



GOLDBERG SEGALLA ^{LLP}

Toxic Tort and Environmental Law

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The scope of a manufacturer's duty to warn, particularly in complex toxic tort matters involving exposures over several years at job sites owned and operated by sophisticated companies has been an evolving line of case law throughout the country. Product manufacturers have with varying degrees of success attempted to limit or obviate any duty to warn argument in toxic tort cases by arguing that the plaintiff's employer was knowledgeable about the potential hazards of working with certain substances and was in the best position to warn the plaintiff and ensure that adequate safety measures had been taken to limit exposures. During the last quarter, the viability of this defense, often called the "sophisticated intermediary" defense, was arguably diminished by the appellate court decision in *Rickicki v. Borden Chemical*, 2009 N.Y. App. Div. LEXIS 2009 (4th Dept. 2009). As detailed more fully below, the *Rickicki* court reversed a trial court decision dismissing a silica case against multiple manufacturers on the basis that the plaintiff's employer was a "sophisticated intermediary" knowledgeable about the potential hazards associated with silica and was in the best position to warn and protect the plaintiff from those hazards. On appeal, the Fourth Department appears to question, but does not outright reject, the application of the "sophisticated intermediary" defense in toxic tort cases in New York. The court found, "assuming" that the sophisticated intermediary defense was "viable in New York" that questions of fact existed concerning the extent of the employer's knowledge and the adequacy of the defendants' warnings. While the court did not outright reject this important defense, it did not endorse its application and may give trial courts sufficient basis to reject the application of the "sophisticated intermediary" defense in toxic tort matters. At a minimum, the decision stands for the proposition that the adequacy of the warnings, and the scope of the employer's knowledge are typically questions of fact for the jury.

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MOLD

Illinois

***Wiseman-Hughes Enterprises, Inc. v. Harleysville Lake States Insurance Co.*, 2009 U.S. Dist. LEXIS 29797 (N.D.Ill. April 8, 2009)**

Duty to Defend

Plaintiff was a contractor that constructed residential properties. Purchasers of these properties alleged and through mediation sought damages for personal injuries arising from mold exposure allegedly caused by mold infestation in their new homes. Plaintiff brought suit against its insurer alleging that defendant breached the insurance contract. Plaintiff moved for summary judgment, and defendant moved for summary judgment on the counterclaims. The court found that questions of fact existed on both the duty to defend and coverage claims because there was conflicting evidence concerning the cause of the purchaser's claimed illnesses and the sources of the mold. Moreover, questions of fact existed concerning whether the insurer's failure to respond to the defendant's inquiries about mediation in the underlying personal injury claims constituted consent to the mediation.

Kansas

***Artholee v. Trinity Universal Ins. Co. of Kansas*, 3 So. 3d 611; 2009 La. App. LEXIS 170 (3rd Cir. Feb. 4, 2009)**

Exception of Prescription

Plaintiff personal injury claimants appealed a judgment which dismissed, pursuant to defendant insurers' exception of prescription, their suit for damages resulting from a toxic mold infestation at their prior workplace. Suit was filed more than one year after the periods of employment alleged. The insurers contended that the claims had expired by operation of the one-year liberative prescription of La. Civ. Code Ann. art. 3492. Claimants sought to rely on the doctrine of *contra non valentem*, contending that the facts underlying their claims were not reasonably knowable. In their depositions, however, both claimants testified that they were aware of unusual and debilitating symptoms during their employment and that they observed water leaks in the workplace and cleaned a grayish substance from the vents. In addition, one claimant smelled a foul odor in an air conditioning closet. The claimants did not present any evidence of a deliberate act of concealment. The court concluded that the claimants had actual knowledge of their symptoms sufficient to provoke an inquiry into the cause and that the facts were reasonably knowable. Thus, the claims had prescribed.

Louisiana

***Jenkins v. Slidella, LLC et al*, 2009 U.S. App. LEXIS 6572 (5th Cir. March 27, 2009)**

Expert Testimony

Plaintiffs in this mold related lawsuit appeal from the district court's grant of defendants' summary judgment motions dismissing plaintiffs' action with prejudice. Following the plaintiffs' designation of Chester J. Doll, Johnny Belenchia, and Ernest D. Lykissa as expert witnesses, defendants filed motions *in limine* to exclude the testimony of those experts for their failure to meet the requirements for expert testimony prescribed in Federal Rule of Evidence 702 and *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Defendants also filed motions for summary judgment conditioned on the success of their motions *in limine* to exclude the testimony of the plaintiffs' expert witnesses. The district court granted those motions and dismissed plaintiffs' suit with prejudice at their cost. On *de novo* review, the 5th Circuit affirmed, finding that the rulings of the district court were correct and proper.

Mississippi

***American Western Home Ins. Co, v. Utopia Acquisition L.P.*, 2009 U.S. Dist. LEXIS 23219 (W.D. Miss. March 24, 2009)**

Coverage

In this coverage dispute arising from an underlying mold claim, the insurer alleged that the underlying petition did not allege a "discharge, dispersal, seepage, migration, release or escape" of a pollutant, necessary to afford coverage. As these terms were not defined in the policy, they were accorded their ordinary meanings. The court found these terms to be sufficiently broad enough to encompass mold and other airborne contaminants that are discharged, dispersed or released into the air before being ingested or inhaled. Coverage was denied, however, because the underlying complaint alleged injuries resulting from "ingestion and/or exposure to mold and other airborne contaminants" rather than a discharge or release of a pollutant.

Missouri

***Haney v. Fire Insurance Exchange*, 277 S.W.3d 789; 2009 Mo. App. LEXIS 258 (Ct.App. Mo. Feb. 9, 2009)**

Duty to Warn

Plaintiff contractor sued defendants, insurer, adjuster and investigator, for fraudulent misrepresentation, negligence and civil conspiracy for personal injuries due to mold exposure. Plaintiff alleged that the defendants hired an investigator to test for the presence of mold at the premises and received a report confirming the presence of toxic mold. Plaintiff further alleged that although the insurer knew that he was working in the home intermittently, unaware of the mold or the risks it posed, they did not warn the contractor or disclose the investigator's findings for four weeks. The court dismissed plaintiff's complaint for failure to state a cause of action.

The court ruled that the claims sounded in premises liability, and such liability generally was limited to those who owned or controlled the property. Also, the contractor's factual allegations warranted no finding that the investigator undertook to provide services to anyone except the insurer.

New York

***Reid v. Gateway Sherman, Inc.*, 2009 NY Slip Op 1969; 875 N.Y.S.2d 254; 2009 N.Y. App. Div. LEXIS 1949 (2nd Dept. 2009) (March 17, 2009)**

Motion to Dismiss

This is an action to recover damages for personal injuries arising from mold exposure. Defendant Renaissance appealed from the trial court order denying its motion to dismiss the complaint. The appellate court affirmed, finding that the complaint stated a cause of action against Renaissance by alleging that it owned the building in which the toxic mold condition was present, it had notice of that condition, and it had a reasonable time to repair it, but failed to do so. The appellate court also found that the documentary evidence submitted by Renaissance was insufficient to warrant dismissal of the complaint because the documents failed to establish that Renaissance did not have notice of the dangerous condition or a reasonable opportunity to repair it.

Ohio

***Stanley Martin Companies, Inc. v. Ohio Casualty Group*, 2009 U.S. App. LEXIS 2758 (4th Cir. Feb. 12, 2009)**

Defense and Indemnity

Plaintiff insured sued defendant insurer seeking a declaratory judgment that the insurer breached its duty to indemnify the insured for costs it incurred to remediate mold damage caused by a subcontractor's defective work. On appeal, the court addressed the issue of whether damage that a subcontractor's defective work caused to a general contractor's otherwise non-defective work constituted an occurrence under the general contractor's commercial general liability insurance policy. The appellate court found that the policy's definition of occurrence was broad and inclusive, providing coverage for any accident or any event that took place without one's foresight or expectation. There was no allegation the insured either expected or intended that its subcontractor would perform defective work or that the spread of mold beyond the defective trusses was expected or intended. The court held, however, that any mold damage that spread beyond the defective trusses and the gypsum fire walls to nondefective components of the townhouses was an occurrence that triggered coverage.

Pennsylvania

***Snipes v. Liberty Mutual Ins. Co.*, 2009 U.S. Dist. LEXIS 24816 (E.D. Pa. March 24, 2009)**

Policy Exclusions

Plaintiff homeowners sued their insurance company, alleging that the company failed to pay a water-damage claim and that the failure to do so was in bad faith. Defendant moved for summary judgment and submitted evidence, which was not disputed by the plaintiff, that the leak was ongoing for several weeks, that the water damage had spread and mold was present. Under these circumstances, defendant argued that coverage was excluded under a policy endorsement which stated that losses arising from “seepage, meaning continuous or repeated seepage or leakage of water, steam or fuel over a period of weeks, months or years” were not covered. The court found the policy endorsement language unambiguous and granted defendant’s motion for summary judgment.

Texas

***Plunkett v. Connecticut General Life Insurance Co.*, 2009 Tex. App. LEXIS 1405 (Ct.App. 5th Dist. Feb. 27, 2009)**

Expert Testimony

Residents alleged that they suffered property losses and personal injuries arising from toxic mold contamination. Some of them also alleged that their personal property was converted. Summary judgment was entered against them and this appeal followed. In affirming, the appellate court rejected the argument that it was required to take expert opinions at face value on summary judgment. One expert did not provide any empirical evidence or methodology that explained the validity of his extrapolation that observations pertaining to the exposure of one resident's property were also applicable to all the other residents' property. Two doctors that testified did not conduct examinations or testing that would have been required to show causation as to the personal injury claims filed by the residents.

Washington

***Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. 537; 2009 U.S. Dist. LEXIS 1804 (W.D. Wash. Jan. 9, 2009)**

Class Certification

Plaintiffs, as class representatives, alleged that a defect in the decking and railing products manufactured by defendants resulted in fungal, mold, or mildew growth that caused extensive permanent discoloration. The court found that the requirements for class certification, for settlement purposes only, were met. The parties had provided the necessary notice under the Class Action Fairness Act. The court also approved the settlement as fair, reasonable, adequate, and in the best interests of the class members.

SOLVENTS

Third Circuit

***Public Citizen Health Research Group v. U.S. Dep't of Labor et al.*, 2009 U.S. App. LEXIS 3577 (3rd Cir, February 23, 2009)**

PEL Standards

A workers' union and an organization representing interests of electric power companies, asserted that OSHA established a standard which adopted an erroneous permissible exposure limit (PEL) for exposure of workers to toxic hexavalent chromium (Cr(VI)). The union and the organization separately petitioned for review of the standard. The union argued that the PEL provided inadequate worker protection based on improper findings that a lower PEL was infeasible, that a uniform PEL was appropriate, and that notification of workers was required only when the PEL was exceeded. The court found that the standard was properly adopted. The union's petition for review was granted in part with regard to worker notification, but the union's petition and the organization's petition were otherwise denied, and the matter was remanded to OSHA for further consideration of worker notification requirements.

Arkansas

***Skender v. Ameron International Corp.*, 2009 U.S. Dist. LEXIS 6479 (W.D. Ark. Jan. 20, 2009)**

Motion to Dismiss

Defendant served a motion for a more definitive statement and a motion to dismiss in a wrongful death action where plaintiff alleged that the decedent was exposed to paints, enamels, epoxies, coatings, paint additives, primers, solvents, thinners, reducers, or lacquers manufactured by defendants. Defendant argued that it was unable to frame a response to plaintiff's complaint because it failed to describe the specific products manufactured or distributed by the defendant to which the decedent was exposed. The court denied the motion reasoning that the Federal Rules do not require the plaintiff to set out in detail the facts upon which she bases her claims. The court also denied the motion to dismiss on the grounds that the complaint sufficiently stated facts to meet the "frequency, regularity, and proximity" test.

Delaware

***Collins v. Ashland, Inc.*, 2009 Del. Super. LEXIS 7 (Sup.Ct.Delaware Jan. 6, 2009)**

Product Identification

Plaintiffs, a painter's spouse, individually and on behalf of the painter's estate filed suit against defendants, including a manufacturer, alleging that the painter contracted acute myelogenous leukemia as a proximate result of exposure to benzene containing products manufactured by the defendant. The manufacturer moved for summary judgment on product identification. The trial court held that the painter's affidavit was not admissible as a dying declaration as it was not made

under a sense of impending death. The affidavit was also inadmissible as it lacked sufficient indicia of trustworthiness. Thus, the painter's affidavit and interrogatory responses could not create a fact issue on product identification. The court did consider a co-worker's affidavit placing the decedent in the vicinity of the manufacturer's product, which the court held was sufficient to defeat the manufacturer's motion for summary judgment on product identification.

Louisiana

***Leija v. Penn Maritime, Inc.*, 2009 U.S. Dist. LEXIS 8539 (E.D. La. Jan. 23, 2009)**

Expert Testimony on Causation

Plaintiff's husband was employed as a lead tankerman on defendant's vessel and was allegedly exposed to numerous toxic chemicals, including PAH. Decedent was diagnosed and eventually died from invasive squamous cell carcinoma. Decedent's physician testified that the known "traditional primary risk factors" for this type of cancer were smoking, alcohol intake and a genetic predisposition and family history for the disease. The treating physician denied being able to state medically whether decedent's cancer was caused by a workplace exposure to refined gasoline products. Defendant moved for partial summary judgment, arguing that plaintiff and plaintiff's expert could not carry the burden of proving that the decedent's cancer was, more likely than not, the consequence of his exposure to PAH during his employment. The court agreed with the defendant, reasoning that plaintiff's expert, who was not a medical doctor was not qualified to render an opinion on causation and that his opinion that PAH exposure *could* have caused the decedent's illness was insufficient.

***Shepherd v. Exxon Mobil Corp.*, 2009 U.S. Dist. LEXIS 20625 (M.D. La. March 11, 2009)**

Workers' Compensation Bar

Plaintiff brought suit against his employer and other parties alleging that he sustained injuries as a result of exposure to benzene while working on a Kirby barge located on Exxon Mobil premises. The employer served a motion for summary judgment arguing that plaintiff could not create a genuine issue of material fact relative to his claims of intentional tort and therefore could not assert a claim outside of workers' compensation. The court granted summary judgment in favor of the employer, finding that plaintiff failed to present any evidence to create a genuine issue of material fact relative to the incident being "intentional." The court reasoned that even if the employer had knowledge that a pressure release would likely contain benzene or of the dangers associated with benzene exposure, under Louisiana law, without evidence that it intentionally and consciously wanted the result of any alleged exposure, plaintiff's recover is limited to workers' compensation.

Mississippi

***John Pounds v. Rogersol, Inc.*, 2009 U.S. Dist. LEXIS 22207 (S.D. Miss. March 5, 2009)**

Statute of Limitations

Defendant moved for summary judgment arguing that plaintiff's benzene related personal injury action was barred by the applicable statute of limitations. The court found that plaintiff's strict liability and negligence-based claims accrued when plaintiff first had knowledge of the injury, not knowledge of the injury and its cause as argued by plaintiff. According to the court, plaintiff had knowledge of the ALL in September of 2002, at the time plaintiff was diagnosed with that disease. As such, under Mississippi law plaintiff had three years from that date, up to and including September of 2005, in which to bring the strict liability and negligence-based claims. As the Complaint was not filed until July of 2007, the Court held that the strict liability, negligence, and failure to warn claims were time barred.

Texas

***In Re: Allied Chemical Corporation*, 2009 Tex. App. LEXIS 557 (Ct.App. 13th Dist. Jan 27, 2009)**

Writ of Mandamus

Defendants, manufacturers and suppliers of chemicals used in pesticide facilities, sought a writ of mandamus to compel a trial court to grant their motions for summary judgment, to grant their motion to compel discovery, and to vacate a severance order in a toxic tort case involving hundreds of plaintiffs. The claims of one plaintiff were severed and set for trial. The manufacturers and suppliers challenged the adequacy of responses to interrogatories concerning exposure to chemicals and the diseases attributed to those chemicals. The court stated that in toxic tort cases, mandamus relief was appropriate to preclude the setting of cases for trial in the absence of an adequate interrogatory response linking each injury with a particular product. The order that severed and set for trial the claims of one plaintiff was proper because she provided the identities of medical experts who had attributed her alleged injuries to exposure to specific products. She also linked those products to specific defendants and calculated the approximate amounts of each exposure.

***Knapper v. Safety Kleen Systems, Inc.*, 2009 U.S. Dist. LEXIS 30118 (E.D. Tex. April 3, 2009)**

Waiver of Affirmative Defenses

Plaintiffs claim that Mr. Knapper developed leukemia because he was exposed to benzene in products manufactured or sold by the defendants over the course of his forty-year career. Mr. Knapper's work and the defendants' places of business are spread across the country. Defendants challenged plaintiff's choice of venue on multiple grounds. Defendants argued that the Eastern District of Texas is an improper venue and moved to dismiss the case. The court denied defendants' motions, on several grounds, including waiver. The court held "each defendant in this case has filed an answer to Plaintiffs' complaint. However, no defendant challenged this

Court's personal jurisdiction in its answer, in a separate motion under Rule 12(b)(2), or in any other fashion. Therefore, any personal jurisdiction defense has been waived.”

Washington

***Henricksen v. Conocophillips Com.*, 2009 U.S. Dist. LEXIS 10107 (E.D. Wash. Feb. 11, 2009)**

Plaintiff's Experts Excluded

Plaintiffs, a former gasoline truck driver and his wife, sued defendant gasoline company, alleging that the driver's acute AML was caused by occupational exposure to benzene in the company's gasoline. The company filed motions to exclude and motions in limine, seeking to exclude testimony and reports of plaintiffs' causation experts as well as the driver's treating physicians. The court analyzed the opinions to determine if the method the expert used to reach their conclusions was reliable. The court also examined the expert opinions to determine if they formed a sufficient causal chain to aid the trier of fact in reaching a conclusion on causation. The court ruled that there was too great an analytical gap between the data presented and the opinions offered, especially as to specific causation; therefore the expert testimony too speculative as a matter of law and the lack of scientific evidence on proximate cause mandated summary judgment in favor of the defendant.

SILICA

Tennessee

***Walker v. Moldex-Metric, Inc.*, 2009 U.S. Dist. LEXIS 23018 (E.D. Tenn. March 20, 2009)**

Prima Facie Showing of Impairment

In this silica lawsuit, defendant sought dismissal of the complaint on the grounds that plaintiffs failed to comply with Tenn. Code Ann. 29-34-3-4(a) which requires all plaintiffs to make an early prima facie showing of a physical impairment to which silica or mixed dust exposure was a substantial contributing factor. The prima facie showing must be in the form of opinion evidence from a "competent medical authority", which must be filed within 120 days after the filing of the complaint. Plaintiff failed to comply with the 120 day rule and the case was therefore dismissed.

New York

***Rickicki v. Borden Chemical*, 2009 NY Slip Op 2013; 2009 N.Y. App. Div. LEXIS 2009 (4th Dept. 2009)**

Sophisticated Intermediary Defense

Plaintiffs commenced this action seeking damages for injuries sustained by plaintiff husbands resulting from their inhalation of silica dust while working with defendants' products. The trial court dismissed plaintiffs' negligence and products liability actions based upon defendants' duty

to warn under a “sophisticated intermediary” defense. The appellate court reversed, finding that the defendants had not met their burden with respect to the negligence and products liability causes of action by establishing as a matter of law that they provided adequate warnings of the dangers of silica. Defendants argued, and the appellate court rejected, that plaintiffs’ employer was a “sophisticated intermediary” already knowledgeable of such dangers and was in the best position to take safety measures for its employees. The appellate court did not outright reject the viability of the “sophisticated intermediary” argument in New York, but the likelihood of success on any such argument in other toxic tort cases is more unlikely following this decision.

FOOD FLAVORINGS

Iowa

***Kuiper v. Givaudan, Inc.*, 2009 U.S. Dist. LEXIS 9156 (N.D. Iowa Feb. 7, 2009)**

Hearsay

Plaintiff employee alleged that he developed a respiratory disease as a result of his exposure to butter flavorings while he worked at his employer's popcorn manufacturing plant. By motion *in limine*, the employee sought to exclude medical records that referred to a daughter telling one of his doctors that conditions at his home were "filthy." The court determined that the daughter's motive in making her statement to the doctor was to help the doctor in his diagnosis and treatment. Moreover, it was clear that the doctor relied on the daughter's statement, noting in the records that conditions at home could be contributing to the patient's pulmonary problems. Accordingly, the court held that references the medical records to filthy living conditions were admissible hearsay under Fed. R. Evid. 803(4). The court denied defendants’ motion to preclude evidence concerning its’ employees’ health, finding that the probative value of such evidence outweighs any prejudice to defendants. The court also denied defendants’ motion to preclude Dr. Egilman from testifying. The court held that “while Dr. Egilman's prior checkered past gives the court some pause, the court cannot ignore the fact that Dr. Egilman is a physician, with a masters degree in public health, who is board certified in internal and occupational medicine with a specialty in occupational lung disease, has published dozens of articles over a wide array of health topics, and has been qualified to testify in numerous state and federal courts in the United States.”

LEAD PAINT

Missouri

***Allison v. Mouton*, 2009 Mo. App. LEXIS 399 (Ct.App. Miss. March 25, 2009)**

Disclosure of Mother’s Medical Records

Parents filed a lawsuit against defendants, homeowners and realtor, alleging that their child was exposed to lead paint while living in a residence owned or managed by the defendants. The

parents argued that the judge should be prohibited from enforcing its order requiring the father to execute a medical authorization that purported to permit the release of the mother's privileged medical records to defendants pursuant to a medical authorization signed by the father. The appellate court agreed. None of the homeowners' medical authorization motions were supported by an affidavit of a qualified medical expert explaining why and how the mother's prenatal, pregnancy and birth records were material and necessary to the defense.

New York

***Peguero v. 601 Realty Corp.*, 2009 NY Slip Op 443; 58 A.D.3d 556; 873 N.Y.S.2d 17; 2009 N.Y. App. Div. LEXIS 463 (1st Dept. 2009) (Jan. 29, 2009)**

Officer's Personal Liability

Children, who lived with their mother in an apartment building owned by the corporation, claimed that they suffered personal injuries as a result of their exposure to lead paint in their apartment. The principal of the corporation contended that the trial court erred by submitting the issue of his negligence to the jury, because he was acting in his capacity as an officer of the corporation. Because the principal did not object to this portion of the charge or request contrary instructions, the issue of the sufficiency of the charge was not preserved for review. Nevertheless, the court decided to reach the issue in the interests of justice, and found that the principal was to have a new trial as to liability because the court did not believe that the children could have responded to a specific objection by the principal by offering evidence to hold him liable. Additionally, the future pain and suffering awards deviated materially from reasonable compensation. The portion of the judgment imposing personal liability on the principal was vacated and the matter was remanded for a new trial on the issue of his liability, the awards for future pain and suffering were vacated and the matter was remanded for a new trial as to those damages only.

***Seye v. Ralph Sibbio*, 2009 NY Slip Op 3153; 2009 N.Y. App. Div. LEXIS 3083 (2nd Dept. 2009) (April 21, 2009)**

Motion for Summary Judgment

The infant plaintiff and her mother brought this action alleging that the infant plaintiff suffered lead poisoning as a result of exposure to lead paint while residing in the second floor apartment of a two-family house. Defendants moved for summary judgment under the *Chapman* criteria. The court denied the motion as premature.

***Lott-Coakley v. Ann-Gur Realty Corp.*, 2009 NY Slip Op 50778U; 2009 N.Y. Misc. LEXIS 944 (Sup.Ct. Bronx 2009) (April 23, 2009)**

Summary Judgment

Defendants served a motion for summary judgment arguing that there was no evidence evincing that there was a lead hazard at the subject premises. Defendants also sought summary judgment with respect to plaintiffs' claim that the infant plaintiff was exposed to lead within another apartment owned by the defendants on grounds that upon notice of the lead hazard, defendants

reasonably abated the hazard. After reviewing all of the evidence, the appellate court reversed the trial court's order granting defendants summary judgment, reasoning that the trial court erred in resolving issues of credibility and any inconsistencies between the plaintiffs' deposition testimony and their affidavits submitted in opposition to the motion presented issues for trial.

***Ortiz v. Joremi Enterprises, Inc.*, 2009 NY Slip Op 50454U; 2009 N.Y. Misc. LEXIS 543 (Sup.Ct. Bronx 2009) (March 13, 2009)**

Summary Judgment

The trial court denied plaintiff's motion for summary judgment, finding questions of fact on the reasonableness of the landlord's abatement efforts and proximate cause. The court cited to Local Law 1 which places a duty on landlords to abate a lead hazard. To avoid liability, a landlord must prove that, even though it violated Local Law 1, it was acting reasonably under the circumstances. The court held that, in the case at bar, under the "standard of reasonableness" defendants should be allowed to present to the fact-finder, their evidence that they made reasonable efforts to prevent a lead-paint hazard.

Ohio

***Nolan v. Citywide Development Corp., Inc.*, 2009 Ohio 65; 2009 Ohio App. LEXIS 56 (Ct.App. 2d Dist. Jan. 9, 2009)**

Lead Inspector Liability

After the inspector decided a lead paint hazard at the minor's home was abated, the minor's lead poisoning was found. The appellate court held the inspector's recklessness, under R.C. 2744.03(A)(6)(b), was not shown and affirmed the trial court's order dismissing plaintiffs' complaint. According to the appellate court, the inspector was not responsible for abatement specifications, nor did they have to include soil abatement or post-abatement soil analysis, as the prior owner covered exposed dirt, addressing any hazard. Industry standards did not require the inspector to use the procedure required to find if door casings were replaced, as specifications required, rather than painted over, and a visual examination gave no cause to think they were not replaced. Painting them with an encapsulant was proper abatement. Thus, it was not reckless to approve the project without knowing if the casings were replaced or encapsulated.

DIESEL EXHAUST

Nebraska

***King v. Burlington Northern Santa Fe Railway Co.*, 277 Neb. 203; 762 N.W.2d 24; 2009 Neb. LEXIS 29 (S.Ct.Neb. Feb. 27, 2009)**

Causation

Plaintiff alleged that the Estate's decedent became ill due to exposure to diesel exhaust emissions during his employment. The trial court determined that the differential etiology used by the

administratrix's expert was unreliable because the record did not show what causes other than diesel exhaust exposure were considered, because he ruled in diesel exhaust exposure as a possible cause, and because he failed to explain why he ruled out other potential causes. On appeal, the court held that the trial court abused its discretion by improperly requiring studies to show a definite conclusion on causation. The court held that individual epidemiological studies did not need to draw definite conclusions on causation before experts could conclude that an agent can cause a disease. The court reversed the judgment and remanded the case to the trial court for the parties to present methodology evidence and for the trial court to conduct a hearing focusing on the admissibility of the expert's opinion on specific causation.

ENVIRONMENTAL LAW

SEQRA

Develop Don't Destroy v. Urban Development Corp., 2009 WL 465770 (1st Dept. 2009)

SEQRA does not require an environmental impact statement to address the risk of terrorism

This case concerns a 22 acre development project in Brooklyn called the "Atlantic Yards". The multi-billion dollar project includes nearly 6500 housing units, thousands of square feet of commercial space, an arena for the Nets basketball team, eight acres of open space, and a new, covered rail yard. Plaintiffs claim, among other things, the environmental review by the Empire State Development Corporation was deficient because it failed to address the risk of a terrorist attack on the project. The court held that SEQRA, N.Y. McKinney's ECL § 8-0101, contains no provision requiring an EIS to address the risk of terrorism and such risk would not ordinarily be viewed as an environmental impact of a proposed action. The court specifically left open the possibility that there may be a case in which a proposed action by its nature would present a "significantly elevated risk of terrorism and consequent environmental detriment", providing as examples a nuclear storage facility and biological weapons laboratory.

RCRA

Scotchtown Holdings v. Town of Goshen, 2009 WL 27445 (S.D.N.Y. 2009)

Claims brought under RCRA must allege imminent harm or a present threat

A federal claim under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6972, was not the right avenue for a land developer attempting to stop defendants from using road salt and to recover damages. Plaintiff claimed that the Town of Goshen, New York, used and was continuing to use road salt with sodium chloride to remove snow from the highways, including those on land owned by plaintiff. The salt allegedly leached into the ground water, causing unsafe levels of sodium chloride for human consumption. Plaintiff claims it was forced to abandon plans to develop the area for residential purposes. The court found that RCRA required a present threat that was not alleged by plaintiff. Rather, as the levels of sodium chloride had contaminated the water, the threat to humans would never occur since they would

not be drinking the water. Waste that no longer poses a threat is specifically excluded from RCRA. The court made it clear that it was not condoning pollution and noted the decision should not be an impediment to claims by the plaintiff under alternative theories for either an injunction or damages.

Clean Water Act

United States v. Cundiff, 555 F.3d 200 (6th Cir. 2009)

Wetlands that have a continuous surface connection with waters of the United States will be subject to the Clean Water Act

The court determined that Kentucky wetlands on defendants' properties had a sufficient nexus with navigable waters, and so the wetlands were waters of the United States subject to the Clean Water Act. The wetlands were connected to creeks that were tributaries of a river that was a traditional interstate navigable waterway. The court relied on the tests set forth by the Supreme Court in *Rapanos v. U.S.*, 547 U.S. 715 (2006), to make its determinations. In that case, different tests were proposed by the plurality and by Justice Kennedy. It is not clear which test controls.

The significant nexus test was Justice Kennedy's test in his concurrence in *Rapanos*, whereby the Clean Water Act will apply to wetlands that possess a significant nexus to waters that are or were navigable in fact or that could reasonably be so made. If the wetlands significantly affect the chemical, physical or biological integrity of such navigable waters, a nexus will be found. However, there will be no nexus found where the wetlands' effect on water quality is speculative or insubstantial. The second test, the plurality test in *Rapanos*, requires that the adjacent channel contains a water of the United States and that there was a continuous surface connection between the wetlands and that water. Both the nexus and the plurality test were satisfied in this case, mainly due to the tributaries adjacent to defendants' properties.

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