

Putative Class Action Could Require That Gas Retailer Provide Gas Detectors



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A recent class action lawsuit, filed on April 11, 2019, in Dallas, Texas, could ultimately require a Texas-based natural gas supplier to provide all of its customers with gas detectors so that its customers can be warned in the event of a gas leak. The suit is styled Robert Russell McElyea, Individually and on Behalf of All Others Similarly Situated in Texas vs. Atmos Energy Corporation, Dallas County, Texas, Case No. CC-19-02170-C. **The alleged events that precipitated the filing are sometimes also found in propane related accidents, so this case bears watching.**

According to the complaint, Robert McElyea was severely injured on May 14, 2017, when a natural gas explosion occurred at the home of his friend, Raul Pedroza. The two friends were preparing lunch, and when Pedroza attempted to turn on the stove, the explosion occurred. Pedroza suffered burns over 70% of his body and passed away 15 months later; McElyea experienced severe burn injuries but survived. The complaint alleges that Atmos provides gas to millions of Texas households and that Atmos knows “odor fade is a major problem in Texas.” Despite that knowledge, the complaint alleges that Atmos’s consumer warning program focuses on what to do if one smells gas but does nothing to warn about odor fade and the possibility of the presence of a gas leak that a consumer cannot smell. The complaint details a number of other natural gas accidents where no one smelled gas before an explosion.

In his suit, McElyea does not seek monetary damages. Instead, he asks the Court to provide nonmonetary relief, including requiring Atmos to “design and implement an effective public safety awareness campaign” that warns about odor fade, and he asks the Court to order Atmos “to provide its customers with natural gas detection devices so that its customers will be warned in the event natural gas is unknowingly leaking in their home or property.”

It is unclear how any Court could fashion an order providing

the requested relief. How does anyone determine whether a safety campaign is “effective”? How is effectiveness measured, and who decides whether any given program is “effective” enough? The request concerning gas detectors is also problematic, because in order to ensure that customers “will be warned” in the event of a gas leak, detectors would have to be 100% effective and accurate. That isn’t always the case.

There are a number of reasons why a gas detector may not provide a reliable warning of a gas leak. For example, if the detector is not UL listed, then it hasn’t been tested against nationally recognized safety standards and may not be as accurate or reliable as other brands. PERC warnings include a recommendation that consumers consider installing UL listed gas detectors as an additional measure of security. However, failure to follow the manufacturer’s installation instructions may prevent the detector from operating as intended. Also, a detector placed in one location inside a residence may or may not detect a leak at a remote location or may not be audible in certain areas inside or outside a structure. Further, some alarms require periodic calibrations, which if done incorrectly might result in a failure to detect explosive levels of gas. Other detectors simply wear out over time and must be replaced on a regular basis. Thus, even where a gas detector is present, the failure to properly install, maintain, or replace the detector may still lead to an accident.

The possibility that a gas detector may not operate properly is not merely theoretical. One example of a gas detector failure being a fire’s contributing cause is *Liberty Mutual Fire Ins. Co. v. Fluor Enterprise, Inc.*, 853 F.Supp.2d 607 (E.D. La. 2012). In that case, a UL listed gas detector was installed close to floor level near a gas stove. The detector was located a couple of feet below the gas burners. Two people were subsequently injured in an explosion that occurred after they entered the home, smelled gas, and one of them turned the stove’s ignitor knob in a mistaken attempt to shut off the gas. Despite evidence that one of the gas burners had been on for a number of days, the gas detector never sounded prior to the explosion. The court noted that the detector’s manual recognized a difference between a gas leak from a line and gas escaping from an open burner. In the latter case,

the gas is already mixed with air when it is released and is therefore not as heavy as the unmixed gas from a leak, leading to a combustible mixture close to the cooktop but not at the detector's lower location. The manual went on to say that "eventually the gas will reach the detector's location and be detected." However, in this case, post-accident testing confirmed that, even when exposed to a gas concentration that should have been sufficient to produce an alarm, the detector failed to operate.

The Fluor case underscores that gas detectors can and do malfunction, and that even one that is working properly will alarm only if gas is present in sufficient concentration at the detector. What's true in real estate is also true about gas detectors: Location, Location, Location!

Even if detectors were 100% "effective," cases from across the country suggest the McElyea case faces other significant legal hurdles. Besides the substantial obstacles in establishing the elements of class action certification, many courts have rejected the notion that a retailer or others in the stream of distribution have a duty to advise about the availability of gas detectors, much less any duty to supply them. In *Elliott v. El Paso Corp.*, 181 So.3d 263 (Miss. 2015), the Mississippi Supreme Court held that a natural gas pipeline owner had no duty to warn consumers about the use of gas detectors. The court in *Moore v. Centerpoint Energy Resources Corp.*, Case No. A14-1751 (Minn. Ct. App. 2015), held that a product manufacturer was not required to incorporate a gas detector into its gas stove. According to the court in *Stoffel v. Thermogas*, 998 F. Supp. 1021 (N.D. Ia. 1997), an upstream gas supplier had no duty to warn about gas detectors because it had provided warnings about odor fade to an intermediary who had taken reasonable steps to advise the end user of odor fade; therefore, the general rule that there is no duty to advise about available means for amelioration of obvious dangers applied. There are other cases with

similar holdings, all of which suggest that the majority position is that there generally is no duty to advise about the availability of gas detectors. If no such duty exists, it would be a stretch to say there is a duty to actually supply detectors. Whether the court in Dallas County agrees remains to be seen. Stay tuned.

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