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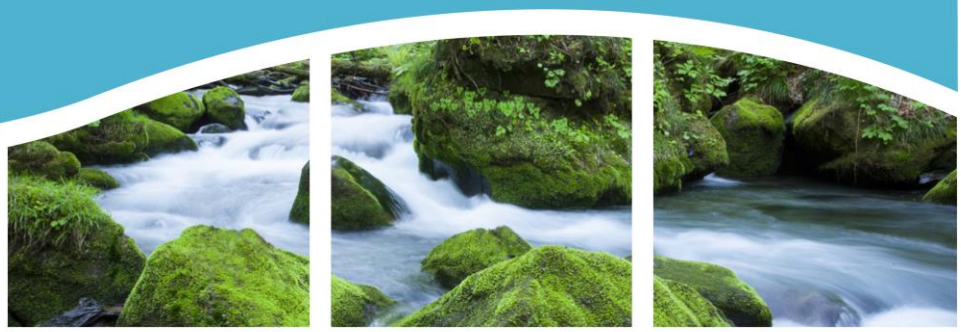

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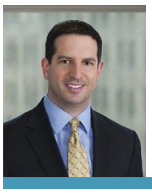

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ABOUT B&D

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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CLASS ACTIONS

Eighth Circuit Holds Fear of Contamination Insufficient to Establish Nuisance Class

By: Hilary Jacobs

In a ruling that underscores the difficulty of securing class certification in toxic tort cases involving fear of contamination claims, the United States Court of Appeals for the Eighth Circuit reversed a Missouri federal district court's certification of a class of plaintiffs alleging nuisance. See Smith v. ConocoPhillips Pipe Line Co., 801 F.3d921 (8th Cir. 2015).

In 2002, a homeowner near Phillips Pipe Line Company's petroleum pipeline in West Alton, Missouri, discovered benzene contamination in his well water, prompting Phillips to conduct remediation and monitoring. Benzene, toluene, ethyl benzene, xylenes, and lead were detected in the groundwater beneath the homeowner's land. Plaintiffs, owners of nearby homes, subsequently filed a class action against Defendant alleging nuisance under Missouri law, seeking monetary damages for purported diminution of property value, complete remediation of the area, and continued monitoring. Despite the lack of contaminants found on Plaintiffs' properties, the district court certified the class for the owners of 61 properties within a quarter mile of the site, relying on the detection of contaminants in monitoring wells, the migrating nature of the pollution, and the possibility of "pockets of contamination."

In reversing the district court's class certification ruling, the Court held that Plaintiffs could not satisfy the commonality requirement of Federal Rule of Civil Procedure 23. Plaintiffs failed to show any physical invasion of their property and therefore failed to show any actual injury. The Court therefore concluded that the putative class's fear of contamination, in the absence of proof failed to support the nuisance claim.

West Virginia Federal Court Certifies Class for Liability Purposes in Chemical Spill Suit

By: Anthony Papetti

A West Virginia federal court certified a class for purposes of determining Defendants' liability for a chemical spill that disrupted the water supply for approximately 300,000 residents in the Charleston area. Good v. Am. Water Works Co., No. CV 2:14-01374, 2015 WL 5898465 (S.D. W. Va. Oct. 8, 2015). The court also denied class certification with respect to damages, rejecting expert testimony proffered by plaintiffs in support of a proposed model for calculating damages.

In January 2014, a coal processing chemical mixture, known as Crude MCHM, was discharged into the Elk River and reached the West Virginia American's water treatment plant. Charleston area residents were ordered not to drink the water until the contamination had been addressed. Plaintiffs assert claims of negligence, gross negligence, breach of warranties, strict products liability, and public nuisance, among others.

On Defendants' motion, the Court excluded the testimony of Plaintiffs' damages experts as based on hypothetical or speculative calculations, and held the damages issues in the case were too individualized and particular to be given class treatment. The Court held, however, that issues related to liability were well suited to class certification, finding "the proposed liability issue certifications provide an orderly means to resolve some of the central issues in the case." Id. at 48.

EXPERTS

Seventh Circuit Affirms Exclusion of Plaintiffs' Causation Experts in Vinyl Chloride Case

By: Anthony Papetti

Underscoring the importance of sound science in expert opinions, the United States Court of Appeals for the Seventh Circuit upheld the exclusion of expert testimony that did not adequately draw or extrapolate from reliable sources. C.W. v. Textron, Inc., No. 14-3448, 2015 WL 5023926 (7th Cir. Aug. 26, 2015).

The Plaintiffs were two parents who brought a toxic tort suit on behalf of their children against Defendant Textron, Inc. arising out of Textron's fastener manufacturing operations in Rochester, Indiana. Plaintiffs claimed that Defendant's release of vinyl chloride, a toxic gas, contaminated the drinking water in nearby private wells and, as a result, caused

certain health problems experienced by Plaintiffs, as well as future risks of cancer and other health complications.

To show causation linking Plaintiffs' ailments to a vinyl chloride release, Plaintiffs offered the testimony of three medical doctors who relied on differential etiology, a process-of-elimination approach that establishes causation by ruling out other possible causes. They supported their conclusions in part by citing to studies of the harmful effects of vinyl chloride exposure in adults and animals, and relying on the medical history of the plaintiffs. The experts found no studies specifically evaluating the effect of vinyl chloride on children.

The district court excluded the experts' testimony, finding the experts did not use reliable bases to support their opinions. With no evidence of causation, the district court granted summary judgment for Defendant.

On review, the Seventh Circuit first found that the district court properly followed the Daubert framework by exhaustively evaluating the reliability of the doctors' opinions. The Court then affirmed the district court's exercise of discretion to exclude the experts' opinions because the experts failed to adequately "bridge the gap" between their causation conclusions and the studies they cited when conducting their differential etiology.

Texas Court Requires Expert Testimony to Support Toxic Tort Personal Injury Claims

By: Hilary Jacobs

Reinforcing the requirement for expert testimony to support toxic tort personal injury claims under Texas law, a Texas appellate court held that claims for damages due to "symptoms caused by discomfort" do not fall within the domain of a layperson's knowledge and experience, and therefore must be supported by expert testimony. See Cerny v. Marathon Oil Corp., No. 04-14-00650-CV, 2015 WL 5852596 (Tex. App. Oct. 7, 2015).

In 2010, Plaintiffs leased mineral rights to Marathon Oil Corp., which subsequently conducted oil and gas operations in the area surrounding Plaintiffs' home. After a few years of operations, Plaintiffs alleged Marathon's oil and gas activities exposed them to noxious odors and chemicals, dust, noise, and constant traffic. Plaintiffs claimed this worsened their pre-existing mental and physical ailments and caused property damage. Plaintiffs sued Marathon for damages based on claims of nuisance and negligence.

Texas law requires that any plaintiff seeking relief for personal injuries caused by exposure to or migration of a toxic substance must proffer expert testimony to prove causation. In an attempt to avoid this requirement, Plaintiffs disclaimed damages for "a diagnosed disease," instead claiming damages for "symptoms caused by discomfort rather than disease." Plaintiffs asserted that the causal link between symptoms of discomfort and Marathon's operations fell within the domain of a layperson's knowledge and therefore causation could be proved using general common law standards of nuisance and negligence.

In affirming the trial court's decision to grant Defendants' motion for summary judgment, the appellate court found that Plaintiffs had generated a false distinction between "symptoms of discomfort" and "symptoms of disease." The Court held that because symptoms of both discomfort and disease fall outside a layperson's general knowledge and experience, causation of such symptoms must be proven by expert testimony.

COMMON LAW TORTS

New Jersey Supreme Court Reaffirms Restatement Approach to Nuisance, Trespass

By: Sarah Kettenmann

In a ruling that further delineates the threshold for maintaining private nuisance and trespass claims in New Jersey, the state's highest court held that defendant landowners were not liable for contamination to neighboring landowners' property in the absence of intentional, negligent, or reckless conduct or an abnormally dangerous activity. See Ross v. Lowitz, 120 A.3d 178 (2015). This decision keeps New Jersey common law aligned with the Second Restatement of Torts.

Plaintiff landowners sued their current and former neighbors, alleging damages from a leaking underground heating

oil tank. Plaintiffs' claims included private nuisance, negligence, and trespass for failing to timely abate the contamination.

The Court found for Defendants, reasoning that section 822 of the Second Restatement of Torts required the Defendants to have acted intentionally, negligently, or recklessly in order to create an actionable common law nuisance or trespass. Plaintiffs offered no evidence of such conduct. Indeed, the Court found that the storage of heating oil did not constitute an abnormally dangerous activity, and that Defendants conducted reasonable testing on the oil tank and acted reasonably by contacting their insurance companies to engage in remediation efforts when they became aware of the leak.

Third Time Is the Charm for Refinery in Getting Claims Dismissed With Prejudice

By: Sarah Kettenmann

In a case that tested a federal judge's patience for inadequate pleadings, a Michigan federal court shut down a group of business owners' repeated attempts to craft viable tort claims against an oil refinery in a semi-residential Detroit neighborhood. See Mourad v. Marathon Petroleum Co. LP, No. 14-CV-14217, 2015 WL 5439738 (E.D. Mich. Sept. 15, 2015).

Plaintiffs were current or former business owners in the Oakwood Heights neighborhood in Detroit. Defendant operates an oil refinery that began processing tar sands in 2012 after an expansion project at the facility. Defendant initiated a buyout program for local homeowners, but not for businesses, through which Defendant acquired 277 of 294 residential properties in the neighborhood. With such a significant portion of the neighborhood's residents gone, Plaintiffs' businesses suffered.

Plaintiffs brought suit in 2014. The original and first amended complaints were both dismissed in earlier proceedings without prejudice. The second amended complaint, which was at issue here, contained two counts: tortious interference with business relationships or expectancy and nuisance.

In their tortious interference claim, Plaintiffs alleged that Defendant, through its residential buyout program, sought to reduce future liability for environmental contamination by seeking to intentionally drive out neighborhood businesses and reduce property values so Defendant could later acquire real estate at a discount. The Court dismissed this claim, finding that Plaintiffs had failed to allege Defendant acted with an improper motive.

In their nuisance claim, Plaintiffs alleged the refinery expansion caused increased air emissions. The Court found, however, that Plaintiffs' "bare bones allegations" failed to allege any facts explaining how the emissions substantially interfered with the use and enjoyment of their properties or how the interference was unreasonable in light of the refinery's utility. Plaintiffs sought leave to amend their complaint, but the Court declined, noting "Plaintiffs have benefitted from the opportunity to amend their pleading twice previously," and dismissed the complaint with prejudice. Id. at *20.

DAMAGES

Court Allows Pennsylvania Punitive Damages Claims in Petroleum Exposure Case

By: Graham Zorn

The judge in a petroleum exposure case will allow a jury to decide whether a gas station operator and its environmental consultant recklessly failed to inform a plumber of the risks of working in an excavated pit with a documented petroleum release. *See Marino v. Pilot Travel Centers LLC*, 14-cv-04672 (E.D. Pa. Nov. 3, 2015).

Defendant Pilot Travel Centers, LLC ("Pilot") operates a Flying J Travel Plaza in New Milford, Pennsylvania, where Pilot discovered a release from its diesel fuel storage and dispensing system. Pilot hired Co-Defendant Sovereign Consulting, Inc. ("Sovereign") to investigate and remediate the release. During remediation, a water supply line was

damaged, and Plaintiff was hired to repair it. Plaintiff alleges injuries stemming from exposure to petroleum products in the excavated pit.

Defendants moved for summary judgment on the issue of punitive damages, arguing that there was no evidence of evil motive or reckless indifference to Plaintiff's exposure to petroleum products. The Court denied the motion, finding that the record contained evidence showing that Defendants knew there were petroleum liquids in the area where Plaintiff would be working, but no one told Plaintiff of the contamination or to stop working. From those facts, the Court found, a reasonable jury could conclude that Defendants behaved recklessly.

Jury in C-8 Exposure Case Awards $1.6M in Compensatory Damages, Denies Punitives

By: Graham Zorn

An Ohio federal jury in October handed out the first verdict in multi-district litigation ("MDL") against E.I. DuPont de Nemours and Co. related to ammonium perfluorooctanoate, or C-8, in drinking water around DuPont's Washington Works plant in West Virginia. *See Bartlett v. E.I. Du Pont de Nemours & Co.*, 2:13-cv-170 (S.D. Ohio Oct. 7, 2015). The verdict, awarding $1.6 million in compensatory damages to a Plaintiff who alleged her kidney cancer was caused by C-8, is the first in some 3,500 cases in the MDL. The jury awarded $1.1 million in damages for Plaintiff's negligence claim and another $500,000 for her emotional distress claim.

In an August 2015 decision, the judge overseeing the MDL held DuPont may face punitive damages. *In re: E.I. Du Pont de Nemours & Co. C-8 Personal Injury* Litigation, 2:13-md-2433 (S.D. Ohio Aug. 19, 2015). DuPont argued it had implemented affirmative and extensive measures to protect and inform the public, including studying the health effects of C-8 and monitoring worker and public exposure to the substance. But the Court held that "[a] reasonable jury could find the evidence shows that DuPont knew that C-8 was harmful, that it purposefully manipulated or used inadequate scientific studies to support its position, and/or that it provided false information to the public about the dangers of C-8." *Id.* at *10. The jury here, though, found Plaintiff had not shown that DuPont acted with actual malice, and it rejected Plaintiff's bid for punitive damages.

INTERNATIONAL TOXIC TORTS

Third Circuit Affirms First-Filed Rule to Nix Toxic Tort Forum Shopping

By: Maryam Mujahid

Chastising the Plaintiffs for forum shopping, the United States Court of Appeals for the Third Circuit upheld a district court's decision to dismiss a matter with prejudice on the grounds that the Plaintiffs had previously filed nearly identical claims before another federal district court. See Chavez v. Dole Food Co., Inc., 796 F.3d 261, 264 (3d Cir. Aug. 11, 2015). While related litigation has been winding its way through U.S. courts since 1993, this case relates only to federal actions filed first in United States District Court for the Eastern District of Louisiana, and later the United States District Court for the District of Delaware.

Plaintiffs are foreign agricultural workers who allege that they suffered injuries from the misuse of the pesticide dibromochloropropane (DBCP) while working on banana farms throughout Central America from the 1960s to the 1980s. In June 2011, several suits were filed in federal court in Louisiana, which were then consolidated. Dole, a primary defendant, moved for summary judgment of the consolidated matter on statute of limitation grounds, which the Court granted in September 2012. The Fifth Circuit affirmed the decision in September 2013.

In June 2012, while Dole's summary judgment motion was still pending before the Louisiana court, the Appellants filed lawsuits in federal court in Delaware that were "materially identical" to the Louisiana cases. Later that month, Dole filed a motion to dismiss the Delaware actions on the basis of the "first-filed" rule, which gives the first court that had possession of a matter deference to decide that case when a matter is pending before two separate federal courts that have concurrent federal jurisdiction. The Delaware federal court granted Dole's motion, dismissing the later-filed actions with prejudice.

The Third Circuit upheld the Delaware court's decision, noting the appellants' "blatant[] forum shopping" and reasoning that a district court has discretion to dismiss a matter that, at the time of its filing, was duplicative of a matter previously brought in another district court. The Court cited the "first-filed rule," which "counsels deference to the suit that was filed first, when two lawsuits involving the same issues and parties are pending in separate federal district courts." *Id.* at *11. During remediation, a water supply line was damaged,