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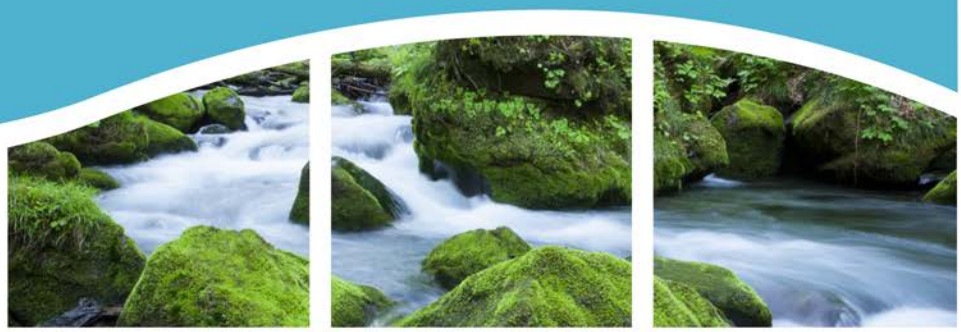

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Beveridge & Diamond's 100 lawyers in seven U.S. offices focus on environmental and natural resource law, litigation and dispute resolution. We help clients around the world resolve critical environmental and sustainability issues, including the defense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

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PRODUCTS LIABILITY

Last Product Liability Claims Dismissed in Massachusetts PCB Suit

By Toren Elsen

In a win for manufacturers of products containing PCBs, a Massachusetts federal court dismissed the last few PCB-related product liability claims in a sprawling case brought by a local school because injuries related to caulking made with PCB-containing plasticizers were not reasonably foreseeable when the caulk was first used. *See Town of Westport v. Monsanto Co.*, No. 14-12041 (D. Mass. Apr. 7, 2017).

Until 1977, Defendant Pharmacia produced plasticizers containing polychlorinated biphenyls, or PCBs, that were used in certain kinds of caulk. A middle school in the Town of Westport was constructed in 1970, and PCB-containing caulk was used in its construction. The PCBs were detected in 2011 and the school was remediated. The town brought suit, and Pharmacia successfully moved to dismiss claims alleging public nuisance, private nuisance, trespass, and violation of the Massachusetts Oil and Hazardous Material Release Prevention and Response Act. But Plaintiff's claims for negligence, defective design, and failure to warn survived.

To support defective design claims, Massachusetts law required the plaintiff to show both that a safer alternative design existed for the PCB-containing plasticizers, and that the injury alleged was reasonably foreseeable when the caulk was used in the school's construction. Finding that the plaintiff had not proved that a safer alternative existed, the court noted that "Massachusetts law does not allow for the categorical imposition of liability on an entire class of products[,]" so the plaintiff could not base its claim on the conclusion that PCB plasticizers "should never have existed in the first place." Moreover, the court found that the risks posed by PCBs in the caulk were not reasonably foreseeable at the time they were used in the school's construction. The plaintiff's own expert admitted to not knowing of any scientific studies "demonstrating that PCBs volatizing from building materials caused adverse health effects." The court concluded that it could not find that the risk was foreseeable in 1970 "when it is not clear today that the PCBs contained in caulks pose a danger to human health."

The plaintiff's failure-to-warn claims failed for the same reason, among others: Under Massachusetts's bulk supplier doctrine, Pharmacia was not obligated to warn the school itself because it "reasonably relied upon [the caulk manufacturers] to pass on the necessary warnings to the end users of PCB-containing plasticizers." Similarly, the plaintiff failed to show how Pharmacia could have identified the school as an end user of the plasticizer. The court rejected the argument that Pharmacia could have used public media to publish a general warning "for all conceivable end users of products containing [PCB] plasticizers."

Finally, Pharmacia defeated the plaintiff's last remaining claim – negligence – when the court dismissed the defective design claims, which were the sole basis for the negligence claim.

Pennsylvania Federal Court Applies Expanded "Take-Home" Toxic Tort Liability

*By Jeffrey Clare**

A Pennsylvania federal court applied a New Jersey Supreme Court opinion expanding the scope of potential workplace-exposure liability and allowed a beryllium exposure case to move forward. *Schwartz v. Accuratus Corp.*, No. 12-cv-06189 (E.D. Pa. March 30, 2017). As previously reported, the New Jersey Supreme Court held that an employer may be liable for toxic exposures not just to the spouse of an employee, but potentially to people with more attenuated relationships as well. Under some circumstances, the so-called "take-home" liability of an employer may extend to people with whom an employee may live with or interact with regularly.

Plaintiffs Brenda Ann and Paul Schwartz filed suit against Accuratus Ceramic Corporation alleging negligence, products liability and strict liability after Brenda was diagnosed with chronic beryllium disease. Paul had worked at the defendant's ceramic facility in 1978 and 1979. By 1979, Paul and Brenda were dating and Brenda often visited and stayed overnight at Paul's apartment, which he shared with a co-worker. Brenda did the laundry and other chores at the apartment, both before and after she and Paul were married in June 1980.

Plaintiffs filed their complaint in Pennsylvania state court claiming that Brenda was subjected to take-home beryllium exposure due to Paul and his roommate bringing the substance home from the facility on their work clothing, including during the time before she and Paul were married. The case was removed to the U.S. District Court for the Eastern District of Pennsylvania, which found that New Jersey had not recognized a duty for an employer to protect a worker's non-spouse roommate from take-home exposure to a toxic substance. Plaintiffs appealed to the Third Circuit, which submitted a petition to the New Jersey Supreme Court, asking that court to better define the extent of potential "take-home" liability under New Jersey law.

The New Jersey Supreme Court held that the duty of care may extend to a plaintiff who is not a spouse, and set forth three factors to be considered in take-home toxic tort actions: (1) the relationship of the parties, including the relationships between the defendant's employee and the injured person, as well as between the defendant and the injured person; (2) the opportunity for exposure to the toxin and the nature of the exposure that causes the risk of injury; and (3) the employer's knowledge of the danger associated with exposure when the exposure occurred – not at a later time when more information may become available.

Upon remand, the federal court reversed its earlier decision and denied Accuratus' motion to dismiss the negligence claims. The court found that because of beryllium's particular "danger with minimal exposure," the "duty-creating relationship threshold . . . must be considered relatively low." The court found that an employer must be reasonably expected to foresee that "virtually all of its employees live with or have repeated close contact with *someone*," meaning that the "absence of a direct relationship" should not "count much against duty and liability." The court reasoned that for a toxin where even "a brief exposure could cause harm," the law "should not insist upon the closest, longest, most serious relationship."

CONTAMINATED PROPERTY

Fifth Circuit: Louisiana's Subsequent Purchaser Doctrine Bars Claims for Damage to Real Property

By Shengzhi Wang

In a case that may have implications at contaminated former oil and gas production sites across Louisiana, the Fifth Circuit applied Louisiana's "subsequent purchaser doctrine" and affirmed the dismissal of a landowner's property damage claims stemming from a decades-old oil and gas operation. *See* *Guilbeau v. Hess Corp.*, No. 16-30971 (5th Cir. Apr. 18, 2017). Although the Fifth Circuit acknowledged the Louisiana Supreme Court had not directly addressed the issue, the court held that a Louisiana property owner without assignment or subrogation of rights held by previous landowners cannot sue a third-party lessee of mineral rights for damages inflicted on the property before the current property owner purchased the property.

Defendant Hess Corporation's predecessors conducted oil and gas operations on the property in dispute for years, until the early 1970s. Thirty-five years later, in 2007, the plaintiff purchased the property without obtaining from the seller any assignment of rights to bring pre-purchase damage claims. After the purchase, the new owner sued Hess Corporation for contamination allegedly caused decades ago by its oil and gas operations. Hess moved for summary judgment, arguing that under Louisiana's "subsequent purchaser rule," no property owner without the right of assignment or subrogation may sue a third party for damages inflicted before the land sale. The trial court granted the motion and the plaintiff appealed to the Fifth Circuit.

The key question on appeal was whether Louisiana's subsequent purchaser rule applies to mineral lease scenarios. In 2011, the Louisiana Supreme Court reaffirmed the "subsequent purchaser rule" as valid state law, but "express[ed] no opinion as to the applicability of [its] holding to fact situations involving mineral leases or obligations arising out of the Mineral Code." Based on this language, the plaintiff argued that the law was unsettled and that some prior Louisiana cases rejected applicability of the rule to mineral leases.

The Fifth Circuit disagreed. The court looked into cases from three Louisiana intermediate appellate courts after 2011 and found that "a clear consensus ha[d] emerged among all Louisiana appellate courts that have considered the issue, and they ha[d] held that the subsequent purchaser rule does apply to cases, like this one, involving expired mineral leases." *Id.* at 7-8. The Fifth Circuit therefore affirmed the district court's decision to dismiss the case.

EXPERTS

Pennsylvania Federal Court Vacates Jury Award, Orders New Trial in Tort Lawsuit Against Natural Gas Producer

*By Katrina Krebs**

Illustrating the importance of expert testimony in establishing a factual basis for private nuisance claims and damages in tort actions, a Pennsylvania federal judge vacated a $4.24 million jury verdict and granted a new trial in a case about alleged contamination from natural gas production operations. *See Ely v. Cabot Oil & Gas Corp.*, Civil No. 3:09-CV-2284 (M.D. Pa. Mar. 31, 2017)

In 2009, plaintiff landowners sued defendant Cabot Oil & Gas Corp. for allegedly causing nuisance injuries and property damage, including restricting their access to clean water, through its natural gas drilling operations. The plaintiffs originally brought claims for breach of contract, fraudulent inducement, private nuisance, negligence, negligence per se, medical monitoring, and violations of state environmental laws, but the court earlier granted defendant's motions for summary judgment on most of those claims. When the case went to trial in 2016, only two claims—private nuisance and negligence—remained.

At trial, the court granted the defendant's motion for a directed verdict on the negligence claim. Thus, the jury only considered the private nuisance claim. Despite the case being so limited in scope, the jury returned a $4.24 million verdict for the plaintiffs. The defendant sought relief from the judgment.

While the court concluded that the defendant did not meet the high standard required for judgment as a matter of law, it vacated the jury verdict and ordered a new trial. In justifying its ruling, the court cited "a constellation of serious problems [that] thoroughly undermined" the jury's verdict. The court noted that the evidence presented by the plaintiffs did not support the verdict. Specifically, the court cited uncontroverted evidence that groundwater beneath the plaintiffs' property was contaminated prior to drilling and compared the speculative and disputed testimony from the plaintiffs' expert witnesses with the stronger and more rigorous testimony from the defendant's experts. Second, the court explained that the plaintiffs' conduct at trial was prejudicial and improper because, among other actions, they did not abide by evidentiary rulings and encouraged the jury to engage in speculation. Third, the court held that the damages award for the single remaining claim was unreasonable based on the limited testimony from the plaintiffs about their alleged injuries.

DAMAGES

Kentucky Appeals Court Outlines Limitations on Stigma Damages

By Zaheer Tajani

Illustrating the limitations on so-called "stigma" damages under Kentucky law, Kentucky appellate court ruled that a claim for stigma damages is not an independent cause of action, and that such damages are not available in addition to the cost to remediate a contaminated property. *See Muncie v. Weiseman*, 2015-CA-001788-MR (Ky. Ct. App. April 21, 2017).

The case stems from a 2010 leak from a home heating oil tank onto Cindy and Jim Muncie's property. Oil-contaminated water entered the Muncies' sump pump, which later failed, flooding their basement with petroleum-contaminated water. Over the next year, the Kentucky Division of Waste Management declared the site an environmental emergency and ordered and oversaw expedited remediation efforts, finally declaring that the site required no additional remediation in December of 2011. In 2013, the Muncies, the tank owner, and other parties settled a suit for allocation of insurance payouts, but the settlement did not include claims by the Muncies to assert "the diminution of the value of their real estate due to the stigma resulting from the contamination." A month later, the Muncies filed suit in state court against the tank owner, alleging stigma damages. The trial court granted the defendant's motion for summary judgment, finding that a claim for stigma damages is not an independent cause of action and that such damages are not available when the landowner has already been compensated for remediation.

On the Muncies' appeal, the appellate court affirmed the lower court's decision and reiterated the Kentucky Supreme Court's holding in *Smith v. Carbide & Chems. Corp.*, 226 S.W.3d 52 (Ky. 2007). As a matter of law, actual damage to real property includes damages caused by stigma or reputational harm. Even when this damage is not included explicitly in the calculation, reputational damage does not stand as an independent suit for recovery. The court further held that allowing any recovery for reputation in addition to damages for actual harm to the property would result in an inappropriate double recovery for the injured party, even accounting for the fact that the 2013 settlement explicitly contemplated a future suit on reputation.

STATUTORY ABROGATION OF CLAIMS

North Carolina Legislature Limits Nuisance Lawsuits, Reducing Potential Liability for Hog Farming Industry

*By Katelin Shugart-Schmidt**

Overriding a gubernatorial veto, on May 11 the North Carolina legislature significantly limited the liability of hog farms in any future nuisance lawsuits. *See* 2017 N.C. Sess. Laws 11. The new law caps the compensatory damages that may be awarded to a plaintiff bringing a private nuisance action to either the reduction in fair market value of a property, if the nuisance is permanent, or to the diminution of the property's fair rental value, if the nuisance is temporary.

North Carolina has the second-largest hog farming industry in the country, with operations valued at more than $1 billion. As a result, approximately 4,000 hog waste lagoons are located across the state, grandfathered into operation under a 2007 moratorium that bans construction of new lagoons. In 2014, two dozen lawsuits involving more than 500 plaintiffs were filed against Murphy-Brown LLC, a Smithfield Foods subsidiary, alleging that some of the company's lagoon-utilizing farms created a nuisance for neighboring homes and seeking compensatory and punitive damages, as well as injunctive relief.

In response, Representative John R. Bell, the House Majority Leader, introduced House Bill 467, seeking to protect hog farmers (as well as other agricultural or forestry operations in the state) by limiting liability in nuisance cases. The bill was sent to the Governor's desk, but was vetoed out of concern that "[s]pecial protection for one industry opens the door to weakening [the state's] nuisance laws in other areas." The House and Senate voted to overturn the veto less than a week later.

Under the new law, total damages that can be awarded to any plaintiff or successor in interest are capped at the fair market value of the property, regardless of the defendant against which damages are sought. Once a plaintiff has recovered damages equivalent to the property value, further nuisance claims, even against additional defendants, are barred. However, the law was amended to only apply to lawsuits filed after the date of enactment, after bipartisan concern that the legislative branch was overstepping into judicial branch territory, particularly in regards to the Murphy-Brown litigation.

In 2011, the governor of Missouri vetoed a Republican-backed bill that would have limited punitive damages in litigation against corporate hog farms, but legislation limiting compensatory damages was signed in 2012. This March, the Iowa state government also passed legislation creating a new "public interest" affirmative defense, and capping special compensatory damages in animal feeding lot nuisance litigation.

Texas Supreme Court Upholds $22.7M Award in Gas Production Contamination Case

By Zaheer Tajani

Holding that the Texas Railroad Commission's statutory authority to regulate contamination from oil and gas operations does not preclude private suits for damages, the Texas Supreme Court upheld a $22.7 million award in a suit alleging contamination from natural gas production. *Forest Oil Corp. v. El Rucio Land & Cattle Co.*, 518 S.W.3d 422 (Tex. 2017).

For more than 30 years, the defendant, Forest Oil Corporation, produced natural gas on plaintiff James McAllen's property. In 2004, McAllen learned that Forest had contaminated the property and left behind oilfield tubing contaminated with naturally occurring radioactive material. McAllen sued and the defendant compelled arbitration under an agreement settling a previous lease dispute. Meanwhile, McAllen contacted the Texas Railroad Commission (RRC) about the contamination. The RRC referred the defendant to a cleanup program under which the defendant would propose and implement plans to remediate the property. The RRC approved parts of the defendant's remediation proposal, but had not yet approved a final remediation plan.

The arbitration panel denied the defendant's request to stay proceedings until the RRC completed its assessment of the remediation plan. The panel awarded McAllen $16 million in damages and $6.7 million in attorney fees. The panel further declared that, under the agreement between the parties, the defendant was responsible for all past and future investigation and remediation costs related to its production activities.

On review in the Texas Supreme Court, Forest argued that the RRC had exclusive, or at least primary, jurisdiction over claims for environmental contamination resulting from oil and gas operations. The defendant pointed to several statutes that it contended made the RRC "solely responsible" or gave it "sole authority" for prevention and abatement of pollution from oil and gas activities, or otherwise conferred enumerated statutory and regulatory causes of action to the exclusion of common law claims. In each case, the court did not find the express legislative intent necessary under Texas law to abrogate private common-law claims. The defendant also argued that allowing a private plaintiff to seek damages or injunctive relief for remediation while the RRC regulatory process was ongoing exposed defendants to potential double liability, which is reason enough to confer exclusive jurisdiction on the RRC. The court acknowledged this possibility, but dismissed it as one "for the Legislature."

GOVERNMENTAL IMMUNITY

New York Municipality Not Immune in Negligent Lead Abatement Suit

*By Jennifer Leech**

Illustrating the limits on the governmental immunity defense, a New York appeals court denied summary judgment to the City of Buffalo and City of Buffalo Urban Renewal Agency in a lead paint abatement negligence suit. *See Moore v. Del-Rich Properties, Inc.*, No. 16-02130, 2017 WL 2604503 (N.Y. App. Div. June 16, 2017).

When tests detected dangerous levels of lead paint in plaintiff Lillie Moore's apartment building, the building's owner enrolled in the City of Buffalo's federally-funded Lead Hazard Control Project to pursue lead paint abatement. The City of Buffalo Urban Renewal Agency (BURA) managed this lead paint abatement work in early 2000. The following year, the building's lead retest again detected dangerously high levels of lead paint. The plaintiff then brought suit against the City of Buffalo, the City of Buffalo Urban Renewal Agency (BURA), and the building's owner for negligent lead paint abatement work, claiming that they were liable for the continued presence of hazardous lead paint levels and that the lead caused injuries to the plaintiff's grandson while he visited and lived in her apartment. The City of Buffalo and BURA moved for summary judgment, arguing they were protected by governmental immunity from liability. The trial court denied the motion, and the City and BURA appealed.

The court found the municipal defendants could not claim immunity. In jointly managing the Lead Hazard Control Project, the Defendants arranged and supervised the lead paint abatement project at the plaintiff's apartment. In doing so, the City played a proprietary role rather than a governmental function—thereby extinguishing any immunity—because the City "voluntarily assumed the homeowner's duty to remediate the lead paint" at the plaintiff's residence. The court further noted that once the defendants assumed this proprietary duty, they also assumed liability, despite the fact that the City did not own Plaintiff's apartment building.

CLASS ACTIONS

Iowa Supreme Court Upholds Class Certification in Corn Mill Nuisance Suit

*By Tasmaya Lagoo**

Endorsing a degree of flexibility in devising classes in nuisance suits, the Iowa Supreme Court permitted the certification of a two-tier class action in a nuisance suit filed against the owner of a corn milling plant by nearby residents. *See Freeman v. Grain Processing Corp.*, 895 N.W.2d 105 (Iowa 2017).

An Iowa district court first granted class certification in 2015, dividing the class into two subclasses: one for members living in close proximity to the corn milling plant and one for those in peripheral proximity to the plant. On appeal, the plant owner argued that there was insufficient commonality between the plaintiffs' claims, and that alleged common questions of law or fact did not "predominate" over individual issues that may have existed.

The Iowa Supreme Court agreed with the trial court that "[t]he central factual basis for all of Plaintiff's claims . . . is [the defendant's] course of conduct and knowledge of its potential hazards." The court also held that by dividing the class into two subclasses, the trial court resolved issues arising from potential disparities in the alleged harm suffered by the plaintiffs.

The court also held that these common issues predominated over any individual questions of law or fact. Noting that the test for predominance is a pragmatic one, the court rejected the notion that the mere existence of any individual issues is fatal to class certification. Accordingly, the court held that individual issues, such as potential contamination from other sources or the precise extent of contamination on plaintiffs' property, were nevertheless outweighed by common questions regarding the defendant's course of conduct, its knowledge of emissions, and the level at which emissions would interfere with a normal person's enjoyment of his or her property.

INSURANCE COVERAGE

Washington Supreme Court Holds that Prior Negligence May Trigger Insurance Coverage Notwithstanding Pollution Exclusion

By Shengzhi Wang

In a ruling highlighting the limits of ubiquitous pollution exclusion clauses in property insurance policies, the Washington Supreme Court held that an insurer had a duty to defend a claim where the insured's prior negligence led to pollution, notwithstanding a pollution exclusion clause. *See Xia v. ProBuilders Specialty Ins. Co.*, 393 P.3d 748 (Wash. 2017).

Zhaoyun Xia ("Xia") purchased a new home from homebuilder Issaquah Highlands 48 LLC ("Issaquah"). Issaquah was insured under a general liability insurance policy through ProBuilders Specialty Insurance Company ("ProBuilders"). The insurance policy included a pollution exclusion clause that covered "gaseous" and other pollutants including "vapor" and "fumes." Xia became ill soon after her move-in. Investigation revealed that Issaquah had improperly installed the water heater, which led to carbon monoxide releases. Xia sued Issaquah and notified the insurer, which declined to defend and indemnify Issaquah based on the pollution exclusion clause. Xia settled with Issaquah, was assigned first-party causes of action, and sued the insurer, in the shoes of the insured, for coverage.

The insurer prevailed at the trial and intermediate appellate level. The appellate court held that the pollution exclusion clause applied, and that ProBuilders did not breach its duty to defend. On appeal to the Washington Supreme Court, the justices agreed that the carbon monoxide in Xia's home was within the scope of the pollution exclusion clause under the policy. A majority of the court also held, however, that the insurer had a duty to defend, because its insured's negligence – the failure to install the heater properly and, later, to discover and correct the defect – was a "separate step" "in the same causal chain" as the subsequent carbon monoxide releases. Accordingly, although the releases were an "excluded peril" under the pollution exclusion clause, the alleged acts of negligence were "covered occurrences," because a water heater usually "does not pollute when used as intended," and improper installation and later acts were not otherwise specifically excluded under the policy. Xia had explicitly raised the negligence question in her original complaint.