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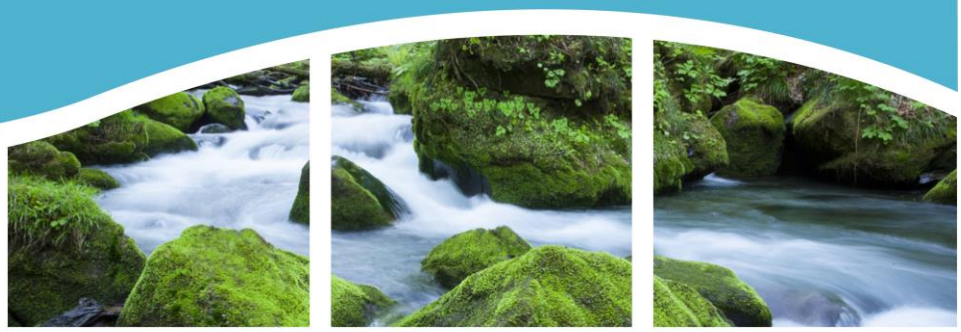

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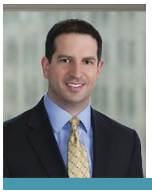

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ABOUT B&D

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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EXPERTS

Maryland Court of Appeals OKs Circumstantial Causation Evidence in Lead Paint Cases

By: Graham Zorn

In a case that may make it easier to prove causation in Maryland lead paint cases, the Maryland Court of Appeals held that neither direct evidence of the source of lead nor expert testimony was necessary when a trier of fact had sufficient circumstantial evidence to conclude that the subject property was the "reasonable probable" source of lead exposure. *See* *Rowhouses, Inc. v. Smith*, 133 A.3d 1054 (Md. 2016)

Plaintiff brought suit against the owners of two rental properties she had lived in as a small child in the early 1990s, alleging that lead paint exposure at those properties caused permanent neurological deficits. The trial court granted a defense motion for summary judgment, citing a lack of direct evidence of lead paint at the subject property, which had since been demolished, and inability of Plaintiff's expert to rule out other potential sources of lead exposure. This, the trial court ruled, left Plaintiff unable to prove causation.

On appeal, Maryland's intermediate court reversed the trial court, and the Maryland Court of Appeals affirmed. After a detailed survey of its recent lead paint cases, the Maryland high court noted that its precedents established that causation may be established with circumstantial evidence "so long as the circumstantial evidence demonstrates that the subject property is a reasonable probable source of lead exposure." *Id.* at 1080. In the summary judgment context, "a reasonable probability requires a showing that is less than 'more likely than not,' but more than a mere 'possibility.'" *Id.* at 1080-81. Here, that meant a jury could reasonably conclude that the subject property was a source of Plaintiff's lead exposure. However, the court continued, "the case law has not discussed what exactly is required to rule out other reasonably probable sources." *Id.* at 1083 (emphasis added). The court held that, just as circumstantial evidence can be used to establish that a property was a "reasonable probable" source of lead exposure, circumstantial evidence could be used to establish that there were no other "reasonable probable" sources of Plaintiff's lead exposure.

Expert's Specific Causation Methodology Unreliable in Leukemia Row

By: Graham Zorn

In a case underscoring the importance of reliable methodologies in expert testimony, the U.S. Court of Appeals for the First Circuit upheld a trial court decision excluding specific causation testimony linking benzene exposure and acute promyelocytic leukemia ("APL") because the expert could not properly support her conclusions. *See* *Milward v. Rust-Oleum Corp.*, No. 13-2132, 2016 WL 1622620 (1st Cir. Apr. 25, 2016).

Plaintiff alleged he was exposed to benzene from Defendant's products during his work as a pipefitter and refrigerator technician, and that such exposures caused his APL. To support this contention, Plaintiff relied on the testimony of Dr. Sheila Butler, a physician specializing in occupational chemical exposures. The trial court found Dr. Butler's methodologies unreliable and excluded her causation testimony under Rule 702. With Plaintiff unable to show specific causation, the trial court granted a defense motion for summary judgment.

On appeal, Plaintiff challenged the trial court's treatment of Dr. Butler's relative risk analysis and differential diagnosis, and the First Circuit upheld the trial court's decision. In her relative risk analysis, Dr. Butler compared Plaintiff's benzene exposure levels to those that had been found to be dangerous in other studies. The Court found, however, that Dr. Butler had not accounted for studies that conflicted with her opinion, nor could she explain why she chose the studies she chose. Dr. Butler's "complete unwillingness to engage with the conflicting studies (irrespective of whether she was able to or not) made it impossible for the district court to ensure that her opinion was actually based on scientifically reliable evidence . . . ." *Id.* at *13. The First Circuit found this lack of reliability justified the trial court's exclusion of her testimony.

The First Circuit also found Dr. Butler's differential diagnosis unreliable. Dr. Butler ruled out all other causal factors associated with APL, including smoking, obesity, and idiopathic diagnosis (i.e. a diagnosis with no known cause). The

Court noted that Dr. Butler only "ruled out" idiopathic causes because she "ruled in" benzene as a cause of Plaintiff's APL. The Court found that because the record did not contain a scientifically reliable basis to "rule in" benzene, Dr. Butler's dismissal of idiopathic causes was also unreliable. Therefore, while differential diagnosis can be a reliable methodology for showing specific causation, the First Circuit held that it was not reliably employed and upheld the trial court's decision excluding Dr. Butler's specific causation testimony.

LEAD IN DRINKING WATER

D.C. Water Utility Sheds Negligence, Consumer Protection Claims in Lead-in-Water Litigation

By: Graham Zorn

In a decision that may have implications in other cases related to alleged lead in drinking water, a District of Columbia trial court dismissed negligence and consumer protection claims against the District's water utility, DC Water. *See Barkley v. D.C. Water & Sewer Auth.*, 2016 WL 184433 (D.C. Super. Ct. Jan. 13, 2016). Plaintiffs claimed injuries stemming from their alleged exposure to lead in drinking water in the early 2000s. DC Water, represented by Beveridge & Diamond P.C., successfully argued that the public duty doctrine – which bars negligence claims against government entities regarding services provided to the public at large – bars claims regarding drinking water distribution and related public education.

Under the District's public duty doctrine, the District and its agencies "owe no duty to provide public services to particular citizens as individuals." *Id.* at *3. "Stated another way, absent a special relationship between the District and an individual citizen creating a specific duty of care owed to that individual, the duty to all is a duty to no one." *Id.* In granting summary judgment to DC Water on Plaintiffs' negligence claims, the Court found that DC Water, created by the District's legislative body, is part of the District government and is therefore entitled to the protection of the public duty doctrine. The Court noted that the public duty doctrine protects government funds from the drain of litigation costs and safeguards the separation of powers.

The Court also found that DC Water is not a "merchant" for purposes of the District's Consumer Protection Procedures Act ("CPPA"). The Court wrote that "[DC Water] exists for a distinctly public purpose and that the fees [DC Water] charges are to maintain its solvency and to enable it to fulfill its statutory public purposes, not to turn a profit," thus shielding DC Water from suit under the version of the CPPA in effect in the early 2000s. The Court also rejected Plaintiffs' claims for personal injury damages under the CPPA, finding that remedies under the CPPA were limited to the limited relief prescribed by the statute.

CLASS ACTIONS

Tenth Circuit Bars Class Tort Claims for Failing to Plead Injury

By: Gayatri Patel

Underscoring the importance of pleading actual injury in a toxic tort class action, the U.S. Court of Appeals for the Tenth Circuit dismissed Oklahoma class claims that were based only on "reasonable concern" of future injury and a summary statement of alleged health effects. *See Reece v. AES Corp.*, No. 14-7010, 2016 WL 521247 (10th Cir. Feb. 9, 2016).

Putative class Plaintiffs alleged injuries relating to Defendants' disposal of coal combustion waste and wastewater generated in oil and gas drilling operations. On Defendants' motion, the trial court dismissed with prejudice Plaintiffs' strict liability, negligence, and negligence *per se* claims.

On appeal, the Tenth Circuit upheld the District Court's decision, noting that Oklahoma law requires pleading an actual injury. Here, Plaintiffs' "reasonable concern" about possible exposure to fly ash particles and groundwater contamination from drilling wastewater was insufficient to state a claim: "Alleging reasonable concern about an injury occurring in the future is not sufficient to allege an actual injury in fact." *Id.* at *19. The court also noted that Plaintiffs

did not plead any examples of injuries to specific Plaintiffs: "Their summary statement of health effects is nothing more than a rote recitation of general harms" and is therefore insufficient to satisfy the injury element of Plaintiffs' claims. *Id.* at *20.

MEDICAL MONITORING

Pennsylvania Federal Court Dismisses Untimely Medical Monitoring Class Claim

By: Anthony Papetti

In a decision that may make it more difficult to sustain medical monitoring claims in Pennsylvania, a federal district court dismissed as untimely a putative class action alleging workplace chemical exposure. *Blanyar v. Genova Prods., Inc.*, No. 3:15-1303, 2016 WL 740941 (M.D. Pa. Feb. 25, 2016). Plaintiffs alleged that their employer unlawfully and fraudulently failed to inform or warn them about alleged occupational exposures to sixteen toxic chemicals, including vinyl chloride ("VC") and polyvinyl chloride ("PVC"). *Id.* at *2-3.

Claims for medical monitoring in Pennsylvania have a two-year statute of limitations starting from the moment an individual was "placed at a significantly increased risk of contracting a serious latent disease." *Id.* at *5 (internal quotation marks and citation omitted). Defendant's plant closed in 2012 but Plaintiffs filed their complaint in 2015. Plaintiffs alleged that Defendant's fraudulent concealment tolled the statute of limitations.

Even accepting Plaintiffs' claims as true, the Middle District of Pennsylvania concluded that Defendant's alleged activity did not give rise to the "affirmative independent act of concealment" required to toll the statute of limitations: "Mere non-disclosure is not a misleading act for purposes of tolling the statute of limitations." *Id.* at *6. The Court further noted that, by Plaintiffs' own admission, the harmful effects of VC, PVC, and other chemicals obviously used at Defendant's plant were "well-studied and well-documented" so as to place Plaintiffs on notice before the two-year limitations period expired. *Id.* The court therefore rejected Plaintiff's tolling argument and granted a defense motion to dismiss Plaintiffs' medical monitoring claims without prejudice.

AGENCY JURISDICTION

Michigan Court Defers to Regulator's Concurrent Jurisdiction in UST Cleanup

By: Graham Zorn

In a decision highlighting a practical challenge in pursuing tort claims against some underground storage tank ("UST") owners and operators, the Michigan Court of Appeals held that a trial court could nix a lawsuit stemming from a leaking UST while state regulators were already involved in an ongoing cleanup. *See Carson City Hospital v. Quick-Sav Food Stores, Ltd.*, No. 325187, 2016 WL 1719047 (Mich. Ct. App. Apr. 28, 2016).

The Michigan Department of Environmental Quality ("MDEQ") confirmed a release from a UST system at Defendant's gasoline station in October 2011. Defendant conducted a site investigation and found soil and groundwater contamination at the station and on neighboring properties, including at a medical clinic next door. Defendant engaged MDEQ in formulating a response, remediation, and monitoring plan pursuant to state regulations, although MDEQ had not approved a final corrective action plan as of late 2014.

The owner of the neighboring medical clinic brought suit against the gasoline station in September 2013, seeking damages and injunctive relief to address the contamination affecting the medical clinic property. The trial court granted a defense motion to dismiss, citing the doctrine of "primary jurisdiction," which allows a court to defer primary jurisdiction to a regulatory agency better positioned to apply its expertise to the issue. The court ruled that the MDEQ had primary jurisdiction to address issues related to leaking USTs, based on the agency's expertise and the authority the legislature delegated to the agency. So long as MDEQ was involved in addressing such issues, the court could defer the lawsuit as a matter of discretion and judicial deference to the agency. The dismissal was without prejudice, and the court noted that "it is not a matter of *whether* there will be judicial involvement in resolving a case, but instead pertains to *when* it will occur and *where* it will start." *Id.* at *7 (emphasis added).

On appeal, the Court of Appeals upheld the trial court's decision, holding that the trial court properly applied the primary jurisdiction doctrine. Here, the Court held that applying the doctrine and deferring to MDEQ's concurrent jurisdiction fulfilled the policy objectives of protecting the separation of powers, allowing the agency with the expertise and the regulatory authority over UST operators to do its job, and avoiding inconsistent results. With no MDEQ-approved remediation plan yet in place, "the full extent of corrective actions and remediation demanded of [Defendant] remained unknown and could have eventually been inconsistent with or adverse to equitable relief ordered . . . or adverse to monetary damages awarded on the basis of response costs and business and property-value losses." *Id.* at *11. The Court also emphasized that, because the trial court dismissed without prejudice, Plaintiff was free to re-file its claims after the administrative process ran its course.

DAMAGES

North Carolina Court of Appeals Caps UST Damages to Diminution in Property Value

By: Anthony Papetti

Illustrating the limits on damages available to North Carolina landowners in toxic tort cases, the North Carolina Court of Appeals upheld a trial court's order capping damages at the diminution in the value of the contaminated property. *BSK Enters., Inc. v. Beroth Oil Co.*, 783 S.E.2d 236 (N.C. Ct. App. 2016).

In a suit claiming nuisance, trespass, and violation of North Carolina's Oil Pollution and Hazardous Substances Control Act, Plaintiffs alleged that Defendant's leaking underground storage tanks contaminated the groundwater under Plaintiffs' property, a commercial warehouse and distribution facility. At trial the jury found that the contamination resulted in a $108,500 diminution in the value of Plaintiffs' property. The jury also awarded $1.5 million in reparation damages for the cost of remediating the groundwater beneath Plaintiffs' property. The trial court, however, capped the damages at the diminished value of the property and refused to award reparation damages.

The Court of Appeals affirmed the trial court's cap. The Court held that where the cost to restore the property is disproportionate to or greatly exceeds the diminution in value of the property, the proper calculation for damages is merely the diminution of the property's value. *Id*. at 249. The Court noted the "personal use" exception to this doctrine, whereby a plaintiff may recover reparation damages in excess of the diminution of value if the plaintiff's property has a personal use, such as a home. Here, however, Plaintiffs were business entities that did not qualify for the exception.

Court Upholds $1.6 Million C-8 Jury Verdict

By: Maryam Mujahid

In another development in the ongoing ammonium perfluorooctanoate ("C-8") multidistrict litigation, a federal trial court in Ohio upheld an October 2015 jury verdict against E.I. du Pont de Nemours and Co. ("DuPont"). *Bartlett v. E.I. du Pont de Nemours and Co.*, No. 2:13-CV-170, 2016 WL 659112 (S.D. Ohio Feb. 17, 2016). The case was the first to go to trial of the more than 3,500 personal injury or wrongful death suits in the C-8 multidistrict litigation.

A jury awarded $1.6 million in compensatory damages to a plaintiff who alleged that her kidney cancer was caused by C-8 in groundwater around a DuPont plant in West Virginia. The Court upheld the jury's verdict of $1.1 million for negligence and $500,000 for negligent infliction of serious emotional distress. The Court found that the verdict was supported by substantial probative evidence and denied DuPont's motion for judgment as a matter of law. The Court also found that the jury verdict was reasonable given the evidence at hand and that the award was not excessive under Ohio law, denying DuPont's requests for a new trial and remittitur (reduction or dismissal of the verdict award).