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I. PUNITIVE DAMAGES

Water District Allowed to Pursue Punitives for Alleged Failure to Address Contamination

The U.S. District Court for the Northern District of California ruled that a water management agency could pursue punitive damages in a negligence claim involving perchlorate contamination that required the agency to take remedial action. *See Santa Clara Valley Water Dist. v. Olin Corp.*, No. 07-CV-3756 (N.D. Cal. Aug. 18, 2008). The Santa Clara Valley Water District ("SCVWD") claimed that, in response to perchlorate contamination, it had spent over $4 million to sample water production wells and supply alternative drinking water to customers. *Santa Clara Valley Water Dist.*, Slip Op. at 2. Identifying the alleged source of the contamination as an industrial facility owned by Olin Corporation ("Olin"), the water district sued to recover not only the response costs but also punitive damages under theories of negligence and restitution. *Id.* at 2–3. Olin countered that SCVWD was barred from seeking punitive damages because the agency did not suffer any direct injury from the contamination. *Id.* at 4.

To be eligible for punitive damages in California, a claimant must demonstrate not only a direct injury but also clear and convincing evidence of "malice, oppression, or fraud" by the defendant. *Id*. at 3. The court found that the water district suffered a direct injury, sufficient to allow it to pursue punitive damages, from the contamination and ensuing response. *Id*. at 4. Specifically, with respect to the negligence claim, the court held that SCVWD's allegations regarding a 12–year period in which Olin knew of the contamination but refused to act "could support a finding of malice." *Id*. at 4. With respect to the restitution claim, however, the court concluded that Olin's refusal to pay costs was too commonplace to rise to the level of malice. *Id*. at 4–5.

Punitive Damages Claim Entitles Plaintiff to Discovery of Financial Information

In a decision that may have implications for toxic tort actions, a federal district court has allowed a plaintiff to proceed with discovery of the defendants' financial condition prior to establishing prima facie entitlement to punitive damages. *See Grosek v. Panther Transp., Inc.*, No. 3:07-CV-1592 (M.D. Pa. July 22, 2008), *available at* http://www.pamd.uscourts.gov/opinions/munley/07v1592.pdf. Defendants, a truck driver and his employer, requested a protective order, arguing that discovery on their financial status would be premature, "unduly burdensome, costly and inappropriate" without a prior determination that punitive damages were appropriate. *Grosek*, Slip Op. at 2. The court denied the motion for a protective order, finding the defendants had "demonstrated no [potential] prejudice." *Id*. at 4. The court concluded that mere allegations of punitive damages in a complaint, even without any prima facie showing, were sufficient to require the defendants to provide pretrial discovery on financial matters. *Id*. Short of a failure to state a claim, the court reasoned that delaying discovery on the requested financial documents would be "inefficient." *Id*. at 7. To provide some level of protection for sensitive financial information, the court mandated a confidentiality agreement. *Id*. at 10.

District Court Strikes Punitives Award Due to Improper Expert Testimony

The United States District Court for the Eastern District of Arkansas struck a plaintiff's expert testimony, vacated a $27 million punitive damages award stemming from a negligence action against two drug manufacturers, and ordered a new trial on the issue of punitive damages. *See In re Prempro Prods. Liab. Litig.*, No. 04-01169 (E.D. Ark. July 8, 2008), *available at*

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http://www.fileden.com/files/2007/7/10/1254845/Scroggin%20v%20%20Wyeth%20JNOV%20on%20Punitives.pdf. A jury initially found the defendants liable for $2.7 million in compensatory damages for manufacturing hormone replacement drugs that allegedly caused the plaintiff's breast cancer. *In re Prempro*, Slip Op. at 18. The defendants challenged the admission of the plaintiff's expert testimony, and the trial judge granted the motion, stating that the expert "did not provide analysis, opinion, or expertise." *Id*. at 1–2. Without the expert testimony, the case "lacked substantial evidence" of malice and the punitive damages issue should not have been submitted to the jury. *Id*. at 49.

The plaintiff's expert was designated to offer testimony as a regulatory expert and to establish the standard of ordinary care in the pharmaceutical industry. *Id*. at 3. The trial judge, however, allowed her to testify "as to the bottom line without any explanation," to "simply summarize [documents] . . . with a tilt favoring a litigant," and to "invade[] areas that required no expert testimony." *Id*. at 20. The court also found that numerous documents should not have been admitted through the plaintiff's expert. *Id.* at 7–20. Without these documents and testimony, the court concluded, the evidentiary basis for punitive damages was insufficient. *Id*. at 20–51.

II. EXPERT TESTIMONY

Following *Daubert* Hearing, District Court Denies Certification of Proposed Medical Monitoring Class

Following a *Daubert* hearing on whether a putative class of plaintiffs in a toxic tort action had satisfied its burden of meeting the class certification requirements set out in Federal Rule of Civil Procedure 23, the United States District Court for the Southern District of West Virginia denied class certification on September 30, 2008, finding that the plaintiffs' fact and expert evidence failed to prove an exposure and injury distinct from that of the general population. *See Rhodes v. E.I. Du Pont de Nemours and Co.*, No. 6:06-cv-00530 (S.D. W. Va. June 11, 2008) ("*Rhodes I*"), *available at* http://www.wvsd.uscourts.gov/district/opinions/pdf/~8442864.pdf; *Rhodes v. E.I. Du Pont de Nemours and Co.*, No. 6:06-cv-00530 (S.D. W. Va. September 30, 2008) ("*Rhodes II*"), *available at* http://www.wvsd.uscourts.gov/district/opinions/pdf/RhodesvDuPontMemOp.pdf. The plaintiffs argued for class certification based, in part, on a common medical monitoring cause of action for those plaintiffs who received drinking water from the local utility board in Parkersburg, West Virginia and who were allegedly exposed to a chemical known as C-8 in the water. *Rhodes I*, Slip. Op. at 2, 10; *Rhodes II*, Slip. Op. at 13–15.

Because West Virginia recognizes a cause of action for medical monitoring only where claimants prove that the expenses are necessary and reasonably certain, the court concluded in *Rhodes I* that the individual issues related to each plaintiff's potential medical monitoring needs were inconsistent with the requirements of Rule 23 — particularly the "cohesiveness" requirement that courts have interpreted to be a part of Rule 23(b)(2). *Rhodes I*, Slip. Op. at 3–9; *Rhodes II*, Slip. Op. at 15–16. Accordingly, the court reasoned that a *Daubert* hearing was necessary because the plaintiffs' assertions of commonality and cohesiveness depended solely on the opinions of the plaintiffs' experts. *Rhodes I*, Slip. Op. at 10–11. Although the court acknowledged both the difficulties of determining the need for a preliminary *Daubert* hearing as well as the extent of such a hearing, the court nevertheless noted that "numerous other courts" had deemed a preliminary hearing to be appropriate and useful when considering class certification. *Id.* at 15–17, 20 n.10, 22.

In *Rhodes II*, the court evaluated whether the plaintiffs could "commonly prove that each and every class member has been exposed to C-8 above so-called 'background levels' of exposure, that is, exposure levels experienced by the general population." *Rhodes II*, Slip. Op. at 17. The plaintiffs relied on three types of fact evidence: a previous settlement involving DuPont related

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to C-8 exposure, public health agencies' recommendations about safe levels of C-8 in drinking water, and elevated C-8 in the blood levels of the named plaintiffs. *Id*. at 17–18. The court rejected the settlement and public health evidence because neither demonstrated a "comparison between the exposure of the proposed class and the general population" and rejected the importance of the elevated C-8 blood levels because the plaintiffs did not establish a relationship between the levels and the common source of drinking water. *Id*. In addition, the court stated that "DuPont's agreement [as part of the settlement] to participate in a *voluntary* medical monitoring program is *not* an admission that a class of plaintiffs exposed in a similar manner must be subject to a uniform medical monitoring program." *Id*. at 27 (emphasis in original).

With respect to expert testimony, the court recognized the validity of DuPont's arguments that "individual characteristics and habits will affect the level of risk experienced by each class member." *Id*. at 20–21. The court discounted the testimony of one of the plaintiffs' two experts who relied on a risk assessment "[b]ecause a risk assessment overstates the risk to a population to achieve its protective and generalized goals" whereas the court must evaluate "proximate causation as to each individual in the proposed class." *Id*. at 24–25. Similarly, for the plaintiffs' second expert, the court rejected, as relating only to the general population, reliance on epidemiological analyses and a study showing that C-8 can cause various diseases. *Id*. at 25–27. The court also rejected the expert's notion that individual determinations of injury could be deferred until later in the trial because it "avoids making the individual inquiries into the need for medical monitoring that would destroy cohesiveness of the class." *Id*. at 29.

Expert Testimony Barred Due to Failure to Address Possibility That Disease Had No Known Cause

The United States District Court for the Eastern District of Pennsylvania barred the testimony of two plaintiffs' experts due to their failure to account for the possibility that the specific illness at issue had no known cause. *Perry v. Novartis Pharmaceuticals Corp.,* No. 05-5350 (E.D. Pa. July 9, 2008), *available at* http://www.paed.uscourts.gov/documents/opinions/08D0778P.pdf. Without the experts' testimony, the plaintiffs could not prove that a prescription drug known as Elidel, manufactured by defendant Novartis, caused their child's non-Hodgkin lymphoma, and the court granted the defendants' motion for summary judgment. *Perry*, Slip Op. at 40.

Regarding general causation, the court accepted expert testimony that exposure to pimecrolimus, the active ingredient in Elidel, could cause non-Hodgkin lymphoma. With regard to specific causation, each expert surveyed the individual plaintiff's exposure to certain risk factors and, after identifying pimecrolimus as the only risk factor present, concluded that it caused lymphoma in the plaintiffs' child. *Id.* at 31. The court, however, rejected the experts' differential diagnosis (i.e., the determination of a diagnosis through medical analysis involving process of elimination) because it failed to consider the possibility that the cause of the plaintiff's lymphoma was unknown, or idiopathic. *Id.* at 31–36. "This is not to say that where most diagnoses of a disease are idiopathic it is impossible to prove specific causation. But in those cases, analysis beyond a differential diagnosis will likely be required." *Id.* at 33.

Indiana Court Affirms Defense Judgment Where Plaintiffs' Expert Failed to Account for Potential Alternative Causes

The Indiana Court of Appeals affirmed a trial court's decisions granting defendants' motions for summary judgment because the plaintiffs' expert did not adequately account for the possibility that factors other than contaminants found at a defendant's facility could cause the plaintiffs' seizures. *Gregory v. DaimlerChrysler Corp.*, No. 33A01-0712-CV-581 (Ind. Ct. App. July 11. 2008), *available at* http://www.in.gov/judiciary/opinions/pdf/07110801jgb.pdf; *Coomer v. DiamlerChrysler Corp.*, No. 33A01-0712-CV-582 (Ind. Ct. App. July 11, 2008), *available at*

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http://www.in.gov/judiciary/opinions/pdf/07110802jgb.pdf. Plaintiffs, two employees at a DaimlerChrysler manufacturing facility, filed separate suits claiming that contaminants present at the facility, and in the soil and groundwater surrounding the facility, induced seizures. The defendants moved for summary judgment on the basis that independent medical examinations of each plaintiff concluded that one had "idiopathic epilepsy" and that the other had juvenile myoclonic epilepsy ("JME"), "a genetic form of epilepsy." *Gregory*, Slip Op. at 2–3; *Coomer,* Slip Op. at 2–3. In response, the plaintiffs' expert filed affidavits asserting that "it is reasonable to conclude that [plaintiffs'] occupational exposure to this mix of toxic chemicals may have contributed to the onset of [their] seizure disorder[s]." *Gregory,* Slip Op. at 3; *Coomer*, Slip Op. at 3. Nonetheless, the lower court granted summary judgment, concluding that the expert failed to conduct a differential diagnosis.

The Indiana Court of Appeals deemed the affidavits of the plaintiffs' expert insufficient to create a genuine issue of material fact because the expert did "not identify which chemicals [plaintiffs were] allegedly exposed to," and did "not specify the level, concentration, or duration of [plaintiffs'] alleged exposure to the unspecified chemicals." *Gregory*, Slip Op. at 6; *Coomer*, Slip Op. at 6. Further, the affidavits did not account for possible alternative causes of the plaintiffs' seizures, such as genetic epilepsy or idiopathic epilepsy. Accordingly, the appellate court affirmed the lower court's decisions to grant the defendants' motions for summary judgment.

III. PRODUCTS LIABILITY

Pennsylvania Supreme Court Upholds Defense Verdict Overturning Prior $90 Million Product Liability Verdict

On September 26, 2008, the Supreme Court of Pennsylvania upheld a defense verdict in favor of Monsanto Corporation in which the jury had found that polychlorinated biphenyls ("PCBs") manufactured by Monsanto and released into an office building housing several state agencies were not defective under strict products liability law. *See Commonwealth v. U.S. Mineral Prods. Co.*, No. 75 MAP 2007 (Pa. Sept. 26, 2008), *available at* http://www.aopc.org/OpPosting/Supreme/out/J-76-2008mo.pdf. The court agreed with the lower court's ruling denying the Commonwealth of Pennsylvania's post-verdict motion for a new trial, finding that Monsanto had presented sufficient evidence for the jury to conclude that the PCBs were released into the building due to a fire in 1994 rather than in the course of the intended uses of the PCBs as components of building materials. *U.S. Mineral Prods. Co.* Slip. Op. at 4–12. Despite the Commonwealth's arguments that PCBs are harmful at low levels and that contamination occurred before the fire, the Supreme Court of Pennsylvania concluded that the jury reasonably found the chemicals were not present at a level that would constitute a serious health risk. *Id.* The court based this conclusion on evidence that PCB levels in the building were below the limits set by the U.S. Environmental Protection Agency and that the primary method of PCB dispersal was through smoke and soot associated with the fire. *Id.*

At the conclusion of a trial in this matter in 2000 before the Commonwealth Court, the jury returned a $90 million verdict against Monsanto, finding that the PCBs were a defective product. *Id.* at 2. On appeal, the Supreme Court of Pennsylvania reversed and remanded for retrial on several claims, in part due to the trial court's refusal to give a jury instruction distinguishing between "fire- and non-fire-related contamination." *Pa. Dep't of Gen. Servs. v. U.S. Mineral Prods. Co.*, 898 A.2d 590, 604 (Pa. 2006). The second trial was conducted in the Commonwealth Court and the post-trial motions were heard by a three-judge panel of that court. *See Commonwealth v. U.S. Mineral Prods. Co.*, 927 A.2d 717, 722 (Pa. Commw. Ct. 2007). The Pennsylvania Supreme Court upheld the defense verdict from the second trial.

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IV. NUISANCE / PROPERTY DAMAGE

New Jersey Court Recognizes Public Nuisance Claim for Activities on Private Land

A New Jersey court issued an unpublished letter of opinion recognizing that facts alleged by the New Jersey Department of Environmental Protection ("NJDEP") that would ordinarily give rise to natural resource damages ("NRD") can constitute a public nuisance, even where the property was privately owned at the time of the contaminating activity, but limited the remedy to abatement. *See New Jersey Dept. of Envtl. Prot. v. Exxon Mobil Corp.*, No. UNN-L-3026-04 (Super. Ct. N.J. Aug. 29, 2008) (unpublished), *available at* http://www.nj.gov/oag/newsreleases08/091008-Opinion.pdf. Although remediation that began under a 1991 administrative consent order is ongoing at two former ExxonMobil refinery sites, NJDEP filed a suit seeking NRD (for "loss of use"), restitution, and unjust enrichment damages under theories of public nuisance and trespass. *ExxonMobil Corp.*, Letter Op. at 1–3. The court granted NJDEP's motion for partial summary judgment on public nuisance, rejecting ExxonMobil's argument that the public nuisance doctrine did not apply to privately owned sites. *Id.* at 7.

The court ruled as a matter of law that the operations of ExxonMobil and its predecessors on private lands constituted both an "unreasonable interference" with the public's "right to an uncontaminated environment" and an "abnormally dangerous activity," forming the basis for NJDEP's public nuisance claim. *Id.* at 4–6. The court rejected ExxonMobil's argument that NJDEP's inability to demonstrate a special injury foreclosed the agency's public nuisance claim. *Id.* at 8–9. Nevertheless, the court held that because, under the public trust doctrine, NJDEP did not have to prove special injury, the relief available to NJDEP under a public nuisance theory — including NRD normally available under New Jersey's Spill Act (N.J.S.A. 58:10-23.11 *et seq.*) — was limited to abatement only. *Id.* Accordingly, the court denied NJDEP's partial motion for summary judgment on "loss of use" NRD. *Id.* The court also denied NJDEP's motion for partial summary judgment for trespass because the State did not hold the property in exclusive possession and for unjust enrichment because NJDEP already had an adequate remedy at law. *Id.* at 9–11.

Low-Level Presence of Hazardous Chemicals Found to Constitute Physical Injury in Property Damage Case

A district court has ruled that the presence of a hazardous chemical in the air, despite being undetectable by odor to humans and being well below harmful levels, can constitute a physical injury to property for purposes of a common law claim for property damage. *See Gates v. Rohm and Haas Co.*, No. 06-CV-01743 (E.D. Pa. July 30, 2008), *available at* http://www.paed.uscourts.gov/documents/opinions/08D0912P.pdf. The plaintiffs in this putative class action sued on behalf of residents of the Village of McCollum Lake, Illinois, alleging not only statutory violations but also nuisance, trespass, and negligence under the common law of both Pennsylvania and Illinois. *Gates,* Slip. Op. at 1, 3–4. As part of their property damage claims, the plaintiffs alleged a diminution in property value due to the stigma resulting from vinyl chloride contamination in the groundwater and air on their properties. *Id.* The parties agreed that any alleged groundwater contamination occurred in the past but disputed whether present levels of airborne vinyl chloride exceeded background levels. *Id.* at 2.

Defendants moved for partial summary judgment on the grounds that Illinois law did not recognize a cause of action for economic harm, such as diminution in property value, without present, physical injury. *Id.* at 4. According to the court, "[w]here the invading substance is a hazardous chemical, to demonstrate interference with the use and enjoyment of the property, a plaintiff must show either a physical invasion or an invasion by something otherwise perceptible, but not necessarily physical, like noises or vibrations." *Id.* at 6 (emphasis in original). Because

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the plaintiffs presented sufficient evidence to suggest that vinyl chloride is hazardous to human health, the court concluded that the plaintiffs "need only show that vinyl chloride was and continues to be physically present on their properties" to sustain a claim for diminution in property value. *Id*. at 7. Moreover, the court concluded that "the exposure level need not necessarily present a health risk to make out a property damage claim." *Id*. at 6.

V. VAPOR INTRUSION

District Court Concludes Vapor Intrusion May Present Imminent and Substantial Harm

The U.S. District Court for the Southern District of Illinois held that chemical vapors emanating from a contaminated refinery may present an imminent and substantial endangerment to health under the Resource Conservation and Recovery Act ("RCRA"), and the refinery owner was therefore subject to an injunction to monitor and abate the contamination. *See U.S. v. Apex Oil Co., Inc.*, No. 05-CV-242-DRH (S.D. Ill. July 28, 2008). The court's broad interpretation of RCRA's endangerment provision may open the door for similar suits attempting to hold companies liable for so-called vapor intrusion — chemical vapors emanating from contaminated sites.

According to the court, for several decades, numerous spills and leaks of petroleum products at a refinery owned by Apex Oil ("Apex") and its corporate predecessors contributed to subsurface hydrocarbon contamination in Hartford, Illinois. *Apex Oil*, Slip Op. at 21. Over time, hydrocarbon-vapor odor complaints and hydrocarbon-related fires were reported throughout Hartford, and, the court stated, air monitoring data showed "clear evidence of vapor intrusion" in several homes. *Id.* at 63–70, 109–14. In 2003, the U.S. Environmental Protection Agency ("EPA") assumed responsibility for addressing problems at the site and, based on an Illinois Department of Public Health study, concluded that the vapor intrusion posed a public health hazard. *Id*. at 82–83. EPA entered a consent agreement with four of the companies responsible for the contamination, but Apex declined to participate. *Id*. at 84. EPA brought an action under RCRA to require Apex to abate health threats posed by the alleged contamination. *Id*. at 1.

Emphasizing courts' broad authority to grant relief under RCRA, the court found that the vapor intrusion was sufficient to establish liability under RCRA because the vapors "may present an imminent or substantial endangerment to health." *Id*. at 162–63. Noting that the operative word was "may," the court stressed that the U.S. need only show there was "a potential for an imminent threat of serious harm." *Id*. at 164. The court interpreted "imminent" broadly, stating that imminence is not limited only to emergency situations but also, according to the court's interpretation of First Circuit case law, refers to any threat that "is near-term even though the perceived harm will only occur in the distant future." *Id*. at 164. The court also defined "substantial" to encompass "any reasonable cause for concern that someone or something may be exposed to a risk of harm . . . if remedial action is not taken." *Id*. at 165. In its conclusions of law, the court found that the vapors emanating from the hydrocarbon-contaminated soils in Hartford exposed residents to potential adverse health effects that presented an imminent and substantial endangerment to health. *Id*. at 166–79. Because Apex contributed to the endangerment through its handling of waste at the site, the court held Apex liable for monitoring and abating the contamination. *Id*.

VI. CLASS ACTIONS / PROCEDURE

Seventh Circuit Finds Class Action Fairness Act Allows Determination of "Mass Action" at Any Time

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On an issue of first impression at the federal appellate level, the United States Court of Appeals for the Seventh Circuit upheld a district court's decision to deny a motion to remand a suit brought by 144 individual plaintiffs from federal to state court, holding that federal jurisdiction for "mass actions" under the Class Action Fairness Act ("CAFA") can be determined any time after the filing of a complaint. *See Bullard v. Burlington N. Santa Fe Ry. Co.*, No. 08-8011 (7th Cir. Aug. 1, 2008). Originally filed in Illinois state court, the complaint sought damages from four corporations allegedly responsible for exposing the plaintiffs to injurious chemicals. *See Bullard*, Slip Op. at 1–2. The defendants removed the case to the United States District Court for the Northern District of Illinois pursuant to CAFA, which allows a federal court to exercise jurisdiction over "mass actions," defined as suits "in which plaintiffs propose a trial involving the claims of 100 or more litigants — if at least one plaintiff demands $75,000, the stakes of the action as a whole exceed $5 million, and minimal diversity of citizenship exists." *Id*. at 2.

Despite conceding that the complaint met the substantive requirements of a "mass action," the plaintiffs nonetheless moved for remand back to state court. Writing for the court, Chief Judge Easterbrook characterized the plaintiffs as seeking to maintain their "class action substitute" in state court through a "loophole" in CAFA, codified at 28 U.S.C. § 1332(d)(11)(B)(i), which provides that "mass actions" must be "proposed to be tried jointly." *Id*. at 3 (emphasis added). Plaintiffs argued that removal of a suit from state to federal court as a "mass action" under CAFA — as the defendants had previously succeeded in doing — was not proper until a final pretrial order, typically issued on the eve of trial, has identified the plaintiffs whose claims are "proposed to be tried jointly." *Id.* at 2–3. The court rejected the plaintiffs' arguments, interpreting the definitions of "class action" and "mass action" in CAFA to be met if a complaint "is either filed as a representative suit or becomes a 'mass action' at any time." *Id*. at 3. The Court held that because the Complaint described circumstances common to all plaintiffs, it "propose[d] one proceeding and thus one trial." *Id*. at 4.