

EMERGING TRENDS IN TOXIC TORTS

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Ask any asbestos or tobacco manufacturer whether companies should take notice to the emerging trends in toxic tort lawsuits and the answer would be YES. When States began to sue tobacco manufacturers to recover smoking related health care costs no one, including the tobacco manufacturers, could have predicted the outcome. By the end of the 1990s tobacco manufacturers had handed over more than \$300 billion dollars and agreed to make huge changes in their marketing strategies which continue to hit their bottom line. The asbestos litigation is equally as staggering in sheer size and dollars. A recent study by the Rand Corporation found that over 730,000 individuals had filed claims against some 8,400 business entities and asbestos manufacturers had spent over \$70 billion on asbestos litigation, half of which was consumed by litigation expenses.¹ The asbestos litigation led 75 corporations into bankruptcy. This article looks at recent court filings that illustrate some of the latest trends in toxic tort lawsuits across the country.

#1 Perchlorate Lawsuits

One area of potential increased lawsuits is associated with perchlorate exposure. Perchlorate is a man made inorganic salt used since the late 1940s as a component in solid rocket fuel, munitions, pyrotechnics and airbags. The military and its weapons contractors are the primary users of perchlorate. Consequently, the defense manufacturing industry could be crippled if perchlorate litigation proves to be the next wave in toxic tort lawsuits.

Perchlorate is soluble, mobile in ground and surface water and degrades very slowly in the environment. When ingested (primarily in drinking water) perchlorate can limit the uptake of

¹ www.rand.org/pubs/monographs/2005/RAND_MG162.pdf, *Asbestos Litigation*, Rand Corporation, 2005

iodide by the thyroid gland which effects the regulation of metabolism and growth.² The absence of these hormones in newborns and fetuses could impede brain development and lead to mental retardation, and other neurological problems, such as attention deficit syndrome, vision, speech and hearing problems.³ Infants and pregnant woman are most at risk.⁴

Perchlorate has reportedly migrated into groundwater in at least 30 states.⁵ In California, perchlorate has been found in more than 300 drinking water wells.⁶ Since 1998, 1.4 million pounds of perchlorate has flowed from a manufacturing plant into Lake Mead and the lower Colorado River.⁷ The Colorado River is the source of drinking water for more than 15 million people in Southern California, Nevada and Arizona.⁸ The River is also used to irrigate millions of acres of farmland. The Food and Drug Administration (FDA) investigators have found the chemical in milk and lettuce in 15 states.

For several years, federal and state agencies have debated over what is an acceptable level of human perchlorate exposure. The Pentagon, NASA and the defense industry, which have historically used significant amounts of perchlorate, advocate a drinking water standard of 200 parts per billion. In contrast, scientists at the EPA recently advocated a standard of 1 part per billion.⁹ The EPA is still years away from setting a standard for perchlorate. Without a standard, the agency does not have an enforceable threshold to order cleanups. Arizona recently advocated a standard of 14 parts per billion.¹⁰ California adopted a public health goal of 6 parts per billion in 2004 and Nevada has set its level at 18 parts per billion.¹¹

² *Perchlorate and Children's Health: The Case for a Strong Cleanup Standard for Rocket Fuel in Drinking Water*, Environmental California Research and Policy Center, March, 2005

³ *Chemical in rocket fuel spurs public-health debate*, Boston Globe, May, 2003

⁴ Id.

⁵ Luis M. Nido and Jason B. Hutt, *Perchlorate Debate Intensifies in 2004*, May, 2004

⁶ Id.

⁷ *Chemical in rocket fuel spurs public-health debate*, Boston Globe, May, 2003

⁸ Id.

⁹ *Perchlorate and Children's Health: The Case for a Strong Cleanup Standard for Rocket Fuel in Drinking Water*, Environmental California Research and Policy Center, March, 2005

¹⁰ *Human Health-Based Guidance Levels for the Ingestion of Contaminants in Drinking Water and Soil*, Arizona Department of Health Services, Office of Environmental Health

¹¹ *Perchlorate Occurrence Study Sampling and Analysis Plan*, Arizona Department of Environmental Quality

There have been a few toxic tort lawsuits filed concerning perchlorate contamination. Most recently, two lawsuits were filed against Olin Corporation in the Northern District of California. (*Rianda v. Olin Corp.*, No. C-04-02668 RMW and *Palmisano v. Olin Corp.*, C-03-01607 RMW). Both lawsuits alleged perchlorate contamination from an Olin facility that manufactured flares in Morgan Hill, California. Flare manufacturing involves the use of perchlorate and other chemicals. In both cases, a group of area landowners filed a lawsuit against Olin alleging that perchlorate had migrated from Olin's flare factory to their property through the underground aquifer. The plaintiffs alleged the following causes of action: (1) negligence, (2) negligence per se, (3) strict liability, (4) trespass, (5) private nuisance, (6) public nuisance, (7) intentional infliction of emotional distress, (8) negligent infliction of emotional distress, (9) monetary damages under CERCLA and (10) declaratory relief under CERCLA. The Plaintiffs argue that the contamination at the Olin facility damaged their water supply and property resulting in physical illness, diminution of their property and damages due to the stigma caused by the alleged contamination.¹²

In 2004, the Natural Resources Defense Council (NRDC) filed a lawsuit against the Department of Defense, the Environmental Protection Agency and the Office of Management and Budget in the U.S. District Court for the Central District of California--*NRDC v. U.S. Department of Defense et al.*, C.D. Cal., Case No. 2:04CV02062. The lawsuit alleged violations of the Freedom of Information Act. The lawsuit compelled production of documents that the NRDC requested from the agencies related to perchlorate. The NRDC requested the documents to assess the health risks associated with perchlorate.¹³ In another lawsuit environmental groups filed a lawsuit against the U.S. Army over pollution from the Eagle Flats firing range in Fort Richardson, Alaska-- *Alaska Community Action on Toxics v. U.S. Army*, D. Alaska, Case No. A02-0083-CV.

Finally, two lawsuits have been filed in California by hundreds of people who blame perchlorate for their health ailments. Both lawsuits name weapon facilities as the defendants, one operated by Lockheed Martin and the other by Aerojet.¹⁴

#2 Global Warming Lawsuits

[Note: This commentary was adopted from an article that was published in The Toxic Law Reporter entitled "Global Warming Litigation: The Phantom Menace"]

There has been increasing attention paid lately to the issue of global warming or climate change. In the last few years, global warming has been blamed for Hurricane Katrina, the tsunami that hit Asia, and the 2003 summer heat wave in Europe. It has also been the subject of a major Hollywood motion picture, *The Day After Tomorrow*. In May 2006, the USA Today newspaper

¹² The Northern District of California granted defendants' motions for summary judgment on May 30, 2006 (*Rianda v. Olin Corp.*, 2006 WL 1525694 and defendants' motions for summary judgment on June 24, 2005 (*Palmisano v. Olin Corp.*, 2005 WL 1514076)

¹³ The lawsuit is still pending.

¹⁴ *Chemical in rocket fuel spurs public-health debate*, Boston Globe, May, 2003

did a week-long series on the supposed effects of global warming, and Al Gore's movie "An Inconvenient Truth" has been receiving substantial attention. Is global warming lawsuits the next wave of litigation after tobacco and guns? Will global warming lawsuits be the next wave of toxic tort lawsuits?

The term "global warming" refers to an increase in the Earth's temperature that is claimed to be brought about by the emission of greenhouse gases such as carbon dioxide. Heat from the sun enters the Earth's atmosphere and is absorbed by the Earth's surface. The heat then radiates from the surface and, rather than escaping into space, this heat is trapped in the Earth's atmosphere by greenhouse gases. The amount of carbon dioxide present in the earth's atmosphere has increased significantly in the past several decades and global temperatures have also increased. Among the claimed impacts of global warming are rising sea levels, melting ice caps, reduced water supplies, intensified summer heat waves and increased storm intensity.

Recently, there have been a few toxic tort lawsuits filed concerning global warming. In September 2006, California's Attorney General filed a lawsuit against the top six American and Japanese auto manufacturers saying pollution from their vehicles has contributed to global warming and cost taxpayers millions of dollars to address current and future impacts. The suit was filed in U.S. District for the Northern District of California and names as defendants: Chrysler Motors, General Motors, Ford Motors, Toyota, Honda and Nissan.

In 2004, eight states, three environmental organizations, and New York City brought suit against five electric utilities. The complaint alleged that the defendants are the largest emitters of carbon dioxide in the United States and that emissions of carbon dioxide have caused global warming that has caused various injuries to the plaintiffs and their populations. The complaint alleged a federal common law and a state law cause of action for public nuisance and sought a court order requiring the defendants to reduce their carbon dioxide emissions.¹⁵

In a lawsuit filed January 25, 2005, a New York resident brought a public nuisance claim against the EPA, the New York State Department of Environmental Conservation and the New York City Department of Environmental Protection. The complaint alleged that the defendant contributed to global warming by emitting carbon dioxide and by failing to implement emission controls for carbon dioxide.¹⁶

A class action lawsuit was filed on September 20, 2005, in the U.S. District Court in the Southern District of Mississippi. The lawsuit alleges insurance related claims against several insurance carriers and also states a negligence cause of action and seeks damages from oil and

¹⁵ In *Connecticut v. American Electric Power Co.*, 406 F.Supp. 2d 265 (S.D.N.Y. 2005), the U.S. District Court for the Southern District of New York dismissed the complaint for lack of subject matter jurisdiction, finding that the case presented a non-justiciable political issue.

¹⁶ In *Korsinsky v. EPA*, 2005 WL 2414744 (S.D.N.Y. Sept. 29, 2005), the court dismissed the complaint because of plaintiff's lack of standing (*Korsinsky v. EPA*, 2005 WL 2414744 (S.D.N.Y. Sept. 29, 2005))

refining companies. The complaint alleges that the actions of those companies contributed to global warming which intensified the strength of Hurricane Katrina. The case is still pending.

#3 United States Supreme Court Re-Visits Punitive Damages

The Supreme Court heard oral arguments on October 31, 2006 on the debate over punitive damages awards. The Court's decision will impact any company that sells products in the United States. The case asks the high court to review the punitive damages award for excessiveness and asks the Court to set standards for how judges and juries are to weigh harm caused by the defendant's conduct to other people that were not parties to the suit. The case is *Philip Morris v. William*, No. 05-1256, which involved the death of a plaintiff--a longtime smoker that died of lung cancer.

In 1999, an Oregon jury found Philip Morris liable for fraud and negligence in the lung cancer death of retired Portland schools janitor, Jesse Williams, who began smoking Marlboros during the Korean War. The jury awarded the widow \$821,000 in compensatory damages, which a statutory wrongful death cap reduced to \$500,000. The jury then awarded \$79.5 million in punitive damages, which the trial judge subsequently reduced to \$32 million. The ratio of punitive to compensatory damages was 97 to 1.¹⁷ This ratio was much higher than the single digit ratio between punitive and compensatory damages that was previously set by the Supreme Court. Both parties appealed. The Oregon Court of Appeals upheld the fraud finding and reinstated the punitive damages award. The Oregon Supreme Court denied review. Philip Morris petitioned for review in the U.S. Supreme Court, which granted certiorari, vacated the judgment and remanded the case for consideration in light of its then recent ruling in *State Farm Mutual Auto Insurance Co., v. Campbell*, 538 U.S. 408 (2003). On remand, the Oregon Court of Appeals reached the same result and the State Supreme Court affirmed.

Philip Morris appealed again to the United States Supreme Court and argued that the jury award was not in line with the rough 9-to-1 guideline on the ratio of punitive to actual or compensatory damages that the Court had outlined in two previous cases. The two key precedents are (1) *BMW of North America v. Gore*, 517 U.S. 559 (1996): the Supreme Court held that punitive damage awards should be measured against three guideposts: (1) the reprehensibility of the defendant's conduct; (2) the proportionality of the punitive damages award to the harm to the plaintiff; and (3) comparison of the punitive award to other civil or criminal penalties; and (2) *State Farm Mutual Auto Insurance Co., v. Campbell*, 538 U.S. 408 (2003): the Supreme Court held that the reprehensibility of the defendant's conduct was the most important indicator and the court outlined five factors to consider in determining the reprehensibility.

During oral argument, Philip Morris' counsel argued that the Oregon court allowed the jury to consider the companies harm to other Oregon smokers who had not filed suit. In contrast, Mr. William's lawyer argued that the jury was merely assessing the "reprehensibility" of the tobacco manufacturer's behavior, an element that the Supreme Court's previous precedents permitted

¹⁷ *Justices Weigh Limits on Punitive Damages*, The New York Times, November 1, 2006

juries to consider.¹⁸ Philip Morris urged the Court to adopt a punitive damages standard that would only permit four times the damages for actual harm.¹⁹

This was the first punitive damages case to come before the Supreme Court that involved personal injury. The two previous cases that addressed punitive damages involved an automobile paint job and an insurance claim. Thus, the fact that the punitive damage award was in response to human harm could impact the Court's decision. A decision by the United States Supreme Court is expected in the spring of 2007.

#4 Court Allows Emotional Distress Damages in Contamination Suit Alleging Property Harm

Traditionally a plaintiff could not recover emotional distress damages absent physical injury. Yet on June 1, 2006, a federal district court held in a case of first impression that landowners whose sole contamination-related injury is property damage could recover emotional distress damages. In *Nnadili v. Chevron U.S.A. Inc.*, D.D.C., No.02-1620, 6/01/06, 500 current and former District of Columbia residents sued Chevron U.S.A. Inc., alleging a nearby Chevron service station leaked petroleum from the station's underground storage tanks and contaminated their properties and also lowered their property values. The landowners' Complaint alleged that Chevron wantonly and willfully and in reckless disregard for their safety contaminated their properties. Thus, the landowners requested not only diminution in value damages in connection with their property claims, but also emotional distress damages.

The Court rejected Chevron's argument that the landowners could not recover emotional distress damages as part of their trespass claims because they had not alleged any personal physical injury or physical endangerment. While the federal court could not locate any on-point rulings by District of Columbia courts on the issues, the Court said that prior rulings of the District of Columbia Court of Appeals have allowed emotional distress damages unaccompanied by personal physical injury in intentional tort and personal property conversion actions. (*Adams v. George W. Chochran & Co.*, 597 A.2d 28 (D.C. 1991); *Parker v. Stein*, 557 A.2d 1319 (D.C. 1989) and *Barnes v. District of Columbia*, 452 A.2d 1198 (D.C. 1982). The Court found the *Parker* case instructive noting that the Court of Appeals for the District of Columbia concluded that emotional distress damages were available in an action for conversion of personal property. The Court stated that it could find no "distinction between personal and real property to suggest that the District of Columbia would permit recovery of emotional distress damages for intentional torts involving personal, but not real, property damages.

This ruling creates precedent for other plaintiffs to rely on which could expand liability for property claims in the future.

#5 Clients Sue Class Counsel in Asbestos Fight for Disgorgement of Fees

¹⁸ *Supreme Court revisits punitive damages*, The National Law Journal, October 30, 2006

¹⁹ *Id.*

Asbestos litigation has been extremely profitable for lawyers in the last few decades. Case in point, Messrs. Pritchard and Fitzgerald were the lead lawyers in an asbestos personal injury case filed in Jefferson County, Mississippi in 1995. A trial was conducted in 1998, and the plaintiffs were awarded approximately \$48.5 million dollars in damages. Shortly thereafter, Mr. Pritchard filed a second asbestos class action in Mississippi state court. The plaintiffs in that class action have now sued the lead lawyers for breach of fiduciary duty and related counts. That class also had a recent victory in the U.S. 3rd Circuit Court of Appeals, a divided appellate panel revived the plaintiffs' claims and remanded it to the trial court. *Huber v. Taylor*, No. 05-1757 (Oct. 31). A federal court in Pittsburgh earlier had dismissed the claim on summary judgment. If the class is successful, the lawyers could be forced disgorge all of their legal fees in connection with their representation of the class, approximately \$160 million.

Plaintiffs alleged that the lead lawyers negotiated deals with local counsel that guaranteed that they would be paid between 95% and 97.5% of the total attorney fees. The plaintiffs argue that they were never informed of the lawyers' fee arrangement with local counsel, and that the fee of 1% to 2% of any client's recovery created a disincentive for local counsel to pay particular attention to any case. The plaintiffs also allege that the attorneys entered into co-counsel agreements, without plaintiffs' knowledge, where the lead counsel in charge of the negotiation of settlements would receive four percent of all gross settlements. Finally, plaintiffs allege that the attorneys had fee arrangements that gave defendants a larger percentage of recoveries in southern states than of northern states and that created a disincentive for defendants to negotiate settlements for northern claims in order to maximize their attorney fees.

#6 Judge Rejects Class-Action Lawsuit Over Vioxx

A judge ruled on November 22, 2006 that thousands of federal lawsuits against Merck & Co., the manufacturer of Vioxx, could not be pooled into one national class action. (*In re: Vioxx Products Liability Litigation*, MDL No. 1657). The plaintiffs' were attempting to try all the cases in one class action under the laws of New Jersey, where Merck is headquartered. United States District Court Judge Fallon rejected the proposal and ruled that the law of each plaintiff's home state should apply to each plaintiff's individual claim. Thus, the ruling does not prevent separate class actions for each state.

#7 Expanding Employer's Duty to Third Parties

Plaintiffs' bar is now attempting to expand the duties an employer owes to third parties who never worked at the premise. Typically the cases involve a family member who was exposed to some toxic chemical that was trapped on the clothes of the person who worked at the premises. For instance, a spouse who may have laundered the worker's clothes. Recently there has been a flurry of lawsuits involving extending employers' duty, especially in asbestos litigation.

Recently, several states have rejected to extend premises owners/employers' duty to third parties. In Tennessee, a state court dismissed a \$20 million wrongful death suit ruling that there is no provision in Tennessee law that imposes a duty of care to the family members of an employee. (*Satterfield v. Breeding Insulation Co.*, Tenn. Circ. St., 5th Jud. Dist., No. L-14000, 3/2/06). The

2003 lawsuit alleged that the employer ALCOA owed a duty of care to Amanda Satterfield who was allegedly exposed to asbestos from the clothes of her father. The Georgia Supreme Court in *CSX Transp. Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005), also rejected extending a duty of care to an employee's spouse where the wife allegedly contracted mesothelioma as a result of laundering her spouse's clothes. New York held similarly in *In re New York City Asbestos Litig.* (*Hold-ampf v. A.C. & S. Inc.*, 2005 WL 2777559 (N.Y. Oct. 27, 2005))

In contrast, in New Jersey, the Supreme Court ruled that the duty of care could be extended to a worker's spouse who died of an asbestos related disease. The plaintiff alleged that the spouse washed her husband's asbestos-covered work clothes every day and was diagnosed with malignant mesothelioma in 2003, (*Olivo v. Owens-Illinois Inc.*, N.J., No. A-23-05, 4/24/06). New Jersey's Supreme Court ruled that Exxon Mobile should have foreseen that whoever laundered the employees clothes would be exposed to asbestos.

#8 Court Requires Plaintiff to Present Degree of Exposure in Toxic Tort Case

In *Parker v. Mobil Oil Corp.*, 2006 WL 2945397 (N.Y., Oct. 17, 2006), the plaintiff alleged that during his employment as a gas attendant he was exposed to benzene through inhalation of gas vapors and dermal exposure to gasoline which caused him to develop acute myelogenous leukemia (AML). Defendants moved to preclude plaintiff from introducing expert testimony regarding the cause of his leukemia and for summary judgment dismissing plaintiff's claims. In support of their motions, defendants filed two expert reports that found that amount of exposure to benzene resulting from employment as a gas attendant was below the amount to cause leukemia. Plaintiff also submitted two expert reports that supported plaintiff's claims that his exposure to benzene was significant enough to have caused his leukemia. The first report cited a study of rubber plant workers which linked benzene exposure to leukemia. The report found that the cause of plaintiff's leukemia was his "occupational exposure to benzene." The second report relied on a study which found an increase in leukemia and benzene exposure in refinery workers.

The trial court denied defendant's motions, but the New York Appellate Division reversed. It ruled that Parker had failed to quantify his exposure to benzene and therefore conclusions on whether his exposure to benzene caused his AML were speculative. The Court of Appeals affirmed the Appellate Division's ruling and held that Parker had failed to establish that exposure to benzene was the cause of the AML. The Court of Appeals rejected the Appellate Division's requirement that the amount of exposure had to be quantified exactly, but a plaintiff will need to prove that the exposure to the chemical exceeds the threshold shown to cause the illness.

#9 FDA Preemption

On January 18, 2006, the United States Food and Drug Administration (FDA) issued a final rule on drug labeling which contained a preamble with preemptive language. 71 Fed. Reg. 3921. The FDA preamble states "under existing preemption principles, FDA approval of labeling...preempts conflicting or contrary state law." This pronouncement has spawned a judicial divide that likely will have to be resolved by the United States Supreme Court.

Some courts have given deference to the FDA's preemption language and have dismissed state failure to warn cases. For instance, in *In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation*, 2006 WL 2374742 (N.D. Cal. Aug. 16, 2006), the Northern District of California dismissed state law failure to warn claims involving a prescription drug because they held that it conflicted with the FDA's determination of the proper warning. Similarly, in May the U.S. District Court for the Eastern District of Pennsylvania deferred to the FDA's position that its labeling requirements pre-empted state failure to warn claims. (*Colacicco v. Apotex Inc.*, E.D. Pa., No. 05-5500, 5/26/06). There a widower had sued the drug manufacturer of Paxil, after his wife committed suicide. Colacicco alleged that the drug manufacturer failed to warn of the heightened risk of suicide associated with Paxil.

In contrast other courts have not given deference to the preemption language and have not allowed the defense. For instance, in *McNellis v. Pfizer Inc.*, 2006 WL 2819046 (D.N.J. Sept. 29, 2006), the Court did not allow the pre-emption defense. Similarly, a judge presiding over Prempro litigation denied a summary judgment motion and held that FDA's labeling regulation did not preempt state law warning claims (*In re Prempro Product Liability Litigation Review (Reeves v. Wyeth)*, E.D. Ark., No. 05-163, 6/15/06).

#10 State Prevails in Public Nuisance Suit Against Lead Paint Industry

In February 2006, a Rhode Island jury found three former manufacturers of lead paint responsible for a public nuisance. (*Rhode Island v. Lead Industries Ass'n*, R.I. Super. Ct., No.99-5226, 2/28/06). This was the first lawsuit filed by a State against the lead paint industry. The State alleged that the lead manufacturers knew that lead based paint was toxic, but continued to sell and market the paint until it was banned. The State presented evidence that 240,000 homes in Rhode Island have lead paint. The companies will now have to abate the nuisance which could cost from \$7,500 per house to \$15,000 per house, thus, the total cleanup costs could total millions of dollars. However, the Court ruled that the companies would not be liable for punitive damages.