

TOXIC TORT & PRODUCT LIABILITY QUARTERLY



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I. CLASS ACTIONS

Louisiana High Court Denies Class Certification For Low-Level Exposures

Striking a blow against the certification of class actions in low-level exposure cases, the Louisiana Supreme Court denied class certification in a mass tort action, holding that the plaintiffs failed to meet the predominance requirement. *Alexander v. Norfolk S. Corp.*, No. 11-C-2793 (La. Mar. 9, 2012), available at www.bdlaw.com/assets/attachments/Alexander.pdf. Reversing both the trial and appellate courts, the Supreme Court determined that the lower courts failed to properly account for toxicological evidence that established that trying the case as a class would “degenerate into a series of individual trials.” *Alexander*, slip op. at 3-4.

In 2001, ethyl acrylic fumes leaked from two parked railroad tank cars. *Id.* at 1. Approximately 20 people in the surrounding area were treated for exposure to the fumes, and hundreds of others complained about eye, nose, throat and respiratory irritations, in addition to the noxious smell. Plaintiffs filed a class action against defendants for their injuries. *Id.* at 1-2.

The district court certified the class. The district court found that common issues of law and fact existed because the resolution of whether the chemicals released were capable of and did in fact cause the plaintiffs’ alleged injuries, and whether defendants’ negligence could have caused damage to the class members, would affect a significant number of the plaintiffs. *Id.* at 3.

On appeal, the Supreme Court held that the lower court failed to take into account undisputed evidence by plaintiffs’ toxicologist. *Id.* The toxicologist testified that injuries from exposure to low levels of ethyl acrylate are extremely rare. In addition, the toxicologist testified that “determining whether any particular person was within this microcosm of the population would require an entirely individualized understanding of each person’s health, medical history, records, and other variables impacting exposure.” *Id.* The court concluded that, based on this testimony, each member of the proposed class would have to offer “different facts to establish liability and damages. *Id.* at 3-4.

II. EXPERTS

New York Appellate Court Finds Plaintiffs in Toxic Mold Case Could Satisfy Frye Standard

Giving a potential boost to plaintiffs claiming injury due to toxic mold exposure, a New York appellate court held that the plaintiff-appellant’s toxic mold claims may meet the Frye standard of scientific reliability. *Cornell v. 360 W. 51st St. Realty*, No. 01643 (N.Y. App. Div. Mar. 6, 2012), available at http://www.nycourts.gov/reporter/3dseries/2012/2012_01643.htm. The appellate court found that the lower court had incorrectly interpreted the appellate court’s earlier decision in *Fraser v. 301-52 Townhouse Corp.*, 57 A.D.3d 416 (2008), when it held that the expert testimony put forth by the tenant was inadmissible and that the tenant did not meet her burden to quantify her exposure level to the mold.

The tenant had lived in a ground-floor New York City apartment since 1997. *Cornell*, slip op. at 3. After the basement of the building flooded in 2002 and 2003, the landlord renovated the basement. Shortly after renovations began, the tenant claimed to have experienced “dizziness, chest tightness, congestion, shortness of breath, a rash, swollen eyes, and a metallic taste in her mouth” as a result of toxic mold disturbed by the renovations. *Id.* The tenant withheld rent on this basis. The landlord commenced an action for past due rent and the tenant asserted counterclaims for, *inter alia*, constructive eviction and breach of warranty of habitability. *Id.*

After the New York City Civil Court found in favor of the tenant, the New York County

Supreme Court granted summary judgment for the landlord. *Id.* at 6. The Supreme Court held that plaintiff's scientific theory of causation was the same theory rejected by the Appellate Division in *Fraser*, thus mandating the dismissal of the plaintiff's claim because it failed to meet the *Frye* standard for reliability. The court also found that plaintiff's proof was not strong enough to constitute a causal relationship. *Id.* at 6-7.

On appeal, the Appellate Division reversed the lower court's holding, stating that its decision in *Fraser* did not require dismissal of all personal injury claims based on exposure to mold. The Appellate Division held that plaintiff's expert testimony has "some support in existing data, studies and literature, namely, studies that have found a statistically significant relationship between mold and various respiratory maladies." *Id.* at 2-3. The court cautioned that a *Frye* analysis should not focus on "how widespread a theory's acceptance is, but should instead consider whether a reasonable quantum of legitimate support exists in the literature for an expert's views." *Id.* (quoting *Marsh v Smyth*, 12 A.D.3d 307 (2004) (Saxe, J., concurring)). The Appellate Division also rejected the view that a party alleging exposure to toxic mold has the burden of quantifying the level of that exposure, reasoning that "it is generally difficult or impossible to quantify a plaintiff's exposure to a toxin." *Id.* at 7.

III. PRODUCTS LIABILITY

Louisiana Appellate Court Finds Plaintiffs Need Not Own Property at Issue to Recover Damages

In a decision that may expand the duty owed by manufacturers and sellers in products liability actions, a Louisiana state appeals court held that buyers and processors of crawfish do not have to show ownership of the damaged property – in this case, crawfish – to maintain a viable products liability claim for economic loss. *Phillips v. G&H Seed Co.*, No. 10-1405 (La. Ct. App. Mar. 7, 2012), available at www.bdlaw.com/assets/attachments/Craw.pdf. The Louisiana Court of Appeal, Third Circuit, sitting en banc at the direction of the State Supreme Court, reversed a trial court's summary judgment ruling that had dismissed the claims of crawfish buyers and processors because they could not establish a proprietary interest in the crawfish. *Phillips*, slip op. at 1-2.

Plaintiffs are several dozen buyers, resellers and/or processors of crawfish in Louisiana who brought actions against manufacturers and sellers of an insecticide and an insecticide-coated rice seed. Plaintiffs allege that the insecticide-coated rice seed killed or sterilized a portion of the crawfish population in southern Louisiana in the late 1990s. *Id.* at 2. One defendant moved to dismiss plaintiffs' claims arguing that Louisiana product defect law requires claimants to have a proprietary interest in the property allegedly damaged by the product at issue. It was undisputed that the *Phillips* plaintiffs had no ownership interest in the crawfish at issue. *Id.*

The trial court denied defendant's motion, rejecting a "*per se* exclusionary/proprietary interest rule" articulated by the U.S. Supreme Court in favor of the policy driven duty/risk analysis espoused in more recent Louisiana Supreme Court precedent. *Id.* at 3-4. The duty-risk analysis requires a court to determine whether a particular risk falls within the scope of the duty. *Id.* at 9. Applying that analysis, the trial court concluded that the law extended a remedy to the buyer/processor plaintiffs. *Id.* at 4. After an initial trial, the court issued a directed verdict to plaintiffs on the scope of duty, finding that crawfish buyers and processors are "inextricably interwoven and symbiotic in their relationships" with the farmers who own the crawfish. *Id.*

On appeal, a five-judge panel found the *per se* proprietary interest rule applied and reversed the trial court's directed verdict. *Id.* On remand, the trial court granted the motions and dismissed plaintiffs' claims for lack of a proprietary interest. *Id.* at 7.

In a subsequent review of the dismissal, the *en banc* appellate court concluded that the five-judge

panel's earlier decision in the case improperly required plaintiffs to prove a proprietary interest to recover economic damages. Following state Supreme Court precedent, the *en banc* court held that Louisiana law abandoned the *per se* proprietary interest rule in favor of a duty-risk analysis for products liability cases. *Id.* at 14. The court held that recovery is available for a limited universe of persons “with a special interest in or relationship with the damaged property, whose damages were a particularly foreseeable result of the tortious conduct of the defendant.” *Id.* The court remanded the case back to the trial court to perform a duty-risk analysis to determine the scope and extent of defendants’ duties in the case. *Id.*

California Appellate Court Rejects Tort Claims Against Component Part Suppliers

In a decision that may help solidify toxic tort defenses for suppliers and manufacturers of intermediate goods, a California Appeals Court ruled that a metal worker could not hold component part suppliers liable for negligence or strict liability as a result of injuries allegedly sustained by his use of or exposure to their metal products. *Maxton v. Western States Metals, et al.*, Slip Op. B227000 (Cal. Ct. App. Feb. 1, 2012), available at www.bdlaw.com/assets/attachments/Maxton.pdf. In dismissing plaintiff's claims, the court found that no “extraordinary circumstances” existed—such as the presence of contaminated or inherently dangerous raw materials—and therefore the defendant suppliers could not be held liable.

From 1975 to 2007, Plaintiff Maxton was employed by a manufacturer where he worked with and around the metal products manufactured and supplied by defendants. *Maxton*, slip op. at 4. In his complaint, Plaintiff alleged that through the intended use of the metal products, he was exposed to toxic fumes and dusts released from the products. *Id.* Maxton further alleged that he developed interstitial pulmonary fibrosis as a result of the “inherently hazardous” metal products. *Id.* Maxton also claimed that defendants had fraudulently concealed and failed to disclose the “toxic hazards” of their products. *Id.* at 5.

Relying on the component parts doctrine, the appellate court found that typically a supplier of product components is not liable under negligence or strict liability because it is not involved in developing the end product and the buyer-manufacturer is in a better position to “guarantee the safety of the manufacturing process and the end product.” *Id.* at 8. Exceptions to the doctrine include when the raw materials or parts at issue are contaminated, defective or inherently dangerous. *Id.* at 9.

The court held that none of the exceptions applied. Noting that only asbestos cases had extended liability to suppliers based on inherently dangerous parts, the court concluded that metal products were not analogous to raw asbestos because they were not dangerous when they left defendants’ control. *Id.* at 12. Therefore, under the component parts doctrine, defendants did not owe a duty, nor could they be held strictly liable, to plaintiff.

IV. LATENT INJURIES

Pennsylvania High Court Allows Two Actions For Distinct Malignant Diseases Related to Same Exposure

Expanding the application of Pennsylvania’s “two-disease” rule, the Supreme Court of Pennsylvania concluded that Plaintiff could bring separate lawsuits for more than one malignant disease that allegedly resulted from the same asbestos exposure. *Daley v. A.W. Chesteron, Inc.* No. 27 EAP 2010 (Pa. Feb. 21, 2012), available at www.bdlaw.com/assets/attachments/Daley.pdf. In affirming the Superior Court’s decision, which reversed the trial court’s grant of summary judgment to defendants, the court broadened the scope of the Commonwealth’s “separate disease

rule” that had allowed a plaintiff to file one suit for a nonmalignant illness and one suit for a malignant one stemming from the same exposure. *Daley*, slip op. at 23.

Plaintiff Herbert Daley filed a personal injury action seeking damages for work-related pulmonary asbestosis and lung cancer in 1990. *Id.* at 2. He settled his claims with defendants in 1994. Eleven years later, in 2005, Daley was diagnosed with malignant pleural mesothelioma. Plaintiff brought an action against defendants U.S. Supply, Duro-Dyne, A.W. Chesterton along with eleven other defendants. *Id.* at 3. Plaintiff alleged that his disease was caused by the same asbestos exposure that had resulted in his lung cancer and pulmonary asbestosis in 1989.

Defendants moved for summary judgment, arguing that Pennsylvania’s two-disease rule precluded plaintiff from two separate actions for malignant diseases related to asbestos exposure. The trial court granted defendant’s motion concluding that the rule “permits a plaintiff to bring only *one* cause of action for nonmalignant diseases caused by asbestos exposure and then only *one* subsequent action for malignant diseases caused by that same exposure.” *Id.* at 4 (emphasis in original). The Superior Court reversed and defendants appealed to the state Supreme Court.

The Supreme Court agreed that the trial court had misapplied the law by adopting an “unduly restrictive” interpretation of the two-disease rule. *Id.* The rule was originally developed to address problems such as anticipatory lawsuits, protracted litigation, evidentiary hurdles and speculative damages, which often resulted when a plaintiff was required to file one action for all potential injuries related to the asbestos exposure. *Id.* at 21. Requiring a party to seek damages for a potential future diagnosis of mesothelioma, which can have a latency period approximately 30 years longer than lung cancers and asbestosis, would raise the same problems the two-disease rule was intended to address. *Id.* at 22. The court concluded that a “plaintiff who is diagnosed with a malignant disease, and later diagnosed with a separate and distinct malignant disease may benefit from the separate disease rule.” *Id.* at 23.

V. FEDERAL TORT CLAIMS ACT

First Circuit Dismisses Lawsuit by Plaintiffs Over Pollution from Navy Training Exercises

Deferring to the federal government’s discretion in matters of military policy, the U.S. Court of Appeals for the First Circuit dismissed tort claims brought by several thousand residents of the Puerto Rican island of Vieques who claimed they were harmed by hazardous and toxic waste emitted by the U.S. Navy during the several decades that it conducted training exercises on the island. *Sanchez v. United States*, No. 10-1648 (1st Cir. Feb. 14, 2012), *available at* www.bdlaw.com/assets/attachments/Sanchez.pdf. The First Circuit concluded that the government’s decision not to warn residents about pollution relating to the Navy’s activities was driven by “policy-related judgments,” and was therefore covered by the discretionary function exception to the Federal Tort Claims Act’s (“FTCA”) waiver of sovereign immunity. *Sanchez*, slip op. at 37-38.

The Navy’s operations on the island included live-munitions training (including with depleted uranium bullets) and other combat-simulation exercises as well as the incineration and detonation of unused ordinance. *Id.* at 6-7. Pursuant to the FTCA, the 7,125 named plaintiffs asserted various causes of action under Puerto Rico law against the United States. Among the claims was that the government negligently failed to warn the plaintiffs of harmful pollution related to years of live-fire training exercises and the disposal of unused ordnance about the pollution. *Id.* at 7-8. The plaintiffs also claimed that the Navy’s actions violated the Clean Water Act (“CWA”), various federal permits, and internal regulations and policies. *Id.* at 7.

The court dismissed the lawsuit for lack of jurisdiction on two principal grounds. With respect to plaintiffs’ tort claims, the court found that they were barred by the “discretionary function

exception” to the FTCA, “which precludes FTCA actions against government conduct which is both within the discretion of the relevant government party and susceptible to policy-related judgments.” *Id.* at 4. The court held that the Navy’s challenged conduct on Vieques constituted an exercise of its discretion, and noted the great deference courts must give to the military in weighing competing interests between “secrecy and safety, national security and public health.” *Id.* at 32, 38. As to the CWA-related claims, the court found that “Congress did not intend that the CWA authorize civil tort actions against the federal government for damages.” *Id.* at 18.

The court nevertheless noted the “serious health concerns” raised by the plaintiffs’ claims, and took the unusual step of directing the court clerk to send a copy of its opinion to the leadership of the House of Representative and the Senate. *Id.* at 39. In addition, Circuit Judge Juan R. Torruella, a Puerto Rican native, wrote a stinging dissent in which he faulted the majority’s reasoning and placed it in the context of the “turbulent history” of the U.S. government’s relationship with Vieques and a neighboring island, Culebra. *Id.* at 40.

On March 29, the plaintiffs filed a petition for rehearing *en banc*; the court has not yet ruled on the petition.

VI. INSURANCE COVERAGE

Pollution Clause Excludes Coverage for Damages Sought in Groundwater Contamination Case

In a decision that clarifies the broad scope pollution exclusions in certain insurance policies, the Seventh Circuit Court of Appeals affirmed a district court’s grant of summary judgment in favor of the insurance companies excluding coverage to their insured. *Scottsdale Indemnity Co. v. Village of Crestwood*, Nos. 11-2385, 11-2556, 11-2583 (7th Cir. Mar. 12, 2012), *available at* www.bdlaw.com/assets/attachments/Crestwood.pdf. The Seventh Circuit concluded that pollution exclusions contained in the Village of Crestwood’s insurance policies protected the insurers from having to defend or indemnify the Village in connection with an underlying lawsuit for allegedly distributing contaminated well water to Village residents.

In the mid-1980’s, Crestwood Village officials were notified by state environmental authorities that perchloroethylene (“perc”) had been detected in one of the Village’s water wells. *Crestwood*, slip. op. at 2. The Village continued to use of the well for drinking water until 2007 without disclosure to the Village’s residents. *Id.* at 3. Upon learning of the contamination, Crestwood residents sued the Village in state court seeking damages “for injur[ies] to health.” *Id.*

The Village sought defense and indemnity costs from its insurers in connection with the lawsuits. The insurers brought an action in the United States District Court for the Northern District of Illinois seeking a declaration that they had no duty to defend or indemnify the Village. *Id.* at 2. The policies at issue excluded from coverage personal injuries or property damages that resulted from the discharge, migration or release of pollutants at any time. The district court granted summary judgment in favor of the insurers, holding that allegations of the complaints triggered the pollution exclusion thereby excluding coverage to the Village. *Id.*

Although the Seventh Circuit panel affirmed the district court’s decision, the court explained that a more in-depth analysis was necessary because a literal interpretation of the exclusion “would exclude coverage for acts remote from the ordinary understanding of pollution harms and unrelated to the concerns that gave rise to the exclusion.” *Id.* at 3. The court held that the Village had caused the contamination of its water supply in distributing the well water, even though the Village did not introduce perc into the soil or groundwater. *Id.* at 12. The court emphasized that “[t]he pollution exclusion would mean little if the insured were required to have been the original author of the pollution in order to be within the exclusion.” *Id.* at 13.

The court also dismissed the Village's argument that this was not a pollution case because the amount of perc was below the regulatory limits. *Id.* at 15. In the court's words, "either the perc caused injuries, maybe because the relevant regulations are too lax, or it did not and the tort suits will fail." *Id.* at 14-15. The pollution exclusion trigger is determined by the nature of damages alleged in the complaint, not whether the perc levels exceeded regulatory limits. *Id.* at 15. Since the underlying lawsuit was "premised on a claim that the perc caused injuries for which the plaintiffs are seeking damages," the panel found that the pollution exclusion was triggered. *Id.*

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