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# I. Preemption

## Creating Circuit Split, Court Rules Federal Regulations Preempt Cell Phone Radiation Claims

In a decision that creates a split of authority among the federal circuits, the U.S. Court of Appeals for the Third Circuit ruled that telecommunications regulations promulgated by the Federal Communications Commission ("FCC") preempted a state law tort action claiming that the radio frequency ("RF") radiation emitted by cell phones in compliance with FCC standards was unsafe. *See Farina v. Nokia*, No. 08-4034 (3d Cir. Oct. 22, 2010), *available at* http://www.ca3.uscourts.gov/opinarch/084034p.pdf.

On behalf of a putative class of all past, current, and future Pennsylvania purchasers and lessees of cell phones, the plaintiff brought the action against various cell phone manufacturers and retailers of wireless handheld devices, alleging that they had improperly warranted and marketed their cell phones as safe to operate and had suppressed information regarding the health risks of RF radiation. *Farina*, Slip. Op. at 12, 20. Asserting several tort theories, the plaintiff claimed that, absent headsets, the phones were unsafe due to RF radiation emitted during their customary use. *Id*. at 12, 20–21.

Though the defendants asserted multiple theories of preemption, the Third Circuit ultimately affirmed the lower court's dismissal of the plaintiff's lawsuit on conflict preemption grounds. *Id*. at 55–66. The court found the FCC's guidelines regarding the specific absorption rate ("SAR") – the maximum amount of RF radiation a device may emit based on the amount absorbed in the body – represented the FCC's "considered judgment" about how to balance competing objectives. *Id*. at 62–63. The two primary objectives at issue were: (1) protecting the health and safety of the public; and (2) allowing industry to maintain an efficient and uniform nationwide wireless network. *Id*.

The court found that allowing juries to perform their own risk-utility analysis to determine whether cell phones in compliance with FCC's SAR guidelines were still unreasonably dangerous would conflict with and "second guess" FCC's regulations. *Id*. at 64. The court also expressed concern that if tort claims were not preempted, RF radiation standards could vary from state to state and eradicate the uniformity that was necessary to regulate a national wireless network. *Id*. at 65–66.

The *Farina* decision creates a split among the Circuit Courts of Appeal regarding whether FCC's RF radiation standards preempt state law actions that, in effect, challenge those standards. In 2005, the Fourth Circuit found that similar state law claims were not preempted and found no evidence of any congressional objective to ensure uniform national RF standards for wireless telephones. *See Pinney v. Nokia, Inc.*, 402 F.3d 430, 458 (4th Cir. 2005).

# II. Experts

## Kansas High Court Strikes Expert Testimony on Multiple Chemical Sensitivity Theory

In an opinion that undermines claims for multiple chemical sensitivity, the Kansas Supreme Court rejected an expert's opinion that a plaintiff's medical symptoms were caused by multiple chemical sensitivity stemming from exposure to paint fumes, finding that the testimony at issue lacked an evidentiary basis sufficient to differentiate it from mere speculation and was therefore inadmissible. *See Kuxhausen v. Tillman Partners, LP*, No. 98,442 (Kan. Oct. 15, 2010), *available at* http://www.kscourts.org/Cases-and-Opinions/Opinions/SupCt/2010/20101015/98442.pdf.

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The plaintiff claimed a variety of medical ailments, including an "ongoing sensitivity to a variety of chemicals," after working in defendant's building and being exposed to fumes from epoxy-based paints for brief periods over three days. *Kuxhausen*, Slip Op. at 3–4. Plaintiff sought to introduce the expert testimony of three physicians to establish her multiple chemical sensitivity diagnosis, but only one of them, Dr. Henry Kanarek, testified that plaintiff's symptoms were caused by her exposure to paint fumes at defendant's building. *Id*. at 4. Dr. Kanarek's physical examination of the plaintiff and other test results indicated no abnormalities and, while he evaluated a material safety data sheet ("MSDS") for the paint, he offered no information on whether the health concerns on the MSDS were related to paint fumes, the exposure required to cause symptoms. *Id*. at 5.

The Kansas Supreme Court upheld the trial court's grant of summary judgment in favor of defendants, as affirmed by the Court of Appeals. *Id*. at 7–8. Under Kansas law, the court noted, "[e]xpert witnesses should confine their opinions to relevant matters which are certain or probable, not those which are merely possible" when testifying to causation. *Id*. at 6 (citing *State v. Struzik*, 269 Kan. 95, Syl. 2, 5 P.3d 502 (2000)). Here, the court found Dr. Kanarek based his opinion largely on the plaintiff's symptoms following her exposure to the paint. *Id*. According to the court, Dr. Kanarek's causation opinion lacked factual support and therefore had to be stricken as mere speculation. *Id*. Without the causation evidence, the court found the plaintiff could not maintain her claim and summary judgment was appropriate. *Id*.

## III. Common Law

### Federal Court Allows Contamination Claims to Proceed Over "Fracking" in Pennsylvania

A federal district court allowed a number of common law and statutory claims stemming from natural gas development in the Marcellus Shale to proceed over the gas driller's motions to dismiss and strike, leaving open the possibility that the plaintiffs may collect punitive damages and attorneys' fees. *See Fiorentino v. Cabot Oil & Gas Corp.*, 09-CV-2284 (M.D. Pa. Nov. 15, 2010), *available at* http://www.pamd.uscourts.gov/opinions/jones/09v2284.pdf. Plaintiffs are a group of 63 residents or former residents of Dimock and Montrose, Pennsylvania, who executed leases with Cabot Oil and Gas Corp. that allowed Cabot to extract natural gas on plaintiffs' land using a process known as hydraulic fracturing or "fracking." The plaintiffs allege that Cabot improperly conducted natural gas production activities, leading to the release of methane, natural gas, and other toxins onto plaintiffs' land and into their groundwater. *Fiorentino*, Slip Op. at 5–6.

Defendants urged the court to dismiss claims for response costs under Pennsylvania's Hazardous Sites Cleanup Act ("HSCA") arguing that the plaintiffs failed to plead: (1) that they gave the required 60-day notice prior to filing suit; and (2) that the Pennsylvania Department of Environmental Protection is not diligently prosecuting the alleged violations. *Id*. at 7–8. Plaintiffs responded, and the court agreed, that those requirements do not apply to HSCA claims for response costs, which is the only type of HSCA claim plaintiffs asserted. *Id.* at 8–9.

Defendants further moved to dismiss plaintiffs' strict liability claims, arguing that Pennsylvania law "holds that petroleum and natural-gas related activities are *not* 'abnormally dangerous' or 'ultra-hazardous' and, therefore, not subject to strict liability." *Id.* at 10 (emphasis in original). The court disagreed, noting that Pennsylvania courts have not decided this issue in the context of fracking. *Id*. at 13. Defendants also sought dismissal of plaintiffs' claim for a medical monitoring trust fund, but the court found that the plaintiffs had pled enough factual allegations to sustain the claim at this early stage of the litigation. *Id.* at 14–15.

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Finally, defendants moved to strike allegations regarding: (1) certain damages, including damages for fear of future illness and emotional distress, punitive damages, and attorneys' fees and litigation costs; and (2) negligence per se. *Id*. at 6–7. The court denied the motion to strike in all respects, noting that it was impossible to determine at this stage of the litigation that "there are no circumstances where an award of fees or litigation costs would be appropriate." *Id*. at 17–20. In addition, regarding the negligence per se claim, the court found that the gas well-drilling statutes listed in the complaint were indeed directed at Defendants' conduct, and that if proven, the allegations that Defendants violated those statutes would be sufficient to state a claim. *Id*. at 20–21.

### North Carolina Federal Court Finds Latent Diseases Exempt From State's Statute of Repose

In a decision that may leave North Carolina courts open to tort claims involving diseases that take years to manifest themselves, the Eastern District of North Carolina found, in a case of first impression, that the state's ten-year statute of repose does not apply to latent diseases in personal injury claims. *See Jones v. United States*, No. 7:09-CV-106-BO (E.D.N.C. Nov. 10, 2010).

The plaintiff in the *Jones* case lived at Camp Lejeune, North Carolina, from 1980–83. *Jones*, Slip Op. at 1. In 2003, she was diagnosed with non-Hodgkin's lymphoma. *Id.* In 2005, the plaintiff learned that Camp Lejeune's water was likely contaminated with tetrachloroethylene, trichloroethylene, dichloroethylene, vinyl chloride, and benzene while she lived there, and that these contaminants may have caused her cancer. *Id*. The plaintiff sued the U.S. government under the Federal Tort Claims Act ("FTCA") in 2009. *Id*. Under the FTCA, the federal government is subject to suit only where a private person in the same position would be subject to liability according to the substantive law of the state where the alleged tort occurred. *Id*. at 2. The United States argued that the plaintiff's claims were barred by North Carolina's ten-year statute of repose, N.C. Gen. Stat. § 1-52(16), because the plaintiff did not file suit within ten years of the Government's last act or omission giving rise to the claim. *Id*.

In denying the Government's motion to dismiss, the court held that North Carolina had long differentiated between latent injuries, for which recovery is barred after ten years under the statute of repose, and latent diseases. *Id*. at 3–7. The court relied, in part, on a North Carolina Supreme Court decision holding that a now-repealed version of a North Carolina statute of repose did not apply to diseases. *Id*. at 5–6 (citing *Wilder v. Amatex Corp.*, 314 N.C. 550, 555–61 (1985)).

Further, the court found the statute of repose, if applied in the latent disease context, would violate the right to open courts in the North Carolina Constitution. *Id*. at 19–20. Without an exemption for latent diseases, the statute of repose "would bar the overwhelming majority of claims involving any cancer. . . . Thus, interpreting [this] statute of repose to exclude latent diseases saves the statute from grave doubts regarding its constitutionality." *Id*. at 17, 20.

## IV. Class Actions

### Federal Court Denies Class Certification in Property Contamination Lawsuit Against Manufacturer

The U.S. District Court for the Middle District of Alabama denied plaintiffs' motion for class certification in a lawsuit alleging that the International Paper Company's manufacturing facility contaminated neighboring residential properties. *Benefield v. International Paper Co.*, No. 2:09cv232-WHA, 1–2, 4 (M.D. Ala. Oct. 20, 2010), *available at* https://ecf.almd.uscourts.gov/cgi-bin/show_public_doc?2009cv0232-125.

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Plaintiffs proposed the following class definition to satisfy the statutory requirements for class certification: everyone who "owned residential property within two miles of the outer boundary of the Facility . . . [and whose] property was contaminated by releases of various substances into the environment from the Facility, and [who] suffered in excess of $100 of diminution in value of the real property." *Benefield*, Slip Op. at 6. The court rejected the plaintiffs' proposed class definition as not administratively feasible. *Id.* at 7–10.

First, the court found that the plaintiffs had to do more than select a broad geographical region to identify potential class members because they failed to establish that all residential property owners within a two-mile radius of the facility actually owned "contaminated" property. *Id*. at 7–8. Second, the court stated that it was not plausible to identify the property owners who have suffered a diminution in excess of $100 to their property's value simply by using the mass appraisal formula offered by plaintiffs' expert. *Id*. at 8.

The court also concluded that neither of the named plaintiffs were adequate representatives for the putative class because one did not own property in the area and the other's claims were not typical of the class because he owned a single-family home and other class members owned vacant lots, mobile homes, and multi-family residential properties. *Id*. at 11–16. Thus, the court held that redefinition would not cure the deficiencies identified above. *Id*.

## V. "Sophisticated User" Defense

### California Court of Appeals Clarifies Sophisticated User Defense

A California appellate court has clarified the scope and application of three distinct but closely related product liability defenses under California law: the "sophisticated user," "bulk supplier," and "sophisticated intermediary" defenses. When properly applied, each of these provide a complete defense to design-defect "failure to warn" claims under California's strict product liability law. *See Stewart v. Union Carbide*, No. B216193 (Cal. Ct. App. Nov. 16, 2010), *available at* http://www.courtinfo.ca.gov/opinions/documents/B216193.PDF.

In the case at issue, Defendant Union Carbide Corp. invoked a sophisticated user defense for the failure to warn claims of a plumber who suffered from mesothelioma due to asbestos exposure. *Stewart*, Slip Op. 2–4. The plaintiff testified that throughout his career he was exposed to a joint compound used in drywalling, and that although he saw many boxes of the joint compound, he never saw a warning that the compound contained asbestos. *Id*. at 3. The jury returned a verdict for the plaintiff, finding Union Carbide liable for failure to warn, among other claims.

The lower court refused to instruct the jury on the sophisticated user defense, and the Second Appellate Division of the California Court of Appeals agreed. *Id*. at 4–6. The sophisticated user defense provides that "manufacturers have a duty to warn *consumers* about the hazards inherent in their products," but "sophisticated users need not be warned about dangers of which they are already aware or should be aware." *Id*. at 5 (citing *Johnson v. American Standard Inc.*, 43 Cal.4th 56, 64-65 (2008) (emphasis added)). However, Union Carbide's proposed instruction was not based on the theory that the plaintiff had the opportunity to acquire any knowledge of the dangers of asbestos, let alone the obligation to do so. *Id*. at 6. Instead, Union Carbide argued that its customers — the suppliers that sold the materials to the drywallers that used them at the sites where plaintiff was working — knew or should have known (from public sources) of the dangers of asbestos. *Id*.

The appellate court noted that Union Carbide's proposed defense was actually based on the bulk supplier doctrine. *Id.* Under the bulk supplier doctrine, "the manufacturer of a product component or raw material is not liable for injuries caused by the finished product unless it

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appears that the component itself was defective when it left the manufacturer." *Id.* (citing *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.*, 129 Cal. App. 4th 577, 581 (2004)). The court found that this defense was inapplicable because raw asbestos is already a defective product. *Id.*

Finally, the court found that Union Carbide indirectly invoked the sophisticated intermediary doctrine, under which a manufacturer's duty to warn is owed to the intermediary, rather than the ultimate consumer or user, because of the intermediary's specialized knowledge and the intermediary's duty under California tort law to pass along information to the ultimate consumer or user. *Id.* at 7. In this case, however, Union Carbide gave no warning and thus could not rely upon the intermediary, even if sophisticated, to pass along a warning to users. *Id.*

## VI. Jury Instructions

### California Court Rejects Plaintiff's Appeal for Jury Instruction on Solvent-Cancer Link

A California appellate court denied a plaintiff's appeal seeking a jury instruction that would have made it easier to establish his claim that his cancer was caused by exposure to solvents used during his employment. *Molina v. Shell Oil Co.*, No. B213451, 2 (Cal. Ct. App. Oct. 5, 2010).

The plaintiff worked at Firestone Tire Company from 1963 to 1980; during that time he regularly used and was exposed to petroleum distillate solvents sold to Firestone by defendants Chevron, U.S.A., Shell Oil Company, and Unocal. *Molina*, Slip Op. at 2–3. After being diagnosed with non-Hodgkin's lymphoma in 2006, he filed suit against defendants seeking recovery under various product liability theories. *Id.* At the conclusion of the trial, the jury ultimately found in favor of defendants on the plaintiff's design-defect and failure to warn claims. *Id.* at 4.

The plaintiff's appeal was based on an alleged error in the use of the term "substantial factor" in the jury instruction concerning whether the defendants' products were a substantial factor in causing his cancer. *Id.* The trial court had instructed the jury that a "substantial factor in causing harm . . . must be more than a remote or trivial factor [and that] [i]t does not have to be the only cause of the harm." *Id.* at 5. The plaintiff argued the jury should have instead been instructed that he could prove defendants' products were "a substantial factor causing [his] illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure was a substantial factor contributing to [his] risk of developing cancer." *Id.* at 6.

The Second Appellate Division of the California Court of Appeals agreed with the trial court, finding that the jury instruction requested by the plaintiff was appropriate only when substances in defendants' products have been shown to contribute to a plaintiff's illness, but the plaintiff is unable to prove which specific product "actually caused the onset of a disease." *Id.* at 4. Both the trial and appellate courts relied on the defendants' expert testimony which acknowledged that, although chemicals in their products were scientifically linked to certain types of cancer, there was no evidence of a link between these chemicals and the plaintiff's non-Hodgkin's lymphoma. *Id.* at 3, 9–11.

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