

A fumigation company was hired to eliminate pests in one of two buildings in a condominium complex that shared a common wall. The owners of the complex told the fumigation company that the common wall separating the infested building from the uninfested building was an impenetrable fire wall. The fumigation company did its own thorough inspection and determined that the buildings were indeed completely separated by the wall. Residents of the condominium units in the building that was to be sprayed were told to evacuate, but the residents of the uninfested building were told that they could remain while the other building was treated.

During and shortly after the fumigation, in which a highly toxic chemical was used, many residents of the uninfested building became sick. It was determined that their illnesses were caused by the fumigation chemical.

In fact, there was a hole in the fire wall separating the two buildings, but because it could only be observed from a specific position in the crawl space underneath the floor of the uninfested building, it had not been discovered by either the fumigation company or any previous building inspector.

Are the residents of the uninfested building likely to prevail in a tort action against the fumigation company?

- A. No, because the condominium complex owners were responsible for accurately conveying the condition of their buildings.
- B. No, because the fumigation company exercised a high level of care.
- C. Yes, because the fumigation company can be held strictly liable for its activity.
- D. Yes, because the fumigation company put a dangerous product into the stream of commerce.

Explanation:

Abnormally dangerous activity

An activity is abnormally dangerous when:

it is uncommon in the community *and*

it presents a foreseeable & highly significant risk of physical harm that cannot be mitigated by reasonable care

A defendant is **strictly liable** (liable regardless of fault) for the plaintiff's harm caused by an **abnormally dangerous activity**. An activity is abnormally dangerous when it (1) is **uncommon** in the community and (2) creates a **foreseeable and highly significant risk** of physical harm to the plaintiff that **cannot be mitigated by reasonable care**.

Here, the use of highly toxic chemicals to fumigate a building (uncommon activity in the community) is an abnormally dangerous activity since it is highly probable that persons exposed to the chemicals will become sick (foreseeable and significant risk of harm). And since several residents became sick after their exposure to the chemicals, the fumigation company will likely be strictly liable for their harm.

(Choice A) The significant risk of harm posed by an abnormally dangerous activity cannot be mitigated by *anyone's* use of reasonable care. Therefore, the condominium owners' failure to exercise reasonable care (by not accurately conveying the condition of their buildings) will not extinguish the fumigation company's strict liability.

(Choice B) A defendant engaged in an abnormally dangerous activity is strictly liable for the plaintiff's harm regardless of the level of care used in carrying out the activity. Therefore, the fumigation company's exercise of a high level of care does not negate its strict liability to the sick residents.

(Choice D) A defendant may be strictly liable for distributing a defective or dangerous product into the stream of commerce, but that is irrelevant here since the fumigation company provided a service—not a product.

Educational objective:

A defendant is strictly liable for harm caused by an abnormally dangerous activity—an uncommon activity that poses a foreseeable and highly significant risk of physical harm that cannot be mitigated by reasonable care. Therefore, the use of reasonable care is no defense.

References

Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 20 (Am. Law Inst. 2010) (abnormally dangerous activity).

Old Island Fumigation, Inc. v. Barbee, 604 So. 2d 1246 (Fla. Dist. Ct. App. 1992).

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