

The Likely Expansion Of Environmental Tort Claims

Law360, New York (June 16, 2010) -- Several trends in toxic tort litigation are combining to expand the scope of cases, increase the number of defendants with potentially significant exposure and, perhaps most significantly, enlarge the size of some plaintiffs' damages claims to extraordinary levels.

This article briefly summarizes three of these trends: (1) the use of product liability theories by plaintiffs other than product users to sue "deep pocket" manufacturers; (2) the use of common law theories to claim injuries even when applicable regulatory limits have not been violated; and (3) the increased aggressiveness of governmental entities, particularly states, in aggregating contamination claims within their borders against certain defendants to seek recovery for broad alleged environmental impacts, such as natural resource damages.

The upshot of these trends is that meeting environmental standards may not be enough to stave off potentially large liabilities; some courts and juries are holding manufacturers to standards well beyond regulatory compliance.

Moreover, manufacturers have every incentive to defend these cases aggressively so as to minimize the chance of paying potentially enormous damage awards based upon conduct that was fully consistent with applicable regulatory and industry standards at the relevant time.

The Rise of Product Liability Claims in Environmental Tort Litigation

Tort cases against dischargers of chemicals and other substances to water or air are legion. Suits against the owners of leaking underground storage tanks that impact groundwater are a good example.

These cases traditionally were brought by nearby landowners and included claims of property damage and sometimes personal injury (e.g., health effects or medical monitoring).

Over the past decade, plaintiffs have increasingly sought to couple such typical claims with product liability theories asserted against manufacturers.

The long-running multidistrict litigation over the gasoline additive methyl tertiary-butyl ether is a good example. There, some plaintiffs have eschewed claims against parties responsible for releases or spills while seeking recovery from gasoline refiners and others in the product distribution chain.[2]

Likewise, in recent litigation regarding the presence of the dry cleaning solvent and degreaser perchloroethylene ("perc") in groundwater, public water suppliers have sought to hold the manufacturers of the chemical liable rather than suing dry cleaners or other small businesses for individual releases.[3]

Another example of this trend includes litigation involving trichloropropane (“TCP”), a chemical used as an industrial solvent, paint remover, and cleaning and degreasing agent.[4]

In each of the above scenarios, plaintiffs have asserted claims against product manufacturers alleging that the products are defective and that the manufacturers have failed to warn users, regulators and the public at large of risks and the need for proper handling.

Many of these cases are filed against essentially an entire industry and include conspiracy allegations and theories of market-share liability.[5]

Although many courts have held that punitive damages are not available in market-share cases, plaintiffs challenge that premise. Plaintiffs use the conspiracy and concealment claims to support punitive damage claims, as has been done in tobacco litigation.[6]

Damage Claims Even When Detection Levels are de Minimis

In many of the MTBE cases, sampling results show levels of MTBE well below applicable regulatory limits or maximum contaminant levels (“MCLs”), meaning that the government has determined the water is safe to drink.

Nonetheless, plaintiffs are arguing with some success thus far that low-level detections — even down to the minimum amount necessary to confirm a detection, which is typically measured in parts per trillion — constitute injuries entitling them to damages. Fundamentally, the argument is that a single molecule of a chemical in drinking water can constitute an injury.

The following are just a few examples of cases in which Plaintiffs seek damages for low-level detections of substances below regulatory thresholds:

— In the case of MTBE, plaintiffs argue, among other things, that the chemical’s taste and odor characteristics below regulatory standards give rise to an injury apart from any health considerations, and that a reasonably prudent water provider must act to address contamination before it reaches the MCL.[7]

— In recently filed litigation over the presence in groundwater of atrazine, a widely used herbicide, plaintiffs argue that its occurrence in concentrations below the MCL causes injury to human health, despite a large body of government and other independent scientific analysis indicating the contrary.[8] Plaintiffs cite a subset of the studies EPA considered in setting the MCL, which they claim link any level of atrazine exposure to negative health effects. Both EPA and the defendants have disagreed with this interpretation.

— In trichloroethylene/perchloroethylene litigation, at least one court has agreed that the presence of these chemicals in water supplies, albeit at levels below the MCL, is sufficient to support a claim for diminution in property value, “merely [based on the] knowledge and presence of cancer-causing chemicals detected in their homes’ water supplies.”[9]

The notion that any contamination above the detection limit for a particular chemical constitutes an injury, even in the absence of an established health risk, has profound implications.

Sampling of most sources of drinking water will show the presence of a broad range of non-naturally occurring chemicals at various levels below regulatory standards.

Does this mean that a cause of action arises against the manufacturers of a chemical whenever any amount of that chemical is detected, no matter how slight? The plaintiffs in these cases argue that the answer is “yes” for the reasons described above.

The defendants say “no,” arguing that the key to a damages claim should be the need to remediate the water (or other environmental medium) because of the presence of the chemical at issue in excess of regulatory standards.

Assuming plaintiffs may state a claim for relief at levels below the MCL, if damages are measured by costs of treatment to below detection limits rather than treatment to within regulatory standards, the differences in damage awards can be staggering.

Given that technical advances are leading to lower detection limits for many chemicals, if plaintiffs prevail in seeking damages for detections below the MCL, damage awards are likely to increase and many more such cases are likely to be filed involving countless other chemicals in groundwater.

Aggressive Tort Claims Brought by States

In addition to the trends in toxic tort litigation brought by private plaintiffs (e.g., property owners) and municipalities (e.g., cities and public water authorities) discussed above, emerging trends in environmental litigation brought by states may also contribute to the growing size, number and complexity of environmental tort cases over time.

States are coupling the two trends discussed above — asserting claims based on product liability theories and for detections below regulatory thresholds — with an increased willingness to aggregate contamination claims within their borders and seek to hold certain defendants responsible for what may be a relatively small individual contribution to larger alleged environmental damages.

Again, the MTBE litigation is a prime example. At least two states and the Commonwealth of Puerto Rico have brought product liability cases in which they rely on their unique authority as trustees of the natural resources within their borders to seek damages on essentially a statewide basis.[10]

These states argue, in effect, that those responsible for the manufacture and distribution of gasoline containing MTBE should be responsible for restoring all groundwater in the state in which MTBE can be detected to levels below the detection limit.[11]

If plaintiffs are successful in these actions, the core elements of these claims could be tested in statewide natural resource damage actions involving many other chemicals found in groundwater.

However, at least one court has reined in similar claims. New Mexico’s claims for natural resource damages due to contaminated groundwater resources were dismissed because the state failed to provide evidence that any of the contaminated groundwater was otherwise available for use.[12]

The court further held that the state, as trustee of its natural resources, was only permitted to collect damages for unallocated resources available for beneficial use; where resources had been allocated, damage claims were better left to rights holders whose beneficial uses had been impaired.[13]

A somewhat different manifestation of this trend can be found in the recent climate change litigation. In *Connecticut v. AEP*, for example, eight states and the city of New York sued six electric power companies that own or operate fossil fuel-fired power plants under public nuisance law seeking the abatement of their contribution to climate change through the emission of carbon dioxide from their facilities.

The state plaintiffs claim that the six defendants are responsible for approximately 10 percent of all carbon dioxide emissions from human activities in the U.S., and seek to enjoin the defendants to abate the alleged nuisance by capping and then reducing their carbon dioxide emissions.

Naturally, given the stakes, the issues in these cases will be litigated vigorously by both sides.

It is not clear whether future trends attempting to reconcile the interplay between toxic tort law and environmental law will favor expansion of manufacturers' liability for environmental releases beyond regulatory levels.

It is clear, however, that regulatory compliance alone may not suffice to protect against potentially massive environmental liabilities.

--By John S. Guttman (pictured), Daniel M. Krainin and Geoffrey R. Goode, Beveridge & Diamond PC

John Guttman is a principal in the Washington and New York offices of Beveridge & Diamond. Daniel Krainin is a principal in the firm's New York office, and Geoffrey Goode is an associate in the firm's Washington office.

Beveridge & Diamond represents defendants in the MTBE litigation and the perchloroethylene litigation referenced in this article, and the firm's clients are among the defendants in the atrazine and climate change litigation referenced in this article.

The views expressed in this article are exclusively those of the authors and do not necessarily represent the views of Beveridge & Diamond, its clients, or Portfolio Media, publisher of Law360.

[2] See, e.g., *In re MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d 348 (S.D.N.Y. 2005).

[3] See, e.g., *City of Modesto v. Dow Chemical Co.*, No. 999643 (San Francisco Super. Ct.).

[4] See, e.g., *Montara Water & Sanitary Dist. v. Dow Chemical Co.*, No. 438267 (San Francisco Super. Ct. filed Jan. 31, 2005).

[5] See, e.g., *In re MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d 348 (S.D.N.Y. 2005).

[6] See, e.g., *In re MTBE Prods. Liab. Litig.*, 644 F. Supp. 2d 310 (S.D.N.Y. 2009); see also *Burton v. R.J. Reynolds Tobacco Co.*, 205 F. Supp. 2d 1253 (D. Kan. 2002).

[7] See *In re MTBE Prods. Liab. Litig.*, 458 F. Supp. 2d 149, 154-55 (S.D.N.Y. 2006).

[8] See *City of Greenville v. Syngenta Crop Prot., Inc.*, No. 10-188 (S.D. Ill. filed Mar. 8, 2010).

[9] See *Bentley v. Honeywell Int'l, Inc.*, 223 F.R.D. 471, 478 (S.D. Ohio 2004).

[10] See, e.g., *New Hampshire v. Hess Corp.*, No. 03-C-550 (Merrimack County Sup. Ct.); *New Jersey Dept. of Env'tl. Prot. v. Atlantic Richfield Co., et al.*, No. 08 Civ. 00312 (S.D.N.Y.); *Commonwealth of Puerto Rico v. Shell Oil Co., et al.*, No. 07 Civ. 10470 (S.D.N.Y.).

[11] See, e.g., *In re MTBE Prods. Liab. Litig.*, 2008 U.S. Dist. LEXIS 51781 (S.D.N.Y. 2008).

[12] See *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1251-52 (10th Cir. 2006).

[13] See *id.* at 1251.

