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## STATUTE OF LIMITATIONS

### Texas Supreme Court Tosses Untimely Damages Claims, Leaves Open Possibility of Injunctive Relief

By Toren M. Elsen

Highlighting the importance of proving a factual timeline in a statute of limitations analysis, the Texas Supreme Court held that a cattle ranch owners' claims related to alleged contamination from long-dormant oil and gas operations were barred by Texas's statute of limitations. See [ExxonMobil v. Lazy R Ranch, LP](#), No. 15-0270 (Tex. Feb. 24, 2017). However, the court did not reach the issue of whether a plaintiff can obtain injunctive relief, e.g. for remediation, that costs more than the diminution of property value.

The Lazy R Ranch is a nearly 20,000-acre ranch in western Texas where the defendant ExxonMobil conducted oil and gas operations for almost 60 years. After the defendant sold the operation in 2008, ranch owners hired an environmental manager to investigate potential contamination from the oil and gas operations. Plaintiffs filed suit in 2009 alleging contamination in four specific areas that had been under the defendant's control, totaling a little over one acre in size. Plaintiffs claimed it would cost \$6.3 million to remediate the contamination. Defendant moved for summary judgment. At a hearing on the motion, Defendant argued that the statute of limitations barred the ranch's claims and, even if the claims could go forward, that the ranch was not entitled to remediation damages in excess of the diminution of the value of the property. The trial court granted summary judgment but did not specify why. Subsequently, the court of appeals reversed and remanded. Defendant appealed this decision to the Texas Supreme Court.

On appeal, the Texas Supreme Court reasoned that because the defendant abandoned its oil and gas operations at two of the four sites long before the limitations period, there was no evidence that contamination could have occurred during the limitations period. The statute of limitations, therefore, barred Plaintiffs' claims for these two sites. However, the court found that Plaintiffs' claims at the other two sites, which were still in operation during the limitations period, were not barred. In dismissing claims at the two older sites, the court rejected Plaintiffs' argument that the discovery rule should have tolled the limitations period. Under Texas law, the "discovery rule applies when a type of injury is objectively verifiable and inherently undiscoverable within the limitations period." *ExxonMobil*, slip op. at 7-8. However, the court found that there was nothing "inherently undiscoverable" about the contamination.

The court left unaddressed the important issue of whether the limit on monetary damages under Texas law also applies to injunctive relief. During the trial court hearing on Defendant's summary judgment motion, Defendant also argued Plaintiffs were not entitled to damages that exceeded the difference in value before and after the alleged contamination. Plaintiffs originally sued for \$6.3 million, the estimated cost of remediation. But they amended their complaint to instead request an injunction ordering remediation instead of damages to pay for remediation. This raised the question of whether a claim for injunctive relief is bound by the same value-loss limitation as a claim for damages. However, the court found the issue was not properly before it and therefore declined to address it. This issue is likely to come up in proceedings related to Plaintiffs' remaining claims and future contaminated property litigation.

### Fourth Circuit: Plaintiff Cannot Rely on CERCLA Discovery Rule to Save Tort Claims

By Dacia M. Thompson

Declining to apply CERCLA's discovery rule to preempt a state statute of limitations, the U.S. Court of Appeals for the Fourth Circuit upheld a district court decision to dismiss untimely state tort claims stemming from dewatering operations at a Virginia coal mine. See [Blankenship v. Consolidation Coal Co.](#), No. 15-02480 (4th Cir. Mar. 9, 2017).

The case arose from a dewatering operation that began in 1994, when Defendant coal mine operators received regulatory approval to pump water from their mine into an exhausted mine underneath Plaintiffs' nearby property. Nearly 20 years later, Plaintiffs sued, alleging that the dewatering operation damaged their property interests in the exhausted mine and unjustly enriched Defendants by storing the water without paying Plaintiffs. Plaintiffs only asserted Virginia common law claims, seeking damages for trespass and unjust enrichment.

Typically, the state statute of limitations applies to state law claims, but the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA, creates an exception to state statutes of limitation where there is a CERCLA cause of action available. In such cases, the state statute of limitations does not begin to run until the plaintiff knew or reasonably should have known that the contaminant caused or contributed to the property damages. See 42 U.S.C. §§ 9658(a)(1), 9658(b)(4)(A).

Here, Plaintiffs' alleged injuries occurred in 1994, well beyond Virginia's five-year statute of limitations, so Plaintiffs argued that CERCLA's discovery rule should toll the statute. The Fourth Circuit rejected that argument. The court noted that the CERCLA exception only applies where a CERCLA cause of action is available. The court held Plaintiffs had no CERCLA cause of action because Plaintiffs did not make any claims for recovery of clean-up costs, and the releases at issue were properly permitted. To hold otherwise, the court reasoned, would expand the stated scope of CERCLA and alter the traditional relationship between state and federal law.

Furthermore, the court explained, even if the CERCLA discovery rule were to apply, the claims were still filed too late because Plaintiffs should have been aware of the damage to their interests long ago. The court noted a number of public activities that gave Plaintiffs constructive notice of Defendants' dewatering, including four published notices in the local newspaper, the permit application filed in the local courthouse, at least seven articles in local newspapers discussing the dewatering operation, and the open construction of an above-ground pipeline.

### **New York Lead Paint Suit Barred by Statute of Limitations**

*By Toren M. Elsen*

Illustrating the limits of New York's discovery rule, a New York appeals court dismissed claims alleging injuries from lead paint exposure as barred by the statute of limitations. See [Vasilatos v. Dzamba](#), No. 523286 (N.Y. App. Div., Mar. 2, 2017).

As a child in the late 1980s and early 1990s, the plaintiff Violet Vasilatos lived in or often visited apartments owned by Defendants. Blood tests in 1990 showed Plaintiff had elevated blood lead levels. She filed a personal injury suit in 2014 at age 28, alleging she was exposed to and ingested lead paint particles at Defendants' properties, which caused cognitive difficulties in school. Defendants moved to dismiss the complaint as untimely. The trial court denied the motion and Defendants appealed.

The appeals court evaluated Plaintiff's claim under New York's discovery rule. New York has a three-year statute of limitations for personal injury actions, but the statute is tolled until a plaintiff turns eighteen. When the claim is based on a latent injury caused by exposure to a toxic substance, the statute can be further tolled by the discovery rule, or until the date "through the exercise of reasonable diligence such injury should have been discovered by the plaintiff." *Vasilatos*, slip op. at 3.

As Plaintiff turned eighteen in 2004, the statute of limitations was only tolled until 2007. Further the court found that she reasonably should have known of her injury based on blood tests conducted in 1990 combined with the cognitive difficulty she experienced throughout her school career. Under New York's discovery rule in toxic tort cases, the court held, "the statute runs from the date the condition or symptom is discovered or reasonably should have been discovered, not the discovery of the specific cause of the condition or symptom." *Id.* at 4. Therefore Plaintiff's claims were untimely.

## **EXPERTS**

### **Federal Court Allows Expert Testimony on Health Risks Despite Lack of Personal Injury Claims**

*By Dacia M. Thompson*

Underscoring the importance of expert testimony regarding health risks in toxic tort cases involving potential exposure issues, a Mississippi federal judge allowed expert testimony on health risks posed by alleged contamination even though the plaintiffs had not alleged personal injuries. See [Hollingsworth v. Hercules, Inc.](#), 2:14-CV-113-KS-MTP (S.D. Miss. Jan. 3, 2017).

Plaintiffs owned property near a former chemical plant that Defendant operated from the 1920s until about 2009. The landowners asserted counts of negligence, gross negligence, nuisance, and trespass, and claimed that they suffered property damage, loss of income, and emotional distress due to Defendant's allegedly improper disposal of hazardous waste products at the chemical plant. Plaintiffs did not assert a personal injury claim.

Plaintiffs moved to exclude opinions from two defense experts on health risks from exposure to various chemicals. Plaintiffs argued that because they had not asserted a personal injury claim, expert testimony about health risks was not relevant to the case. The court disagreed and allowed the testimony, finding the experts' opinions were relevant to Plaintiffs' damages claims, including claims of lost rental income and decreased property values. Implicit in the court's decision is that the merit and value of Plaintiffs' damage claims were tied to the health risks posed by the alleged contamination, even though, as the court acknowledged, health effects were not relevant in evaluating Defendant's liability.

## NUISANCE

### Illinois Appellate Court Allows Rare "Prospective Nuisance" Claim to Proceed Against Mining Facility

By Zaheer Tajani

Addressing the relatively uncommon "prospective nuisance" claim, an Illinois appeals court found a group of landowners pleaded sufficient facts to show that a new sand mining operation would result in a nuisance if constructed. See [Whipple v. Vill. of N. Utica](#), 3-15-0547 (Ill. App. Ct., Mar. 9, 2017). The court reversed the trial court's decision and found that the landowners could proceed with a claim to enjoin construction of the facility

The Village of North Utica, Illinois, over the objections of nearby landowners, approved the annexation and rezoning of three agricultural land tracts to allow operation of a proposed silica mine. Plaintiffs filed suit seeking an injunction against the mine facility alleging, among other things, prospective nuisance. In other words, Plaintiffs alleged that, if constructed and operated as intended, the mine would constitute a nuisance. The trial court dismissed all of Plaintiffs' claims.

On appeal, the court held that the landowners alleged sufficient facts to state a claim for private nuisance. Relying on the mining company's own statements, Plaintiffs alleged that the new mining project would result in continuous light and noise from blasting, increased road traffic, effluent pollution in a nearby creek, and dust pollution in the air. The court found that factual allegations of such particularized harm to nearby property supported a claim for private nuisance and reinstated the claim for an injunction.

## NEGLIGENCE

### Fifth Circuit Tosses Coastal Damage Tort Lawsuit Against Oil and Gas Companies

By Shengzhi Wang

Illustrating the challenges in using Louisiana tort suits to address large-scale environmental issues, the U.S. Court of Appeals for the Fifth Circuit dismissed claims seeking relief for alleged coastal damage from oil and gas operations off the Gulf Coast. See [Bd. Comm'r Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co.](#), No. 15-30162 (5th Cir. Mar. 3, 2017).

The plaintiff, a Louisiana levee board charged with regional coordination of flood control (the "Board"), brought negligence, strict liability, and nuisance claims, among others, against energy companies in Louisiana state court. Plaintiff alleged Defendants' canal dredging and other oil and gas exploration and production activities caused land loss, erosion, and submergence in the coastal buffer zone. This, Plaintiff contended, increased storm surge risk on the Louisiana coast and caused the Board to incur costs to restore the coastal land and mitigate flooding risk. After the case was removed to federal court, the trial court granted a defense motion to dismiss those claims, and the Board appealed.

On appeal, the Fifth Circuit upheld the trial court's decision to dismiss Plaintiff's negligence claim because the Board could not establish that Defendants owed it a duty of care. The Board argued the federal River and Harbors Act and the Clean Water Act established such a duty. The court disagreed and found that both the River and Harbors Act and the Clean Water Act protect the federal government's interest, not the Board's; and that neither the Coastal Zone Management Act nor other state regulations create a private cause of action. The court also upheld the trial court's dismissal of the Board's natural servitude of drain and nuisance claims, because the Board's complaint lacked "specificity." The court found the Board's pleading did little more than restate the legal elements of those claims; the Board did not allege facts sufficient to support those claims. As a result, the court affirmed the trial court's decision on the motion to dismiss.

## *FEDERAL ABSTENTION*

### **Federal District Court Declines to Declare that CERCLA Bars Pending State Law Tort Action**

*By Shengzhi Wang*

Highlighting the discretion a federal court may exercise to allow a state court to hear state tort claims, a federal district court in Montana dismissed a former smelter operator's claim for injunctive relief against plaintiffs where a related but separate tort action was pending in state court. See [\*Atl. Richfield Co. v. Christian\*](#), 15-cv-00083 (D. Mont. Feb. 15, 2017). Even though the federal court acknowledged it had diversity jurisdiction, it found the state court was better situated to efficiently handle the matter.

The dispute came out of arsenic and lead emissions from a former smelter operated by Atlantic Richfield Company (ARCO) in Anaconda, Montana. After the smelter was closed and the surrounding area was designated as a Superfund site in the 1980s, the Environmental Protection Agency selected, and ARCO implemented, a cleanup plan for the site pursuant to the Comprehensive Environmental Restoration, Compensation, and Liability Act (CERCLA).

Owners of property within the Superfund site boundaries sued ARCO in Montana state court in 2008, alleging negligence, nuisance, trespass, constructive fraud, unjust enrichment, and wrongful occupation of property. Among other damages, the landowners sought compensation for restoration of natural resource damages (NRD). ARCO moved for summary judgment, arguing that CERCLA barred the landowners' restoration damage claims because the landowners' proposed plan was inconsistent with EPA's selected plan. Then in 2015, while ARCO's motion was pending in state court, ARCO sued the landowners in Montana federal district court, requesting declaratory relief based on the same argument that CERCLA barred the landowners' tort claims for restoration damages. The landowners then moved to dismiss the federal case for lack of subject matter jurisdiction.

The federal court held that it had diversity jurisdiction over the case. But the court declined to exercise the jurisdiction based on the abstention doctrine because ARCO's affirmative arguments in the federal case were virtually identical to its summary judgment arguments in state court. The court held that at least four factors weighed in favor of declining jurisdiction: that ARCO filed the federal case long after the commencement of the state court action, raising a forum shopping concern; that the same argument has been litigated in the state court; that prosecution in the federal court may lead to federal-state entanglement; and that the federal case would only resolve the damages issue, not all aspects of the litigation. The court therefore granted the landowners' motion to dismiss ARCO's federal court action.

## PRODUCTS LIABILITY

### Federal Court Dismisses Some of Seattle's PCB Tort Claims

By Zaheer Tajani

In a blow to the efforts of municipal plaintiffs to pursue environmental damages through product liability theories, a Washington federal court granted Monsanto's motion to dismiss Seattle's design defect and failure to warn claims for damages to the city's waterways and lands caused by polychlorinated biphenyls (PCBs). See [\*City of Seattle v. Monsanto Co.\*](#), 16-cv-00107 (W.D. Wash. Feb. 22, 2017). The court, however, allowed the city's negligence and public nuisance claims to proceed.

Seattle brought suit against Monsanto in January 2016 based on Monsanto's manufacture, advertisement and sale of PCBs from 1935 to 1979. The city alleged public nuisance, defective design, failure to warn, negligence, and equitable indemnity based on the alleged harm to Seattle's land and the alleged cost the city incurred in studying and remediating PCB contamination on its property.

The court dismissed Seattle's product liability claims under both the defective design and failure to warn theories for lack of standing. Such claims could only be brought by a user or consumer, the court held, and Seattle is neither user nor consumer. The court also rejected Seattle's equitable indemnity claims, reasoning that while Seattle alleged that some contamination resulted from Monsanto's actions, Monsanto could not fairly be forced to indemnify Seattle for all damages because other defendants might be responsible for portions of the contamination.

The court allowed other claims to go forward. It upheld a negligence claim based on allegations that Monsanto continued to manufacture and sell PCBs with its knowledge of toxicity concerns regarding the chemical. The court also upheld Seattle's novel public nuisance claim, noting that "Seattle does not need to own the contaminated water to bring a public nuisance claim" because "Seattle is injured when it suffers financial loss due to toxic contamination," which in this case resulted from chemical deposition upon Seattle's land. Seattle properly pleaded causation by alleging that Monsanto knew that PCBs would end up in the environment.