Toxic Tort & Product Liability Quarterly

Vol. VIII
January 19, 2010

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I. DAMAGES

Ohio Supreme Court Upholds Cap on Non-Economic Compensatory Damages

The Supreme Court of Ohio has held that a cap on non-economic compensatory damages does not violate the right to a jury trial or the right to equal protection under either the Ohio Constitution or the U.S. Constitution. *See Oliver v. Cleveland Indians Baseball Co., L.P.*, 123 Ohio St.3d 278, 2009-Ohio-5030 (Ohio Oct. 1, 2009), *available at* http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2009/2009-ohio-5030.pdf. The court reversed the appellate decision, which had held the cap to be unconstitutional and had upheld a jury award of $400,000 to each plaintiff for compensatory damages. *Oliver*, Slip. Op. at 2–3.

Appellees were arrested and brought into custody, where they were mistreated as suspects in the detonation of an explosive device at a Cleveland Indians baseball game. *Id.* at 2. Despite a grand jury indictment, the charges against appellees were dropped. *Id.* Appellees successfully sued the City of Cleveland for malicious prosecution, false arrest and imprisonment, and intentional infliction of emotional distress. *Id.*

The statutory cap at issue in the case, R.C. 274405(C)(1), limits compensatory damages awarded against political subdivisions to $250,000. *Id.* at 3. The court of appeals ruled that the provision was unconstitutional because it violated the right to a jury trial and the right to equal protection. *Id.* at 2. Reversing, the Supreme Court of Ohio held that the right to a jury trial — specifically the right to a jury's fact-finding function — is not invaded by R.C. 274405(C)(1). *Id.* at 4. The court found that a damages cap falls within matters of law and therefore is outside the fact-finding right guaranteed by a jury trial. *Id.* at 5. With regard to equal protection, the court deemed R.C. 274405(C)(1) to be rationally related to the legitimate government purpose of preserving the financial soundness of its political subdivisions. *Id.* at 5–7.

Tennessee Supreme Court Cuts Punitive Damage Award in Half But Still Allows Three-Digit Multiplier

The Tennessee Supreme Court has reduced a $1,000,000 punitive damage award for private nuisance, which represented a punitive-to-compensatory ratio of over 302 to 1, to $500,000, finding that the award approved by the trial court violated the defendant's due process rights. *See Goff v. Elmo Greer & Sons Construction Co.*, No. M2006-02660-SC-R11-CV (Tenn. Nov. 3, 2009), *available at* http://www.tsc.state.tn.us/OPINIONS/TSC/PDF/094/SC%20David%20Goff%20et%20al%20v%20Elmo%20Greer%20n%20Sons%20Construction%20OPN.pdf. Plaintiffs alleged that a highway construction company intentionally buried tires and other solid waste on a homeowner's property. *Goff*, Slip Op. at 2. A jury found the company liable for compensatory damages in the amount of $3,305 and punitive damages in the amount of $2 million, which the trial court reduced to $1 million. *Id*. at 6.

The court, applying the due process standards adopted by the United States Supreme Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) and its progeny, found that focusing only on the ratio did not comport with the Supreme Court's jurisprudence on the subject, which instructs that punitive awards must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff. *Id*. at 17–19. The court held that the 302-to-1 ratio approved by the trial judge in this case was excessive in light of the circumstances presented because the defendant's intentional burial of tires and solid wastes on the plaintiff's property did not create an environmental hazard or threaten the health or safety of any individual; however, the court found that a punitive ratio of approximately 150-to-1 met constitutional muster in this case. *Id*. at 16–17, 23.

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II. CLASS ACTIONS

New Jersey District Court Certifies Nuisance Classes for Water Contamination

In a series of consolidated lawsuits alleging injury from perfluorooctanoic acid ("PFOA") contamination, a district court certified classes for claims of public and private nuisance, as well as whether the release of PFOA constitutes an abnormally dangerous activity, but declined to certify all other proposed classes. *See Rowe et al. v. E.I. du Pont de Nemours and Co.*, Nos. 06-1810, 06-3080 (D.N.J. Oct. 9, 2009). All plaintiffs in the consolidated actions allege that DuPont's release of PFOA contaminated the water supply near DuPont's Chamber Works plant in New Jersey. *Rowe*, Slip Op. at 5. Plaintiffs for two of the suits sought certification on claims of nuisance, trespass, negligence, gross negligence, strict liability, public nuisance (for consumers of public water supplies), and private nuisance (for private well owners). *Id.* at 4.

On the issue of private nuisance, the court certified the class based on its finding that the fear of significant harm from PFOA contamination in private wells is subject to common proof. *Id.* at 15–26. By contrast, the court declined to certify the putative trespass class because the trespass claims required individual sampling results to determine whether or not PFOA was present in each plaintiff's private well. *Id.* at 29–31. In certifying the public nuisance class, the court found that only users of the public water supply could suffer an injury common to the general public. *Id.* at 26–27. For the proposed negligence classes, the court reasoned that without alleging any common injury, such as a "threshold level of contamination," "there can be no common causation, as there is nothing to cause." *Id.* at 34. Despite its decision not to certify the proposed strict liability class, the court nonetheless certified, under Rule 23(c)(4) of the Federal Rules of Civil Procedure, the issue of whether the release of PFOA is an abnormally dangerous activity. *Id.* at 42–43.

The district court denied DuPont's motion for interlocutory appeal of the above order. *See Rowe et al. v. E.I. du Pont de Nemours and Co.*, Nos. 06-1810, 06-3080 (D.N.J. Dec. 30, 2009). In an earlier order, the court denied certification of a proposed medical monitoring class. *See Rowe et al. v. E.I. du Pont de Nemours and Co.*, Nos. 06-1810, 06-3080 (D.N.J. July 29, 2009).

Florida District Court Certifies Class in Groundwater Contamination Case

A federal district court has certified a class to pursue claims against Raytheon Co. for property damage allegedly caused by a groundwater plume that has migrated beneath a residential neighborhood from Raytheon's property. *Sher v. Raytheon Co.*, No. 8:08-cv-889-T-33AEP (M.D. Fla. Sept. 30, 2009). Raytheon acknowledged that various chemicals, including trichloroethylene ("TCE") and vinyl chloride, from its property had caused the plume in question; Raytheon had been engaged in a cleanup of its property pursuant to a consent order with the State of Florida. *Sher,* Slip Op. at 3–4. In opposing the motion for class certification, Raytheon argued that the proposed class was based on an arbitrary geographic boundary developed by the plaintiffs' expert and, as a result, the class would include property owners whose property had little or no contamination. *Id.* at 18.

The court found that the plaintiffs' proposed class of approximately 1000 property owners met the class certification requirements of Federal Rule of Civil Procedure 23(a) and 23(b)(3) for restoration costs, diminution in property value, and injunctive relief. Raytheon had previously notified neighboring property owners in the 1990s that the groundwater contamination might affect their property; the plaintiffs' proposed class "mirrored" this group of property owners, and the similarity convinced the court that the class was sufficiently definite. *Id.* at 19–20. On the issue of whether the diminution in property values could be proven on a class-wide basis, the

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court noted that the local county appraiser already used the kind of aggregate property assessment methodology that the plaintiffs' expert had employed, showing that it was feasible to estimate damages on a class-wide basis. *Id.* at 12–13.

Florida District Court Denies Class Certification for Boaters Claiming Damage from Ethanol

The Southern District of Florida denied a motion for class certification in a putative class action brought against various petroleum companies for the failure to adequately warn of the potential for damage to fiberglass fuel tanks and other boat equipment allegedly caused by ethanol-blended gasoline. *See Kelecseny v. Chevron, USA, Inc.*, No. 08-61294 (S.D. Fla. Nov. 25, 2009). The plaintiff sought certification of both a damages and warning class. *Kelecseny*, Slip Op. at 5–6.

For almost every requirement of class certification under Rule 23 of the Federal Rules of Civil Procedure (e.g., ascertainability, numerosity, etc.), the court found that individual issues counseled against class certification for both of the proposed classes. *Id.* at 8–40. With regard to the theory of market share liability proposed by plaintiffs, the court reasoned that typicality was lacking in the damages class because the representative plaintiff purchased gasoline in a method different from the other proposed class members and because the proposed market — the State of Florida — was not defined specifically enough to avoid individual inquiries. *Id.* at 16–17, 26–27. For the warnings class, the court concluded that a class representative with pre-existing knowledge of the alleged danger could never have standing for injunctive relief in a failure to warn claim and that, even if the class definition were narrowed to those unaware of any alleged danger, the court would still have to conduct individual inquires of each owner's actual knowledge prior to using ethanol blended gasoline. *Id.* at 30–31. Beveridge & Diamond, P.C. represents Defendant Sunoco, Inc. (R&M) in this matter.

III. MEDICAL MONITORING

Ohio District Court Tosses Medical Monitoring Class Action for Dioxin Exposure

The United States District Court for the Northern District of Ohio granted defendant CSX Transportation, Inc.'s motion for summary judgment in a medical monitoring class action arising from a train accident that took place near Painesville, Ohio. *See Mann v. CSX Transportation, Inc.*, No. 1:07-cv-3512 (N.D. Ohio Nov. 10, 2009). The case arose from the derailment of thirty-one rail cars, nine of which contained hazardous materials, including dioxins, and the subsequent sixty-hour fire that displaced the plaintiffs from their homes. *Mann*, Slip. Op. at 2. The district court previously granted the defendant's motion to dismiss the plaintiffs' other claims, leaving only the plaintiffs' negligence claim, which sought the establishment of a judicially administered medical monitoring program. *Id.*

Ohio law recognizes medical monitoring as a type of damages for an underlying tort, including negligence, if the plaintiff proves all of the elements of the claim apart from injury. *Id.* at 5 The defendant stipulated to the elements of a duty and breach of duty but argued that the plaintiffs had not adequately demonstrated causation for a significantly increased risk of disease. *Id.* at 3, 5.

The district court agreed, finding that the plaintiffs' experts did not provide an independent assessment of the causal link between the exposure to the substances and the feared disease. *Id.* at 6. Although the expert opined that numerous organizations have classified dioxins as a human carcinogen, the court held that "it is not appropriate for one set of experts to bring the conclusions of another set of experts into the courtroom and testify merely that they 'agree' with

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that conclusion." *Id.* The court further held that the plaintiffs failed to establish exposure to dioxins in an amount warranting a reasonable physician to order medical monitoring. *Id.* at 7–11.

Pennsylvania Supreme Court Recognizes "Two-Disease" Rule for Asbestos-Related Cancer

The Supreme Court of Pennsylvania, reversing an en banc court of appeals decision, has held that a prior recovery for increased risk and fear of developing cancer due to asbestos exposure does not preclude a later recovery against a new defendant for damages due to the development of asbestos-related lung cancer. *See Abrams v. Pneumo Abex Corp.*, No. 17 EAP 2008 (Penn. Oct. 21, 2009). The plaintiffs were diagnosed with nonmalignant asbestos-related disease between 1984 and 1985. In 1986, the plaintiffs brought suits for increased risk and fear of developing asbestos-related cancer against various defendants, and settled in 1993. *Abrams*, Slip Op. at 4–5. The appellee, John Crane, was not a defendant in the suits. *Id.* at 4–5. In 2002, plaintiffs were diagnosed with lung cancer, and brought suit against several manufacturing companies, including Crane, alleging their cancer was due to occupational exposure to asbestos-containing products. *Id.* at 5. The trial court granted Crane's motion for summary judgment on the basis that the plaintiffs were required to name Crane as a defendant in the earlier suit and that the claims were now barred by the statute of limitations. *Id.* at 5–6. The court of appeals affirmed, finding that the law required suit within two years "against all potential asbestos defendants upon being diagnosed with an asbestos-related disease." *Id.* at 6.

In 1996, the Pennsylvania Supreme Court adopted the "two-disease" rule instead of the "one-disease" rule, which required a single suit for all present and future harm arising out of exposure to a single substance. *Id.* at 7–8. The two-disease rule recognizes the view that more than one disease may arise from exposure to the same substance — for example, both a non-malignant lung condition and lung cancer may arise from exposure to asbestos. Moreover, the court found that because symptoms of asbestos-related cancer may be latent, plaintiffs should not be barred for failure to bring a claim for cancer upon the diagnosis of a non-malignant asbestos-related lung condition. *Id.* at 8–13. Accordingly, based on its application of the two-disease rule, the Pennsylvania Supreme Court reversed and remanded the decision of the appellate court. *Id.* at 13–22.

IV. COMMON LAW

Ohio District Court Finds No Injury to Property Despite Presence of Hydrocarbon Plume and Tosses Personal Injury Claims

Despite the subsurface presence of hydrocarbon contamination on the plaintiffs' property, a federal district court granted defendants' motions for summary judgment on various property-related tort claims because the plaintiffs failed to demonstrate interference with the reasonable use of their property rights. *See Baker v. Chevron USA, Inc.*, No. 1:05-CV-227 (S.D. Ohio Nov. 4, 2009). In a subsequent opinion, the court deemed the testimony of plaintiffs' experts to be inadmissible in support of their personal injury claims and dismissed those claims for failure to demonstrate causation. *See Baker v. Chevron USA, Inc.*, No. 1:05-CV-227 (S.D. Ohio Jan. 6, 2010). Based on the alleged migration of hydrocarbons from a former refinery to the groundwater underneath the plaintiffs' properties, the plaintiffs claimed negligence, gross negligence, negligence per se, conspiracy, fraud, strict liability, trespass, private nuisance, and failure to warn. *Baker*, Slip Op. at 3–4 (Nov. 4, 2009). The court bifurcated the property claimants and the personal injury claimants.

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With respect to the property claimants, the defendants did not dispute whether the refinery was a source of the plume in question; instead, they argued that the plaintiffs had not suffered any cognizable injury. The court deemed the assumed presence of the plume beneath each plaintiff's property to be a fact "not dispositive of the issue [of] whether they have suffered any cognizable damages." *Id.* at 10. Under Ohio common law, a plaintiff cannot recover for a property-related tort unless the alleged injury interferes with the plaintiff's reasonable use of the property. *Id.* at 10–12 (discussing *Chance v. BP Chemicals, Inc.*, 670 N.E.2d 985 (Ohio 1996)). The court found that the plaintiffs do not use the allegedly contaminated groundwater for any purpose. *Id.* at 12–13. The court further found that the plaintiffs' deposition testimony regarding intermittent oil, gasoline, and diesel fuel odors in their homes and near their properties did not demonstrate any compensable harm. *Id.* at 17–19. Absent an actual injury, the court noted that Ohio common law does not recognize loss in market value from environmental stigma as compensable damages. *Id.* at 20.

With respect to the personal injury claimants, the defendants argued that the plaintiffs' expert had not demonstrated a sufficient medical or scientific basis from which to conclude the plaintiffs had been exposed to an amount of benzene that could have caused their illnesses. *Baker*, Slip Op. at 11 (Jan. 6, 2010). The court found that: one of the plaintiffs' experts failed to meet the requirements of Rule 26(a) of the Federal Rules of Civil Procedure because he did not explain the "how's and why's" of the opinion; the expert's rebuttal report "constitute[d] an improper attempt to correct the weaknesses and improprieties of his original reports"; and the reports failed because "[t]he mere fact that Plaintiffs were exposed to benzene emissions in excess of mandated limits is insufficient to establish causation." *Id.* at 22–26. The expert concluded that benzene levels in 1977 were high enough to cause the plaintiffs' injuries but "failed to note that . . . none of the Plaintiffs even lived in [the same town as the refinery] in 1977." *Id.* at 28. The court also rejected much of the expert's interpretation of cited literature, in part because the subjects of the studies "generally had much higher exposure to benzene than these plaintiffs." *Id.* at 46.

V. FOREIGN JUDGMENTS

Federal Court Refuses to Recognize $97 Million Nicaraguan Judgment

A federal district court in Florida has declined to recognize or enforce a $97 million Nicaraguan judgment, $647,000 per prevailing plaintiff, against Dole Food Company and the Dow Chemical Company. *See Sanchez v. Dole Food Co.*, No 07-22693-CIV-HUCK (S.D. Fla. Oct. 20, 2009). Plaintiffs, 201 Nicaraguan citizens, alleged exposure to the pesticide dibromochloropropane ("DBCP") while employed on banana plantations between 1970 and 1982. *Dole*, Slip Op. at 1, 11. DBCP is a pesticide that was banned in the U.S. in 1977 after it was linked to sterility. *Id.* at 1.

A Nicaraguan trial court issued the award under Special Law 364, which the Nicaraguan legislature enacted in 2000 for the specific purpose of addressing DBCP claims. *Id.* Special Law 364 provides sterile plaintiffs with an irrefutable presumption that DBCP-exposure caused their sterility, sets a minimum damages award of $125,000 for prevailing plaintiffs, requires that defendants deposit $15 million within 90 days of notice of a complaint, and eliminates any relevant statutes of limitations. *Id.* at 5–6.

The U.S. District Court for the Southern District of Florida rejected the Nicaraguan verdict for a number of reasons. For example, thirty-two of the allegedly sterile plaintiffs fathered children after being exposed to DBCP. *Id.* at 13. Among others, the Court cited the following additional bases for its decision not to recognize the judgment: the lack of jurisdiction in the Nicaragua trial court, the apparent lack of an impartial tribunal, the failure to "provide procedures compatible with the requirements of due process of law," and the repugnancy of Special Law 364 to the public policy of Florida. *Id.* at 18–60. This decision follows a June 2009 decision in

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which a state court in Los Angeles dismissed similar DBCP cases involving Nicaraguan plaintiffs after finding that certain plaintiffs and their counsel had fabricated evidence and committed fraud on the court. *See* Beveridge & Diamond, P.C., *Toxic Tort & Product Liability Quarterly*, Vol. VI (July 15, 2009).

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