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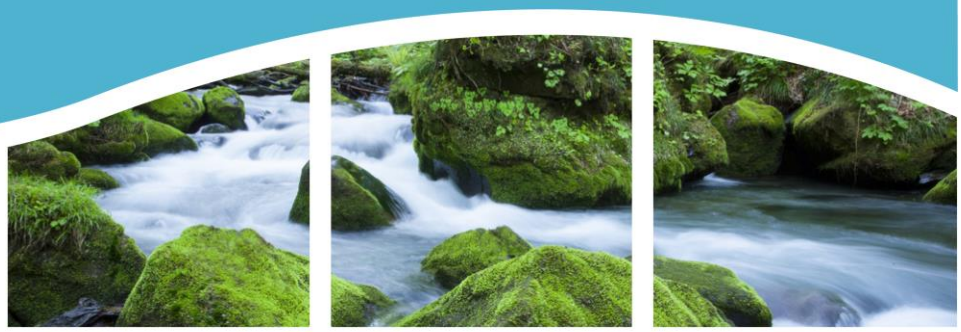

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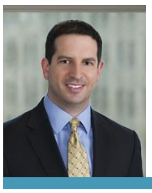

Daniel M. Krainin
Principal
(212) 702-5417
dkrainin@bdlaw.com

Graham C. Zorn
Associate
(202) 789-6024
gzorn@bdlaw.com

Contributors

- Anthony G. Papetti
- Gayatri M. Patel
- Robert C. Sylvester

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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

Sixth Circuit Rules that Clean Air Act Does Not Preempt State Tort Claims

By: Gayatri Patel

In a decision that may leave facilities open to private tort liability despite compliance with federal Clean Air Act (CAA) requirements, the U.S. Court of Appeals for the Sixth Circuit concluded that the CAA does not preempt state tort claims. *See Merrick v. Diageo Americas Supply Inc.*, Case No. 14-6198 (6th Cir. Nov. 2, 2015).

The Sixth Circuit held that the states' rights saving clause in the CAA "expressly preserves the state common law standards on which plaintiffs sue." *Id.* at 6. The court also noted that its conclusion was consistent with the CAA's legislative history, which "indicates that it was not Congress's purpose to preempt state common law claims." *Id.* at 8.

The Sixth Circuit's decision was consistent with those from similar cases in the Second and Third Circuits, but differed with the Fourth Circuit's ruling in *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291 (4th Cir. 2010). In that case, the Fourth Circuit held that the CAA preempts state common law claims. According to the Sixth Circuit here, the *North Carolina* decision is distinguishable because it involved claims brought under state common law in a state other than the state that was the source of the emissions. The Sixth Circuit also reasoned that its decision was not inconsistent with the Supreme Court's ruling in *American Electric Power Co. v Connecticut*, 564 U.S. 410 (2011), in which the U.S. Supreme Court held that the CAA displaces federal common law. The Sixth Circuit noted "the Clean Air Act expressly reserves for the states—including state courts—the right to prescribe requirements more stringent than those set under the Clean Air Act . . . [whereas it] does not grant federal courts any similar authority." *Merrick* at 11.

CLASS ACTIONS

Iowa Trial Court Certifies Class of 4,000 Residents in Corn Mill Nuisance Suit

By: Anthony Papetti

In a victory for toxic tort class action plaintiffs, an Iowa trial court certified a class covering approximately 4,000 residents who alleged property damages due to air emissions from a nearby corn milling plant. *See Freeman v. Grain Processing Corporation*, No. LACV021232 (Muscatine Cty. Dist.. Ct. Oct. 28, 2015).

Following a 2014 decision in which the Iowa Supreme Court found the federal Clean Air Act does not preempt state common law claims, Plaintiffs filed a Motion for Class Certification, seeking to certify a class of residents who lived within 1.5 miles of Defendant's facility and who alleged lost-use-and-enjoyment damages attributable to emissions from Defendant's operations. The Court granted Plaintiffs' motion finding that they had met the requirements necessary to certify a class in Iowa.

Specifically, the Court found the class to be sufficiently numerous, with approximately 4,000 members. It found that Defendant's conduct raised common issues of fact and law, such as whether Defendant employed antiquated pollution control technology and whether Defendant knew that it was creating a nuisance to the community.

The Court also found that Plaintiffs had proposed a manageable and efficient plan for adjudicating their claims by outlining various stages of litigation that would resolve specific questions of fact. The court found that, while the damages inquiry would be particularized, there were a number of issues that were common to all of the claims such as the application of Iowa's objective nuisance standard of liability and causation.

Finally, the Court found that the class representative "fairly and adequately" protected the interests of the class. The court found that the class representative retained experienced class counsel and that any concern over waiver of issues or conflicts among class participants based on the adequacy of the class representative could be resolved by limiting the scope of the judgment or by allowing putative class members to out of the class.

OIL AND GAS DEVELOPMENT

Pennsylvania Appeals Court Rejects Contamination Claim for Lack of Causation

By: Graham Zorn

Demonstrating the importance of expert causation evidence, a Pennsylvania appellate court refused a landowner's request to reopen a case alleging chemicals from a natural gas drilling operation contaminated the landowner's well. *See Kiskadden v. Penn. Dep't of Envt'l Prot.*, No. 1167 (Commonwealth Court of Penn. Dec. 7, 2015). In June 2015, the Environmental Hearing Board (EHB), which hears appeals from Pennsylvania Department of Environmental Protection administrative proceedings, rejected Plaintiff landowner's claim that nearby drilling operations contaminated his water supply.

On appeal to the Commonwealth Court, Plaintiff argued newly discovered evidence warranted remand to the EHB for further proceedings. The Court disagreed. The Court found Plaintiff did not show that consideration of the additional evidence—which included information related to the chemical composition of fluids used in Defendant's drilling operations—would have affected the outcome of the case. The Court noted that the EHB rejected Plaintiff's contamination claims because he failed to show a hydrogeologic connection between his well and Defendant's drilling operations. Information on the chemical composition of fluids used in the drilling operations, without any further information connecting those operations to Plaintiff's well, would have no bearing on the EHB's ruling.

Tort Suit Seeks to Hold Drillers Responsible for Oklahoma Earthquakes

By: Graham Zorn

In what may be part of a wave of litigation blaming increased seismicity on oil and gas development activities, 12 residents of Oklahoma City and its suburbs filed suit against oil and gas drillers and operators of wastewater injection wells following two earthquakes in central Oklahoma. *See Felts v. Devon Energy Production Co., LP*, Case No. CJ-2016-137 (Oklahoma County Dist. Ct. Jan 11, 2015). Plaintiffs allege 4.3- and 4.2-magnitude earthquakes, on Dec. 29, 2015 and Jan. 1, 2016 respectively, caused substantial damage to Plaintiffs' homes and property. Plaintiffs' complaint sounds in negligence and strict liability, alleging Defendants' underground injection of wastewater from gas drilling operations are the proximate cause of "unnatural and unprecedented" earthquakes in the area. The suit comes as Oklahoma drilling regulators consider measures to address what the Oklahoma Geological Survey has identified as increased seismic activity in the area, and follows a 2015 Oklahoma Supreme Court holding that jurisdiction over cases alleging damage from wastewater injection-related earthquakes rests with the courts and not with the state oil and gas regulator (previous coverage available here).

Private and Governmental Plaintiffs File Toxic Tort Suits Over L.A. Gas Leak

By: Anthony Papetti and Graham Zorn

In perhaps the most well-publicized environmental release incident since Deepwater Horizon, Southern California Gas Co. faces a number of toxic tort-based lawsuits stemming from a natural gas leak at one of its storage wells in an affluent Los Angeles neighborhood. *See Gandsey v. Southern California Gas Co.*, BC601844 (L.A. Cty. Superior Ct.). The leak was discovered October 23, 2015. The utility announced on February 12, 2016 that it temporarily controlled the leak. Some of the approximately 25,000 residents have sought temporary housing elsewhere, while some who have stayed have complained of a range of health effects.

Approximately 25 civil actions have been consolidated in Los Angeles County Superior Court. The lead suit is a putative class action filed by nearby residents of the Porter Ranch neighborhood seeking damages and injunctive relief based upon negligence and nuisance. Plaintiffs seek injunctive relief and monetary damages from the gas company for alleged health effects including nausea, dizziness, vomiting, shortness of breath, nosebleeds, and headaches.

The City of Los Angeles also filed suit, alleging public nuisance and unfair business practices that have long-term climate implications and caused injuries to residents. The California Attorney General intervened in the suit in February

2016, and filed papers amending the City's suit to include allegations on behalf of the City and County of Los Angeles, the California Air Resources Board, and the People of California. These public plaintiffs seek civil penalties and injunctive relief to permanently stop the leak, prevent future leaks, and mitigate alleged climate change effects.

CHEMICAL RISK WARNINGS

Federal Court Strikes Town Ordinance Requiring Warning Labels

By: Graham Zorn

In a case that may have implications for chemical warning laws, a federal court in New York found a town's efforts to require warning labels on pesticide-treated utility poles compelled non-commercial speech and infringed on a utility company's First Amendment rights. *See PSEG Long Island LLC v. Town of N. Hempstead*, 15-cv-00222 (E.D.N.Y. February 3, 2016). The Town of North Hempstead ordinance required the local electric utility to place placards on new utility poles to warn the public that the poles contain "hazardous chemicals." Town officials imposed the requirement after expressing concern that pentachlorophenol and copper chromium arsenate, used to prevent insect damage and fungal decay, posed a threat to human health and the environment.

The utility company challenged the ordinance on First Amendment grounds, among others. It argued that the warnings were non-commercial speech and therefore the requirement to post the warning signs was subject to strict scrutiny, valid only if narrowly tailored to a compelling government interest. The Court agreed. The Court found that, even if the risk of public exposure to chemically treated wood utility poles constitutes a compelling interest, the Town could have chosen less prescriptive means of communicating with the public. Finding the labeling requirement therefore failed the strict scrutiny test, the Court permanently enjoined the Town from enforcing the ordinance.

SECONDARY EXPOSURE

North Dakota High Court Rejects "Take-Home" Asbestos Claim

By: Graham Zorn

In a case of first impression that may clarify the duty of care in secondary exposure claims in North Dakota, the state's highest court rejected claims based on childhood exposure to asbestos brought home on an insulation worker's clothing. *See Palmer v. 999 Quebec, Inc.*, 2016 ND 17 (N.D. Jan. 14, 2016).

Plaintiff was the surviving spouse of Gary Palmer, who alleged his mesothelioma was caused by childhood exposure to dust that his father inadvertently brought home from his job installing asbestos insulation in the 1960s. Defendant, the former employer of Palmer's father, argued it owed Palmer no duty of care because there was no special relationship between Defendant and Palmer, nor was Palmer's injury foreseeable.

The North Dakota Supreme Court agreed with Defendant. It noted that negligence cases in the state historically "have focused on both foreseeability of the injury and the relationship of the parties in deciding whether a duty exists," with more recent case law focusing on the relationship. *Id.* at ¶¶ 15–16. Here, the Court found Palmer had not shown either that Defendant knew of the hazards of secondary asbestos exposure at the time of the exposure or that he had a special relationship with Defendant. Therefore, the Court held, Palmer's claims fell short regardless of whether the Court focused on foreseeability, relationship of the parties, or a combination of both.

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