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I. PRODUCT LIABILITY

D.C. Trial Court Rejects Product Liability, Related Claims Alleging Corrosive Drinking Water

Underscoring that regulatory standards and compliance can sometimes provide a defense against liability, particularly where the alleged product defects have nothing to do with the intended uses of the product, Beveridge & Diamond successfully defended a major water utility against claims that the drinking water it delivered caused pinhole leaks in plumbing. Following a three-week bench trial, on September 30, 2011, District of Columbia Superior Court Judge Gregory Jackson issued findings of fact and conclusions of law rejecting claims that the utility was responsible for alleged leaks in five apartment buildings. *Cormier v. District of Columbia Water and Sewer Authority*, No. 03-1254B (D.C. Sup. Ct. Sept. 30, 2011), *available at* http://www.bdlaw.com/news-1227.html. Because plaintiffs failed to show an applicable standard of care or that the alleged damages derive from the contemplated uses of the product, the court was not required to choose between competing scientific experts on causation in issuing its defense judgment.

Plaintiffs, property owners in the District, alleged that the drinking water sold by the utility caused numerous pinhole leaks in copper plumbing in his buildings, and sought $5,000,000 to replace the plumbing. Plaintiffs' claim was supported by expert testimony concluding that the water chemistry would lead to additional pinhole leaks in the buildings, and calling for the replacement of all plumbing in the buildings. In addition to a defense expert who disagreed that the water was excessively corrosive and explained building-specific factors lead to pinhole leaks, the defense provided extensive testimony that the overriding mission of water utilities – as reflected in the Safe Drinking Water Act – is to provide potable water, not to insure leak-free pipes.

Judge Jackson summarized:

> There is no dispute that the water [from DC Water] is, indeed, safe for drinking, cooking, and bathing. The primary purpose of the water is not to keep Plaintiffs' pipes from corroding. The Court finds persuasive the testimony that *all* types of pipes, including galvanized steel, copper, or plastic, can experience leaks from water, which is a naturally corrosive substance.

Cormier, slip op. at 18. Applying § 402A of the Restatement Second of Torts, the court held that the water could not be deemed unreasonably dangerous because it was safe for its "intended, ordinary purpose," consumption for drinking. *Id*. at 17. Similarly, with respect to the plaintiffs' Uniform Commercial Code ("UCC") claim, the court found the same facts showed the water did not breach an implied warranty of merchantability: "The primary purpose of the water is not to keep Plaintiffs' pipes from corroding." *Id*. at 18. Finally, the plaintiffs' negligence claim failed because they could not establish a recognized standard of care for prevention of pinhole leaks or a breach of a standard.

California Court Eases Product Liability Pleading Requirements

In a decision easing a plaintiff's pleading requirements for product liability claims under California state law, the California Court of Appeals ruled that a plaintiff at the pleading stage need not identify the specific toxins contained in a product that allegedly injured him, so long as he can identify the product that allegedly caused him harm. *Jones v. ConocoPhillips*, No. B225418 (Cal. Ct. App. Aug. 30, 2011), *available at* www.bdlaw.com/assets/attachments/jones-concophillips.pdf.

Carlos Jones, an employee of The Upjohn Company and The Goodyear Tire and Rubber Company, died in 2008 of heart, liver and kidney disease. His wife and children filed an action

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against 19 manufacturers of 34 chemical products, alleging that each product was a substantial factor in Mr. Jones's death. Defendants moved to dismiss the complaint on the grounds that the complaint was not sufficiently specific. *Jones*, slip op. at 2-4. Defendants argued that plaintiffs had simply sued the makers of every chemical Mr. Jones worked with during his employment, claiming that every product caused his illnesses, yet failed to identify the specific toxins in each product that allegedly injured him. *Id* at 4. The trial court granted defendants' motion and dismissed plaintiffs' claims, holding that plaintiffs' allegations needed to apprise defendants of the particular toxins and products that allegedly caused Mr. Jones's illness. *Id*.

The Court of Appeals reversed the trial court's decision based on the standard set by the California Supreme Court in *Bockrath v. Aldrich Chemical Co., Inc.,* 21 Cal.4th 71 (1999). The *Bockrath* court rejected the argument that a complaint is unacceptably speculative if it fails to identify which toxin contained in a particular product caused an alleged injury, or if the plaintiff sues the manufacturers of multiple products. *Jones*, slip op. at 6. Bockrath only limited suits by plaintiffs who lacked any notion of the identity of the product causing their injury. Applying this standard, the Court of Appeals held that, to assert a viable claim, plaintiffs did not have to allege the specific chemical compounds – only the specific products – that had caused them harm. *Id*. at 10.

II. RCRA AND CERCLA

Ninth Circuit Finds Dry Cleaning Equipment Manufacturers Not Liable Under CERCLA or RCRA

The Ninth Circuit Court of Appeals issued a pair of decisions this quarter that may serve to limit the liability of equipment manufacturers under two key federal environmental remediation statutes.

In the first decision, the Ninth Circuit affirmed a district court's grant of summary judgment in favor of the defendant and held that it was not liable as an "arranger" under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") based solely on its status as a manufacturer of dry cleaning equipment. *See Team Enterprises, LLC v. Western Investment Real Estate Trust*, No. 10-16916 (9th Cir. July 26, 2011), *amended by* Order and Amended Opinion (9th Cir. Sept. 26, 2011) (denying rehearing), *available at* www.bdlaw.com/assets/attachments/Team%20Enterprises%2009.pdf.

In that case, the plaintiff operated a dry cleaning business in Modesto, California; it used perchlorethylene ("PCE") in its operation and used equipment manufactured by defendant R.R. Street & Co. ("Street") to filter and recycle the PCE for reuse. *Team Enterprises*, slip op. at 18251-52. PCE was released to the soil during the filtering and recycling process, and the plaintiff sued Street under CERCLA for contribution to the cleanup. The plaintiff claimed that Street was an "arranger" because it designed the equipment in such a way that improper disposal of hazardous waste was inevitable, and that it failed to warn the plaintiff of the hazards associated with improperly disposing of the waste. *Id*. at 18252.

The Ninth Circuit concluded that Street was not an "arranger" under CERCLA because it lacked the requisite intent for arranger liability. *Id*. at 18256. Relying on the reasoning underlying the "useful product" defense, the court held that the plaintiff presented no evidence indicating that Street designed or sold the equipment it manufactured for the specific purpose of disposing of hazardous substances. *Id*. at 18256-57. Rather, the purpose of the equipment was to recover and reuse PCE that would otherwise be discarded, falling squarely into the scope of a "useful product." The court also declined to infer a defendant's intent to dispose, for purposes of arranger liability under CERCLA, based on the defendant's alleged failure to warn the plaintiff of the risks associated with improper disposal of PCE. *Id*. at 18257-58.

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In the second case at issue, the Ninth Circuit dismissed Resource Conservation and Recovery Act ("RCRA") claims against a dry cleaning equipment manufacturer. The court held that simply designing equipment that generates waste is insufficient for RCRA liability; rather, "a plaintiff must allege that the defendant had a measure of control over the waste at the time of its disposal or was otherwise actively involved in the waste disposal process." *Hinds Investments, L.P. v. Angioli*, No. 10-15607 (9th Cir. Aug. 1, 2011), *available at* www.bdlaw.com/assets/attachments/Hinds.pdf.

Plaintiffs, owners of a shopping center, commenced an action against a dry cleaning equipment manufacturer, alleging its property was contaminated with PCE. *Hinds Investments*, slip op. at 9853. In the complaint, plaintiffs claimed that defendant's faulty machine design and accompanying instructions–that users should dispose of contaminated wastewater in drains in open sewers–"contributed to" the disposal of hazardous waste. *Id*. Plaintiffs sought declaratory relief and monetary damages under RCRA to offset the cost of environmental remediation and cleanup of their groundwater. *Id*. The district court granted the defendants' motion to dismiss finding that the plaintiffs "failed to state a claim for relief because they did not allege active involvement by Defendants in handling or disposing of waste." *Id*. at 9854.

The Ninth Circuit affirmed the district court's dismissal and held that to state a claim under RCRA for "contributing to" the disposal of hazardous waste, a defendant must have some control over waste at the time of disposal. *Id*. at 9859. The court held that "[h]andling the waste, storing it, treating it, transporting it, and disposing of it are all active functions with a direct connection to the waste itself," but the mere design of equipment that generates waste is not sufficient to establish liability. *Id*. at 9857, 9859.

Second Circuit Requires Pre-Suit Notices to List All Chemicals Forming Basis of RCRA Claim

Emphasizing the importance of specificity in Resource Conservation and Recovery Act ("RCRA") notices of intent to sue ("NOIs"), the U.S. Court of Appeals for the Second Circuit held that NOIs must identify each chemical alleged to be the basis of a RCRA violation for a claim to withstand dismissal. *See Brod v. Omya, Inc.*, No. 09-4551-cv (2d Cir. July 18, 2011), *available at* www.bdlaw.com/assets/attachments/Omya.pdf.

Defendant Omya, Inc. operated a mineral processing facility in Vermont that processed raw marble ore into products such as ground calcium carbonate. *Brod*, slip op. at 3. Solid byproducts, including chemical reagents and mineral impurities, were disposed into unlined pits, allowing the byproducts to seep into the groundwater. *Id*. at 4. Local citizen-plaintiffs concerned with the effects on nearby public water supply wells served defendant with a RCRA NOI alleging improper disposal of 21 specific chemicals and unnamed "other hazardous chemicals." *Id*. at 5.

Plaintiffs commenced an action claiming defendant violated RCRA based on the allegations in the NOI. Thereafter, plaintiffs became aware of defendant's possible improper disposal of two additional chemicals not listed in the NOI, namely arsenic and aminoethylethanolamine ("AEEA"). *Id*. at 6-8. The district court granted summary judgment to defendant as to the AEEA claim, holding that plaintiffs had not complied with RCRA's NOI requirements. The Second Circuit agreed and further held that plaintiffs' claims as to arsenic were similarly invalid. *Id*. at 12, 22. In its reasoning, the Second Circuit relied on RCRA's requirement that an NOI include "sufficient information" to allow the recipient to identify the alleged nonconforming behavior. *Id*. at 17. A plaintiff must include the identity of each "contaminant alleged to be the basis of the [RCRA] violation" in an NOI before it can bring an action based on that particular alleged violation. *Id*. at 23.

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III. MEDICAL MONITORING

Sixth Circuit Tosses Medical Monitoring Claim Based on One-in-a-Million Increase in Risk

A Sixth Circuit decision affirming a district court's grant of summary judgment to CSX Transportation reaffirms the evidentiary standard in tort cases for plaintiffs seeking damages for increased risk of future illness. Plaintiffs' medical monitoring claims were dismissed on the grounds that an additional one-in-a-million risk of developing cancer was insufficient to establish that the chemical exposure at issue was significant enough to warrant increased medical monitoring. *Hirsch v. CSX Transportation, Inc.*, No. 09-4548 (6th Cir. Sept. 8, 2011), *available at* www.bdlaw.com/assets/attachments/CSX.pdf.

On Oct. 10, 2007, a CSX train carrying hazardous materials derailed and caught fire in Ohio. *Hirsch*, slip op. at 2. Local residents claimed that dioxin levels in their town rose significantly as a result of the fire. They brought suit against CSX in the U.S. District Court for the Northern District of Ohio. *Id*. The district court granted defendant's motion for summary judgment and dismissed plaintiffs' negligence claim. *Id*. at 3. The court stated that the plaintiffs failed to meet their burden to prove that the dioxins released by the fire are known causes of human disease. *Id*. Plaintiffs also failed to show that they were exposed to dioxins in amounts sufficient to increase their risk of disease significantly enough to prompt a reasonable physician to order medical monitoring. *Id*.

In affirming the district court's decision, the Sixth Circuit emphasized that, to succeed on a claim for future illness, plaintiffs needed to show that a reasonable physician would order medical monitoring for them. *Id*. at 6. Plaintiffs could not establish a causal link between the train fire and increased dioxin levels in the town. In addition, plaintiffs had not yet suffered any discernable injury and their experts could only speculate that the plaintiffs' risk of disease might be slightly elevated by their exposure. The court noted that the estimate of plaintiffs' elevated risk was "proverbially small," amounting to a possible one-in-a-million chance. *Id*. at 7. Accordingly, the Sixth Circuit affirmed the lower court's holding dismissing their claims. The court noted, however, that the plaintiffs might have survived summary judgment if they had obtained conclusive medical evidence that their risk of disease had been elevated by a small margin – something more than one-in-a-million – as a result of the accident. *Id*. at 8.

IV. CLASS ACTIONS

Third Circuit Declines to Allow Class Certification Based on Total Class Average Exposure

In a case that limits the availability of class actions for plaintiffs seeking remedies based on their aggregate exposure to a chemical, the Third Circuit affirmed a decision denying plaintiffs class certification because the common evidence proposed for trial was not sufficiently cohesive and common issues of law and fact did not predominate. *Gates v. Rohm and Haas Co.*, No. 10-2108 (3d Cir. Aug. 25, 2011), *available at* www.bdlaw.com/assets/attachments/Gates.pdf.

Defendant Morton International owned and operated an industrial facility in Ringwood, Illinois where it used vinylidene chloride from 1960 through 1978. *Gates*, slip op. at 4. Morton disposed of wastewater containing this chemical in an onsite lagoon. *Id*. Samples from more than 90 monitoring wells installed around the facility allegedly tested positive for the chemical; however, no vinylidene or vinylidene byproducts were found in any of the residential wells in a nearby village. *Id*. In 2006, village residents filed a complaint alleging that, as a result of the defendants' industrial activities, the chemicals may be present in undetectable levels in their drinking wells and that therefore they had been exposed to vinyl chloride. *Id*. at 5. Plaintiffs looked to litigate their medical monitoring claims as a class. The proposed medical monitoring

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class included all individuals who had lived for one year or more in the village from 1968 through 2002. *Id.* at 6. Plaintiffs also proposed a property damage class to include all persons who owned property in the village as of April 2006, alleging devaluation of their property due to contamination. *Id.*

The District Court for the Eastern District of Pennsylvania declined to certify both classes. *Id.* at 10. The court concluded that plaintiffs did not meet the requirements of a class because the common evidence offered for trial did not adequately typify individual class members. *Id.* The Third Circuit affirmed the denial of class certification because plaintiffs only relied on evidence of the class's total average exposure to vinylidene and its byproducts. *Id.* at 20-26. Plaintiffs offered no data showing that each member had been exposed to contamination sufficient to reduce property values or warrant preventative medical monitoring. *Id.* at 31-33. The Third Circuit held that averages and community-wide estimates will not suffice to gain class certification, in part because the effects of any exposures may vary widely based on age, sex, genetics, physical activity and a range of other factors.

Pennsylvania District Court Rejects Proposed Class Defined by Distance from Release Site

Illustrating the evidentiary burdens on class action plaintiffs seeking certification, a federal court in the Eastern District of Pennsylvania held that a proposed class of plaintiffs living within 2,500 feet of a gas station allegedly contaminating groundwater was overbroad. *See Kemblesville HHMO Ctr. LLC v. Landhope Realty Co.*, No. 08-2405 (E.D. Penn. July 28, 2011), *available at* www.bdlaw.com/assets/attachments/Landhope.pdf.

In 1998, a plume of methyl tert-butyl ether ("MTBE") was discovered in groundwater beneath a gas station that had been in operation since 1978. *Kemblesville*, slip op. at 1-2. Subsequent testing of groundwater nearby revealed 17 affected properties, the majority of which were located within 750 feet of the gas station, and all of which were located within 1,500 feet. *Id.* at 2-3. Nearby property owners filed suit and sought certification of a class defined as those owning land within 2,500 feet of the gas station. The proposed class comprised the owners of some 179 properties. *Id.* at 1, 9.

The district court denied class certification, stating that plaintiffs seeking certification of a class area must demonstrate that a contamination plume "may have traveled, or will ever travel" to the edges of the proposed class area. *Id.* Plaintiffs, however, did not offer a "model or a concrete expert opinion as to the extent or eventual movement of the alleged MTBE plume." *Id.* at 10. The court held that plaintiffs did not meet their burden and, therefore, the proposed class was overbroad. *Id.* at 10-11. Moreover, the court found the plaintiffs could not show that the putative class would be too numerous to consider individually. *Id.* at 13-14.