CONCLUSION

For all the foregoing reasons I deny the Motion of Defendant Brush Wellman Inc. to Dismiss Amended Third-Party Complaint and I retain jurisdiction over Tube Methods, Inc.'s Amended Third-Party Complaint.