

Dismissal of Bellwether Case in FEMA MDL Upheld

July 6, 2011 by [Sean Wajert](#)

The plaintiff who at one time had been the first-in-line bellwether plaintiff in the FEMA Trailer MDL has lost her appeal of the dismissal of her claims. [In Re: Fema Trailer Formaldehyde Products Liability Litigation](#) (Alana Alexander, plaintiff), No. 10-30451(5th Cir. June 24, 2011).

Plaintiffs sued the government, alleging exposure to potentially dangerous, high levels of formaldehyde in their Federal Emergency Management Agency (FEMA) provided emergency housing unit. Following Hurricanes Katrina and Rita, FEMA provided EHUs to the displaced victims of the storms. The hurricanes' destruction created an urgent and immediate need for an unprecedented number of EHUs. In response, FEMA purchased more than 140,000 new EHUs from manufacturers and dealers. Alexander and her children were among the Louisiana residents who received an EHU. The Alexander family moved into their EHU in May 2006 and almost immediately noticed a "chemical smell" in the unit that caused the children's asthma to worsen. Other physical manifestations allegedly included irritation, burning, and tearing of the eyes; irritation and burning of nasal membranes; eczema; headaches; difficulty breathing; wheezing; shortness of breath; and new allergies and worsening allergies.

Alexander admitted that she knew the smell came from the EHU. Shortly after moving in, Alexander claimed, she asked an unidentified Government representative or contractor about the smell. She claimed that he told her that that the smell was "nothing to worry about."

In July, 2008, Alexander submitted an administrative claim with FEMA and in early 2009 filed a complaint in the district court, alleging under the Federal Tort Claims Act that the Government was careless, reckless, grossly negligent, and acted with deliberate indifference by failing to disclose the exposure to potentially dangerous and high levels of formaldehyde in the trailers.

Defendant moved to dismiss the complaint as untimely (in cases where the government has waived sovereign immunity, the statute of limitations issue is jurisdictional). Although the FTCA does not define when a claim accrues, it is well-settled that a tort action under the FTCA accrues when the plaintiff knows or has reason to know of the alleged injury that is the basis of the action. The trial court dismissed the case, and plaintiff appealed.

On appeal, Alexander argued that the accrual of her claim was delayed or tolled pursuant to either: (1) the discovery rule, (2) equitable estoppel, or (3) the continuing tort doctrine. The 5th Circuit found these arguments were without merit.

There was no dispute that Alexander was aware of the injuries by May 2006. When the family moved into the trailer in May 2006, almost immediately, the asthma worsened, and the kids experienced a plethora of other health issues. The primary dispute was thus whether Alexander knew or in the exercise of reasonable diligence should have discovered the cause of the injuries such that her claim accrued at that time.

Plaintiff claimed she did not discover the Government's role in the alleged injuries until July 2007, when FEMA issued its second round of flyers about formaldehyde emissions in the EHUs. This argument was "not convincing." The court of appeals held that plaintiff had enough information regarding the injury and its cause by May 2006 that would lead a reasonable person in plaintiff's position to further investigate the specific cause of that injury. All the facts were not in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. Plaintiff could have established FEMA's connection to the EHU, from which the "chemical smell" was emanating.

Second, plaintiff argued that because she reasonably relied on the claims of the representative that there was "nothing to worry about," the limitations period should be equitably tolled. Because the limitations periods in statutes waiving sovereign immunity are jurisdictional, the district court properly held that equitable tolling did not apply to this case.

Finally, Plaintiff could not cite any Fifth Circuit case law indicating that accrual should be delayed when the plaintiff knows about the injury and could have discovered, with a reasonable inquiry, the putative defendant's, here the Government's, potential liability. The court thus declined the invitation to apply the continuing tort doctrine to the facts presented in this case.