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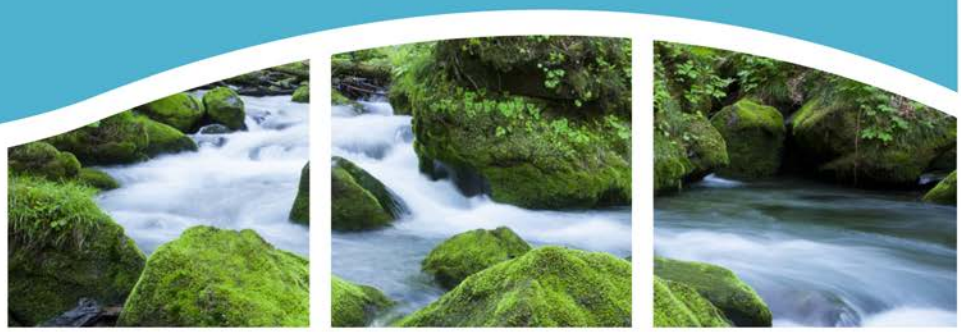

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ABOUT B&D

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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TABLE OF CONTENTS

PFOA

Property Ownership and Water Supply Sources Matter in PFOA Contamination Lawsuits

By Shengzhi Wang

Illustrating some limitations on common law claims for groundwater contamination, a federal court in New York partially granted and partially denied a motion to dismiss in a cluster of sixteen lawsuits alleging perfluoroocatanoic acid (PFOA) contamination in a village's groundwater. *Benoit v. Saint-Gobain Performance Plastics Corp.*, No. 16-cv-930, 2017 WL 3316132 (N.D.N.Y. Aug. 2, 2017). The opinion showed how certain intricate issues such as property ownership and source of water supply could alter the outcome of a tort claim even at the pleading stage. The order was certified for interlocutory appeal to the Second Circuit.

The defendants, Saint-Gobain Performance Plastics Corp. and Honeywell International Inc., owned a facility in Hoosick Falls, New York, that had been using PFOA since the late 1960s. Discharged PFOA migrated into local soil and groundwater. The plaintiffs are local residents. Most used a municipal water supply; some used private wells. Some plaintiffs rented, while others owned their homes. All wells, municipal or private, were later shown by tests to have excessive levels of PFOA. Most, although not all, plaintiffs claimed that they had elevated level of PFOA in blood. Some plaintiffs asserted specific symptoms. The plaintiffs alleged negligence and strict liability, trespass, and nuisance. The defendants moved to dismiss each complaint for failure to state a claim.

The court first addressed the negligence and strict liability claims, which were brought based on alleged property damages and personal injury. The court dismissed the property damage claims from those renter plaintiffs, holding that "a plaintiff cannot recover for damage to property he does not own." But the court rejected the defendants' argument that a negligence claim in New York could not be premised on groundwater contamination, citing cases holding the opposite. The court found that the plaintiffs' alleged reduction in property values, as well as compensatory damages for remediation and restoration, could support property damage claims. Thus the non-renter plaintiffs' claims survived the motion to dismiss.

The plaintiffs sought medical monitoring as the "central remedy" for the personal injury claims. The court declined to dismiss most of these claims, holding that the alleged accumulation of PFOA in blood was sufficient to permit personal injury claims for medical monitoring. However, two plaintiffs did not claim any elevated blood concentration of PFOA, and the court dismissed their claims with leave to amend. The court further commented that, even if the PFOA accumulation in blood would not be a sufficient basis, plaintiffs' medical monitoring requests could still survive the dismissal challenge, because New York law permits medical monitoring to be consequential damages for "an already existing tort cause of action" concerning property, and the plaintiffs had successfully alleged property torts in this case.

The court dismissed the trespass claims of the plaintiffs who were on the municipal water supply, reasoning that they did not have the "possessory interest" to support trespass claims, unlike those with private wells. Specifically, the court emphasized that New York law did not recognize groundwater contamination alone as an "invasion of property interest," but soil contamination, which municipal water plaintiffs did not asserted in their complaints, would support trespass. The court therefore granted these plaintiffs leave to amend their complaints.

Finally, the court held that the claims could be public - but not private - nuisance. Yet, because public nuisance would only be privately actionable if the plaintiffs suffered "special injury" beyond that suffered by the public, the municipal water plaintiffs' nuisance claims were dismissed. The private well plaintiffs' claims survived because the court found the costs of repairing or restoring the private wells were adequately alleged as special losses. The court reasoned that these costs for the private well owners was sufficiently different from the harm suffered by the rest of the area's population (i.e. municipal water supply users), and that, among private wells, the costs or repair or restoration would vary from case to case, because the alleged levels of contamination were different across properties and the wells on them.

LONE PINE

Federal Court in California Greenlights Discovery After Sufficient *Lone Pine* Submissions

By Shengzhi Wang

In a case demonstrating the limits of a *Lone Pine* strategy, a California federal court allowed a toxic tort class action to proceed after plaintiffs' experts showed that "Plaintiffs' case is not meritless or frivolous." The court therefore declined to dismiss the case and instructed the parties to proceed into discovery. *See* *Trujillo v. Ametek, Inc.*, Case No. 3:15-cv-01394 (S.D. Cal. July 17, 2017).

The plaintiffs are classes of students and teachers from an elementary school bordering a property once owned by the defendant Ametek, Inc. The plaintiffs alleged that chemicals released on the property migrated into groundwater and air at the school and posed significant health risks to the school's occupants. Plaintiffs seek, among other things, medical monitoring damages.

On Ametek's motion, the court issued a *Lone Pine* case management order ("CMO" or "*Lone Pine* Order"; named *after Lore v. Lone Pine Corp.*, 1986 WL 637507 (N.J. Sup. Ct. Nov. 18, 1986)), requiring the plaintiffs to show prima facie evidence of exposure and six other items relevant to plaintiffs' damage claims. The plaintiffs produced their Lone Pine submission along with five experts' opinions on exposure, increased risk of specific injury, and causation with other information responsive to the CMO. Ametek and its co-defendent objected that the submission was insufficient because it failed to establish a *prima facie* case and to address specific requests from the court.

The court disagreed with Ametek. First, the court held that its specific requests within the *Lone Pine* Order were not based on "individual elements of a *prima facie* case for negligence, but rather, [were] factors that the trier of fact must weigh before concluding that the plaintiffs are entitled to medical monitoring damages." Therefore, the court said, the requests from the CMO were "merely a useful tool" to evaluate whether the plaintiffs' claims to exposure, injury, and causation would "have enough merit to warrant" discovery.

The court further reasoned that the only two "narrow, but weighty" questions in dispute were the level of the plaintiffs' exposure and whether such level was harmful. The court found that the plaintiffs' expert case reports answered the two questions with opinions that "Plaintiffs were exposed to a significant level of chemical toxins that has increased their risk of developing certain health problems." Therefore, even though Ametek objected by citing opposite conclusions on the merits from the state government and by raising evidentiary challenges, the court held that the plaintiffs' submission satisfied the CMO and that the case should proceed into discovery.

PCBs

Washington State's Suit Against Monsanto Remanded to State Court

By Toren Elsen

Clarifying the application of a doctrine called "federal officer jurisdiction," a federal judge in Washington held that the federal government's actions involving procurement of polychlorinated biphenyls ("PCBs") from Monsanto were not enough to show that Monsanto was supervised or influenced by the government. *See* *Washington v. Monsanto Co.*, No C17-53RSL (W.D. Wash. July 28, 2018). Washington originally brought suit against Monsanto in December 2016 alleging statewide PCB contamination under state product liability theories. Monsanto removed the suit to federal court asserting federal question jurisdiction and federal officer jurisdiction, which can be invoked by a private party if they are "sued for acts performed while acting under a federal agency or officer."

From 1935 to 1979 Monsanto was the only company manufacturing PCBs in the United States. Monsanto argued that several actions by the federal government during these years showed that Monsanto was operating under the government's direction, indicating that the suit should proceed in federal court under federal officer jurisdiction. First, in 1941 when Monsanto was unable to produce enough PCBs to support war requirements, the government approved Necessity Certificates for the construction of additional manufacturing facilities. Second, Monsanto's PCBs were mentioned by name in numerous military specifications. Third, in the 1970s when Monsanto was contemplating ending the

manufacture of PCBs, the government invoked Section 101 of the Defense Production Act of 1950, directing Monsanto to fulfill third-party PCB orders.

The court disagreed that these actions rose to the level that would support federal officer jurisdiction. First, the court rejected Monsanto's argument that Necessity Certificates demonstrated their "facilities were 'essentially nationalized.'" Second, the court distinguished that PCBs were "*mentioned in* a government specification, not *produced to* government specification." Third, although the government directed Monsanto to deliver PCBs, Monsanto was not directed "to produce PCBs that it had not already, or would not have otherwise, produced." Although the court annunciated a three-part test for whether federal officer jurisdiction existed, it focused solely on the second prong, finding that no causal nexus existed between the claims brought by Washington and any actions "Monsanto took pursuant to a federal officer's direction." The court also rejected Monsanto's assertion of federal question jurisdiction, finding that CERCLA does not preempt state law claims.

PCB Nuisance Suits from Three California Cities Stayed Pending Administrative Decision

By Shengzhi Wang

Showing how administrative claims can derail coexistent judicial actions, a federal court in California asked three California cities to first exhaust their administrative claims seeking state compensation for the cities' treatment of polychlorinated biphenyls (PCBs) in stormwater discharge before they can sue Monsanto Co. in court for tort damages. *San Jose v. Monsanto Co.*, No. 5:15-cv-03178 (N.D. Cal. Aug. 4, 2017). The court will freeze the cities' tort actions against Monsanto until February 8, 2018, after the state agency will have a chance to hear the cities' administrative claims seeking state reimbursement for complying with the PCB discharge standards that the state made more stringent in 2015 without providing funding assistance.

Three California cities, San Jose, Oakland, and Berkeley, operated municipal stormwater and runoff systems under permits. The permits mandated limitations on PCB discharges, which a regional water quality control board made stricter in 2015. The heightened standard necessitated compliance expenses from the Cities. The cities filed claims before California Commission on State Mandates, arguing that the permit obligations constituted unfunded state mandates for which the state should reimburse the Cities for compliance. The cities also sued Monsanto Company, Solutia Inc., and Pharmacia LLC ("Monsanto"), which produced PCBs, in the federal court for public nuisance and equitable indemnity. On motion from Monsanto, the court dismissed both claims in the original complaints, but granted the cities' leave to amend the nuisance claim.

The cities amended their complaints in September 2016, alleging only public nuisance. Monsanto again moved to dismiss or stay the case, arguing that the cities had not exhausted their administrative remedies. The cities countered that the administrative relief sought before the state Commission would be unrelated to the federal cases, which were based on public nuisance. It further contended that no administrative process would be available for a public nuisance claim.

The court ruled against the cities. It found that the cities, in both the judicial and the administrative proceedings, sought "damages to compensate them for the cost of complying with state-mandated permit obligations—for instance, costs associated with retrofitting their stormwater systems to filter out PCBs." The court therefore concluded that there was "substantial overlap between the costs the cities seek to recover in their [administrative] test claims and in their federal actions." It ordered the lawsuits to be stayed until February 2018. Parties were instructed to file a joint status report and appear for a status conference after the state Commission hosted a hearing on the administrative claims in January 2018.

INJUNCTIVE RELIEF

Mississippi Federal Court Denies Preliminary Injunction for Failure to Show Threat of Irreparable Harm

By Dacia Meng

In a case demonstrating limits to injunctive relief, a Mississippi federal court denied a request for temporary restraining order because the plaintiff did not show he would suffer irreparable harm when he relied on conclusory statements about the harm he faced, nor did he show monetary damages could not make him sufficiently whole. *Miller v. Mississippi Resources*, LLC, No. 5:17-cv-41-DCB-MTP (S.D. Miss. June 26, 2017).

The defendant is an oil production company that has access to the plaintiff landowner's property for oil and gas production and the use of a saltwater pipeline. The landowner sued as a result of defendant's alleged contamination of the land, claiming negligence, negligence per se, and negligent infliction of emotional distress. The plaintiff sought a temporary restraining order and preliminary injunction to prohibit the oil company from entering and continuing operations on his property unless the oil company were there for the clean-up, restoration, and/or payment of damages. The defendant oil company moved to dismiss the count requesting this injunctive relief. The landowner responded seeking an immediate order restraining the defendant from operating its saltwater disposal well.

To support his request for a temporary restraining order and preliminary injunction, the plaintiff needed to demonstrate a substantial threat of irreparable injury if the injunctive relief were not granted. To demonstrate irreparable harm, the plaintiff needed to show that there is no adequate remedy at law (i.e. monetary damages) available. The court rejected the plaintiff's request based on the plaintiff's failure to demonstrate a substantial threat of irreparable harm. The plaintiff only made conclusory statements about the threat of irreparable harm and failed to show that the monetary damages he is seeking would be insufficient to make him whole. While this was the court's focus, the plaintiff also failed to provide sufficient support on several other fronts.

FEDERAL TORT CLAIMS ACT

District Court Permits Landowner to Pursue Hazardous Material Dumping Case Against the U.S. Navy

By Zaheer Tajani

Illustrating what constitutes "sufficient notice" to the government of the value of a claim under the Federal Tort Claims Act (FTCA), a Maryland federal court rejected the Navy's claim that it had insufficient notice of the value of a claim stemming from environmental contamination. *Baker v. United States*, No. MJG-17-546 (D.Md Aug. 9, 2017). Instead, the court held that the Navy had sufficient notice of the total value of the landowner's administrative claims.

Frederick Baker bought land in 2003 and later discovered that the Navy had used the land decades before for waste and oil disposal. In 2012, Baker discovered the Navy trespassing on his land for a construction project. In settling the matter of trespass, the Navy agreed to remove historical waste from the site and test the area for contamination. Based on the results of its study, the Navy informed Baker that it had contaminated both his land and his drinking water well with gasoline organics, rendering the water undrinkable.

Under the requirements of the FTCA, a claimant must notify the agency of the alleged value of the claim and with enough information to allow the agency to investigate the claim. In August of 2014, Baker filed two administrative claim forms: one for $149,100 accounting for property value diminution as a result of the contamination and one for $20,761.86 for the cost of connecting the property to a public water system. Baker included a property appraisal indicating the total value of the uncontaminated property was $710,000 and requested either $149,100 for the diminished value of the property, or that the Navy purchase the property for $710,000. Navy denied Baker's claims and Baker filed suit under the FTCA for the full property value. Navy contended that it was only on notice up to the amount of the two administrative claims, $169,861.86, and sought to limit the amount Baker could recover to that amount.

The court noted that the administrative claim is a "typical procedure for notice." However, it also made clear that notice through administrative claim "is not required…provided that the claimant's supplied materials provide sufficient information to apprise the United States that a claim is being asserted against them and a specified amount of damages." The court held that Baker's inclusion of detailed appraisals and specific amounts for the land value informed the Navy of its maximum exposure and sufficiently notified the agency.

INSURANCE COVERAGE

Insured Survives Summary Judgment Motion on Three Pollution Exclusion Exceptions

By Shengzhi Wang

Illustrating how the insured can counter the insurer's pollution exclusion arguments in coverage disputes, a federal court in Illinois held that an insured chemical company succeeded in raising genuine issues of material fact on three alleged

exceptions to pollution exclusion. The court denied the insurer's summary judgment motion in the insurance defense and indemnity case arising from numerous underlying environmental and personal injury claims against the insured party. *Velsicol Chemical, LLC. v. Westchester Fire Ins. Co.*, No. 15-CV-2534 (N.D. Ill. Sept. 7, 2017).

Plaintiff Velsicol Chemical, LLC ("Velsicol") held an excess insurance policy from Defendant Westchester Fire Insurance Company ("Westchester"). The policy included two pollution exclusion clauses, which purported to preclude coverage of environmental liabilities as well as liabilities for bodily injury or property damages arising out of environmental releases. For over two decades, Velsicol was subject to judicial and administrative actions for environmental and personal injury claims relating to a range of sites. Velsicol filed a federal lawsuit in 2015, alleging that the underlying general liability policies had been exhausted, that the incidents at issue were not precluded from coverage under the pollution exclusion clauses, and that Westchester therefore should defend and indemnify Velsicol.

Defendant moved for summary judgment, arguing the pollution exclusion clauses in the policy preclude Velsicol's recovery. Velsicol countered that three exceptions to the pollution exclusions apply: "products hazard," "permitted use," and "sudden and accidental." The court found that plaintiffs had raised sufficient material facts related to all three exceptions and denied the insurer's motion.

The court first addressed the "products hazard" exception, which covers claims related to the handling of Velsicol's products away from Velsicol's facilities and out of its control. The court found that the insurer did not offer any factual allegations to refute Velsicol's assertion that some of its costs arose from such use and handling. The court noted that the facts were at best "ambiguous" and the insured should enjoy the benefit of the doubt, Velsicol survived the motion. The court next found genuine issues of material fact related to the "permitted use" exclusion. Velsicol asserted it operated its plants in compliance with state environmental permits, and therefore discharges may qualify for the "permitted use" exclusion. The court noted that while compliance with the permits was uncontested, it was unclear whether the permits would allow discharges of the specific pollutants. Finally Westchester argued that pollution came from Velsicol's ordinary operation and was not "sudden and accidental." The court disagreed. It held that under Illinois law "sudden and accidental" meant "unexpected or unintended." The court then noted that Velsicol's witnesses testified multiple times that the spills were sudden, not intended, or not routine business practices or operations. Thus Velsicol raised genuine issues of material fact to survive summary judgment.

PROCEDURE

Ohio Natural Resources Damages Claim Dismissed with Prejudice for Failure to Properly Serve Defendant

By Zaheer Tajani

Demonstrating the importance of timely service of process in complex environmental cases, a federal court in Ohio dismissed CERCLA natural resource damages claims and related state statutory actions for the state's failure to serve a complaint on an individual defendant for nearly two years. *Ohio, ex rel. DeWine v. Superior Fibers, Inc.*, No: 2:14-cv-1843 (S.D. OH June 29, 2017).

Ohio brought suit under CERCLA and Ohio's surface water and hazardous waste laws to recover damages and secure remediation for contamination of groundwater in Fairfield County, Ohio. The state alleged that the contamination resulted from the disposal of the solvent trichloroethylene ("TCE") at a manufacturing facility. Ohio brought suit against three owners and operators of the site: Reichhold, Inc., which used TCE at the site from 1964 until 1984 and declared bankruptcy in 2011; Superior Fibers, Inc., which operated and used TCE on the site from 1984 until 2006; and Superior Bremen Filtration, LLC, which has owned and operated the site since 2006 without use of TCE. Ohio also brought suit against William Miller, the statutory agent for Superior Fibers and a former employee of Reichhold.

Ohio filed its complaint in October 2014 against the four defendants and all three corporate defendants filed notices of appearance within the month. Service was not made on Miller until 22 months later, in August 2016. During that nearly two-year period, the court entered a preliminary injunction and approved two consent decrees with the three corporate defendants. After Miller was finally served, he moved to dismiss in February 2017 alleging failure to timely serve a summons and complaint, insufficient service of process and failure to prosecute claims.

The court noted that the Sixth Circuit considers dismissal for failure to prosecute "a harsh sanction which the court should order only in extreme situations" of delay or disobedience by the plaintiff. The district court applied a four-part test to the situation from the Sixth Circuit's opinion in *Schafer v. City of Defiance Police Dept.*, 529 F.3d 731, 737 (6th Cir. 2008), considering whether the dismissed party acted willfully or was warned, whether the adversary moving to dismiss was prejudiced, and whether less drastic sanctions were imposed first. Here, Ohio provided no explanation for why it took so long to find Miller or evidence that it had searched in good faith in the intervening 22 months. Because Ohio entered into consent decrees to the detriment of Miller during that time and because Miller was not able to participate in negotiations or enter into those consent decrees with his employers, the court determined that Miller's participation in the case would be too burdensome and expensive, and dismissed the claims with prejudice.

PREEMPTION

Sixth Circuit Holds Safe Drinking Water Act Does Not Preempt Constitutional Claims

By Shengzhi Wang

The Sixth Circuit revived previously dismissed claims in the Flint water cases, clarifying where the Safe Drinking Water Act (SDWA) does not preempt § 1983 claims. *Boler v. Earley*, No. 16-1684 (6th Cir. July 28, 2017). Previously dismissed as preempted under the SDWA, the plaintiffs' constitutional claims were found to be distinct from statutory rights, which might have been preempted by the SDWA.

Citizens of Flint and consumers of Flint water filed suit against the State of Michigan, the City of Flint, and their respective officials. The suits alleged a series of claims including constitutional claims under § 1983 of Title 42 of the United States Code, described by the Sixth Circuit as a "vehicle for a plaintiff to obtain damages for violations of the Constitution or a federal statute." The District Court determined that it lacked subject matter jurisdiction because the plaintiffs' § 1983 claims were preempted by the federal SDWA and dismissed the cases.

On appeal, the Sixth Circuit focused on the congressional intent behind SDWA to determine whether Congress intended to displace remedies available under constitutional jurisprudence when it passed the SDWA. The court looked at three elements of the statute: statutory text, the remedial scheme of the SDWA, and the types of rights and protections provided by the SDWA. Regarding the text, the court held that because the SDWA neither uses "language related to constitutional rights" nor codifies "legal standards that appeared in prior cases to enforce rights guaranteed by the Constitution," the court could find no preclusion. The court found "no clear inference from either the text of the statute or its legislative history that congress intended for the SDWA's remedial scheme to displace § 1983 suits enforcing constitutional rights." Further, the court did not find the remedial scheme "so comprehensive as to demonstrate congressional intent" to preclude a § 1983 suit. Finally, the court analyzed the type of right protected. It presented hypotheticals suggesting that an action may violate the Due Process Clause without violating the SDWA, or vice versa. Such a case provides that the "contours of the rights and protections found in the constitutional claims diverge from those provided by the SDWA" so as to refute a claim for preemption.