TOXIC TORT & PRODUCT LIABILITY QUARTERLY

BEVERIDGE & DIAMOND PC

Vol. VI
July 15, 2009

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Seventh Circuit Affirms *Forum Non Conveniens* Dismissal of Product Liability Suits

Under the doctrine of *forum non conveniens*, the Seventh Circuit upheld the dismissal of two consolidated product liability cases brought by Argentinean plaintiffs against American manufacturers for injuries allegedly sustained in Argentina. *See Abad v. Bayer Corp.*, 563 F.3d 663 (7th Cir. May 1, 2009). In one case, a putative class of hemophiliac plaintiffs alleged infection with HIV due to the defendant's failure to eliminate the virus from its blood clotting factor. *Abad*, 563 F.3d at 669–70. In the other suit, the plaintiff claimed wrongful death from a sport utility vehicle rollover, which allegedly resulted from the defendant's defectively manufactured tires. *Id.* at 672. Federal district courts had subject matter jurisdiction over both suits on the basis of diversity but the courts nonetheless granted defendants' motions to dismiss on *forum non conveniens* grounds.

Writing for the panel, Judge Posner rejected plaintiffs' arguments that federal courts must apply a strong presumption in favor of giving plaintiffs their choice of courts as long as the requirements of subject matter jurisdiction, personal jurisdiction and venue are met. Instead, the court held that "[w]hen application of the doctrine [of *forum non conveniens*] would send the plaintiffs to their home court, the presumption in favor of giving plaintiffs their choice of court is little more than a tie breaker." *Id.* at 666–67. Applying an abuse of discretion standard, the court reviewed the circumstances of each case and concluded that the lower courts reasonably decided that the litigation should be conducted in Argentina. *Id.* at 665–66, 668–73. In particular, the Seventh Circuit recognized that either forum would apply Argentine — rather than American — law in both suits, and that Argentine courts would be more competent to apply their own law. *Id.* at 669–72.

California Court Dismisses Two Pesticide Lawsuits on Evidence of Fraud

A California superior court judge dismissed two lawsuits filed on behalf of Nicaraguan agricultural workers against Dole Food Company and other U.S. companies for alleged exposure to dibromochloropropane ("DBCP"), a pesticide used at banana plantations that the plaintiffs claimed can cause sterility and other health problems. *See* Transcript of Oral Ruling, *Mejia v. Dole Food Co. Inc.*, No. BC 340049 (Cal. Super. Ct. Apr. 23, 2009). The court found that plaintiffs' counsel recruited individuals who had never worked on the plantations to serve as plaintiffs in the case and took numerous other steps to perpetuate the fraud, including fabricating employment records and falsifying laboratory tests. The court singled out not only attorneys in Los Angeles and Nicaragua but also a Nicaraguan judge as participants in the conspiracy. According to the court, "[w]hat has occurred here is not just a fraud on this court, but it is blatant extortion of the defendants." *Id.* at 10.

It is not clear what impact this case will have on a prior ruling in a related case against the same defendants that resulted in a reduced award of $1.5 million in compensatory damages to six Nicaraguan plaintiffs. *See Tellez v. Dole Food Co. Inc.*, No. BC 312852 (Cal. Sup. Ct. Mar. 7, 2008). Dole and other defendants in *Tellez* filed an appeal, which is now pending in the California Court of Appeal, Second District. In the oral ruling, the court indicated that the fraud in *Mejia* "contaminated each and every one of the plaintiffs in the *Tellez* matter." Transcript of Oral Ruling, *Mejia v. Dole Food Co. Inc.*, at 25.

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United States Chemical Companies Sued for Waste Disposal in Brazil

More than three dozen Brazilian plaintiffs have sued several American chemical and petroleum companies in federal district court, alleging damages from toxic chemical exposure and reserving their right to move for class certification. *See* Complaint, *Vieira v. Eli Lilly & Co.*, No. 1:09 CV-0495 RLY-JMS (S.D. Ind. filed Apr. 21, 2009). The plaintiffs contend that the defendants contaminated soil, water, and air near the cities of Cosmópolis and Paulina in the state of São Paulo. *See* Compl. at 4. Specifically, the plaintiffs allege that the defendants stored or incinerated the herbicide tebuthiuron, the group of chlorinated insecticides known as "drins" (aldrin, dieldrin and endrin, now banned in the United States), and other potentially toxic chemicals. *Id.* at 4–6. As to damages, the plaintiffs allege reproductive harms, cancers, and premature death, as well as mental suffering, other economic and non-economic losses, and attorneys' fees. *Id.* at 8–10. The complaint enumerates claims for negligence, gross negligence, strict liability, and wrongful death, and for "knowing or intentional violation of the law of nations" under the Alien Tort Claims Act (28 U.S.C. § 1350). *Id.* at 11–12. Suggesting that "there may be thousands of additional people that have suffered damages," the plaintiffs reserved their rights to move for class certification. *Id.* at 9.

II. EXPERTS

Sixth Circuit Allows Expert Testimony Based on Differential Diagnosis

Adopting the Third Circuit's differential diagnosis test, the Sixth Circuit has reversed a lower court's exclusion of an expert witness and the resulting grant of summary judgment. *Best v. Lowe's Home Ctrs., Inc.*, 563 F.3d 171 (6th Cir. Apr. 16, 2009). The plaintiff alleged that he lost his sense of smell and suffered other damages after pool chemicals spilled onto his face from a container that had been punctured by the defendant's employee. *Best*, 563 F.3d at 175. The plaintiff's expert offered causation testimony based on his analysis of the pool treatment's Material Safety Data Sheet (MSDS), elimination of other (e.g., medicinal) potential causes, and the temporal relationship between the incident and the symptoms. *Id.* at 175–77. The district court nevertheless excluded the expert testimony as speculative and unreliable under Rule 702 of the Federal Rules of Evidence and related case law, finding that the expert's testimony raised the following "red flags": (1) improper extrapolation, (2) reliance on anecdotal evidence, (3) reliance on temporal proximity, (4) insufficient information about the case, (5) failure to consider other possible causes, and (6) subjectivity. *Id.* at 174–78.

The Sixth Circuit analyzed the expert testimony de novo, holding that the district court was not entitled to the abuse of discretion standard of review because it had failed to recognize that the expert employed "differential diagnosis," which the Sixth Circuit had previously held to be a valid technique for medical causation testimony. *Id.* at 178–79. Recognizing that "[n]ot every opinion that is reached via a differential-diagnosis method will meet the standard of reliability required" under *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), the court adopted the Third Circuit's three-prong test: (1) objective determination of the nature of the injury, (2) valid methodology to rule in one or more causes of the injury, and (3) use of standard diagnostic techniques to rule out alternative causes. *Best*, 563 F.3d at 179 (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994)). The court held that the plaintiff's expert had met all three prongs of the Third Circuit's test and that the expert was not required to rule out "every conceivable" cause or employ "perfect" methodology because any weaknesses would affect the weight of the testimony at trial rather than admissibility. *Id.* at 180–84.

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Texas Supreme Court Reverses $20 Million Verdict Due to Improper Expert Testimony

The Texas Supreme Court reversed a lower court's judgment of $20 million for plaintiffs against the City of San Antonio for alleged benzene exposure because the opinion of the plaintiffs' expert was conclusory and speculative, and therefore unable to support the judgment. *See City of San Antonio v. Pollack*, No. 04-1118 (Tex. May 1, 2009), *available at* http://www.supreme.courts.state.tx.us/Historical/2009/may/041118.htm. The plaintiffs claimed both personal injury, in the form of acute lymphoblastic leukemia, and loss of property value from alleged migration of benzene onto their property from an adjacent, inactive municipal waste disposal site. *Id.* at 2. In the testimony at issue, the plaintiffs' expert provided analysis of gas levels reported in a sealed monitoring well near the plaintiffs' property and epidemiological studies that found high rates of cancer among workers occupationally exposed to benzene. *Id.* at 7. The court dismissed the testimony as "the kind of naked conclusion that cannot support a judgment" and as having "no basis in the record," noting that the experts not only failed to prove that the high levels present in the monitoring well were present on the plaintiffs' property but also relied on studies in which the subjects had been exposed to significantly higher levels of benzene than those claimed by the plaintiffs. 14–16.

District Court Tosses $8 Million Verdict as Unsupported by Expert Testimony

A federal district court has granted a new trial after ruling that a jury's $8 million wrongful death verdict was excessive, unsupported, and based on improper expert testimony. *See Jackson v. A-C Product Liability Trust,* No. 1:99 CV 10802 (N.D. Ohio Mar. 31, 2009). The decedent had worked on a ship owned by the predecessor of the defendant for approximately four months out of a 33-year seafaring career. The court noted that exposure to asbestos "cannot be presumed merely because [the decedent] worked on board a vessel where asbestos materials were located" and agreed with the defendant that the decedent's vague testimony did not provide evidence of exposure on the particular ship at issue. *Jackson*, Slip Op. at 3–6. Second, because the hypothetical questions presented to the plaintiff's experts were based on allegations of exposure and other statements unsupported by the evidence, the court concluded that the expert testimony in the case was "meaningless." *Id.* at 6–7. Finally, the court held that the $8 million verdict "shocked the conscience" because it was beyond the range of both what was supported by the proof and previous awards in similar cases. *Id.* at 8–9.

III. CAUSATION

Seventh Circuit Denies PCE Claim Due to Insufficient Causation Evidence

Based on a lack of causation evidence, the Seventh Circuit affirmed a district court's grant of summary judgment against a couple claiming damages for perchloroethylene (PCE) in their home. *See Cunningham v. Masterwear Corporation*, No. 08-1924 (7th Cir. June 23, 2009), *available at* http://www.ca7.uscourts.gov/fdocs/docs.fwx?submit=showbr&shofile=08-1924_003.pdf. The plaintiffs alleged that PCE leaked into their home from a nearby dry cleaning business and claimed damages for headaches and respiratory ailments as well as a diminution in the value of their home. *Id.* at 2.

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Writing for the court, Judge Posner found that causation was the plaintiffs' "Achilles heel," barring them from recovering on either claim. *Id.* at 4. The court noted that the plaintiffs' medical expert had never treated an illness caused or exacerbated by PCE and held that the expert failed to present any theory linking the plaintiffs' illnesses to PCE exposure. *Id.* at 3–4. Similarly, the plaintiffs failed to establish the sale price of their home absent the presence of any PCE because they did not provide any testimony from a real estate agent or appraiser on comparable home prices. *Id.* at 6–7.

Illinois Supreme Court Allows Nonparty Exposure to Support Sole Proximate Cause Defense

The Illinois Supreme Court set aside a $1.2 million judgment and ordered a new trial, holding that a defendant is permitted to submit evidence of a plaintiff's exposure to asbestos at a nonparty site when pursuing a sole proximate cause defense. *See Nolan v. Weil-McLain*, No. 103137 (Ill. Apr. 16, 2009), *available at* http://www.state.il.us/court/Opinions/SupremeCourt/2009/April/103137.pdf. The plaintiff first noted that evidence of frequent, regular, and proximate exposure to asbestos merits a presumption of proximate causation under the test established in *Thacker v. UNR Industries Inc.*, 151 Ill. 2d 343 (Ill. 1992). *Nolan*, Slip Op. at 10. Therefore, the plaintiff argued, evidence of exposure at other workplaces was properly excluded as irrelevant under *Lipke v. Celotex Corp.*, 153 Ill. App. 3d 498, 509 (1987) and was otherwise harmless error because the jury was well aware of the plaintiff's other exposure. *Nolan*, Slip Op. at 10. Illinois recognizes the sole proximate cause defense, "which seeks to defeat a plaintiff's claim of negligence by establishing proximate cause in the act of solely another not named in the suit." *Id.* at 19. The defendant countered that the exposure evidence should have been admitted because the purpose of the sole proximate cause defense is to allow the jury to place blame on a nonparty to the suit if the evidence shows that the nonparty may have caused the injury. *Id.* at 2.

In a 5-1 decision, the Illinois Supreme Court held that exclusion of the plaintiff's exposure to other types of asbestos from different products during his 38-year career was a reversible error because it "made the case 'undefendable' for [the] defendant" and presented only a partial story to the jury. *Id.* at 23. The court concluded that *Lipke* does not apply to evidence introduced for the purpose of supporting a sole proximate cause defense and specifically overruled post-*Lipke* decisions to the extent that they barred admission of "other exposure" evidence when the case involved a sole proximate cause defense. *Id.* at 17–18, 23. The court further held that fulfillment of the *Thacker* test establishes only cause in fact — not legal causation — and a plaintiff still must meet "the ultimate burden of proof" on causation. *Id.* at 15.

IV. CLASS ACTIONS

District Court Denies Class Certification in Nuisance Suit

A federal district court judge denied class certifications for proposed medical-monitoring and property-owner classes that alleged statutory and common law nuisance for air, water, and soil contamination from the defendants' zinc and lead mining activities. *See Cole v. Asarco, Inc.*, No. 03-CV-327-GFK-PJC (N.D. Okla. Apr. 2, 2009). The requested medical monitoring relief included medical screening programs, a medical registry, a health risk assessment, and other medical research and studies; the property claims included a request for relocation and recovery of damages for diminution of property value. *Cole*, Slip Op. at 3. The court held that Oklahoma law did not support a medical monitoring class where the representative plaintiffs disavowed any present injury.

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With respect to the property-owner class certification, the court held that the named plaintiffs failed to define the potential class members with adequate specificity, deeming untenable the definition of potential class members as those who had "owned or had an interest in real property" on a specific date. *Id.* at 5. The court alternatively concluded that the plaintiffs had not met their burden as to other required class action certification requirements under Fed. R. Civ. P. 23(a) for the following reasons: (1) numerosity — because a state buyout program substantially reduced the number of potential class members; (2) typicality — because the nature of the property interests varied significantly among the named plaintiffs; and (3) adequacy of representation — because the named plaintiffs lacked any personal injury claims, had conflicts of interests, and lacked standing. *Id.* at 9–15.

V. STATUTE OF LIMITATIONS

Eighth Circuit Allows Contamination Claim Under "Discovery Rule"

The Eighth Circuit vacated a district court's decision to grant summary judgment in favor of defendants on statute of limitations grounds, holding that an action for damages resulting from alleged chemical contamination could go forward under the so-called "discovery rule" of limitations. *See Harry Stephens Farms Inc. v. Wormald Americas Inc.* No. *07-3547 (8th Cir. June 19, 2009), available at* www.ca8.uscourts.gov/opndir/09/06/073547P.pdf. In 2006, the plaintiff filed suit in federal court in Arkansas claiming that the owners and operators of a chemical plant located adjacent to the plaintiff's property were liable for negligence, nuisance and trespass because 1, 2 dichloroethane (or ethylene dichloride) had allegedly migrated from the plant onto the plaintiff's property and into his groundwater and irrigation wells. *Id.* at 1–2. Based on a 2001 report by an environmental consultant and the plaintiff's expressions of concern about contamination, the district court concluded that the plaintiff had sufficient knowledge of the injury more than three years prior to the date on which he filed suit and that the suit was therefore barred by the applicable statute of limitations.

The Eighth Circuit disagreed, holding that the plaintiff's "mere suspicion" about possible contamination of his wells did not constitute discovery for statute-of-limitations purposes. *Id.* at 2. Applying the "discovery rule," which the Eighth Circuit concluded the Arkansas Supreme Court would apply, the court held that the statute of limitations did not begin to run until the plaintiff knew, or reasonably should have known, that the land had suffered a remediable injury. *Id.* The 2001 environmental report was submitted to state agencies and indicated that the plaintiff had been notified of well contamination in 2001, but the court nonetheless deemed the report insufficient to constitute discovery of the injury because it provided no proof that the plaintiff had been put on notice that he had suffered a remediable injury. *Id.* Witness accounts of the plaintiff discussing his awareness of the contamination also did not satisfy the court because the plaintiff offered conflicting testimony, which created a genuine issue of material fact. *Id.* at 3. Therefore, the court concluded that the question remained open whether the plaintiff had been on sufficient notice of the contamination prior to the three-year limitations period.

VI. SUCCESSOR LIABILITY

District Court Rejects Successor Liability Claim in Petroleum Contamination Case

In a suit filed by the United States for alleged petroleum contamination, the U.S. District Court of Eastern Pennsylvania granted a motion for summary judgment by Sunoco Inc.,

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Sunoco, Inc. (R&M), Atlantic Refining & Marketing Corp., and Sunoco Partners Marketing and Terminals, LP (collectively, "Sunoco") that Sunoco is not liable as Atlantic Richfield's (ARCO) legal successor. *See United States of America v. Sunoco, Inc.*, No. 05-6336-ABB (E.D. Pa. June 11, 2009), *available at* www.paed.uscourts.gov/documents/opinions/09D0677P.pdf.

Sunoco purchased the Point Breeze Processing Area, a refinery in South Philadelphia previously owned by ARCO, in 1988. *Sunoco, Inc.*, Slip Op. at 3. In 1992, Sunoco and ARCO entered into a settlement agreement to resolve two lawsuits. *Id.* Under the agreement, ARCO paid Sunoco $72 million to indemnify ARCO and to defend against future claims for remediation of pollution associated with the Point Breeze site. *Id.* at 4. In 1987, the United States identified a plume of petroleum ("the Plume") that it alleged had migrated from Point Breeze to its nearby Defense Supply Center Philadelphia. In 1999, after the conclusion of alternative dispute resolution involving Sunoco, the Defense Logistics Agency, and the Pennsylvania Department of Environment ("PaDEP"), PaDEP ordered the United States to assume sole responsibility for the remediation. *Id.* at 2. In 2005, the United States filed suit against Sunoco and ARCO to recover past and future cleanup costs associated with the Plume, arguing that ARCO and Sunoco's previous settlement agreement created successor liability between the two companies that would allow recovery against both companies. *Id.* at 1.

The court held that the terms of the agreement between Sunoco and ARCO were "clear and unequivocal," and contained "no language . . . that implies that Sunoco agreed to be ARCO's legal successor." *Id.* at 4, 9. Agreeing with Sunoco, the court noted that "nowhere in the settlement agreement does Sunoco agree to assume any of ARCO's responsibilities" and highlighted that "the parties chose to never use the terms 'liabilities' or 'obligations' and only use the word 'assume' in reference to assuming defenses." *Id.* at 8–9. According to the court, an agreement worded in this way is "distinct from a situation in which Sunoco agreed to assume ARCO's liabilities as if it were ARCO." *Id.* at 8. Beveridge & Diamond, P.C. represents Sunoco in this matter.

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