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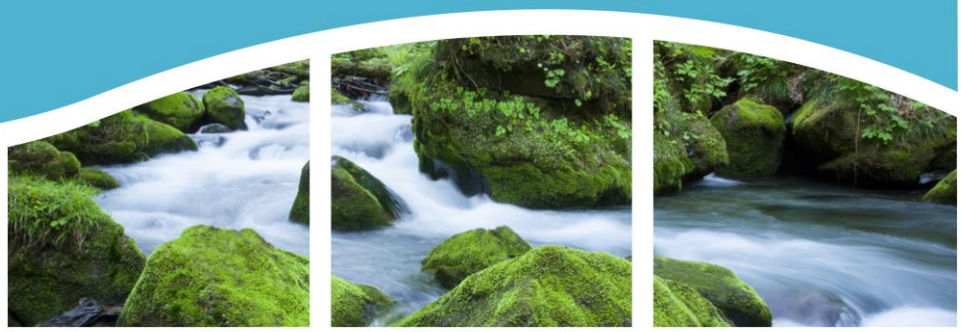

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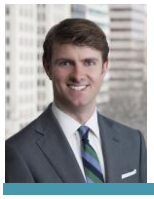

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ABOUT B&D

Beveridge & Diamond's 100 lawyers in seven U.S. offices focus on environmental and natural resource law, litigation and dispute resolution. We help clients around the world resolve critical environmental and sustainability issues, including the defense of toxic tort and product liability claims.

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PREEMPTION

California Court Blocks Local Measure Banning Ground Application of Biosolids

By Zaheer H. Tajani

In a victory for municipalities that recycle biosolids to farmland, Los Angeles' sanitation district prevailed in its suit against a Kern County initiative banning land application of biosolids. *See County Sanitation Dist. No. 2 of Los Angeles County, et al. v. Kern County*, 2016 WL 7175653 (Tulare Co. Super. Ct. Nov. 28, 2016). Defendant Kern County approved Measure E on June 6, 2006, prohibiting the land application of biosolids (treated municipal wastewater sludge) in unincorporated Kern County. After a two-week bench trial, the Superior Court for Tulare County invalidated Kern County's ban on the grounds that the county had exceeded its police power and the ban was preempted by state law.

Whether Kern County exceeded its police power authority depended on whether biosolids pose a "basic public welfare" risk, impacting the health, economy and environment of the people of Kern County. After an extensive review of the history of biosolids application, the court found no evidence of a risk posed by biosolids. Specifically, the court considered expert studies demonstrating the benefits of biosolid application to soil and a lack of documentation identifying an adverse health effect of land application, and weighed these studies against Defendant's claims. The court determined that Kern County's claims were either without evidence or resulted from testimony lacking in credibility. The court found that there was "no basis in fact for any determination that land application of biosolids poses *any* risk to Kern county residents, let alone a real and substantial risk that would be alleviated by banning such land application." *Id.* at 25 (emphasis in original).

The court also determined that the California Integrated Waste Management Act (CIWMA) "*requires* that local agencies *promote* recycling and composting and *maximize* the use of all feasible recycling options," and that CIWMA preempts Measure E's ban, which is in "direct conflict with" the Act. *Id.* at 20 (emphasis in original). The court noted that the measure, "by banning a commonly used and cost-efficient method of recycling and re-use is not consistent with and is destructive of the state's policies and requirements." *Id.* at 19. It concluded that while the measure does not make compliance with CIWMA impossible, it does make compliance "more difficult and expensive" for the Plaintiffs, rendering Measure E invalid. *Id.*

Beveridge & Diamond represented Plaintiff City of Los Angeles in this action. Additional information about this decision is available on the Beveridge & Diamond website here.

PARENS PATRIAE

Applying Product Liability Theory, Washington State Sues for PCB Damages

By Eric L. Klein

In an effort to use product liability theories to hold manufacturers culpable for environmental releases, the Attorney General of Washington State sued PCB manufacturer Monsanto in state court in December. *See* Complaint, *Washington v. Monsanto*, No. 16-2-29591-6 (King Co. Super. Ct. Dec. 16, 2016). The suit is the first to apply product liability theories honed in more than a decade of MTBE litigation to allegations of statewide PCB contamination in waterways.

Polychlorinated biphenyls, or PCBs, have flame retardant characteristics, and were used in a wide variety of products, including electrical equipment, carbonless copy paper, heat transfer fluids such as hydraulic oils, paints, caulks, and many others. Monsanto manufactured PCBs from 1935 until 1977 when it voluntarily ceased production. The U.S. Environmental Protection Agency banned production of PCBs in 1979, but allowed for their continued use in some electrical equipment until a suitable alternative could be developed. Washington's lawsuit claims that PCBs are now found in water bodies throughout the state, an alleged injury to the state's public natural resources for which the state may seek damages on behalf of itself and its residents in the state's *parens patriae* capacity.

The complaint asserts claims for public nuisance, trespass, equitable indemnity for the state's response costs, and products liability (defective design and failure to warn). The state seeks compensatory damages, damages for natural resource injury, and present and future cleanup costs. Though individuals and localities have brought other suits alleging PCB contamination through the years, this case is the first to be brought against the PCB manufacturer by a sovereign state alleging statewide contamination and statewide damages on product liability theories. The structure of the allegations draws from similar claims made by states for alleged impacts to groundwater and surface water from releases of gasoline containing MTBE.

STATUTE OF REPOSE

Statute of Repose Bars Maryland Claims Arising From Exposure to Contaminated Fill

By Jessica L. Kyle

Exemplifying the power of the statute of repose as a defense to claims based on decades-old conduct under Maryland law, the Fourth Circuit held that claims stemming from hazardous improvements to real property were barred by the state's 20-year statute of repose. *See Leichling v. Honeywell Int'l, Inc.*, 842 F.3d 848 (4th Cir. 2016).

Beginning in the 1950s, the Defendant used chromium ore processing residues ("COPR") waste, which contains carcinogenic hexavalent chromium, as fill for 85 acres of land that the Maryland Port Authority later purchased to expand the Dundalk Marine Terminal. Defendant continued to supply COPR fill until 1976. *Id.* Plaintiffs – survivors of a longshoreman who worked at the terminal from 1973 to 2001 – alleged COPR exposure caused the decedent's death from lung cancer. The U.S. District Court for the District of Maryland dismissed the claims as barred by Maryland's statute of repose, which limits to 20 years the period for actions for personal injury "resulting from the defective and unsafe condition of an improvement to real property."

At issue on review was whether the decedent's injuries resulted from an "alleged defective and unsafe condition of 'an improvement to real property'" for the purpose of the statute of repose. Plaintiffs argued the statute of repose does not apply to claims arising from hazardous conditions that made the land "unsuitable for human use." The use of COPR, Plaintiffs argued, therefore could not be considered an "improvement" covered by the statute of repose.

The court found that nothing in the statute's text or legislative history indicated that hazardous conditions are excluded from the repose provision. The court noted the legislature had amended the statute to exclude asbestos alone. Significantly, the court considered the fill an "integral component" of the Marine Terminal expansion, settling its status as an improvement covered by the statute of repose. The court thereby embraced a "common sense" approach to defining an improvement to real property, focusing on actually existing indicia of added value. Accordingly, the court affirmed dismissal.

No Exception for Latent Disease in N.C. Statute of Repose

By Zaheer H. Tajani

Highlighting an area of unsettled law in North Carolina toxic tort litigation, a federal district court in the Eleventh Circuit held that the pre-2014 North Carolina statute of repose contained no exception for latent disease, barring disease-based toxic tort suits ten years after they accrue. Specifically, the U.S. District Court in Georgia held that North Carolina's ten-year statute of repose barred the claims of U.S. Marine Corps service members and their families in a multidistrict litigation (MDL) based on personal injury allegedly resulting from exposure to contaminated drinking water. *See In re: Camp Lejeune North Carolina Water Contamination Litigation*, No. 1:11-MD-2218, 2016 WL 7049038 (N.D. Ga. Dec. 5, 2016).

Plaintiffs alleged across multiple (now consolidated) cases that while on base at Camp Lejeune, they were exposed through the base's drinking water to benzene, trichloroethylene (TCE), tetrachloroethylene (PCE), dichloroethene (DCE), and vinyl chloride through contaminated wells as late as 1987, eventually resulting in illness and death. The government contended that because the earliest suit was filed in 1999, more than ten years after the last government act alleged to cause illness, it was barred by the North Carolina statute of repose. Plaintiffs responded that the statute of repose contains an exemption for latent disease. The Northern District of Georgia, the federal court that oversees the MDL, applied an Eleventh Circuit interpretation of North Carolina's ten-year statute of repose, which held that the North Carolina statute in effect at the time Plaintiffs filed suit contained no exemption for latent diseases. *Bryant v. United States*, 768 F.3d 1378 (11th Cir. 2014), *cert. denied*, 136 S.Ct. 71 (2015).

The court was careful to note that its decision is based on a now-amended North Carolina statute of repose and also is in conflict with an opinion from the U.S. Court of Appeals for the Fourth Circuit. After Plaintiffs filed their cases, the North Carolina legislature amended the statute of repose so that it "shall not be construed to bar an action for personal injury . . . caused or contributed to by groundwater contaminated by a hazardous substance, pollutant, or contaminant" resulting from "consumption, exposure or use" of the water. N.C. Gen. Stat. Ann. § 130A-26.3 (2014). The legislature's exemption is limited to groundwater contamination causing harm, leaving open the issue of other contaminated media causing similar personal injury.

Plaintiffs argued that the MDL court should follow the Fourth Circuit's opinion in *Stahle v. CTS Corp.*, 817 F.3d 96 (4th Cir. 2016), which found an exemption in the statute of repose for latent disease, reaffirming "that 'the [North Carolina] Supreme Court does not consider disease to be included within a statute of repose directed at personal injury claims unless the Legislature expressly expands the language to include it.'" *Stahle*, 817 F.3d at 103-04 (quoting *Hyer v. Pittsburgh Corning Corp.*, 790 F.2d 30, 34 (1986)). The District Court declined to do so. The court applied the general rule in MDL-transferred cases that the transferee court, here the federal district court in Georgia, is bound by the law of the Circuit in which it sits in cases where jurisdiction is based on federal law rather than diversity. As a result, the court followed the Eleventh Circuit's *Bryant* opinion and dismissed.

DUTY TO THIRD PARTIES

D.C. Remediation Contract Can Trigger Duties to Third Party at Construction Site

By Eric L. Klein

In a case highlighting common-law tort duties that can arise from contractual relationships, an environmental contractor at a construction site may be liable to a subcontractor's employee who claims he was injured when exposed to petroleum contamination, according to a federal court in Washington, D.C. *See Parker v. John Moriarity & Assoc.*, No. 15-cv-01506 (D.D.C. Dec. 14, 2016).

Environmental Consultants and Contractors, Inc. ("ECC"), an environmental services contractor at a theater renovation project in Washington, moved to dismiss third-party claims brought by the employee of a subcontractor on the project who alleged he was injured when exposed to chemicals from a leaking underground storage tank. ECC argued the subcontractor was not party to the contract between ECC and the owner, and therefore ECC could not be held liable to the subcontractor for any failure to perform under the contract. The subcontractor, facing its own potential liability in the suit, claimed that ECC owed a common-law duty of care to the injured employee based on its contract to remediate the site with the site owner.

The U.S. District Court for the District of Columbia declined to dismiss claims against ECC. The court noted ECC's contract and related documents "reflect that ECC's undertaking as the environmental consultant on the project included making recommendations for appropriate procedures including use of protective equipment, providing ongoing daily monitoring of the volatile organic compound levels at the job site, and taking appropriate steps if hazardous conditions were detected." These contractual duties ECC owed to the owner of the site, the court reasoned, could also create a common-law duty to workers at the site as third-party intended beneficiaries of the contract. The court therefore denied ECC's motion to dismiss because it could not find, as a matter of law, that ECC owed the subcontractor no common-law duty of care.

Georgia Supreme Court Limits Duty to Warn Third Parties

By Jessica L. Kyle

Affirming limits on the duty to warn third parties of toxic exposure risks, the Supreme Court of Georgia held that a manufacturer of asbestos-laden pipes had no duty to warn the daughter of a worker who serviced the pipes about the dangers of asbestos dust inhalation. *See Certainteed Corp. v. Fletcher*, 794 S.E.2d 641 (Ga. 2016). The Plaintiff laundered her father's work clothing, which was covered in asbestos dust, for years. After developing mesothelioma, the Plaintiff sued the pipe manufacturer, alleging negligent design and negligent failure to warn. The trial court granted summary judgment to the manufacturer, but the Court of Appeals of Georgia reversed, holding in part that the question of the duty to warn was one for the jury.

On review, the Supreme Court of Georgia emphasized that the scope of the duty to warn is not resolved by the foreseeability of third-party exposure to toxic hazards. Rather, public policy considerations addressing the practical effect of a duty to warn may recommend against imposing a duty. The court noted that the Plaintiff would not have seen warning labels on the manufacturer's pipes, which would ultimately have placed the burden of conveying the warning on the worker. Moreover, it found that the scope of the third-party warning sought by Plaintiff "would be endless" and would expand traditional tort concepts beyond acceptable limits. Accordingly, the court reversed in part and declined to require a manufacturer warning. The decision is consistent with an earlier opinion in which the Georgia Supreme Court found that an employer does not owe a duty to third-party, non-employees exposed to asbestos-tainted work clothing. *See CSX Transp. v. Williams*, 608 S.E. 2d 208 (Ga. 2005).

By contrast, the Plaintiff's defective design claim survived, illustrating that negligent design and negligent failure to warn claims are not co-extensive. The court found that the risk-utility analysis governed, which asks whether the manufacturer reasonably chose the particular product design in light of factors including alternative models. At summary judgment, the defendant could not meet its burden of showing the absence of evidence of defective design; the court therefore held that the defendant's summary judgment motion should have been denied on that ground.

Punitive Damages

Connecticut Common-Law Rule Limiting Punitives Does Not Apply to Statutory Damages

By Dacia M. Thompson

Drawing a distinction between punitive damages based on statutory and common law claims, the Connecticut Supreme Court held that a common-law rule limiting punitive damages does not apply to an award of statutory damages under Connecticut's Product Liability Act. *See Biflock v. Philip Morris, Inc.*, 324 Conn. 402 (2016).

Connecticut's Product Liability Act provides that the amount of punitive damages is "not to exceed an amount equal to twice the damages awarded to the plaintiff." Conn. Gen. Stat. § 52-240b. The state's common law limits punitive damages to litigation expenses less costs. Relying on traditional principles of statutory construction, the court determined that the legislature clearly intended to create a separate punitive damages scheme where the common-law limit does not apply, and noted that the statute includes a separate provision authorizing an award of attorney's fees.

The court also addressed two other related issues. First, the court opted to retain the strict liability standard it has adapted from the Restatement (Second) of Torts, instead of adopting the Restatement (Third) of Torts standard, which would have required additional showings that the harm was foreseeable and that there was a reasonable alternative design. The court opted to retain its existing tests – the "consumer expectation test" and the "risk-utility test" – which have fewer required elements to prove product liability than the Restatement (Third) approach.

Second, the court determined that comment (i) to Section 402A of the Restatement (Second) of Torts does not provide the unitary definition of "unreasonably dangerous" for purposes of raising a product liability claim under theories of strict liability and/or negligence. Comment (i) to Section 402A of the Restatement (Second) of Torts captures the aforementioned "consumer expectation test," but the court emphasized that the availability of the alternative "risk-utility test" necessitates a finding that "unreasonably dangerous" does not have a single definition. In other words, in Connecticut, a product can be unreasonably dangerous if it fails the consumer expectation test or if its risks outweigh its utility.