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Maryland High Court Slashes Billion-Dollar Jury Award and Clarifies Toxic Tort Standards

Reversing nearly all of the $1.6 billion in jury verdicts that had been entered against Defendant Exxon Mobil Corporation by lower courts, the Maryland Court of Appeals on February 26, 2013, issued a pair of opinions that may make recovery of damages more difficult for Maryland plaintiffs in toxic exposure cases.

In the two related opinions, Maryland's highest court clarified the showing required for plaintiffs to prevail on medical monitoring, injury to real property, fraud, and emotional distress for the fears of disease and loss of property value in the context of chemical exposure claims.

The cases arose from an accidental release, in February 2006, of 26,000 gallons of gasoline from an underground storage tank system at a service station in Jacksonville, Maryland. More than 500 Jacksonville residents and business owners filed suit in the two actions, asserting various tort-based claims and seeking compensatory damages (including medical monitoring, property damages and emotional distress) and punitive damages. In 2009, a group of about 91 families secured a jury award of roughly $147 million. In 2011, a group of more than 450 plaintiffs won a compensatory award of nearly $500 million and a punitive damages award of just over $1 billion.

The Court's February 26 opinions dramatically reduced these awards – in many cases rejecting them entirely – in every damages category.

A brief summary of the Court's holdings on certain key issues is set forth below.

- Property damages: (i) In the absence of detectable contamination, no property damages may be recovered unless plaintiffs can show "more than a possibility of future contamination or mere annoyance;" (ii) property damages may not exceed the pre-contamination fair market value of the property; (iii) plaintiffs may not recover for both diminution of property value and past loss of use and enjoyment where such recovery is duplicative; and (iv) property damages must be established using market data unless a real estate expert can offer a reasonable justification for ignoring such data.

- Emotional distress: (i) No recovery is permitted based on fear of loss of property value in the absence of a showing of fraud; and (ii) a plaintiff may recover for fear of contracting a latent disease (such as cancer) only where he can show he was actually exposed to a toxic substance due to the defendant's tortious conduct, which led him to fear objectively and reasonably that he would contract a disease, and where he manifested a physical injury as a result of that fear.

- Medical monitoring: This remedy is only available where the plaintiff (i) has been significantly exposed (*i.e.*, above regulatory action levels) to a proven hazardous substance; (ii) suffers a significantly increased risk of latent disease as a result of that exposure; and (iii) reasonably requires periodic diagnostic medical examinations that are capable of detecting symptoms of the latent disease.

- Punitive damages: (i) To recover punitive damages based on a misrepresentation, plaintiffs must establish that they detrimentally relied on the misrepresentation; and (ii) members of the public may not recover damages for fraud based only on false statements made to the government.

The two decisions, *Exxon Mobil Corp. v. Albright,* No. 15 (Md. Feb. 26, 2013), *available at* www.bdlaw.com/assets/attachments/Albright.pdf and *Exxon Mobil Corp. v Ford*, No. 16 (Md. Feb.

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26, 2013), *available at* www.bdlaw.com/assets/attachments/Ford.pdf, were decided unanimously and are certain to be cited widely by defendants in future toxic tort actions in Maryland. In particular, defendants will likely rely on the Court's explanation that plaintiffs must establish actual exposure to or detections of chemicals (as opposed to potential future exposures or detections) – in some cases above regulatory standards – as a threshold requirement to recover on certain toxic tort claims.

New Hampshire Jury Awards State $236M in MTBE Case

Approximately six weeks after getting the Maryland Supreme Court to agree that nearly all of the $1.6 billion in damages awarded by lower courts should be overturned, Exxon Mobil Corporation found itself facing a new toxic tort jury award, this one in favor of the State of New Hampshire in the amount of $236 million. The jury found ExxonMobil responsible for groundwater clean-up costs allegedly associated with the gasoline additive methyl tert-butyl ether ("MTBE"). *New Hampshire v. Hess Corp.*, No. 03-C-0550 (N.H. Sup. Ct. Apr. 9, 2013), *available at* www.bdlaw.com/assets/attachments/Hess.pdf. The jury found in favor of the State on its failure to warn, design defect and negligence claims.

New Hampshire claims it will have to spend $816 million for environmental testing and cleanup costs related to the MTBE. The state, which sued 16 companies over MTBE, had settled its claims with all of the other defendants by the time the trial ended. New Hampshire claimed that ExxonMobil, the sole remaining defendant, had a market share in the state of approximately 29%. The jury awarded the state 29% of its total alleged damages, which amounted to $236 million.

Among other things, ExxonMobil had argued that that the dangers of MTBE were well-known (and therefore warnings were not required), that it had adequately warned distributors about the risks of gasoline containing MTBE, and that the state voluntarily joined the reformulated gasoline program in an effort to improve air quality, which resulted in the use of greater quantities of gasoline containing MTBE in the state. The company has said it will appeal the verdict on the grounds that erroneous rulings before and during the three-month trial kept the jury from hearing all of the evidence and deprived it of a fair trial.

II. CLASS ACTIONS

D.C. Court Denies Class Certification in Drinking Water Case

In a significant victory for Defendant D.C. Water and Sewer Authority ("D.C. Water"), which is represented in the action by Beveridge & Diamond, the Superior Court of the District of Columbia denied Plaintiffs' motion for class certification in a putative class action relating to claims of injuries due to lead allegedly found in drinking water in the city. *Parkhurst v. D.C. Water & Sewer Auth.*, No. 2009 CA 000971 B (D.C. Sup. Ct. Apr. 8, 2013), *available at* www.bdlaw.com/assets/attachments/Parkhurst.pdf.

In a 34-page opinion, the Court analyzed each factor under Rule 23, and held that plaintiffs failed to satisfy the requirements for certification under Rule 23(b)(3) of numerosity, typicality, adequacy of representation, predominance, or superiority. *Parkhurst*, slip op. at 8. Among other findings, the Court concluded the threshold requirement that the proposed class be identifiable had not been met; the proposed class was both over- and under-inclusive; and that common issues did not predominate over individual issues, notwithstanding plaintiffs' proposal to deal separately with common and individual issues through a bifurcated proceeding. *Id.* at 10-17.

The Court further denied plaintiffs' request for certification of issue classes under Rule 23(c)(4)(A). Notably, the Court rejected plaintiffs' argument that issue classes may be certified without meeting Rule 23(b)'s key requirement of predominance, observing that such an interpretation

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would allow putative class representatives to "simply ask for certification of any common issues under [Rule 23](c)(4) and . . . would effectively read the predominance requirement out of Rule 23(b)(3)" altogether. *Id.* at 29.

Supreme Court Shoots Down Stipulated CAFA Caps

In a setback to plaintiffs seeking to get a tactical advantage by litigating in state court, the Supreme Court held that potential class action plaintiffs cannot cap their damages in an effort to avoid the reach of the Class Action Fairness Act ("CAFA"). *The Standard Fire Ins. Co. v. Knowles*, No. 11-1450 (U.S. Mar. 19, 2013), *available at* www.bdlaw.com/assets/attachments/Knowles.pdf. CAFA allows defendants to remove to federal court those putative class actions that seek at least $5 million in the aggregate, assuming other factors are satisfied. *Knowles*, slip op. at 1. In Knowles, the Supreme Court held that potential class-action plaintiffs could not cap their damages in an effort to keep their cases in state court and circumvent CAFA. *Id.*

Knowles filed the proposed class action lawsuit seeking damages from Standard Fire Insurance Company ("Standard") for the company's failure to include a general contractor fee when it made certain homeowner's insurance loss payments. *Id.* at 1-2. An affidavit attached to the complaint included a stipulation by Knowles promising to cap damages at $5 million. *Id.* at 2. Standard removed the case to federal district court and presented evidence sufficient to show that there was proper jurisdiction, yet the court remanded the case to the state court based on Knowles' stipulation. *Id.* Standard petitioned for a writ of certiorari after the Eighth Circuit declined the company's appeal. *Id.*

The Supreme Court stated that stipulations must be binding in order to affect jurisdiction. *Id.* at 3. The court concluded that Knowles' precertification stipulation in the affidavit as to the amount of damages was not binding because it only binds himself and "cannot legally bind members of the proposed class before the class is certified." *Id.* at 4. Federal courts must follow the plain direction of the law when it comes to class action damages, which is to "namely 'aggregat[e]' the 'claims of the individual class members.'" *Id.* at 6 (quoting 28 U. S. C. §1332(d)(6)). CAFA often comes into play in putative class actions involving toxic torts.

Federal Court Certifies Class on Liability Claims Despite Differences Among Class Members on Exposure, Damages

In a limited but significant victory for class action plaintiffs, a federal court in Indiana granted class certification to 1,700 Indiana residents with respect to only the liability portion of their claims against the owners of a wood recycling facility based on alleged exposure to smoke, dust and "extreme noxious odors." *Greene v. Will*, 3:09-cv-00510 (N.D. Ind. Jan. 29, 2013), *available at* www.bdlaw.com/assets/attachments/Greene.pdf. The district court held that the issues of which defendants caused the alleged harm, what chemicals were emitted, and when the chemicals were emitted, could and should be determined on a class-wide basis. *Greene*. slip. op at 7-9.

Plaintiffs alleged past and continuing harm to their health and the environment due to the plant's air emissions from waste processing and sought class certification only on the liability aspect of their claims. *Id.* at 2. Defendants Soil Solutions Co. and VIM Recycling Inc. argued that the plaintiffs should not be treated as a class because their claims were "intensely individual" based on differences among putative class members relating to their alleged exposures, causation for any injuries, and the extent of any alleged damages. *Id.* at 7.

The district court concluded that although causation and damages issues may differ by individual or by household, the question of liability could still be settled on a class-wide basis. *Id.* at 6-8. The court concluded that the defendants' "overly narrow focus on questions pertaining to the proof of individual causation and damages" did not defeat class certification for other common threshold issues held across the class. *Id.* at 9.

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III. BIOSOLIDS

Pennsylvania Court Holds Application of Biosolids To Be Protected Farming Activity

Establishing important precedent that right to farm laws, which have been adopted in most states, have broad application to many farm activities and shield farmers and their suppliers from tort suits, a Pennsylvania court found that defendants' land application of biosolids did not constitute a nuisance or negligence under state law. *Gilbert v. Synagro Techs.*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 323 (York Co. Ct. Comm. Pl. Dec. 28, 2012), *available at* www.bdlaw.com/assets/attachments/Gilbert.pdf. Granting summary judgment to defendants, who were represented by Beveridge & Diamond, the court held that the use of biosolids as a fertilizer was a protected farming activity under the Pennsylvania Right to Farm Act's statute of repose, and stated that use of biosolids is not significantly different from other organic fertilizers that farmers have traditionally used. *Gilbert*, slip op. at 19-20, 33.

The plaintiffs, 37 property owners in York County, Pennsylvania, alleged that land application of biosolids (treated sewage sludge) to farm land near their homes constituted a nuisance, a trespass and caused personal injuries. *Id.* at 1-3. Defendants moved to dismiss all of plaintiffs' claims as barred by the State's Right to Farm Act and that plaintiffs failed to establish the necessary elements of their tort claims. *Id.* at 4.

The court concluded that plaintiffs' claims were time-barred under the Right to Farm Act's statute of repose because the use of biosolids was a protected farming activity. *Id.* at 20. The court dismissed the negligence claims because plaintiffs could not prove that the land applier, farmer and land owner owed a legal duty to the neighbors regarding off-site odors. *Id.* at 28. The court also rejected plaintiffs' claims that odors from biosolids could be a trespass. *Id.* at 32.

The decision establishes important authority in support of the position that right to farm laws, adopted in most states, have broad application to many farm activities and may shield farmers and their suppliers from tort suits in various circumstances.

IV. EXPERTS AND CAUSATION

Utah Federal Court Rejects "Every Exposure" Theory

Adding to the growing chorus of courts that have rejected the "every exposure" theory (sometimes referred to as the "any exposure" theory), under which plaintiffs argue that each and every exposure to a toxic substance is sufficient to establish liability for certain injuries, a federal court in Utah dismissed a plaintiff's claims for failing to establish causation. *Smith v. Ford Motor Co.*, No. 2:08-cv-630 (D. Utah Jan. 18, 2013), *available at* www.bdlaw.com/assets/attachments/Smith.pdf. (For other courts that have reached similar conclusions, *see Maryland Appellate Court Rejects "Any Exposure" Theory*, Toxic Tort and Product Liability Quarterly, October 25, 2012, *available at* http://www.environmentallawportal.com/Maryland-Court-Rejects-Any-Exposure-Theory; *Pennsylvania High Court Rejects "Any Exposure" Theory*, Toxic Tort and Product Liability Quarterly, July 18, 2012, *available at* http://www.environmentallawportal.com/Pennsylvania-High-Court-Rejects-Theory). The District Court held that plaintiff's expert was precluded from testifying that "every exposure" to asbestos-containing products manufactured by the defendant contributed to plaintiff's mesothelioma. *Smith*, slip op. at 3, 10.

Plaintiff claimed he was exposed to dust from defendant's asbestos-containing brakes when he worked as a gas station attendant from August 1966 to May of 1968. *Id.* at 2. Plaintiff offered the expert testimony of Dr. Samuel Hammar, who based his opinion on the theory that "each and every exposure to asbestos by a human being who is later afflicted with mesothelioma, contributed to the formation of the disease." *Id.* at 3-4. Defendant moved to dismiss the

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testimony on grounds that the theory lacked scientific foundation, was mere speculation, and was barred by Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). *Id.* at 3.

The court determined that the "every exposure" theory "as offered as a basis for legal liability is inadmissible speculation that is devoid of responsible scientific support." *Id.* at 3-4. The court concluded that this expert testimony did "virtually nothing to help the trier of fact decide the all-important question of specific causation," and was based solely on the expert's belief that no exposure should be ruled out as a contributing cause. *Id.* at 7.

Pennsylvania Court Allows "Every Exposure" Testimony When Combined With Other Evidence

Distinguishing the recent Pennsylvania Supreme Court's decision in *Betz v. Pneumo Abex LLC*, 44 A.3d 27 (Pa. May 31, 2012) (s*ee Pennsylvania High Court Rejects "Any Exposure" Theory*, Toxic Tort and Product Liability Quarterly, July 18, 2012, *available at* http://www.environmentallawportal.com/Pennsylvania-High-Court-Rejects-Theory), which rejected the "every exposure" theory to prove causation, a Pennsylvania appellate court upheld a nearly $1 million judgment in an asbestos injury case against a welding products company. *Wolfinger v. 20th Century Glove Corp. of Texas*, No. 1393 EDA 2011 (Pa. Super. Ct. Feb. 14, 2013), *available at* www.bdlaw.com/assets/attachments/Wolfinger.pdf. The court held that the jury weighed other evidence in conjunction with the expert's testimony on "every exposure" and therefore the state Supreme Court's decision in *Betz* did not require reversal of the jury's verdict. *Wolfinger*, slip op. at 23-24.

Wolfinger filed suit against a group of defendants alleging that exposure to asbestos caused him to suffer from pleural thickening. *Id.* at 2. Plaintiff relied, in part, on expert testimony that every breath the plaintiff took in the presence of asbestos was enough to establish causation. After trial, the court entered judgment against defendant Lincoln Electric Co. for just over $950,000. *Id.* at 3. The court denied defendant's post-trial motion seeking a new trial or modified verdict on the grounds that testimony from the plaintiff's expert was inadmissible under applicable Pennsylvania Supreme Court precedent.

On appeal, defendant claimed that the trial court improperly admitted plaintiff's expert testimony. *Id.* at 9. Rejecting defendant's arguments, the Superior Court (an intermediate appellate court) distinguished the *Betz* decision on the grounds that the court in that case was confronted only with reviewing the adequacy of the every exposure theory for causation on its own, and not in conjunction with other evidence. *Id.* at 10-11. Here, the plaintiff offered other evidence in the case to buttress its theory, including a specific history of the plaintiff's exposure to the defendant's product, and therefore the expert testimony "was relevant to, albeit not dispositive of, the issue of substantial factor causation." *Id.* at 11.

California Court Denies Award for Damages Down to Background Levels

Striking a blow to plaintiffs seeking damages for cleanups down to "background" levels, the United States District Court for the Southern District of California dismissed an action by the State of California and the City of San Diego seeking damages due to soil and groundwater contamination on city-owned land around and under the San Diego Qualcomm Stadium. *California v. Kinder Morgan Energy Partners, L.P.*, No. 07-CV-1883-MMA (S.D. Cal. Jan. 25, 2013), *available at* www.bdlaw.com/assets/attachments/Kinder.pdf. Eliminating the lynchpin of the City's case, the court excluded testimony by the City's expert under Federal Rule of Evidence 702 and *Daubert,* and granted summary judgment to the defendant. *Kinder Morgan*, slip op. at 13, 51-52.

Defendant and its predecessors have operated a gasoline distribution terminal in southern

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California since the 1960s. Beginning in 1992, the California Regional Water Quality and Control Board ordered defendant to investigate and clean up petroleum releases at the site; the cleanup was scheduled to be complete by the end of 2013. The City of San Diego claimed that city-owned land surrounding and underlying Qualcomm Stadium had been adversely affected by contamination from the adjacent terminal site, and filed suit seeking damages for claims including negligence, nuisance, trespass, as well as declaratory relief. *Id.* at 2. Notably, the City had never cancelled a sporting event or otherwise lost revenue from its operations on the adjacent land. *Id.*

The City's claims rested on its expert's opinion that although defendant spent $60 million, it should be required to spend another $125 million to clean up the contamination to "background" levels. *Id.* at 3-5. However, the court found that this opinion was not sufficiently reliable or relevant because, among other things, (1) "background" levels were not the appropriate cleanup standard, (2) no scientific analysis supported what the background levels actually were, and (3) the expert's opinions were personal rather than scientific. *Id.* at 8-12. Without the City's expert testimony, the City was unable to prove that the defendant's releases reached the City's property or that the releases were continuing in nature. *Id.* at 13, 30.