Toxic Tort & Product Liability Quarterly

Vol. XI
October 20, 2010

Editors:

Daniel M. Krainin
477 Madison Avenue
15th Floor
New York, NY 10022
(212) 702-5417
dkrainin@bdlaw.com

Mackenzie Schoonmaker
1350 I Street, NW
Suite 700
Washington, DC 20005
(202) 789-6006
mschoonmaker@bdlaw.com

Contributors:

Patrick R. Jacobi
Zachary M. Norris
Adam M. Melnick
Toren M. Elsen

TABLE OF CONTENTS

I. Preemption

Fourth Circuit Limits Nuisance Suits, Strengthens Preemption Defense

In a decision that may both weaken public nuisance claims and strengthen preemption defenses, the United States Court of Appeals for the Fourth Circuit barred a public nuisance action brought by North Carolina against the Tennessee Valley Authority ("TVA") based on interstate air emissions from TVA's power plants, holding that North Carolina's action is preempted by the comprehensive air pollution scheme under the Clean Air Act. *See North Carolina v. Tennessee Valley Auth.*, No. 09-1623 (4th Cir. July 26, 2010), *available at* http://pacer.ca4.uscourts.gov/opinion.pdf/091623.P.pdf. The three-judge panel dissolved the district court's injunction, which would have required TVA to spend $1 billion on pollution controls at its coal-fired power plants in Alabama and Tennessee.

The State of North Carolina sued TVA, one of the country's largest power generators, in 2006, arguing that 11 of TVA's coal-fired power plants located in Tennessee, Alabama, and Kentucky posed a public nuisance because air emissions from those plants exacerbated North Carolina's air pollution. *North Carolina*, Slip Op. at 9. The Western District of North Carolina trial judge granted North Carolina's request for an injunction last year, ordering TVA to upgrade or install pollution controls for sulfur dioxide and nitrogen oxides at four of the 11 power plants. *Id*. at 10.

The Fourth Circuit relied on and reinvigorated a 1987 opinion of the Supreme Court of the United States, *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987), to overturn the district court's ruling. *Ouellette* allowed a private nuisance suit to proceed despite the discharger's permit under the Clean Water Act but emphasized that allowing "a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states." *Id*. at 16 (citing *Ouellette*, 479 U.S. at 496-97). Agreeing with this principle, the Fourth Circuit found that a patchwork of nuisance injunctions based on interstate air emissions would frustrate Congress's judgment, supplant agencies' conclusions, and upset the reliance interests of both permit holders and source states. *Id*. at 24-25. The Fourth Circuit focused on the fact that TVA's operations are expressly permitted by the states in which they are located, noting that it would be "odd" to find that an activity explicitly permitted by a state was a nuisance. *Id*. 29-30.

The Fourth Circuit further held that the district court's decision was an affront to the principles of federalism because it applied the law of North Carolina to TVA plants located in Alabama and Tennessee. *Id*. at 25. Despite acknowledging that a court must apply the law of the state in which the point source is located, the district court had erroneously applied North Carolina's Clean Smokestacks Act extraterritorially. *Id*.

Defendants both within and outside the Fourth Circuit can be expected to rely on the *North Carolina v. TVA* decision in future environmental public nuisance actions.

II. Personal Injury

Tenth Circuit Rejects Subclinical Damage Theory, Reverses $1 Billion Judgment

Striking a blow to plaintiffs who rely on alleged subclinical physical injuries to support damage claims in toxic tort actions, the U.S. Court of Appeals for the Tenth Circuit reversed a district court ruling that ordered Dow Chemical Company and the former Rockwell International Corporation to pay nearly $1 billion for the alleged release of plutonium particles onto property near the former Rocky Flats Nuclear Weapons Plant in Colorado. *See Merilyn Cook. v. Rockwell*

Back to Top

Int'l Corp., Nos. 08-1224, 08-1226, and 08-1239 (10th Cir. Sept. 3, 2010), *available at* http://www.ca10.uscourts.gov/opinions/08/08-1224.pdf.

The owners of property near the former plant filed a class action against the facility's operating under the Price Anderson Act ("PAA"), which governs liability for nonmilitary nuclear facilities, alleging trespass and nuisance claims arising from the release of plutonium onto their properties. *Cook*, Slip Op. at 2, 4. Following trial, the district court entered judgment for the plaintiffs in the amount of $926 million. *Id.* at 5-6.

In reversing the judgment, the Tenth Circuit ruled that the jury was improperly instructed that any amount of plutonium on plaintiffs' property was sufficient to prove Dow and Rockwell's negligence under the PAA. *Id.* at 21-24. The Tenth Circuit relied on its previous opinion in *June v. Union Carbide Corp.*, 577 F.3d 1234, 1249 (10th Cir. 2009), in which the court stated that only "an existing physical injury constitutes 'bodily injury' under the PAA; the mere subclinical effects of radiation exposure are insufficient." *Id.* at 20. Because the jury was never instructed on the necessity for plaintiffs to show actual physical damage as required under *June* or loss of use of their property, the court reversed the verdict and remanded the case with instructions to vacate the judgment and conduct further proceedings. *Id.* at 19-24.

III. Class Actions

Fifth Circuit Affirms Remand for Failure to Establish CAFA Amount in Controversy

In a decision that may help define the specificity with which defendants must establish the amount-in-controversy element of federal jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"), the U.S. Court of Appeals for the Fifth Circuit rejected defendants' attempt to remove to federal court a putative class action relating to a chemical spill. *See Berniard v. Dow Chem. Co.*, No. 10-30497 (5th Cir. Aug. 6, 2010), *available at* http://www.ca5.uscourts.gov/opinions/unpub/10/10-30497.0.wpd.pdf.

Following an ethyl acrylate spill, residents filed five separate suits in state court in the Parish of St. Charles, Louisiana. *Berniard*, Slip Op. at 5. Defendants Dow Chemical Company and Union Carbide Corporation removed the cases to federal court, asserting federal jurisdiction under CAFA, 28 U.S.C. §§ 1332(d) and 1453. *Id.*

At issue in the case was CAFA's amount-in-controversy requirement, which confers federal jurisdiction on class actions where class members' aggregate damages exceed $5 million, provided that there are at least 100 plaintiffs and minimal diversity. *Id.* at 5-6. At trial, defendants attempted to prove the amount in controversy by estimating the value of the complaints through census data from areas referred to in the pleadings and the amount of recovery in other cases involving similar occurrences and injuries. *Id.* at 9. The district court found that the defendants did not adequately plead the aggregate damages element of CAFA and remanded the case to state court. *Id.* at 4. The defendants appealed.

The Fifth Circuit affirmed the district court's remand order. *Id.* at 12. The court concluded that the defendants had overstated the value of the complaints by "improperly equating the geographic areas in which potential plaintiffs might reside with the population of the plaintiff class itself" and making attenuated comparisons to other cases. *Id.*

Back to Top

IV. Causation

Tenth Circuit Rejects Cancer Claims for Failure to Establish "But-For" Causation

Clarifying the standard to establish causation in toxic tort actions under New Mexico law, the U.S. Court of Appeals for the Tenth Circuit held that plaintiffs must prove they would not have contracted cancer "but-for" the defendant's acts or omissions. *See Wilcox v. Homestake Mining Co.*, No. 08-2282 (10th Cir. Sept. 8, 2010), *available at* http://www.ca10.uscourts.gov/opinions/08/08-2282.pdf. The Tenth Circuit affirmed a district court ruling that plaintiffs, current and former residents of the county in which the defendant's uranium mining mill was located, had failed to show, to a reasonable degree of medical certainty, that their injuries would not have occurred but-for their exposure to radioactive substances from defendant's operation. *Wilcox*, Slip Op. at 11-12.

Plaintiffs alleged that they or their decedents had developed cancer due to exposure to radioactive substances released from the defendant's uranium mining mill. *Id.* at 2. In support of their allegation, plaintiffs' experts opined that defendant's operations were a "substantial factor" contributing to each plaintiff developing cancer. *Id.* at 2-3. Plaintiffs failed to allege, however, that they would not have developed cancer in the absence of defendant's activities. *Id.* at 3-4. The district court concluded that New Mexico law required a showing of but-for causation and the plaintiffs failed to meet that showing. *Id.* at 3.

On appeal, the Tenth Circuit affirmed the district court's determination. The Tenth Circuit held that but-for causation "does not require proof to an absolute certainty," but rather requires "proof that a causal connection is more probable than not." *Id.* at 9. The court found that plaintiffs had not presented sufficient evidence to meet this burden. *Id.* at 12.

Pennsylvania High Court Holds Smoking Does Not Preclude Recovery in Asbestos Case

In a decision that reaffirms the rule that conclusions based on competing, competent expert testimonies are to be made by the trier of fact, the Supreme Court of Pennsylvania reversed a lower court's holding that asbestos plaintiffs were barred from recovery because they suffered pulmonary conditions related to cigarette smoking. *See Summers v. Certainteed Corp., Nybeck v. Union Carbide Corp.*, J-62-2009 (Pa. July 21, 2010), *available at* http://www.courts.state.pa.us/OpPosting/Supreme/out/J-62-2009mo.pdf. The trial court had granted the defendants' motion for summary judgment, finding that because the plaintiffs suffered from lung diseases associated with both asbestos-related and non-asbestos-related conditions, they could not prove the causal link between their asbestos exposure and their symptoms. *Summers*, Slip Op. at 7.

A split panel of the intermediate appellate court upheld the trial court's grant of summary judgment, holding that the presence of non-asbestos-related conditions barred the plaintiffs' asbestos-related claims. *Id.* at 3, 7. In so holding, the appellate court discredited the plaintiffs' expert's conclusion that, to a reasonable degree of medical certainty, the plaintiffs suffered from an asbestos-related disease that was a cause of their debilitating conditions. *Id.* at 7.

In reversing the appellate court, the Supreme Court of Pennsylvania explained that, while the expert's conclusions may be disputed, assessing the credibility and weight attributed to those conclusions is the province of the jury and inappropriate for summary judgment. *Id.* at 13. As such, the court held that the intermediate appellate court erred by discrediting the plaintiffs' expert and using that as a basis for upholding the grant of summary judgment. *Id.* at 14.

Additionally, the high court held that the plaintiffs were not precluded from attempting to prove

Back to Top

causation simply because they were cigarette smokers: "The resolution of any conflict between competent, competing medical evidence, under clear precedent, must be left for a jury." *Id*. at 20.

V. Nuisance

Vermont Supreme Court Holds Contamination Migration Does Not Establish Public Nuisance

The Vermont Supreme Court has ruled that migration of contamination from private property cannot form the basis of a public nuisance action because it does not impact a right common to the public. *See Vermont v. Howe Cleaners, Inc.*, No. 2009-110 (Vt. Aug. 6, 2010).

One of the defendants purchased the subject property in 1999. *Howe*, Slip Op. at 2. Prior to purchasing the property, he conducted a visual inspection and was shown a recent environmental assessment that deemed the property free of significant environmental hazards. *Id*. at 34. In 2000, however, the Vermont Agency of Natural Resources discovered the presence of the dry cleaning solvent tetrachloroethylene (perc or PCE) on the property. *Id*. at 2. In 2004, Vermont filed a cost recovery action under the Vermont Waste Management Act ("VWMA") as well as public nuisance claims against several parties, including the property owner. *Id*. at 3.

The trial court granted the defendant-property owner's summary judgment motions and dismissed all claims against him. *Id*. at 7. With respect to the public nuisance claim, the trial court found that migration of contaminants in and of itself is insufficient to establish a public nuisance and that the state had failed to allege any other harm to the general public. *Id*. at 7, 48-49. With respect to the VWMA claim, the trial court found that the property owner's reliance on a recent environmental assessment was sufficient, as a matter of law, to invoke Vermont's "diligent owner defense." *Id*. at 7.

On appeal, the Vermont Supreme Court upheld the trial court's ruling, agreeing that the state failed to allege contamination had impacted or threatened groundwater or affected any other public right. *Id*. at 48-52. The court also affirmed the dismissal of the VWMA count after examining all of the circumstances of the case but avoided the question of whether reliance on an environmental site assessment is sufficient to invoke the diligent owner defense. *Id*. at 37.

VI. International Toxic Torts

California Court Vacates Pesticide Exposure Verdict Due to Attorney Misconduct

The California Second District Court of Appeal has vacated a $2.3 million judgment and verdict awarded to Nicaraguan agricultural workers who filed pesticide exposure claims against Dole Food Company, Inc., citing fraud and witness tampering by plaintiffs' attorneys as the basis for the dismissal. *See Tellez v. Dole Food Co., Inc.*, No. BC 312852 (Cal. Super. Ct. July 15, 2010) (oral ruling). The bench ruling by Justice Victoria G. Chaney followed six days of hearings, in which Dole successfully demonstrated that the judgment for four of twelve plaintiffs had been fraudulently procured.

Justice Chaney found clear and convincing evidence that Los Angeles attorney Juan Dominguez, who withdrew from the case in 2009, was actively involved in perpetuating fraud and that plaintiffs' witnesses corroborated the fraud and witness tampering. Justice Chaney further held that the plaintiffs could not have devised the fraud on their own and that it was not reasonable to

Back to Top

conclude 14,000 claimants were made sterile by exposure to dibromochloropropane (DBCP).

The case was among dozens of lawsuits that have been filed in the United States alleging sterility in male agricultural workers from exposure to DBCP, a soil fumigant used on Dole-contracted banana plantations between 1966 and 1982 in Nicaragua.

Office Locations:

Washington, DC

Maryland

New York

Massachusetts

New Jersey

Texas

California