Toxic Tort & Product Liability Quarterly

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I. PUNITIVE DAMAGES

Court Strikes Jury's Punitive Damage Award Against Dole

On March 7, 2008, the Los Angeles Superior Court granted Dole's motion for a judgment notwithstanding the verdict (JNOV) on the jury's award of punitive damages to the plaintiffs, finding that the award would not serve the goals of punishment or deterrence. *See Tellez v. Dole Food Co.*, No. BC 312852 (Super. Ct. of Cal., County of L.A.). The court concluded that "any punitive damages would be so arbitrary as to be grossly excessive, and thus violative of the Due Process Clause of the Fourteenth Amendment." Slip Op. at 7.

Six farm workers alleged that they were rendered sterile by the use of the pesticide dibromo chloropropane (DBCP) in the Dole banana plantations in Nicaragua where they worked during the 1970s and 1980s. Although the United States banned the use of DBCP in 1979, it remained legal in Nicaragua until 1993.

The court employed two rationales for considering, and ultimately eliminating, the punitive damage award. First, the court concluded that punitive damages would not serve the goal of punishment because none of the corporate directors and actors from 30 years ago are still active today and "punishment of the corporations for the actions of such persons borders on the arbitrary." *Id.* at 5 (citations omitted). Second, the court concluded that the state's interest in deterring future injury to foreign nationals caused by California corporations was already sufficiently addressed by the "existing compensatory remedies available in California courts, in addition to whatever remedies are available in Nicaragua" as well as "the considerable DBCP litigation involving California residents." *Id.* at 6 (citations omitted).

On Remand, California Appellate Court Reduces Punitive and Noneconomic Awards

On March 10, 2008, following remand from the U.S. Supreme Court to re-examine the jury's damages awards in light of the Supreme Court's decision in *Phillip Morris USA v. Williams*, which held that consideration of harm to third parties could not be the basis for a punitive damages award, a California appellate court reduced the amount of both the punitive and noneconomic damages but otherwise upheld its previous decision affirming the awards for injuries resulting from an automobile malfunction. *See Buell-Wilson v. Ford Motor Co.*, Slip Op. No. D045154, D045579 (Cal. Ct. of App.) (*Buell-Wilson II*), *available at* http://www.courtinfo.ca.gov/opinions/documents/D045154A.PDF. The Supreme Court vacated the California appellate court's previous decision in *Buell-Wilson v. Ford Motor Company*, 141 Cal. App. 4th 5252 (*Buell-Wilson I*), which affirmed the trial court's award of punitive and noneconomic damages. *See Ford Motor Co. v. Buell-Wilson*, 127 S. Ct. 2250 (2007). Given the holding of *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), the remand required the Court of Appeal for the Fourth Appellate District of California to determine whether proper procedures were in place to prevent juries from punishing defendants for harm caused to third parties when assessing punitive damages while also allowing juries to consider harm to third parties when assessing reprehensibility.

The jury originally awarded $4.6 million in economic damages, $105 million in noneconomic damages, $13 million for loss of consortium, and $246 million in punitive damages for injuries suffered in the rollover of a Ford Explorer that left the plaintiff a paraplegic. The trial court later reduced the noneconomic damages to approximately $65 million, the loss of consortium award to $5 million, and the punitive damages to $75 million. In *Buell-Wilson I*, the Court of Appeal upheld the amounts, rejecting Ford's arguments that California's punitive damages law was unconstitutionally vague and that the trial court erred in excluding certain evidence of industry custom and practice. On remand in *Buell-Wilson II*, Ford renewed its arguments on vagueness

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and the exclusion of evidence related to custom and practice, and also formulated two new arguments, asserting that the noneconomic portion of the damages violated Ford's constitutional right to due process and that the punitive damage award was excessive and the result of improper considerations.

The appellate court found Ford's arguments somewhat persuasive and further reduced the noneconomic damages amount from $65 million to $18 million because it was "excessive under California law" and was "the product of 'passion or prejudice.'" *Buell-Wilson II*, Slip Op. at 5. As evidence of the jury's passion or prejudice, the court noted that despite the plaintiffs' request that the jury award noneconomic damages of only three to four times the economic damages ($4.6 million), or between $13.8 and 18.4 million, the jury awarded $105 million in noneconomic damages, an amount approximately 23 times greater than the economic damages award. *Id.* at 37-38. The court also concluded that the "award of punitive damages is excessive, violates federal due process limitations, and must be reduced [from $75 million] to $55 million." *Id*. at 6. Although "nothing in *Phillip Morris* requires us to reconsider the remainder of our original decision," see *id*. at 48, the court nevertheless concluded that"[a]n award exceeding a two-to-one ratio [of punitive to non-punitive damages] would exceed the constitutional maximum that could be awarded under the facts of this case." *Id*. at 68. Thus, the court reduced the punitive damages award to $55 million, as it was approximately twice the court's final total of $27.6 million for non-punitive damages ($4.6 million in economic damages, $5 million for loss of consortium, and $18 million for noneconomic damages).

California Court Reverses Punitives Award Due to Jury's Consideration of Unrelated Actions

The California Court of Appeal for the Second Appellate District struck down a lower court's award of $5 million in punitive damages as violative of the defendant's constitutional right to due process because the jury was allowed to consider two previous acts of the defendant that were dissimilar to the act at issue. *See Holdgrafer v. Unocal*, No. B175953 (Cal. Ct. App. March 4, 2008), *available at* http://www.courtinfo.ca.gov/opinions/documents/B175953.PDF. A group of commercial property owners sued Unocal Corporation in trespass, nuisance, and negligence for subterranean contamination from a leak in Unocal's oil pipelines. A jury awarded approximately $2.5 million in compensatory damages and $10 million in punitive damages, which the trial court later remitted to $5 million. Unocal appealed the punitive damage award, arguing that the lower court erred when it allowed the jury to hear evidence of previous contamination incidents involving the company.

The court agreed with Unocal, concluding that "evidence of two massive oil spills is too dissimilar to be considered in assessing defendant's reprehensibility." *Id*. at 1. Not only were the previous two spills much larger amounts than the leak at issue, but also, for the previous two spills, Unocal concealed news of the spills from the public and the government, denied responsibility, and misrepresented the magnitude of the environmental impact. "This conduct is radically different from the conduct at issue in this case" because Unocal reported the spill to the state and affected property owners, contained and monitored the spill, participated in settlement negotiations, and "otherwise assisted in protecting Plaintiffs from a negative financial impact on their investment." *Id*. at 21. The court further concluded that "in order to comply with due process, the proscription of 'dissimilar acts' must apply to both the jury's predicate determination whether a defendant is *liable* for punitive damages ([Cal.] Civ. Code § 3294, subd. (a)), as well as to its subsequent evaluation of a defendant's reprehensibility in assessing the *amount* of punitive damages to be awarded." *Id*. at 1-2 (emphasis in original). The court reversed the jury's award of punitive damages and remanded for a retrial solely on the issue of punitive damages.

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II. STATE TORT REFORM LAWS

Ohio Supreme Court Upholds Statutory Caps on Noneconomic and Punitive Damages

Addressing the certified questions of whether Ohio's statutory caps on noneconomic and punitive damages facially violate various provisions of the Ohio State Constitution, the Ohio Supreme Court ruled that, in most tort suits, the caps should be upheld. *See Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, No. 2007-Ohio-6948 (Dec. 27, 2007). Ohio enacted both a limit on noneconomic damage awards in tort actions, Ohio Rev. Code § 2315.18, and a limit on punitive damage awards in tort actions, Ohio Rev. Code § 2315.21, in 2005. In *Arbino*, a suit filed in the U.S. District Court for the Southern District of Ohio, the plaintiff claimed medical injury based on her use of the Ortho Evra Birth Control Patch and argued that the state limitations on damages violated several of her rights under the Ohio Constitution, including provisions relating to the right to trial by jury, a remedy, an open court, due process, equal protection, and separation of powers.

Because the state-enacted caps on noneconomic and punitive damages only limit awards as a matter of law without altering a jury's findings of fact or eliminating a remedy altogether, the court concluded that the caps do not violate the right to due process, a remedy, and an open court. The court also held that the caps do not violate due process or equal protection because they are rationally related to the legislature's findings that the costs and uncertainty of civil litigation were harming the state economy and the public welfare. Although the tasks of finding facts and assessing damages in a case are primarily judicial functions, the court concluded that these are not exclusively judicial functions and recognized the legislature's ability to limit damages for certain types of cases. *See, e.g.*, Slip Op. at 28 (citing *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) ("[L]egislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards.")).

Ohio Supreme Court Upholds Statute of Repose and Other Ohio Tort Reform Measures

Addressing questions certified from the U.S. District Court of Northern Ohio, the Ohio Supreme Court upheld various tort reform measures as not facially violative of the Ohio Constitution; but held that one measure violated the Ohio Constitution when applied to an injury that occurred prior to enactment of the statute. *See Groch v. General Motors Corp.*, Slip Op. No. 2008-Ohio-546 (Feb. 21, 2008), *available at* http://www.sconet.state.oh.us/rod/docs/pdf/0/2008/2008-ohio-546.pdf. One provision at issue was a statute of repose that bars product liability lawsuits against manufacturers and suppliers for injuries that occur more than ten years after a product is delivered to a customer. *See* Ohio Rev. Code § 2305.10. The other two provisions regulate the subrogation of workers compensation claims when an injured worker also receives a jury award. *See* Ohio Rev. Code § 4123.95, 4123.931.

Referencing *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, No. 2007-Ohio-6948 (Dec. 27, 2007), the Ohio Supreme Court held that, on its face, the statute of repose did not violate the open-court, right-to-a-remedy, taking, due process, or equal protection clauses of the Ohio Constitution. As applied to the plaintiff's widow, however, the court concluded that the statute violated the retroactivity clause of the Ohio Constitution because the plaintiff incurred an injury more than ten years after the delivery of the product but thirty-four days before the enactment of the statute of repose. *Groch*, Slip Op. at 44-50. The court concluded that the plaintiff's right to sue vested prior to enactment and that thirty-four days did not constitute a reasonable window of time for the plaintiff to file a claim. *Id.* at 49 (citing cases where one year is considered a more reasonable window of time).

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As part of the Ohio Supreme Court's reasoning for upholding the subrogation statute, the court addressed its previous opinion in *Holeton v. Crouse Cartage Co.*, 748 N.E.2d 1111 (2001), which struck down a 2001 version of the subrogation statute because it violated the takings, right-to-a-remedy, and due process provisions of the Ohio Constitution "by failing to adequately correlate the subrogee's reimbursement to any amount recovered by the claimant that can be characterized as duplicative or double when the claimant settled with the tortfeasor." *Groch*, Slip Op. at 15-16. In the current version, however, injured workers would "keep the [workers-compensation] benefits received from the subrogee" and likely reserve part of a jury award to reimburse the entities covering the workers-compensation claims. *Id.* at 18-19. Thus, the "unfairness [discussed in *Holeton*] has been addressed and the imbalances adjusted to such a degree that the constitutional infirmity has been eliminated." *Id.* at 19.

III. EXPOSURE AND ACCRUAL OF INJURY

Texas Jury Finds for Defendant in Chemical Exposure Case

On February 11, 2008, a jury in the Texas state court for Tarrant County returned a verdict finding that the defendant, BNSF Railway Co., was not liable for the plaintiff's stomach cancer. *See Faust v. BNSF Ry. Co.*, No. 096-212928-05 (Tex. Dist. Ct. Feb. 11, 2008); *see also Texas Jury Rules for BNSF Railway in Lawsuit Alleging Chemical Exposure Caused Cancer,* BNA Daily Environment Report (Feb. 13, 2008), at A-6. The plaintiff alleged that the cause of injury was exposure to polycyclic aromatic hydrocarbons (PAHs) and dioxins from either the coal-tar creosote used in treating wood for BNSF's railroad ties or emissions from a nearby plant. The plaintiff's husband worked at the plant, and the plaintiff argued that exposure occurred when she laundered her husband's work clothes.

BNSF argued that the plaintiff failed to provide sufficient, reliable evidence linking the cancer to creosote dust on the plaintiff's husband's work clothes, especially in light of tests conducted by defendants that demonstrated an absence of the chemicals in the plaintiff's home. In addition, BNSF contended that the likely cause of the cancer was either the plaintiff's use of cigarettes or infection with bacteria H.pylori, a common cause of peptic ulcers. Other cases involving claims of exposure from the same plant are slated for trial in the coming months.

Pennsylvania Supreme Court Rules That Lower Courts May Consider Exposure Facts on Summary Judgment

In a 4-3 decision, the Pennsylvania Supreme Court recognized that consideration of the frequency, regularity, and proximity of exposure to asbestos-containing products is appropriate at the summary judgment stage as part of a determination of whether a party has presented sufficient causation evidence to proceed to trial. *See Gregg v. V-J Auto Parts Co.*, No. 38 EAP 2005 (Dec. 28, 2007), *available at* http://www.courts.state.pa.us/OpPosting/Supreme/out/J-68-2007mo.pdf (majority), http://www.courts.state.pa.us/OpPosting/Supreme/out/J-68-2007do1.pdf (dissent), http://www.courts.state.pa.us/OpPosting/Supreme/out/J-68-2007do2.pdf (dissent). Although the appellee-plaintiff argued that previous cases limited consideration of the frequency, regularity, and proximity of exposure only to those instances where the plaintiff relied solely on circumstantial, rather than direct, evidence, the court rejected a bright-line distinction because such a distinction would ignore the relative strength of the evidence and because most cases involve both types of evidence.

As part of the court's adoption of the frequency, regularity, and proximity test, it noted that "one of the difficulties courts face in the mass tort cases arises on account of a willingness on the part of some experts to offer opinions that are not fairly grounded in a reasonable belief concerning the underlying facts and/or opinions that are not couched within accepted scientific methodology." Slip Op. at 17 (majority). Just such a willingness was on display, the court

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observed, when the plaintiff's expert attributed the plaintiff's mesothelioma to forty years of occupational exposure despite the plaintiff's failure to offer any evidence of occupational exposure. "[W]e do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures implicates a fact issue concerning substantial-factor causation in every 'direct-evidence' case." *Id.* at 18 (majority). The court remanded the case for a determination of whether circumstantial evidence of exposure to the defendant's asbestos-containing brake pads was sufficient to present a jury issue.

Alabama Supreme Court Overturns Previous Ruling on Accrual of Toxic Tort Actions

In a 5-4 decision, the Alabama Supreme Court rejected its previous opinion that toxic tort actions accrue on the "date of last exposure" and adopted a dissent from its 2007 ruling in *Cline v. Ashland Inc.*, which reasoned that "a cause of action accrues only when there has occurred a *manifest*, present injury." *Griffin v. Unocal Corp.*, No. 1061214, 2008 Ala. LEXIS 19, at *4 (Jan. 25, 2008) (quoting *Cline v. Ashland Inc.*, No. 1041076, 2007 Ala. LEXIS 5, at *59 (Jan. 5. 2007) (Harwood, J., dissenting)) (emphasis added in *Griffin*). The decision overturned 29 years of state case law on the application of the two-year statute of limitations for suits alleging injury from exposure to hazardous substances. In dissent, the judges in *Griffin* argued that the determination of when a toxic tort action accrues is properly the domain of the Alabama Legislature. Two of the judges who comprised the majority in *Cline* in 2007 have been replaced by judges who sided with the majority in *Griffin.*

Reasoning that the last exposure rule precluded remedies for plaintiffs with latent diseases, the *Cline* dissent concluded that the rule amounted to a Catch-22 and violated Art. 1, section 13 of the Alabama Constitution, which states that "every person for any injury done him . . . shall have a remedy by due process of law." *Id.* at *51-52 (quoting *Cline*, which is attached as an appendix to *Griffin*). Under the last exposure rule, a plaintiff with an injury that is latent for more than two years would not know of the injury until more than two years after the date of last exposure, in which case the suit would be time-barred under the relevant statute of limitations. Alternatively, if the plaintiff were to file suit within two years of the last exposure, he or she would not have manifested the requisite injury necessary to sustain a suit. In *Griffin*, the plaintiff was diagnosed with acute myelogenous leukemia 10 years after he stopped working at a manufacturing facility, the location of the exposure alleged to have caused the leukemia.

IV. "SOPHISTICATED USER" DEFENSE

California Supreme Court Adopts "Sophisticated User" Defense in Failure to Warn Claims

In a case of first impression, the Supreme Court of California unanimously adopted the "sophisticated user" doctrine, which acts as an exception to a manufacturer's general duty to warn consumers when a plaintiff has or should have knowledge of a product's inherent hazards. *See Johnson v. American Standard, Inc.*, No. S139184 (April 3, 2008), *available at* http://www.courtinfo.ca.gov/opinions/documents/S139184.PDF. Agreeing with the reasoning of the appellate court below, the court held that the sophisticated user defense should apply in the case to defeat "all causes of action for defendant's alleged failure to warn," including both strict liability and negligence. Slip Op. at 20. The court's rationale supporting the sophisticated user doctrine was based on the notion that a "user's knowledge of the dangers is the equivalent of prior notice." *Id.* at 8 (citations omitted).

As part of its opinion, the court discussed three key parameters for application of the

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sophisticated user defense in California. First, with regard to the constructive "should have known" standard, the court reasoned that although "there will be some users who were actually unaware of the dangers" or who do not actually possess the requisite sophisticated knowledge and skill, knowledge will be attributed to "individuals who represent that they are trained or are members of a sophisticated group of users [because they] are saying to the world that they possess the level of knowledge and skill associated with that class." *Id.* at 16. Second, despite the decisions of other states to recognize the sophisticated user doctrine only for negligence cases, the court concluded that the doctrine would apply as a defense to both negligent failure to warn and strict liability for failure to warn causes of action in part because, unlike defective design claims, "failure to warn claims involve some consideration of the defendant's conduct" and "relate[] to a failure extraneous to the product itself." *Id.* at 19; *see also id.* at 18 (citing Restatement Second of Torts, § 402A, cmt. j, p. 353, which addresses strict liability). Finally, the court indicated that the relevant time for determining user sophistication and accompanying knowledge "is measured from the time of the plaintiff's injury, rather than from the date the product was manufactured." *Id.* at 20.

The plaintiff, a trained and certified heating, ventilation, and air conditioning ("HVAC") technician, alleged harm from exposure to a gas known as phosphene. R-22, a hydrochlorofluorocarbon refrigerant commonly used in air conditioning systems, is capable of decomposing into phosphene gas when exposed to flame or high heat -- a common occurrence when a technician is joining together air conditioner pipes. "[M]anufacturers and HVAC technicians have generally known of the dangers [of phosphene exposure] since as early as 1931," and "[t]he dangers and risks associated with R-22 are noted on Material Safety Data Sheets (MSDSs)." *Id.* at 2 (citing Cal. Code Regs., tit. 8, § 5194, subd. (g)(1), (2)). The court rejected the plaintiff's claim that "he had read the MSDS for R-22 but did not understand that he should avoid heating R-22" because the plaintiff's training and certification as well as the study guides and MSDS for R-22 indicated that the plaintiff should have known of the harm associated with exposure to phosphene. *Id.* at 20-21. Accordingly, the court affirmed the appellate court's decision that summary judgment was properly granted to the defendant.

For a more detailed summary and analysis of this opinion, see http://www.bdlaw.com/news-304.html.

V. PREEMPTION

California Adopts Narrow View of Implied Federal Preemption of State Law Claims

On February 11, 2008, the California Supreme Court issued a unanimous decision in the *Farm Raised Salmon Cases*, No. S147171 (Cal. Feb. 11, 2008), *available at* http://www.courtinfo.ca.gov/opinions/documents/S147171.PDF, holding that certain state law causes of action are not preempted by the Federal Food, Drug, and Cosmetic Act ("FDCA") (21 U.S.C. § 301 *et seq*.). In these consolidated class action cases, plaintiffs alleged that the failure to warn consumers of the presence of artificial coloring in farm raised salmon violated the state Sherman Food, Drug, and Cosmetic Law ("Sherman Law") (Cal. Health & Safe. Code § 110660 *et seq*.) prohibiting misbranding of food, which gave rise to state law claims of unfair competition, deceptive trade practices, false advertising, and negligent misrepresentation. In response, defendant grocers argued -- and the lower courts agreed -- that because the Sherman Law would frustrate the purpose and intent of the FDCA's own food labeling requirements, the state law claims were impliedly preempted.

As Congressional purpose and intent are key factors in determining implied preemption, the California Supreme Court focused its analysis on both the FDCA's statutory language, see 21 U.S.C. §§ 343(k), 343-1(a)(3), as well as its legislative history. *See* Slip Op. at 13-20. The

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Court found that "while allowing private remedies based on violations of state law identical to the FDCA may arguably result in actions that the FDA itself might not have pursued, Congress appears to have made a conscious choice not to preclude such actions." *Id.* at 26. Moreover, where Congress has not expressly limited state remedies, the Court concluded it should not find preemption given the strong presumption against its application in areas historically regulated by the States. *Id.*

The California Supreme Court's rejection of the implied preemption doctrine largely followed the reasoning of two recent U.S. Supreme Court cases, *Medtronic, Inc. v. Lohr,* 518 U.S. 470 (1995) involving the FDCA's Medical Device Amendment preemption provision, 21 U.S.C. § 360k, and *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005) involving the Federal Insecticide, Fungicide, and Rodenticide Act's preemption provision, 7 U.S.C. § 134v(b). *See* Slip Op. at 18-19. Like the FDCA food labeling preemption provision at issue here, the preemption provisions analyzed in both *Lohr* and *Bates* prohibited states from passing requirements that were not identical to the relevant federal counterpart. In both cases, the high court found that the federal law at issue did not prevent states from imposing sanctions for the violation of state rules that duplicated federal requirements.

For a more detailed summary and analysis of this opinion, see http://www.bdlaw.com/news-280.html.

VI. SUBSURFACE CONTAMINATION AND TOXIC TORTS

Federal District Court Certifies Class of Property Owners Alleging Injuries from Hazardous Waste Disposal

On February 21, 2008, the U.S. District Court for the District of Connecticut granted a group of plaintiffs' third amended motion for class certification. *See Collins v. Olin Corp.*, No. 3:03-cv-945, 2008 U.S. Dist. LEXIS 15812 (D. Conn. February 21, 2008). The plaintiffs, neighboring property owners in Hamden, Connecticut, allege claims under Superfund and state law against Olin Corp., a Missouri-based company that owned and operated a firearms plant in the area from the 1930s to the 1950s. According to the plaintiffs' allegations, Olin disposed of waste from the plant in public landfills, despite knowing that the contents of the waste -- arsenic, lead, and manufacturing waste -- were hazardous and that the landfills would later be developed for residential purposes.

The court's opinion centered on the predominance and superiority of common issues. Olin argued that the plaintiffs' claims of nuisance, negligence, and emotional distress would require "hundreds or thousands of individual mini-trials," particularly for issues such as causation, damages, and the statute of limitations. Slip Op. at 16. The court rejected the notion that these issues justified a denial of certification and recognized the predominance of the common issues of Olin's course of conduct, knowledge, and intent throughout the industrial waste disposal process, as well as the extent of the area contaminated, the nature of the contaminants, and the general harms alleged. Notably, the court stated that "Olin's entire course of conduct and knowledge of its potential hazards is [*sic*] a common issue to the class, which courts have found to be sufficient even in cases where there are multiple possible sources of contamination." *Id.* at 12 (citations omitted).

W.R. Grace Agrees to Pay Record $250 Million in Proposed Superfund Settlement

As part of a proposed settlement under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), global chemical supplier W.R. Grace has agreed to pay the U.S. Environmental Protection Agency ("EPA") $250 million to resolve a years-old

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dispute regarding response costs for asbestos contamination in Libby, Montana. *See In re W.R. Grace and Co.*, No. 01-01139 (Bankr. D. Del. March 11, 2008). According to the U.S. Department of Justice, this would be the largest amount in the history of the Superfund program. *See W.R. Grace to Pay EPA Record $250 Million Under Proposed Settlement in Libby Suit*, Toxics Law Reporter, (March 13, 2008), at 225. The proposed settlement, announced March 11, 2008, is subject to a 30-day comment period.

From 1963 to 1990, W.R. Grace owned and operated a vercimilitude mine and vercimilitude processing facilities near Libby. Since 2000, EPA has been removing asbestos-contaminated soil from the Libby area. W.R. Grace filed for bankruptcy protection in 2001. In August 2003, EPA received more than $54 million from the U.S. District Court for the District of Montana for response costs incurred through December 31, 2001. According to the Justice Department, this amount has not been paid because of W.R. Grace's bankruptcy, and the proposed settlement would cover both the $54 million assessed in 2001 as well as response costs incurred since that time.

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