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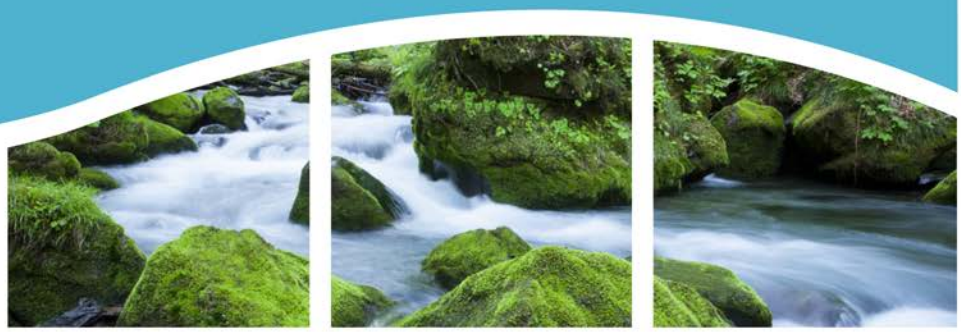

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ABOUT B&D

Beveridge & Diamond's 100 lawyers in seven U.S. offices focus on environmental and natural resource law, litigation and dispute resolution. We help clients around the world resolve critical environmental and sustainability issues, including the defense of toxic tort and product liability claims.

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Sovereign-Led Legislation

New York Brings PFOA/S Products Liability Suit, Claiming Natural Resource and Punitive Damages

By Leigh S. Barton

In a recently filed action, the State of New York is suing six manufacturers and marketers of of perfluorooctanoic acid ("PFOA") and perfluorooctane sulfonic acid ("PFOS") containing firefighting foams under theories of strict product liability, public nuisance, and restitution. Complaint, *New York v. 3M Co.*, No. 904029-18 (N.Y. Sup. Ct. June 19, 2018). This is the first example of sovereign-led PFOA/PFOS litigation.

The PFOA/PFOS containing foams manufactured and marketed by defendants have been used at military bases, airports, firefighting training centers, and industrial sites to extinguish fires involving flammable liquids. The State alleges that the defendants knew or should have known that the intended and/or common use of their products was likely to contaminate groundwater and, therefore, threaten and/or injure human health and the environment.

The State brought suit in its *parens patriae* capacity and as trustee and guardian of New York's natural resources. New York alleges that defendants are strictly liable for defective design of the products; that defendants are strictly liable for failing to warn consumers about the known dangers of their products; that the storage and use of defendants' products caused a public nuisance; and that defendants have been unjustly enriched by failing to fulfill their duties to abate the threats and/or injuries posed by their products. New York seeks compensatory, natural resource, and punitive damages for contamination at several sites around the state.

The structure of New York's complaint and legal strategy here closely resembles the MTBE model for products liability and natural resource damages litigation, as well as recent PCB litigation in the Pacific Northwest. As happened in the MTBE cases, it is possible other states will use New York's lawsuit as a model and bring similar litigation in the future. Beveridge & Diamond will continue to monitor this litigation and report on significant developments.

Class Actions

New York Court Grants Class Cert. to PFOA Exposure Plaintiffs

By Leigh S. Barton

In the latest in a flurry of PFOA (perfluorooctanoic acid) suits, a New York court granted class certification to a group of New York residents who claim that they have been harmed by decades of exposure to the chemical near a manufacturing facility. *See Burdick v. Tonoga, Inc.*, Index No. 253835 (N.Y. Sup. Ct. 2018). The court found that although each resident might have been exposed to different levels of the contaminant and may have been exposed in different ways, plaintiffs had demonstrated that there were common issues of fact and law among them that warranted class certification.

Defendant Tonoga, Inc. owns and operates a plastics manufacturing facility in Petersburgh, New York. One of its operations involves coating fabrics with polytetrafluoroethylene ("PTFA" or "Teflon"), a chemical which, when deposited into soil, degrades and eventually forms PFOA. Plaintiffs are Petersburgh residents with allegedly elevated levels of PFOA in their blood. The residents filed suit in 2016 under theories of nuisance, trespass, and strict liability. Based on the various methods of exposure, plaintiffs proposed four different classes for certification: a town water property damage class, a private well-water property damage class, a private well nuisance class, and a PFOA personal injury class.

The court focused on the New York class certification criteria of commonality, typicality, and superiority. In evaluating each proposed class, the court found that because common issues predominated each claim, class certification was warranted. With regard to the proposed personal injury class, for example, the court determined that at least one common issue of law or fact existed, and that even though there were factual differences between the named and proposed plaintiffs, "such differences d[id] not overcome the facts that all plaintiffs' medical monitoring claims ar[o]se from the same course of conduct by defendant and [were] based on the same legal theory."

Certification Denied in Glass Manufacturing Pollution Class Action

By Matthew D. Schneider

In a potential sign of increased scrutiny of environmental class actions under recent Supreme Court decisions, a class of property owners and residents near Danville, Kentucky, were denied class certification in a class action suit alleging that a glass manufacturing plant intentionally or negligently released toxic chemicals. *See* *Modern Holdings, LLC v. Corning, Inc.*, Civ. No. 13-0405, Memorandum Opinion and Order (E.D. Ky. Mar. 29, 2018). The plaintiffs claimed personal injuries and property damage from the plant's alleged illegal dumping of hazardous chemicals in nearby fields, streams, and properties.

The court rejected the class certification, citing the Supreme Court's decision in *Wal-Mart v. Dukes*, 564 U.S. 338, 349 (2011), which raised the bar for class action pleadings under Rule 23 by holding that plaintiffs had failed to meet the rule's "rigorous" commonality standard. In *Modern Holdings,* the court held that plaintiffs presented too many hazardous substances and too many potential injuries to "generate common answers apt to drive the resolution of the litigation." The court also held that plaintiffs did not meet Rule 23's typicality standard — requiring that representative plaintiffs' claims be typical of those in the class — because the various issues raised by each plaintiff "present too many individualized issues." Lastly, the court also rejected the named plaintiffs' contention that a class certification would adequately protect the interests of the class and noted that these plaintiffs suffered from only three of the twenty-six diseases listed in the complaint. It was therefore likely, according to the court, that the interests of unnamed members might not be represented.

The plaintiffs are expected to appeal the class certification denial to the Sixth Circuit.

Florida Federal Court Denies Proposed 60-Square-Mile Class Area in Environmental Contamination Action

By Casey T. Clausen

A Florida federal district court recently denied a petition for class certification by a group of property owners that allegedly suffered health risks and diminished property values due to contamination at Pratt & Whitney's neighboring aerospace testing and manufacturing plant. *Cotromano v. United Techs. Corp.,* Civ. No. 13-80928, Opinion Memorandum and Order (S.D. Fla. May 2, 2018). The district court decision illustrates some of the issues of proof that a putative class encompassing a large geographic area may encounter.

The proposed class covered a 60-mile square area that encompassed what the Florida Department of Health had once designated as a "cancer cluster." The parties' experts disputed whether groundwater and soil contamination in the class area could be traced to the Pratt & Whitney facility.

Plaintiffs' experts, however, conceded that it was unlikely that the entire class area was contaminated. This evidentiary gap proved decisive to the court which found that the plaintiffs' proposed class area was overbroad, and alternatively, that they failed to meet their burden on Rule 23(b)'s predominance and superiority requirements.

On the issue of whether the plaintiffs' proposed class was ascertainable, the court found that there were no objective criteria to define the class area. Without evidence of the boundaries of the contamination, the court found it "impossible to re-draw the geographic boundaries of the proposed class." Further, the "stigma" attached to the proposed class area was not an objective criterion because it was unconnected to any conduct by the defendant.

Alternatively, the court found that the plaintiffs would be unable to meet their burden of proving the superiority of a class action and that common issues predominated over individual issues. For those issues, the plaintiffs had relied on an expert who proposed to calculate class-wide lost property values, based on a sales trend analysis and contingent valuation survey. But the court excluded the expert's testimony under *Daubert*, and the plaintiffs otherwise lacked proof that the nearly 18,000 properties, which varied significantly in scale, were affected the same way by environmental stigma.

Statute of Limitations

Groundwater Contamination Claim Survives Motion to Dismiss

By Matthew D. Schneider

A recent decision of the Eastern District of New York in a groundwater contamination action illustrates the fact-sensitive nature of statute of limitations defenses. In *Hicksville Water Dist. v. Philips Elecs. N. Am. Corp.*, 2018 WL 1542670 (E.D.N.Y. Mar. 29, 2018), the court denied a motion to dismiss state tort law claims as time-barred because it could not conclude from the complaint and judicially noticed documents that the plaintiffs knew, outside the limitations window, that the alleged groundwater contamination was "significant enough to justify an immediate or specific remediation effort."

The defendant operated an electron tube and semiconductor manufacturing facility on Long Island which allegedly released 1,4-Dioxane into the groundwater from 1953 to 1989. The plaintiff, a local water district, filed a complaint under both New York state law and CERCLA seeking $350 million and $600 million in compensatory and punitive damages, respectively.

The court rejected the defendant's statute of limitations argument as inappropriate "given the fact-specific evaluation" required to determine if and when the plaintiff's claims accrued. Specifically, the court held that it was "not enough to merely detect contamination." Rather, "in order for the statute of limitations to run, knowledge of both the dangers of contamination as well as the harmful impact are required." So the statute of limitations began to accrue when the plaintiff had knowledge of contamination at levels that would prompt a "reasonable water provider" to take "immediate and specific remediation efforts" to address the contamination. Because the plaintiff's wells were below state regulatory standards for 1,4-Dioxane during the period before the statute of limitations window, the court held that the limitations period had not yet begun and therefore that the claims were not barred.

Texas Supreme Court Clarifies Applicability of Discovery Rule in Personal Injury Suits

By Brooklyn N. Hildebrandt

Applying the statute of limitations for legal, rather than discoverable, personal injury, the Texas Supreme Court dismissed a personal injury suit against Schlumberger Technology Corporation that arose from the mishandling of fracking liquids. *Schlumberger Tech. Corp. v. Pasko*, 544 S.W.3d 830 (Tex. 2018).

On May 6, 2013, a Schlumberger employee ordered a contract worker to clean up a spill of fracking liquid, which included a toxic substance known as "U028," without providing protective equipment. Immediately thereafter, the worker experienced severe skin burns and eventually received treatment from a nearby hospital. Four months after the incident, in September 2013, a doctor diagnosed the worker with squamous cell carcinoma cancer.

The worker filed suit on May 5, 2015, just before the two-year statute of limitations ended, but did not initially name Schlumberger as a defendant. On August 13, 2015, the worker filed a first amended petition to add Schlumberger. Schlumberger filed for summary judgment and argued that the court should apply Texas's legal injury rule, which bars claims brought more than two years after a legally cognizable injury occurs. The defendant argued that the statute of limitations had run on May 6, 2015, two years after the worker knew of his initial injuries, and that the worker had known of Schlumberger's involvement at the time of the incident in May of 2013.

The trial court granted summary judgment. The worker appealed, arguing that material facts existed as to the applicability of the discovery rule in this case, which, the plaintiff argued, extended the statute of limitations until two years after the carcinoma diagnosis. The appellate court agreed with the worker that Texas's discovery rule applied and that Schlumberger failed to provide evidence to negate its applicability.

On appeal, the Texas Supreme Court held that Schlumberger conclusively established that the legal injury rule applied and that the worker's cause of action accrued on the day of injury. The court held that application of the discovery rule depends on whether an injured person is aware of an injury and whether the injury is caused by the wrongful acts of another, not whether the injured person knows the tortfeasor's exact identity or full effects of the injury. In this case, the worker suffered severe burns on May 6, 2013, knew immediately of the burn as he sought medical treatment, and knew a

Schlumberger employee had assigned him the clean-up task. The court also held the latent occupational disease rule, similar to the discovery rule, did not apply because the latent occupational disease rule applies only in circumstances where there is no traumatic injury or reason to know of potential injuries.

Preemption

New Mexico Federal Court Allows Tort Claims Against EPA Contractor in Gold King Mine Release

By Collin S. Gannon

Highlighting limits on pre-trial motions arguing CERCLA preemption of state common law claims, a New Mexico federal court denied a motion to dismiss plaintiffs' tort claims arising from a 2015 release of impounded water from the Gold King Mine. *See New Mexico v. EPA,* Civ. No. 16-0465 MCA/LF, Memorandum Opinion and Order (D.N.M. Feb. 12, 2018). The court determined that both the State of New Mexico and the Navajo Nation had valid claims for damages under New Mexico tort law in addition to their CERCLA claims for cost recovery and injunctive relief.

The defendants include an EPA contractor that was working on remediating the former Colorado mining site when a dam holding water contaminated with heavy metals was breached, famously coloring the Animas River gold. The State of New Mexico and the Navajo Nation brought suit against the contractor, alleging nuisance, trespass, and negligence among other things. The contractor moved to dismiss the tort claims as preempted by CERCLA.

The court concluded that CERCLA did not preempt plaintiffs' state tort claims, at least not at that early stage of the litigation, but noted that the Tenth Circuit had previously held "CERCLA's comprehensive [natural resource damages] scheme preempts any state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource," and that a state's pursuit of the remedy of "an unrestricted award of money damages cannot withstand CERCLA's comprehensive NRD scheme." But here, the court continued, "dismissal of Plaintiffs' state law tort claims is not appropriate, as there is no authority for concluding that the *claims* are preempted," as distinguished from the *remedies* the Tenth Circuit addressed. The court concluded there was not yet sufficient factual development in the case to dismiss or to strike the unascertained remedy.

When CERCLA Preemption Fails, Defendants Fall Back on State Law Protections

By Brooklyn N. Hildebrandt

Interpreting the limits CERCLA imposes on state law environmental claims, the Southern District of California held that while plaintiffs' environmental cleanup claims were not barred, plaintiffs could not claim damages for future remediation costs. *See Greenfield MHP Assocs., L.P. v. Ametek, Inc.,* Civ. No. 15-1525, Order Granting in Part and Denying in part Motion for Summary Judgment (S.D. Cal. Apr. 12, 2018).

Plaintiffs in this case are a group of mobile home park owners whose property was contaminated by a release of toxic chemicals from a nearby manufacturing facility prior to the facility's closure in the 1980s. Although the defendant, the former operator of the plant, has a remediation plan in place for its property and works with California state agencies to clean and monitor, the plan doesn't include the plaintiffs' properties. Plaintiffs alleged that new contamination continued to occur to groundwater beneath their properties.

Ametek moved for summary judgment, which the court denied in part and granted in part. First the defendant argued that the plaintiffs' involvement in the cleanup would conflict with California state agencies' current involvement in implementing a CERCLA remedy. The court held that even though CERCLA likely prohibits future restoration damages,

Ametek presented no evidence that Congress intended for CERCLA to preempt state law claims where the federal government is not involved in the cleanup.

The court sided with the defense, however, on future remediation costs. Because future remediation costs would frustrate the purpose of the State's Carpenter-Presely-Tanner Hazardous Substance Account Act ("HSAA") and produce a high risk of double recovery, the court ultimately held that plaintiff's claims were barred on these facts.

By granting only partial summary judgment, the court made it clear that other forms of relief for damage to plaintiffs' properties—such as injunctive or declaratory relief—were still available and the parties will proceed to trial.

Damages

North Carolina Federal Court Slashes Hog Farm Neighbors' $50 Million Punitive Damages Award

By Grant Tolley

Illustrating the power of state-law caps on damages, a federal judge in North Carolina slashed a jury's award of $5 million in punitive damages to each of ten neighbors who sued a hog farm owner for failure to properly dispose of the animals' waste, finding that North Carolina law capped punitive damages at $250,000 for each plaintiff. *See McKiver v. Murphy-Brown LLC*, Civ. No. 14-0180 BR, Order (E.D.N.C. May 7, 2018).

Plaintiff landowners sued neighboring hog farm operations, complaining that odors from open manure pits, truck traffic, and flies created a nuisance. A federal jury agreed, awarding plaintiffs a total of $750,000 in compensatory damages and $50 million in punitive damages. In post-trial briefing on punitive damages, plaintiffs argued that North Carolina's punitive damages cap—$250,000 or three times the compensatory award, whichever is greater—violated the North Carolina Constitution because, as applied to plaintiffs' private nuisance claims, the cap violated plaintiffs' right to a jury trial "[i]n all controversies at law respecting property."

The court rejected plaintiffs' constitutional argument. The court cited North Carolina Supreme Court precedent holding that "property" includes the right to sue for an injury but not the right to sue for an award of punitive damages. "[R]ecovery of punitive damages is fortuitous, as such damages are assessed solely as a means to punish the willful and wanton actions of defendants and, unlike compensatory damages, do not vest in a plaintiff upon injury." The court noted that the North Carolina Supreme Court applies this principle regardless of the underlying claim.

Experts

Eleventh Circuit Rejects Expert Testimony, Affirms Dismissal of Suit Against Fertilizer Plant

By Grant Tolley

Highlighting the importance of strong expert testimony, the Eleventh Circuit affirmed exclusion of an expert's testimony where—among other defects—the expert (1) failed to properly assess dose-response, (2) failed to meaningfully rule out alternative causes, and (3) failed to account for background risk. *See Williams v. Mosaic Fertilizer, LLC*, 889 F.3d 1239, 1245-46 (11th Cir. 2018).

Plaintiff alleged that her pulmonary disease, pulmonary hypertension, allergic reactions, diabetes, and other health conditions were caused or exacerbated by chemicals, dust, and other emissions from a fertilizer plant located three miles from plaintiff's home. Mosaic moved to exclude plaintiff's causation expert under Federal Rule of Evidence 702 and *Daubert* and then moved for summary judgment. Without holding a *Daubert* hearing, the trial court excluded the testimony and granted Mosaic summary judgment. Plaintiff appealed.

Reviewing for abuse of discretion, the Eleventh Circuit affirmed. First, the court found that plaintiff's expert never conducted an independent dose response specific to plaintiff, instead relying solely on regulatory standards like EPA's National Ambient Air Quality Standards. The court chided that it had previously explained the "methodological perils of

relying, at face value, on regulatory emissions levels to establish causation." Namely, regulatory standards are often prophylactic, whereas dose-response calculations identify the exposure levels that actually cause harm. Second, plaintiff's expert "failed to meaningfully rule out other potential causes" of plaintiff's conditions and symptoms. "Indeed, one of the studies heavily relied upon by [plaintiff's expert] determined that environmental factors and emissions by other facilities caused the vast majority of pollution in the area in which [plaintiff] lived." Third, plaintiff's expert failed altogether to address background risk in his report or elsewhere.

Bankruptcy and Environmental Liability

"New" GM Avoids Liability for "Old" GM's Contamination

By Collin S. Gannon

Highlighting a potential shortcoming in some attempts to transfer environmental liability in bankruptcy proceedings, a federal court in New York found common law liability for environmental contamination was not covered by a release of "Environmental Law" liability. *See In re: Motors Liquidation Company, et al.*, BANKR No. 09-50026 MG, Memorandum Opinion and Order Enforcing Provisions of Sale Order with respect to the Moore, *et al.*, Plaintiffs, at 8 (Bankr. S.D.N.Y, May 4, 2018).

In 2009 General Motors ("GM") entered chapter 11 bankruptcy proceedings. "Old" GM was split, creating a separate, distinct entity known colloquially as "New" GM. Among the liabilities new GM assumed from old GM in a 2009 sale order and agreement were those arising under "Environmental Law," defined as "any Law in existence on the date of the Original Agreement relating to the management or release of, or exposure of humans to, any Hazardous Materials; or pollution; or the protection of human health and welfare and the Environment."

A group of landowners near GM's Milford Proving Ground testing facility—which was previously owned by "old" GM, but transferred to "new" GM in 2009—filed a putative class action in federal court in Michigan alleging personal injury and property damage arising from the use of road salt at the facility. New GM moved the bankruptcy court that had overseen the 2009 split to enforce the 2009 sale order and agreement, arguing common law claims were not among new GM's assumed liabilities.

The bankruptcy court agreed and concluded that common-law toxic torts did not fit within the relevant concept of "Environmental Law" under the agreement. Instead, such claims "are essentially successor liability claims" which were not assumed by new GM. The court found the structure of the 2009 sale order and agreement indicated "new" GM's intent to only assume "specifically-identified liabilities," a concept the court found inconsistent with the nature of toxic torts. The court held that the plaintiffs' claims against new GM "for personal injury or property damage based on groundwater contamination that migrated from the [facility] before the sale of the property to New GM was completed" are barred, but that claims for contamination that migrated after the sale could go forward.