



GOLDBERG SEGALLA ^{LLP}

**Toxic Tort and
Environmental Law**

Toxic Tort and Environmental Litigation Update

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**GOLDBERG SEGALLA ATTORNEYS PUBLISH
ARTICLE ON POPCORN LUNG
IN DRI'S FOR THE DEFENSE**

Goldberg Segalla's Toxic Tort and Environmental Litigation team continues to be a leader in the defense and analysis of cutting edge issues. Goldberg Segalla attorneys David S. Osterman, a partner in the firm's Princeton, New Jersey office, Susan E. Van Gelder, a partner in the firm's Buffalo, New York office and Paul C. Steck, an associate in the firm's Long Island office, recently authored an article analyzing the scientific evidence and litigation landscape pertaining to respiratory conditions linked to diacetyl and other flavoring agents. The article, entitled *Searching for Kernels of Truth in the Litigation Maize*, was published in the Defense Research Institute's November 2008 publication, *For the Defense* and was co-authored with Dr. David H. Schwartz of Innovative Science Solutions, LLC. The article analyzes the scientific evidence and studies linking diacetyl exposure to the lung disease bronchiolitis obliterans, commonly referred to as "popcorn lung." The article discusses the current status of the diacetyl litigation nationwide and provides defense strategies, including combating both general and specific causation and the exposure levels necessary to cause disease.

If any of our clients and friends would like to receive a courtesy copy of this article, please contact Susan E. Van Gelder at her e-mail address or telephone number listed below. Goldberg Segalla would like to wish all of you a Happy and Safe New Year.

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SOLVENTS

Delaware

***Herring v. Ashland, Inc.*, 2008 WL 4335735 (Del. Super. 2008)(Sept. 19, 2008)**

Product Identification

Plaintiff claims that his deceased wife developed acute myelogenous leukemia (“AML”) as a result of exposure to Xylene, mineral spirits and Toluene manufactured by Shell during her employment with the Warner Graham Company. Defendant Shell brought a motion for summary judgment arguing that there were no facts upon which plaintiff could rely to establish that a product manufactured by Shell caused the decedent’s injuries. Plaintiff produced two co-workers who testified that they recalled unidentified Shell solvents on site at the decedent’s jobsite. Neither co-worker, however, recalled the specific Shell solvents actually used at the facility or the dates when these solvents were used. In granting summary judgment to Shell, the court noted that to establish a product nexus, the plaintiff must establish that the defendant’s product was present at the job site and that the plaintiff was in proximity to the defendant’s product at the time it was being used. In this case, there was no evidence that Shell solvents were actually used at the facility during the time the decedent worked in the solvent warehouse. The co-workers’ testimony only established that there may have been Shell products at the facility and did not place the decedent in the vicinity of those products while in use.

Kentucky

***Burton v. CSX Transportation, Inc.*, 2008 WL 4691059 (Ky. 2008) (Oct. 23, 2008)**

Expert Evidence

A former employee this brought action against his employer seeking recovery for permanent brain damage allegedly caused by exposure to toxic solvents at work. On appeal, the appellate court held that the employer’s expert toxicologist was qualified to give an opinion criticizing numerous studies indicating that exposure to chemical solvents caused brain damage. The court held that there was sufficient scientific basis to consider the opinion testimony valid and that the expert’s testimony was relevant to the issue of causation. The court also held that the literature reviewed by the employer’s toxicologist which criticized studies showing a causal link between exposure to chemical solvents and brain damage had sufficient scientific basis to be valid for purposes of determining whether the expert’s testimony was sufficiently reliable.

Pennsylvania

***The Bullen Company v. Workers' Compensation Appeal Board*, 2008 WL 4659379 (Pa. Cmwlth. WL Pa. 2008) (Oct. 23, 2008)**

Causation

An employer sought review of an order of the Workers' Compensation Appeal Board that affirmed a decision awarding total disability benefits to the claimant. The court held that the evidence supported a finding that the claimant did not know that his kidney disease was job related until a physician advised him of the causal link between the exposure and his illness. The court found that although the claimant had testified that he had previously suspected that his kidney problem was related to his job and had retained an attorney to secure medical experts to determine if there was such a relationship, the claimant's suspicion did not equate to discovery of whether the disease was job related. The court also found the evidence sufficient to support a finding of causation between the claimant's work with solvents and his kidney disease.

Texas

***Oakley v. AIR Products & Chemicals, Inc.*, 2008 WL 4525093 (E.D. Tex. 2008) (Sept. 29, 2008)**

Jurisdiction

In this chemical exposure case, plaintiff sued various defendants under products liability theories for damages resulting from the death of plaintiff Oakley. Plaintiffs contended that Mr. Oakley was exposed to chemicals during the course of his employment with various entities, which ultimately resulted in the development of acute myelogenous leukemia ("AML") and other blood diseases which eventually resulted in his death. Plaintiff conceded that diversity jurisdiction did not exist and relied on federal question jurisdiction including the private right of action found in 15 USC §2072. Plaintiff alleged that a certain defendant violated the Consumer Product Safety Act and its rules by introducing into the stream of commerce a misbranded hazardous substance and by mislabeling the product in violation of the federal rules. One of Mr. Oakley's former employers moved to dismiss for lack of subject matter jurisdiction. The employer argued that supplemental jurisdiction did not exist because the case against it was not part of the same case or controversy as the federal claim asserted against the other entity. The court denied the employer's motion and found that although Mr. Oakley ceased his tenure as an employee prior to the effective date of the federal laws involved, the two claims form part of the same case or controversy under Article III, and the court therefore should exercise supplemental jurisdiction.

Texas

In Re Union Carbide Corporation, 2008 WL 4891243 (Tex. 2008) (Nov. 14, 2008)

Interveners

Plaintiff Moffett filed a personal injury action in the District Court of Galveston County alleging that he was exposed to toxic chemicals distributed, marketed or manufactured by fourteen defendants and that this exposure caused him to develop acute myelogenous leukemia (“AML”). Family members of another employee, John Hall intervened in Moffett’s lawsuit. They alleged that Mr. Hall died from myelodysplastic syndrome caused by his exposure to toxic chemicals at Union Carbide’s Texas City facility. Some, but not all of the defendants sued by the Hall survivors were also defendants in Mr. Moffett’s suit. Union Carbide was a defendant in both the Moffett and Hall suits. Union Carbide served a motion to strike the Halls’ intervention because the Halls failed to show that they possess a justiciable interest in the Moffett suit. The trial court conducted a hearing on the motion to strike but did not rule on it. The trial court severed the Halls’ claims into a separate suit. Union Carbide petitioned the Court of Appeals for a writ of mandamus directing the trial court to rule on and grant its motion to strike. The appellate court found that the trial court abused its discretion in failing to first rule on the motion to strike. The appellate court reasoned that the Halls did not show that they possess any justiciable interest in the Moffett lawsuit and did not show that they had standing to have brought and recovered for any part of Mr. Moffett’s claim. Therefore, the appellate court ruled that the trial court had no discretion to deny Union Carbide’s motion to strike the petition and intervention.

Washington

Gardner v. Dept. of Labor & Industries, 2008 WL 4483421 (Wash. App. Div. 3, 2008) (Oct. 7, 2008)

Washington’s Industrial Insurance Act

Appellant Gardner was terminated from her employment in January of 2004 based upon excessive absences and a verbal altercation with another worker. Two years later, the appellant filed a claim with respondent L & I claiming that she suffered from toxic encephalopathy and toxic effects of petrol chemicals from the solvents she used during the course of her employment. She also filed a complaint alleging safety violations in her former workplace. In response, L & I made a surprise inspection of the facility and uncovered no violations and concluded that the exposure level for certain solvents were within permissible limits. L & I denied the appellant any benefits after it determined that the appellant’s condition did not constitute an occupational disease or an industrial injury. The appellant filed an appeal with the Board and the trial court reviewed the case *de novo*. Both the Board and the court determined that the appellant did not have an “occupational disease”. To demonstrate an occupational disease, the court focused upon the conditions giving rise to the disease and upon whether the disease itself was common to that particular employment. In affirming the lower court’s decision, the Appellate Court found that the appellant had not shown that the use of certain chemicals can cause any disease.

LEAD PAINT

Louisiana

***Wilhike v. Polk*, 2008 WL 4952780 (La.App. 4 Cir. 2008) (Nov. 19, 2008)**

Doctrine of Forum Non Valentum

A former resident of rental property, individually and on behalf of her minor child, filed suit against landlords, alleging that the child had been exposed to lead paint while residing in rental property owned by the landlords. The landlords asserted exception of prescription and the trial court granted the exception and dismissed the claim. The appellate court affirmed, holding that the doctrine of forum non valentum did not apply to suspend the one-year prescriptive period within which the plaintiff was required to file the claim against the landlords. The appellate court noted that the plaintiff failed to prove that her cause of action was not reasonably knowable to her more than one year prior to filing suit, and that knowledge that the child had lead poisoning more than one year earlier was sufficient to prompt further inquiry or action on the resident's part prior to the running of prescription.

Maryland

***Jackson v. Dackman Co.*, 2008 WL 4164916 (Md.App. 2008) (Sept. 10, 2008)**

Consumer Protection Act and the Reduction of Lead Risk in Housing Act

Tenant and her minor daughter brought this action against their landlord seeking damages under the Consumer Protection Act and the Reduction of Lead Risk in Housing Act for the daughter's lead paint poisoning. Both parties brought summary judgment motions, addressing various issues, including the constitutionality of the Reduction of Lead Risk in Housing Act ("the Act"). The Act bars persons at risk from filing suit for damages as result of alleged ingestion of lead paint while residing in affected properties that are in compliance with the Act at the time of the alleged ingestion. The Act codifies amounts of recovery the tenant is entitled to receive when certain criteria are established. The appellate court held that the Act was constitutional. The appellant's right to a jury trial was not violated because that right applies, specifically to issues of fact and since there were no disputed facts at trial, there was no issue for a jury. The court also found that the Act, which imposes limitations on damages, did not violate the appellant's right of access to courts and remedies because courts have consistently upheld statutes that abrogate or limit causes of action when they bear a reasonable relationship to the legislature's legitimate goals. In this case, the Act was enacted to reduce childhood lead poisoning, while maintaining a stock of affordable housing. The legislature reasoned that capping liability and limiting exposure to costly litigation for landlords who comply with the statute would provide an incentive to bring older rental properties into compliance with state law, thereby reducing the likelihood of lead paint exposure.

New York

***Wali v. City of New York*, 2008 WL 4647705 (N.Y.Sup. 2008) (Oct. 17, 2008)**

Ownership and Control of Premises

The City of New York (“the City”) moved for summary judgment on the ground that the City did not own the subject premises at the time the infant plaintiffs allegedly sustained injuries due to lead poisoning. Both plaintiffs and co-defendants opposed the motion arguing that questions of fact existed with respect to the City’s ownership and control of the premises. The court granted the City’s motion for summary judgment because the City submitted documentary and affidavit evidence that although it was the holder of a foreclosed tax lien on the property, title to the property was never transferred to it and was ultimately transferred by deed to another entity.

Ohio

***Ohio v. Sherwin-Williams Co.*, 2008 WL 4279579 (S.D. Ohio 2008) (Sept. 17, 2008)**

Removal

Plaintiff brought this action under state law, asserting that defendants created a public nuisance by selling lead pigment and paint in the State of Ohio. Defendant Atlantic Richfield (“Atlantic”) manufactured and sold lead pigment to paint manufacturers. Atlantic removed this action to federal court under 28 USC §1442(a)(1) and plaintiff sought remand to state court. In support of its removal petition, Atlantic contended that when it sold lead pigment to Ohio paint manufacturers, who in turn made lead paint for the federal government, Atlantic was acting as a federal contractor, thereby creating a right of removal. The District Court disagreed and remanded the matter to state court. The District Court reasoned that a private party cannot remove an action under the federal officer removal statute unless its product was produced *uniquely* for the federal government. In finding that Atlantic’s product was not produced *uniquely* for the federal government, the District Court noted that the materials supplied by Atlantic were “generic” and essentially an “off-the-shelf” product. The fact that the federal government closely regulated the production and price of lead, as well as the formula for lead pigment, did not by itself give rise to the special relationship necessary to establish removal under the federal officer removal statute.

***Richardson v. Boes*, 2008 WL 5050408 (Ohio.App. 6 Dist. 2008) (Nov. 21, 2008)**

Summary Judgment Reversed

The appellate court reversed the trial court’s order awarding summary judgment to the landlord finding that questions of fact existed concerning the landlord’s constructive knowledge of the presence of lead paint in the premises. The appellate court cited to the landlord’s deposition testimony where he acknowledged that although he did not receive formal training on the hazards associated with lead paint until after the claimed exposure, he had a general understanding that lead paint was found in older homes and could pose health risks to children. The landlord also acknowledged that the plaintiff had complained about chipping paint in the premises shortly after moving in.

Wisconsin

***City of Milwaukee v. NL Industries*, 2008 WL 4977587 (Wis.App. 2008) (Nov. 25, 2008)**

Jury Finding Affirmed

The City of Milwaukee (“the City”) appeals from a final judgment entered on a jury verdict in favor of the defendant, NL Industries. On appeal, the City argued that the evidence showed that NL intentionally caused the public nuisance found by the jury. After reviewing the record, the appellate court concluded that the evidence was sufficient to support the jury’s finding that NL did not intentionally cause the public nuisance found by the jury. In affirming the jury’s verdict, the appellate court concluded that “there is credible evidence in the record to support the jury’s conclusion that NL Industries did not know that the public nuisance found by the jury was resulting or was substantially certain to result from its conduct, where the dangers associated with lead dust . . . were unknown during the time NL Industries sold lead pigment and paint.”

MOLD

Arkansas

***Shea v. Coran*, 2008 WL 4336131 (Ark.App. 2008) (Sept. 24, 2008)**

Damages Reversed

In this property damage claim arising from the growth of mold due to drainage deficiencies, plaintiff Shea appeals a default judgment he obtained against the defendant. Judgment was entered following a bench trial on the issue of damages. For reversal, plaintiff contended that the trial court erred in allowing testimony that contradicted the statements in the complaint and further argued that the court’s assessment of damages was against the preponderance of the evidence. The appellate court reversed and remanded on the issue of damages, finding that the trial court “misstated the testimony in setting the amount of damages, which renders his findings clearly against the preponderance of the evidence.”

California

***Stearns v. Select Comfort Retail Corp.*, 2008 WL 4542967 (N.D.Cal. 2008) (Oct. 1, 2008)**

Class Action

Plaintiff brought this putative class action on behalf of all persons who purchased a Sleep Number bed designed, manufactured, distributed and sold by Select Comfort and its agents. Plaintiff claims that she discovered that mold contamination had developed inside of her mattress, causing her to suffer severe pulmonary distress. Defendants moved to dismiss claims two through six and all putative class claims. The court granted the motion, with leave to amend. The intentional misrepresentation claim was dismissed because the complaint failed to adequately allege reliance. The negligent misrepresentation claim was dismissed because the

complaint failed to allege the requisite details describing the context and nature of the misrepresentation. Plaintiff's breach of express warranty claim was dismissed because the complaint did not allege reasonable reliance and a breach of the warranty. The putative class action causes of action were dismissed because the plaintiff failed to demonstrate that a nationwide class action was the "superior" method for an adjudication of rights. The court noted that many differences in state laws for the fraud and warranty claims made it difficult to maintain a nationwide class action.

Michigan

***Riley v. State Farm Fire & Casualty Co.*, 2008 WL 4367473 (Mich.App. 2008) (Sept. 25, 2008)**

Set Off of Damages Award

Plaintiff filed a claim under her homeowners' policy for damages resulting from a leaky toilet, including mold growth. Due to the presence of mold and plaintiff's complaints of physical ailments, State Farm determined that it would best if plaintiff's family vacated the home during repairs. Plaintiff continued to suffer physical ailments following the repair work and brought suit against State Farm for, among other things, breach of contract. Plaintiff alleged that the mold remediation was unsuccessful and that she continued to suffer damages as result of the toilet leak. The breach of contract claim proceeded to a jury trial and the jury awarded plaintiff \$164,450 in damages. Following the verdict, State Farm requested a setoff from the jury verdict of the amounts it had already paid to plaintiff, as well as a set off of a settlement amount between the plaintiff and another defendant. The court agreed with State Farm and following the setoffs, plaintiff was awarded approximately \$30,000. On appeal, plaintiff argued that State Farm was not entitled to setoffs of the amounts it previously paid because the jury only awarded her damages that arose after State Farm discontinued paying benefits on her claims. The appellate court agreed, and reversed the trial court's order awarding a setoff for the amounts State Farm had previously paid.

Mississippi

***Bostwick v. State Farm Fire & Casualty Co.*, 2008 WL 4539562 (S.D.Miss. 2008) (Oct. 7, 2008)**

Bad Faith and Punitive Damages

This case involves a coverage dispute arising from property damage to plaintiff's residence following Hurricane Katrina. State Farm paid out certain insurance benefits and the issue in this case was whether the company owed more in policy benefits. The court found that State Farm's motion for summary judgment on the contract claims for mold damage and for contents coverage had merit. The court found that State Farm's conclusions on coverage were reached in a legitimate way and were not the result of bad faith, malice or gross negligence that would warrant punitive damages.

New York

Sorrentino v. ASN Roosevelt Center, LLC, 2008 WL 4410369 (E.D.N.Y. 2008) (Sept. 29, 2008)

Medical Monitoring

In this mold case, former tenants of an apartment complex brought a putative class action against the landlord challenging the termination of their leases. Defendants moved to dismiss the state law claims for medical monitoring and for violation of a state statute prohibiting deceptive acts or practices. The court found that an independent cause of action for medical monitoring was cognizable under state law, notwithstanding the claim that it could only be asserted in the form of a remedy. The court also determined that the plaintiffs had alleged an actionable toxic exposure sufficient to state a claim for medical monitoring under New York law.

ENVIRONMENTAL LAW

HLP Properties, LLC v. New York State Department of Environmental Conservation, 864 N.Y.S.2d 284 (N.Y. Sup. Ct., N.Y. Co., 2008) (Sept. 12, 2008)

DEC guidelines for eligibility into Brownfield Cleanup Program constitute impermissible attempt to legislate

The Supreme Court in New York County held that the Department of Environmental Conservation's ("DEC") use of its own administratively created guidance factors was an impermissible attempt to legislate.

Although the DEC has the authority under the Environmental Conservation Law (ECL) to create 'guidance documents' to help implement the ECL, the court found that the DEC's limiting guidelines for the Brownfield Cleanup Program Act (BCP) eligibility were an attempt to legislate and went beyond the definition of a Brownfield in the BCP legislation. The court found that the DEC denial of petitioner's application was arbitrary and capricious and/or an abuse of discretion. Petitioner's property was deemed to be a Brownfield site within the meaning of the BCP, and the site was accepted into the BCP.

East River Realty Company, LLC v. New York State Dept. of Environmental Conservation, 2008 WL 4694535 (N.Y. Sup. Ct., N.Y. Co., 2008) (Oct. 21, 2008)

DEC may not use 'but-for' test to determine if development of property is complicated by presence of contaminants

The court found that the DEC could not use a "but-for" test to determine eligibility to participate in the BCP. The test was used with respect to the Brownfield definition: any real

property, the development or reuse of which may be complicated by the presence or potential presence of a contaminant. In attempting to construe the meaning of the term “complicated”, the DEC “would consider whether remediation would have occurred without the benefits of the BCP.” If the remediation would have taken place regardless of the BCP, the site would be ineligible for the program and its benefits, and the application denied.

Although the state legislation was silent as to the origin of the term ‘complicated’, the court found it clear that the term was adopted from the federal environmental law, CERCLA, which uses the same term in the definition of a Brownfield. Under the federal definition, “complicated” means “where contamination can add cost, time or uncertainty to a redevelopment project”. The state legislature had in fact specifically rejected adding a but-for test in 2008 Amendments to the BCPA. The court held that the use of the but-for test by the DEC is an administrative determination not adopted by the courts, and not binding on the courts, and is therefore null and void. The properties at issue were accepted into the BCP.

***Sycamore Industrial Park Associates v. Ericsson, Inc.*, 2008 WL 4613874 (C.A.7 (Ill.) 2008) (Oct. 20, 2008)**

Seller of property with abandoned asbestos insulation is not liable under either the CERCLA or RCRA

Plaintiff purchased an industrial property with fixtures, including a boiler based heating system subsequently found to contain asbestos insulation. The plaintiff sued the defendant seller of the property under both CERCLA and RCRA to force them to remove and discard the asbestos and to reimburse the plaintiff for their costs incurred in such cleanup. The court found that the defendant Ericsson was not liable under either act, as there was no disposal or release under CERCLA and no active involvement in handling or storing materials under RCRA.

The court found that there was no disposal in this case. Without disposal, Ericsson is not a “responsible party” under CERCLA and liability does not attach. Ericsson sold the building with the fixtures inside it, and did not place the asbestos into or on any land or water so that it would enter the environment or be emitted into the air or discharged into any waters.

To establish liability under RCRA, the plaintiff was required to prove that Ericsson “has contributed or is contributing...to the...handling, storage, treatment, transportation, or disposal of solid or hazardous waste”. The court held that for the contributing language to apply to a defendant, active involvement in the handling or storing of materials is required. Some affirmative action must be taken, and merely leaving a heating system in place upon sale does not meet this requirement. Therefore, RCRA liability did not attach to Ericsson.

***United States v. Cinergy Corp.*, 2008 WL 4585421 (S.D. Ind., Oct. 14, 2008)**

District Court has power to order companies to remedy past violations of CAA

The District Court found that it had the power under the Clean Air Act (CAA) to impose equitable remedies upon the defendant Cinergy. Earlier in the year, Cinergy had been found by a

jury to have violated the CAA for emissions from four construction projects at the Wabash River plant in Terre Haute, Indiana. Defendants sought partial summary judgment with respect to the plaintiff's request for relief from past health and environmental effects, arguing that the court did not have the power to order relief for past effects, only prospective relief such as additional controls or limitations on emissions. Defendants' motions were denied.

The court looked to several Supreme Court decisions to adopt the rule that district courts retain inherent authority to award any equitable remedy that is not expressly taken away from them by Congress through "clear and valid legislative command" or "necessary and inescapable inference". The court is allowed to provide complete relief in conjunction with the statutory purposes. Furthermore, when the interest of the public is involved, the equitable powers of the court are even broader and more flexible.

The CAA, 113(b), invokes the court's equitable jurisdiction, and allows it to "restrain CAA violations, require compliance, assess civil penalties, collect fees, and to award any other appropriate relief". The court decided that this encompassed the authority to order relief to address past harms. Additionally, the purpose of the CAA is "to protect and enhance the quality of the Nation's Air resources so as to promote the public health and welfare." 42 U.S.C. § 7401. In this case, the court found that an order requiring defendants to remedy, mitigate, and offset harms caused by past violations would suit the purpose of the statute.

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