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I. International Toxic Torts

California Court Vacates Pesticide Exposure Judgment Due to Fraud

In a major international toxic tort action derailed by fraud, the California Superior Court for Los Angeles County issued a Statement of Decision in March vacating a $2.3 million judgment and dismissing with prejudice an action filed by Nicaraguan plaintiffs who alleged exposure to pesticides while employed by affiliates of Dole Food Company, Inc. *See Tellez v. Dole Food Co., Inc.*, No. BC 312852 (Cal. Super. Ct. Mar. 11, 2011). The Statement of Decision follows a July 15, 2010 bench ruling that vacated the jury verdict in favor of the plaintiffs. *See California Court Vacates Pesticide Exposure Verdict Due to Attorney Misconduct*, Beveridge & Diamond, P.C., Toxic Tort & Product Liability Quarterly, Vol. XI, Oct. 20, 2010, at 5, *available at* http://www.bdlaw.com/assets/attachments/Toxic_Tort_Product_Liability_Quarterly_October_2010.pdf.

California Court of Appeal Justice Victoria G. Chaney, sitting by assignment on the Superior Court, found clear and convincing evidence that the $2.3 million judgment "was the product of a fraud on the court and extrinsic fraud perpetrated against defendants" by the plaintiffs' lawyers and their agents. Many of the plaintiffs had apparently never worked on the subject banana farms, and the Statement of Decision describes how certain of the plaintiffs' attorneys coached the plaintiffs to lie about working on the farms, forged work certificates, and generated fake lab results to create the impression that the plaintiffs had been rendered sterile by exposure to pesticides. Justice Chaney found that the fraud so permeated the action and the viability of any future proceedings that no sanction less than dismissal with prejudice would be adequate.

The plaintiffs opposed the defendants' motion for vacation and dismissal, claiming that Dole had bribed witnesses and that the plaintiffs were deprived of due process by the court's order protecting the identities of witnesses to the plaintiffs' fraud. The court found no credible evidence of bribery by Dole, and also found that the plaintiffs' attorneys had been able to effectively investigate Dole's allegations of fraud both before and after the imposition of the protective order.

II. Property Damage

Federal Court Dismisses Trespass Claim, Holding Homeowners Do Not Own Groundwater

In a case that may limit the extent to which property owners can recover damages for contaminated groundwater in Michigan, the United States District Court for the Western District of Michigan dismissed the plaintiffs' trespass claim and held that homeowners do not have ownership or exclusive possession over water beneath their property. *See Abnet v. Coca-Cola Co.*, No. 1:10-cv-481 (W.D. Mich. Mar. 31, 2011).

Homeowners living downgradient of defendants' manufacturing plant alleged that application of large quantities of contaminated wastewater to a field adjacent to the plant from 1979 to 2002 exceeded the permitted allowance, depleted oxygen in the soil, and thereby caused heavy metals to leach into the groundwater and migrate to the homeowners' property. *Abnet,* slip op. at 2. Plaintiffs claimed numerous harms from the alleged contamination, including property damage, gastrointestinal problems, developmental disabilities, and nausea. *Id.* In 2000, the defendants entered into an administrative consent order with the Michigan Department of Natural Resources and Environment ("MDNRE") for remediation of the contamination. *Id.* at 3.

In addition to the trespass claim, the court dismissed both the plaintiffs' private property damages via the cost recovery provisions of Michigan's environmental remediation statute and the requested injunctive relief — specifically, further response activities — under the Michigan

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analogue to the National Environmental Policy Act ("NEPA"). In dismissing the action under the Michigan environmental remediation statute, the court found both that the statute did not allow a plaintiff to sue for private property damages and that the defendants' engagement in response activities as part of an administrative consent order with MDNRE precluded further response costs. *Id*. at 10. With respect to the Michigan NEPA analogue, the court concluded that it would not have subject matter jurisdiction under that statute until the agency-ordered response activity is complete. *Id*. at 10–12.

The court denied without comment the defendants' motion to dismiss plaintiffs' remaining claims, including gross negligence, nuisance, and strict liability based on alleged abnormally dangerous activity. *Id*. at 3, 12.

III. Class Actions

Eleventh Circuit Vacates Class Certification Where Court Failed to Rule on Conflicting Expert Testimony

In a decision that underscores the importance of expert testimony in the early stages of putative class actions, the Eleventh Circuit reversed a district court's decision to certify a class without first ruling on conflicting expert testimony presented during the class-certification stage. *See Sher v. Raytheon Co.*, No. 09-15798 (11th Cir. Mar. 9, 2011).

Plaintiffs alleged that the defendant's disposal and storage of hazardous waste at an industrial facility contaminated the groundwater in surrounding neighborhoods. *Sher*, slip op. at 3. In support of a motion to certify a putative class, plaintiffs presented one expert to testify about the impacted area and a separate expert to testify regarding damages. *Id.* at 3–4. Although expert testimony presented on behalf of the defendant directly contradicted the testimony of plaintiffs' experts, the trial court certified the class pursuant to Federal Rule of Civil Procedure 23(f), stating that a court need not engage in an analysis of the merits under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) at such an early stage of the litigation. *Sher*, slip op. at 5.

The Eleventh Circuit reversed, holding that the "district court must conduct a rigorous analysis of the Rule 23 prerequisites before certifying a class" and that the burden to satisfy the Rule 23 requirements falls on plaintiffs. *Id.* at 6. Relying heavily on the Seventh Circuit's opinion in *American Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010), the Eleventh Circuit stressed that a class certification hearing may require consideration of expert testimony, and "if the situation warrants, the district court must perform a full *Daubert* analysis before certifying the class." *Sher*, slip op. at 7. Because the district court failed to weigh the conflicting expert testimony, the Eleventh Circuit found that plaintiffs failed to present sufficient evidence to support class certification and vacated the district court's order. *Id.* at 8–9.

Fourth Circuit Denies Standing to Appeal Class Certification After Plaintiffs Voluntarily Dismiss Individual Claims

In a case involving groundwater contamination near a DuPont Teflon plant in West Virginia, the Fourth Circuit held it lacked jurisdiction to hear plaintiffs' argument for class certification because plaintiffs were no longer able to satisfy Article III standing requirements after voluntarily dismissing their underlying individual claims. *See Rhodes v. E.I. du Pont de Nemours & Co.*, No. 10-1166 (4th Cir. Apr. 8, 2011).

Plaintiffs alleged that their consumption of water contaminated with perfluorooctanoic acid, or PFOA, will lead to future illness. *Rhodes*, slip op. at 2–3. Among numerous tort claims, plaintiffs asserted individual and class claims for medical monitoring. *Id.* at 3. The district court dismissed the other tort claims and denied plaintiffs' motion for class certification, finding that plaintiffs'

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evidence would not be sufficient to establish the elements of a medical monitoring claim on a class-wide basis. *Id.* at 3. As a result, only the individual medical monitoring claims remained. In an effort to expedite an appeal to the Fourth Circuit on the class-certification issue, plaintiffs voluntarily dismissed their individual medical monitoring claims with prejudice. *Id.* at 5.

Despite opinions from other federal courts of appeals that recognize an express reservation of the right to appeal a class-certification denial as sufficient to maintain Article III standing, the Fourth Circuit held that it lacked subject matter jurisdiction to hear the appeal based on principles of the constitutional standing doctrine articulated by the U.S. Supreme Court. *Id.* at 14–17. The plaintiffs surrendered standing once they voluntarily dismissed their individual claims because: (1) the "imperatives of a dispute capable of judicial resolution" were no longer "sharply present"; and (2) the plaintiffs lacked the "personal stake" necessary to sustain an Article III case or controversy. *Id.* at 15–17 (internal quotations omitted).

IV. Common Law

Pennsylvania "Fracking" Strict Liability Claim Survives Motion to Dismiss

The U.S. District Court for the Middle District of Pennsylvania denied defendants' motion to dismiss a claim for strict liability, among other claims stemming from natural gas development in the Marcellus Shale, holding that the fact-specific determination of whether an activity is abnormally dangerous would be better conducted at summary judgment. *See Berish v. Sw. Energy Prod. Co.*, No. 3:10-CV-1981 (M.D. Pa. Feb. 3, 2011). Plaintiffs claimed that the defendants improperly executed hydraulic fracturing or "fracking" activities and thereby contaminated the plaintiffs' water supply. *Berish*, slip op. at 1.

Defendants asked the court to dismiss claims arising under Pennsylvania strict liability law because the complaint did not provide sufficient facts to demonstrate that fracking is abnormally dangerous and because strict liability has not been found in similar Pennsylvania cases. *Id.* at 5. The court disagreed, citing section 520 of the Restatement (Second) of Torts, which lists six factors to be considered in determining whether an activity is abnormally dangerous. *Id.* at 5–6. While the court noted plaintiffs may have difficulty satisfying some of the section 520 factors at summary judgment, it was not necessary for plaintiffs to satisfy those factors at the pleadings stage because the complaint need only put the defendant on notice as to the basis of the strict liability claim. *Id.* The court distinguished the case from decisions that rejected strict liability claims at the summary judgment stage, given that those decisions were made following the completion of fact discovery. *Id.* at 6.

Defendants also moved to dismiss plaintiffs' claims for damages for emotional distress because Pennsylvania common law requires a physical injury to sustain such damages. *Id.* at 6–7. Because only one plaintiff pled physical injury, the court dismissed the other plaintiffs' emotional distress claims but granted those plaintiffs leave to amend the complaint to include damages allegedly caused by the defendants' interference with the plaintiffs' possession of real estate. *Id.* at 7.

V. Punitive Damages

Federal Court Upholds Six-to-One Ratio of Punitives to Compensatories in Exposure Case

In a decision applying U.S. Supreme Court due-process precedent, the U.S. District Court for the Northern District of Ohio upheld a jury's award of $5 million in punitive damages — more than six times the compensatory damage award — in favor of a welder who claimed that four decades of exposure to manganese fumes from defendants' welding rods caused irreversible

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neurological damage. *See Cooley v. Lincoln Elec. Co.*, No. 1:05-CV-17734 (N.D. Ohio Mar. 7, 2011). The jury awarded $787,500 in compensatory damages and $5 million in punitive damages. *Cooley*, slip op. at 1–2.

In its analysis of whether the amount of the punitive damages award comported with constitutional due process, the district court relied on *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), in which the Supreme Court of the United States offered three guideposts to determine whether a punitive damages award is excessive: (1) the degree of reprehensibility of defendants' conduct; (2) the disparity between compensatory and punitive damages; and (3) the difference between the award and the civil penalties authorized or imposed in comparable cases. *Cooley*, slip op. at 54–55.

In upholding the award, the court identified evidence of defendants' "willingness to sacrifice customers' safety in order to preserve profitability" as sufficient to characterize defendants' conduct as "highly reprehensible." *Id.* at 65. In addition, the court found that the ratio of punitive damages to compensatory damages — 6.3 to 1 — was not unjustifiably large given the degree of reprehensibility of defendants' conduct. *Id.*

VI. Statute of Limitations

Ninth Circuit Reinstates Chromium Contamination Claims, Finding Statute Had Not Run

Finding that the filing of a lawsuit does not necessarily trigger the running of the statute of limitations for plaintiffs with related claims, the Ninth Circuit reversed the district court's dismissal and reinstated claims by 160 plaintiffs seeking recovery for medical problems allegedly caused by chemicals released from a hard chrome plating facility. *See Avila v. Remco Hydraulics, Inc.*, No. 09-17852 (9th Cir. Jan. 27, 2011). The Ninth Circuit also upheld the district court's dismissal of plaintiffs' so-called "pre-conception" claims for failure to state claims recognized under California law. *Avila,* slip op. at 1671.

Under the applicable statute of limitations, potential plaintiffs have one year from the date they knew or should have known of a potential claim to file suit. *Id.* at 1689. The district court found that after the original lawsuit was filed on August 23, 1999, the case garnered sufficient publicity to constitute notice for all potential plaintiffs. *Id.* at 1690. As a result, the district court barred all claims filed after August 24, 2000. *Id.*

The Ninth Circuit held that this was a misapplication of the statute of limitations because of several post-August 23, 1999 events in the record, including press coverage, community meetings, and visits by noted toxic tort plaintiff representatives Erin Brokovich and Ed Masry. *Id.* at 1691–93. The Ninth Circuit vacated the dismissal of all claims filed after August 24, 2000 and remanded to the district court to determine, based on the full record, the date by which claims should have been filed to fall within the statute of limitations. *Id.* at 1693.

The Ninth Circuit also upheld the dismissal of plaintiffs' "preconception" claims (i.e., claims that parental exposure to certain substances may cause adverse health effects in subsequently conceived children), which California courts have allowed only where defendants failed to diagnose and warn parents of the probability that an infant will be born with a hereditary disability. *Id.* at 1694–95.

New Jersey District Court Finds No Limitations Bar Where Information Is Conflicting

In a decision that suggests conflicting information about the harm and risk posed by an environmental contaminant may not trigger the running of the statute of limitations for purposes

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of a motion to dismiss, the U.S. District Court for the District of New Jersey ruled in favor of plaintiffs in a chromium exposure case and denied a motion to dismiss tort claims on limitations grounds. *Smith v. Honeywell Int'l, Inc.*, No. 2:10-cv-03345 (D.N.J. Feb. 28, 2011).

Plaintiffs filed several tort claims seeking both property damages and personal injuries related to the alleged transport of toxic wastes from chromate production facilities onto plaintiffs' homes, property, and persons. *Smith,* slip op. at 1–2. The property damage claims are subject to a six-year statute of limitations; the personal injury claims are governed by a two-year limitations period. *Id.* at 3.

To determine whether the statute of limitations has been triggered for an environmental claim in New Jersey, a court must determine "whether there are enough indications of environmental contamination to put the plaintiff on reasonable notice of a need to investigate further." *Id.* at 4 (quoting *New W. Urban Renewal Co. v. Viacom, Inc.*, 230 F. Supp. 2d 568, 573 (D.N.J. 2002)). In support of its argument that plaintiffs were put on notice decades prior, one defendant submitted reports and press articles regarding chromium contamination in the vicinity of plaintiffs' properties from as early as 1984. *Id.* at 4. Plaintiffs alleged in their complaint that chromium exposure did not present a known cancer risk until 2008. *Id.* at 2.

Accepting all facts in the plaintiffs' complaint as true, the district court cited conflicting information about the risk of harm related to chromium exposure, including multiple reports issued by industry groups and government agencies dating back to 1990. *Id.* Based on the pleadings and conflicting information, the court determined that a reasonable person could conclude that plaintiffs were not put on notice until 2008. *Id.* at 5. For the purposes of ruling on the motion to dismiss, the court held plaintiffs' complaint fell within the applicable statute of limitations for both property damage and personal injury. *Id.* The court then dismissed plaintiffs' unjust enrichment count for failure to state a claim but denied the motion to dismiss as to the plaintiffs' remaining counts. *Id.* at 10.