GOLDBERG SEGALLA LLP

Toxic Tort and Environmental Litigation Update

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Goldberg Segalla's toxic tort team continues to monitor and report to our clients and friends on developing theories of liability and litigation trends. During the last quarter, climate change litigation continued to grow and plaintiffs found success in pursuing public nuisance claims against power corporations. In *Connecticut v. American Electric Power Co., Inc.*, 2009 U.S.App.LEXIS 20873 (2d Cir. 2009) (Sept. 21, 2009), various states, cities and land trusts sued multiple electric power corporations that owned and operated fossil-fuel-fired plants seeking abatement of their contribution to the public nuisance of global warming by reducing their carbon monoxide emissions. The District Court dismissed the plaintiffs' complaint on the basis that the matter involved a non-justiciable political question. On appeal, the 2nd Circuit disagreed, finding that there was no textual commitment in the Constitution that granted the Executive or Legislative branches responsibility to resolve issues concerning carbon dioxide emissions. The Court reasoned that the federal court was competent to deal with the issues presented in this case and that the complaint did not present a political question. The 2nd Circuit also rejected defendants' argument that plaintiffs' complaint should be dismissed because the current pollution statutes did not provide plaintiffs with the remedy they sought in this litigation. In rejecting this argument, the 2nd Circuit held that plaintiffs could pursue their claims under federal common law theories of public nuisance. In light of plaintiffs' recent victory at the 2nd Circuit, we anticipate that similar lawsuits will be pursued in other courts against other entities whose operations allegedly contribute to global warming.

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LEAD PAINT

Connecticut

***Fuentes v. New London County Mutual Ins. Co.,* 2009 Conn.Super. LEXIS 1929 (Sup.Ct. 2009) (July 16, 2009)**

Negligent Misrepresentation

The buyers purchased a home from a seller who held a homeowner's policy issued by the insurer. The seller represented that the house did not contain any lead paint. The house contained lead paint and resulted in injury to the minor child buyer. The buyers and seller entered into a stipulated judgment for $ 150,000, and the buyers agreed to seek enforcement against the insurer. In support of their motion for summary judgment, the buyers argued that they were entitled to payment of the stipulated judgment by the insurer because the insurer had a duty to defend the seller and by not doing so the insurer waived its right not to pay the stipulated judgment. The court concluded that the insurer did have a duty to defend the negligent misrepresentation claim. The alleged negligent actions of the seller were not intentional and, as such, would be deemed to be an occurrence that was covered by the subject policy.

District of Columbia

***Taylor v. District of Columbia*, 626 F.Supp.2d 25, 2009 U.S.Dist.LEXIS 50682 (D.C. 2009) (June 17, 2009)**

Supplemental Jurisdiction

Plaintiff brought 14 U.S.C. 1983 and common law tort claims on behalf of her children against defendants, District of Columbia and certain of its employees and a property owner for personal injuries arising from lead paint poisoning. The property owner defendant sought dismissal of the complaint, arguing that the court could not exercise supplemental jurisdiction over the common-law tort claims because the facts that gave rise to those claims did not form part of the same case or controversy giving rise to the federal claims against the District. The court granted the owner's motion, reasoning that the events that triggered liability for the owner and for the District were completely separate. The owner's liability stemmed from an alleged failure to remedy the lead-based paint hazard, and the District's liability stemmed from its alleged failure to compel the owner to remedy the hazard or to keep the children safe from harm while in foster care at the residence.

Georgia

***Brown v. Rader*, 2009 Ga. App. LEXIS 818 (Ct.App.Ga. 2009) (July 10, 2009)**

Defamation Claim

Tenants sued their landlords for defamation, emotional distress, and breach of contract, and sought damages, remediation expenses, attorneys' fees, and punitive damages after the landlord reported to the department of family services that she had seen the tenants in their home following a flood with confirmed toxic mold damage, without any masks or respirators. The court dismissed the defamation claim because the tenant admitted at her deposition that her son was sometimes in the home without a mask, and the landlord had reasonable cause for her allegation and was thus entitled to immunity from the slander claim. The court refused to dismiss the breach of contract claim, as summary judgment evidence that the landlords promised to pay for remediation of the property and

decontaminating and storing the tenants' possessions supported a promissory estoppel claim. The court reasoned that a fact finder could conclude from the apparently bitter nature of the dispute that the landlords' failure to perform some substantial portion of their alleged promises was the result of bad faith.

<u>Illinois</u>

***Suarez v. Playtex Products, Inc.* 2009 U.S. Dist. LEXIS 63771 (N.D.Ill. 2009) (July 24, 2009)**
<u>Motion to Dismiss</u>
Plaintiffs filed an amended complaint on behalf of themselves and others similarly situated against the manufacturer of an insulated baby-bottle cooler that plaintiffs allege was made of that the vinyl fabric containing dangerous levels of lead. Plaintiffs asserted claims for violation of the consumer fraud statutes of forty-three jurisdictions, common law negligence, and unjust enrichment. Defendants moved to dismiss the amended complaint. The court granted the motion because the plaintiffs failed to plead fraud with sufficient specificity. The court noted that the amended complaint failed to offer details as to when, where, or from whom they purchased the coolers and failed to furnish any information on the presence of lead in the products. The court also dismissed plaintiffs claim for medical monitoring because plaintiffs have alleged insufficient facts to allow the court to reasonably infer that their children may have been exposed to lead, requiring ongoing medical monitoring.

<u>Maryland</u>

***Green v. N.B.S., Inc.*, 2009 Md. LEXIS 283 (Ct.App. 2009) (July 21, 2009)**
<u>Cap on Damages</u>
Child's economic damages for her exposure to lead-based paint were capped at $ 515,000 under Md. Code Ann., *Cts. & Jud. Proc. § 11-801*. The Maryland Court of Special Appeals (intermediate court) held that *§ 11-801* applied to all actions for personal injury and wrongful death, that *§ 11-801* was constitutional under *Md. Const. art. III, § 33* and that the cause of action arose after October 1, 1995, but before October 1, 1996. The child's petition for a writ of certiorari was granted. The court held that the Maryland legislature, when it amended the cap statute, did not intend to expand the statute to cover wrongful death actions, but at the same time intended to narrow its application so it covered wrongful death actions and all actions for personal injury so long as the victims were injured as the result of common law torts. The trial court properly ruled that the cap statute applied to the child's claim for damages that arose, in part, out of a violation of the CPA.

<u>New York</u>

***Foster v. Friedman Management Corp.*, *2009 NY Slip Op 4354*, *63 A.D.3d 446*, *881 N.Y.S.2d 55* (1st Dept. 2009) (June 4, 2009)**
<u>Motion for Summary Judgment</u>
Plaintiffs allege that the infant plaintiff was exposed to lead paint both in his mother's apartment and in the apartment of his godmother who lived in the same building and often took care of him. Summary judgment as to liability for the injuries allegedly sustained by reason of exposure to lead

paint in the godmother's apartment was properly denied on the ground that an issue of fact existed as to whether defendants had notice that a child under the age of seven lived in the godmother's apartment. However, since defendants did not dispute that they had notice that a child under the age seven lived in the mother's apartment, and the Department of Health found that the lead condition in the mother's apartment constituted a nuisance and ordered abatement, defendants were found liable to plaintiffs for the injuries sustained by plaintiff in the mother's apartment. The matter was remanded to address the issue of damages.

DelaRosa v. 610-620 West 141 LLC, **2009 U.S.Dist.LEXIS 55058 (S.D.N.Y. 2009) (June 24, 2009)**

Diversity Jurisdiction

In this lead paint personal injury action, plaintiffs testified, contrary to the allegations contained in the summons and complaint that they resided in the Dominican Republic at the time of commencement of this action. Defendant subsequently filed a notice of removal to remove the action to this Court, asserting diversity jurisdiction. Plaintiffs moved to remand the action to state court, asserting the removal was procedurally flawed because (i) defendants are residents of the state in which this suit was originally filed and therefore there is no diversity jurisdiction, and (ii) defendant's notice of removal was untimely. The court granted the motion to remand and awarded attorneys' fees in favor of the plaintiff because the defendants' removal was patently frivolous inasmuch as it was undisputed that all of the defendants were residents of New York, which defeated diversity jurisdiction.

Harleysville v. 500 Ocean Apartment Corp.**, 2009 U.S. Dist. LEXIS 78080 (S.D.N.Y. 2009) (Aug. 26, 2009)**

Motion to Dismiss in Coverage Dispute

In this coverage dispute, plaintiffs insurers sought a declaration that they were not obligated under the terms of the applicable policies to defend or indemnify defendants with respect to claims arising from a lead paint personal injury action. Plaintiffs argued that no bodily injury occurred during the respective periods of policy coverage because the infant's blood-lead levels did not rise to 10 ug/dL - the level at which the CDC recommends that public health action be taken. Defendants moved to dismiss the insurer's complaint arguing that plaintiffs failed timely to disclaim liability under New York State Insurance Law, and are therefore estopped from denying coverage in this action. In denying the defendants' motion, the court found that whether the "bodily injury" covered by either or both of the policies in fact contemplated exposure to lead, is a question of fact that cannot be decided on a motion to dismiss. The court would permit re-consideration of the issue on summary judgment at the completion of discovery.

Wisconsin

Godoy v. E.I. du Pont, **2009 Wisc.LEXIS 285 (Sup.Ct. 2009) (July 14, 2009)**

Defective Design

The Wisconsin Supreme Court affirmed the dismissal of a child's design claims in strict liability and negligence against manufacturers of white lead carbonate pigment. The Supreme Court determined

that the circuit court correctly concluded that the complaint failed to state claims of defective design. A claim for defective design could not be maintained because the presence of lead was the alleged defect in design, and its very presence was a characteristic of the product itself. Without lead, there was no white lead carbonate pigment. Therefore, the Supreme Court reasoned the complaint failed to allege a design feature that made the design of white lead carbonate pigment defective

MOLD

California

***Stearns v. Select Comfort Retail Corp.*, 2009 U.S.Dist. LEXIS (N.D.Cal. 2009) (June 5, 2009)**
Class Certification
The customers claimed beds were defective due to mold. The manufacturer offered to repair the beds and when the customers refused the offer of repair, the manufacturer provided a full refund. The court found that *Cal. Civ. Code § 1793.2* did not provide the customers with any right to a defect-free bed in addition to the full refund. The breach of implied warranty of fitness claim failed because the customers did not allege a "specific use" that was "peculiar" to their business or their intended use of the beds. The claim of breach of implied warranty of merchantability was barred because the mold was not discovered until after the time limitations had run. The claims for intentional and negligent misrepresentation failed because the alleged actionable statements were mere puffery. The antitrust claims failed because it was apparent that the alleged injury was caused only by a defective part, not by any agreement to restrain competition. The complaint failed to show that the customers provided written notice of their Consumer Legal Remedies Act claim. The customers failed to state a claim under the "unlawful" prong of the California Unfair Competition Law (UCL). Defendants' motion to dismiss was granted with leave to amend only with respect to the customers' claims alleging negligence, strict product liability, breach of express warranty, violation of the Magnusson-Moss Warranty Act, and UCL claims. The motion to strike the customers' class certification was granted with leave to amend.

Georgia

***Encompass Ins. Co. v. Friedman*, 2009 Ga.App. LEXIS 672 (Ct.App.Ga. 2009) (June 12, 2009)**
Contractual Time Limitations
An insured filed an action for breach of contract, bad faith, and bad faith attorney fees against an insurance company. A Georgia trial court denied the company's motion for summary judgment. The company filed an interlocutory appeal. The company argued that the insured's lawsuit was untimely under the limitation period contained within its homeowner's policy. The policy provided that a lawsuit had to be started within one year after the date of loss. Georgia law was clear that contractual limitations were valid and would be enforced by the courts. Although the insured argued that the lawsuit was timely because it was filed on September 15, 2006, within one year of the date on which mold contamination was confirmed, the insured sought recovery for water damage and the resulting mold. The record was clear that the house had suffered water damage before September 6, 2005, the date on which an air conditioning company reported "condensation on insulation causing ceiling damage." The insured presented no evidence that would otherwise excuse her strict

compliance with the contractual time limitation. Thus, summary judgment was granted in favor of the insurance company.

Kentucky

***Pharmacists Mutual Ins. Co. v. Sutton*, 2009 U.S.Dist. LEXIS 47951(W.D.Ky. 2009) (June 8, 2009)**

Material misrepresentation in application for insurance

Insurer brought a declaratory judgment seeking an order voiding a homeowner's insurance policy on the grounds that insured failed to disclose the property's history of water and mold damage. The court denied the insurer's motion for summary judgment, finding a question of fact as to whether defendants' representations or omissions were material. To demonstrate that defendants' representations or omissions were material, the insurer must present evidence that it would not have accepted defendants' application had defendants stated the substantial truth, acting reasonably and naturally in accordance with the usual practice of insurance companies under similar circumstances. Moreover, the parties disputed the extent of damage or loss, if any, caused by the broken water pipe or mold growth.

Louisiana

***Watters v. Dept. of Social Services,* 2009 La.App. LEXIS 1285 (Ct.App.La. 2009) (June 17, 2009)**

Apportionment of Fault

Class members were State employees who worked in an office building and were allegedly exposed to toxic mold while working in the building. The appellate court affirmed the finding of liability against the State and the award of damages to the class representatives, but amended the judgment to reduce the fault allocated to the State. The evidence presented showed that the State did not have the responsibility to maintain the building and that it leased a portion of the building. Given that the building owner purposefully allowed a persistent water intrusion problem that in turn resulted in the growth of an abundance of mold, a significant percentage of the fault should have been allocated to the building owner. Applying the Watson factors, the lowest amount of fault that could have been allocated to the building owner was 65 percent. Thus, the judgment was amended to reduce the fault allocated to the State from 100 percent to 35 percent.

***In Re: FEMA Trailer Formaldehyde Products Liability Lit.*, 2009 U.S. Dist. LEXIS 59421 (E.D.La. 2009) (July 13, 2009)**

Motion to Reconsider

Plaintiff filed a motion for reconsideration on the court's ruling disallowing testing for mold in plaintiff's emergency housing unit. The court denied the motion which merely re-hashed arguments that were previously presented and ruled upon. The court would not permit the plaintiff to conduct mold testing to allegedly support his recently-made claims that mold contributed to his injuries. The court ruled, however, that evidence of mold in the unit would be admissible if offered to show an impact on formaldehyde levels.

***Cutrer v. Scottsdale Ins. Co.,* 2009 U.S. Dist. LEXIS 74105 (E.D.La. 2009) (Aug. 6, 2009)**
Remand Denied
Defendant insurer removed this coverage action arising from mold damage caused by Hurricane Katrina to federal court. Plaintiff sought remand, arguing that the insurer's removal was untimely and that the amount in controversy did not meet the applicable threshold. The court denied plaintiff's motion to remand, finding that the insurer's Notice of Removal was timely because it was filed within thirty days of having reasonably ascertained that the case had become removable. The court reasoned that it was not until the insurer received the discovery responses that the insurer became aware the circumstances were such that a favorable award for plaintiff would likely exceed $ 75,000, so as to fall within the scope of federal court jurisdiction. Having filed timely, the insurer then proved by a preponderance of the evidence that the claim would meet the requisite amount by setting forth tangible evidence such as documents of plaintiff's estimates and receipts.

***Stuckey v. Riverstone Residential SC. LP,* 2009 La.App. LEXIS 1465 (Ct.App.La. 2009) (August 5, 2009)**
Delictual Obligations
Tenants alleged that they had developed health problems as a result of toxic mold in their apartment. The lease agreement advised the tenants to operate the heating or air conditioning at all times to prevent mold and mildew growth and expressly stated that the management was not responsible for illness or other harm caused by mold or mildew. Upon receiving notice from the tenants of a mold problem, the management promptly had the apartment inspected and offered the tenants the use of another apartment, which they declined. The court held that the trial court properly found that the statute addressing delictual obligations relating to leased property, was applicable and was not superseded by the provisions in *La. Civ. Code Ann. arts. 2004*, *2696*, *2697*, *2699* governing contractual obligations. *Section 9:3221* did not impose a duty on the part of a lessor to inspect conditions over which a lessee had assumed responsibility. The evidence supported the trial court's conclusions that the owner and manager did not know and did not have reason to know of the alleged mold until the tenants notified them of it; thus, pursuant to *§ 9:3221*, they could not be held liable.

***Deutsch v. State Farm*, 2009 U.S. Dist. LEXIS 74436 (E.D.La. 2009) (Aug. 21, 2009)**
Policy Language Controls When Ambiguity Exists in Commissioner's Directive
Defendant insurer moved for partial summary judgment on insured's mold claims under a homeowner's insurance policy. The insurer argued that the insured could not recover for mold damage because the policy's mold endorsement unambiguously excluded coverage for mold damage regardless of its cause. The insurer did not seek to avoid its obligations with respect to any otherwise covered loss simply because mold-related damage occurs in the same area that was damaged by a covered loss. The insured contended that the policy's mold endorsement did not exclude coverage where mold results from a covered loss, but rather the exclusion only applies where the damage itself is caused by mold. The insured also argued that the interpretation of the mold endorsement would be contrary to the directives of the Insurance Commissioner. The court granted partial summary judgment in favor of the insurer finding that in cases where, as here, there was an ambiguity in the Commissioner's directives, the policy language controlled and the policy in question unambiguously excluded coverage for mold damage even when the mold was caused by a covered loss.

***Ronald Cutrer v. Scottsdale Ins. Co.*, 2009 U.S. Dist. LEXIS 75674 (E.D.La. 2009) (Aug. 24, 2009)**

Proper Party to Commence Coverage Action

Plaintiff commenced this action against his alleged insurer for mold damage to his arising from Hurricane Katrina. The insurer moved for summary judgment arguing that the plaintiff was not the proper party to commence this action because another entity, Construction Concepts was the true owner of the subject building. Plaintiff argued that the insurer's motion should be denied because he is the main member of Construction Concepts. The court denied the insurer's motion finding that a genuine issue of material fact existed because a rational jury could find that the plaintiff as a member/partner/employee is considered to fall within the class of persons covered by the insurance contract.

***Trade-Winds Environmental Restoration, Inc. v. Stewart*¸ 2009 U.S. Dist. LEXIS 76912 (E.D.La. 2009) (Aug. 24, 2009)**

Summary Judgment Granted to Insurer

During mold remediation work at a hotel, additional property damage to areas not affected by mold occurred when adhesive used to attach containment barriers were removed from unaffected areas, causing further damage to the property. On this motion to dismiss, the court addressed whether damage from the adhesive is covered under the contractor's policy as "property damage … caused by an occurrence that takes place in the coverage territory." The court ruled that the alleged adhesive damage to the walls and carpet that were not affected by mold was not an "occurrence," and the court further held that work product exclusions of the policy applied and thus excluded from coverage alleged adhesive residue damage to the walls and carpet of Heritage Plaza resulting from the placement and removal of containment barriers before, during, and after the mold remediation process.

Minnesota

***Buscher v. Montag Development Corp.*, 2009 Minn.App. LEXIS 146 (Ct.App.Minn. 2009) (August 4, 2009)**

Statute of Limitations and Sanctions

Plaintiff homeowner hired defendant contractors to remodel his home between 1996 and 1998. Starting in 2002, he experienced water-related mold problems. The homeowner hired an indoor quality expert to assess the home's air quality and the expert provided a written report, which was discussed with the homeowner. In 2004, the homeowner discovered another water leak and experts concluded that it was caused by defective construction during the remodeling. The homeowner sued in February 2006. The homeowner did not disclose the expert's report during discovery until 2007. He provided an affidavit in 2007, acknowledging the expert's testing, but failed to mention the written report. On appeal, the court agreed that the case was time-barred because the expert's 2002 report put the homeowner on notice of an injury that could have been found with due diligence. That same year, the homeowner also undertook repairs, which revealed shoddy construction, which were the same conditions cited in the complaint. The court also upheld the sanctions against the homeowner, its award of costs and disbursements, as well as a penalty against the law firm, finding that there was no abuse of discretion.

New York

***Milkis v. Condominium Lloyd 54*, 2009 NY Slip Op 29252, 24 Misc.3d 56 (1st Dept. 2009) (June 10, 2009)**

Negligent Parental Supervision

On the appeal it was held that the trial court properly exercised its discretion in denying defendants' belated motion to amend their answer, even though permission to amend is ordinarily freely granted. In denying the motion, the court reasoned that the proposed counterclaim advanced by defendants asserted that the plaintiff mother failed to adequately "interfere with" or take steps to reduce or eliminate the infant plaintiff's exposure to the mold condition giving rise to this lawsuit. According to the court, these counterclaims sound in negligent parental supervision, which, in the absence of limited exceptions, are not a viable cause of action.

***Holland v. W.M. Realty Management, Inc.,* 2009 NY Slip Op 5844, 64 A.D.3d 627, 883 N.Y.S.2d 555 (2d Dept. 2009) (July 14, 2009)**

Motion to Renew

Tenants were allegedly injured by toxic mold in their apartment. After most of the mold was removed, the tenants' industrial hygienist collected samples from the apartment that were sent to an environmental inspection firm for destructive testing. A small piece of wood from the ceiling cavity was retained by the hygienist. The hygienist's preliminary report indicated the presence of contaminated levels of fungi and bacteria in the samples taken from the apartment. When the tenants failed to make the mold samples available to the manager for nondestructive testing, the trial court precluded evidence of mold test results. The tenants then moved for leave to renew and reargue, providing evidence that the small piece of wood obtained from the apartment had been recently located, and that the testable "shelf life" of the swabbed mold samples was approximately only six months, which had long before expired. The appellate court found, inter alia, that the manager was not prejudiced since the samples had lost their testable value. Therefore, the tenants' motion for leave to renew should have been granted, and the order of preclusion vacated.

Tennessee

***Assurance Co. v. Continental*, 2009 U.S.Dist. LEXIS 49272 (Tenn. 2009) (June 8, 2009)**

Expected or Intended Injury Exclusion

In a declaratory judgment action arising from a claim that a contractor’s design and construction defects caused mold intrusion, with resulting personal injuries to the homeowners, the contractor’s insurer sought a declaration that the insurance policy issued to the contractor, did not require the insurer to indemnify the contractor for personal injuries because the policy contained an "expected or intended injury" exclusion that excludes from coverage "'[b]odily injury' or 'property damage' expected or intended from the standpoint of the insured." The insurer argued and the court agreed in granting the insurer’s motion for summary judgment that because the jury in the state court action found that the contractor had engaged in intentional misconduct, the carrier had no obligation to indemnify or defend contractor under the “expected or intended injury” exclusion.

Texas

***Horak v. Newman,* 2009 Tex.App.LEXIS 5629 (3d Dist. 2009) (July 21, 2009)**

Statutory Damages and Attorneys' Fees Awarded

The homeowners complained of water damage and mold. After the builder made repairs, the homeowners found additional damage. The court found the evidence sufficient to support an implied finding that the homeowners discovered or reasonably should have discovered the additional damage within the two-year limitations period. The court also held that the Residential Construction Liability Act did not apply because the builder made no settlement offer. The lay testimony from a skilled witness with personal knowledge was found sufficient to prove causation. Statutory damages under Tex. Bus. & Com. Code Ann. § 17.50(b)(1) (Supp. 2008) were properly awarded because the builder knowingly failed to act to prevent leaks. The homeowners were also entitled to attorney fees as prevailing parties.

Washington

***Mid-Continent Cas. Co. v. Titan Const. Corp,* 2009 U.S.Dist. LEXI 47366 (W.D.Wash. 2009) (June 5, 2009)**

Mold Exclusion

In this coverage dispute arising from a water infiltration at a condominium, the subject endorsement exempted from coverage "[a]ny costs or expenses associated, in any way, with the abatement, mitigation, remediation, containment, detoxification, neutralization, monitoring, removal, disposal, or any obligation to investigate the presence or effects of any fungus, mildew, mold or resulting allergens . . . ." The insured moved for summary judgment. In opposition to the motion, the insurer argued that the claims in the underlying state court action were specifically for "damage caused by fungus, mildew, and mold, all of which resulted from Titan's negligent construction." The court would not consider this evidence on the motion for summary judgment as inadmissible hearsay. The court granted the insured's motion for summary judgment finding that the insurer had provided no factual support for the applicability of the "fungus, mildew, and mold" exclusion.

SOLVENTS

California

***Venoco, Inc. v. Gulf Underwriters Ins. Co.,* 175 Cal. App. 4th 750; 96 Cal. Rptr. 3d 409; 2009 Cal. App. LEXIS 1078 (Ct.App.2d Dist. 2009) (July 1, 2009)**

Pollution Exclusion

Plaintiff insured appealed a summary judgment order, which concluded that tort liability claims against the insured fell outside the pollution coverage provisions in a liability insurance policy issued by defendant insurer. The appellate court affirmed the trial court ruling. The policy excluded toxic pollution coverage. An exception to that exclusion required the insured to notify the insurer within 60 days of an occurrence. The insured did not report any occurrences during the policy period. Thereafter, lawsuits were filed alleging exposure to toxic chemicals from the insured's oil wells over extended periods. The court found the 60-day time limit sufficiently conspicuous. Such provisions, known as pollution buy-back provisions, were common in the oil industry and did not contravene public policy. Because the coverage was conditioned on express

compliance with the reporting requirement, the time limit was enforceable without proof of prejudice.

Indiana

***1100 West, LLC v. Red Spot & Varnish, Co.*, 2009 U.S.Dist. LEXIS 47439 (S.D.Ind. 2009) (June 5, 2009)**
Motion for Sanctions
Plaintiff served a motion for sanctions seeking a default judgment and costs against defendant, and defendant's former attorneys arguing that these entities purposely withheld documents that were responsive to discovery requests and misrepresented the truth about defendant's use of trichloroethylene ("TCE") and tetrachloroethylene. The defendant denied that it purposefully withheld documents or that its' corporate witnesses lied about the company's use of solvents. The defendant further argued that it relied upon its' former counsel in drafting discovery responses and any errors in those responses were the responsibility of their counsel. Defendant's former attorneys asserted that they were not aware of "the fourteen critical documents" that evidence the use of both TCE and PCE on defendant's property. The court granted the motion for sanctions and issued a default judgment against the company, reasoning that company's conduct during discovery and depositions was contumacious, willful, and egregious. According to the court, defendant's former attorneys only "compounded the problem by, like a chameleon, becoming indistinguishable from its client" and allowing the company and its corporate representatives to evade the truth.

Kentucky

***Donaway v. Rohm & Haas Co.,* 2009 U.S.Dist. LEXIS 56574 (W.D.Ky. 2009) (July 1, 2009)**
Class Certification
Plaintiffs are residents of the neighborhoods located adjacent to defendant's chemical manufacturing facility that utilized numerous chemicals in the manufacturing process including Butadiene, Ethyl Benzene, Ethylene Glycol, Formaldehyde, Toluene, and Xylene . The proposed class encompasses all lawful residents and owners of property within approximately a two-mile radius of the plant. Plaintiffs' complaint alleged interference with the use and enjoyment of their property as well as diminution in property values due to air emissions from the plant. Plaintiffs also allege that they have suffered personal injuries. Plaintiffs brought a motion seeking class certification and approval of a class settlement. The Court found that the $700,000 settlement superior to other available methods for a fair and efficient adjudication of this lawsuit. The court also noted that because the lawsuit was being settled, it need not consider the manageability issues typically presented by a class action of this nature.

Louisiana

***LeBlanc v. Chevron,* 2009 U.S.Dist. LEXIS 64632 (E.D.La. 2009) (July 15, 2009)**
Limiting Medical Expert Testimony

In this benzene personal injury action, defendants initially were successful in precluding plaintiffs' medical proof on general and specific causation. On appeal, the 5th Circuit held that a recent report on benzene from the Federal Agency for Toxic Substances and Disease Registry (ATSDR)

warranted careful consideration and remanded the matter for further proceedings. Following additional discovery on these issues, defendants moved to exclude or limit the expert testimony of Dr. Gardner, Dr. Guidotti and Dr. Solanky. The court found that plaintiffs failed to submit sufficient evidence that is valid and admissible under *Daubert* and *Federal Rule of Evidence 702* which would support a finding that myelofibrosis is a form of aplastic anemia. The court rejected defendants' argument that Dr. Guidotti's opinion and Dr. Gardner's opinion regarding general causation between benzene exposure and the development of myelofibrosis should be precluded. The court found that based upon Dr. Guidotti's unsworn declaration, and certain Shell documents recently provided to Plaintiffs and re-examination of the significance of the *Tondel* report, whether benzene exposure causes myelofibrosis in the general population is a triable issue.

Missouri

***Whitehead v. Baxter,* 2009 U.S. Dist. LEXIS 70643 (E.D.Mis. 2009) (Aug. 12, 2009)**
Wrongful Death Damages
In this wrongful death action, plaintiffs were the surviving spouse and children of a decedent who was allegedly exposed to benzene during the course of his employment. Plaintiffs brought this action against the manufacturers who sold benzene-containing products to the decedent's employer. Defendants sought dismissal of plaintiffs' claimed damages for loss of consortium for the deceased's children, arguing that Missouri law only recognized the entitlement to such damages by a deceased's spouse. The court denied the motion, finding that complaint sought damages for loss of companionship for the children and the complaint's failure to separate these damages from the surviving spouse's loss of consortium claim was not fatal to the complaint.

Nebraska

***Vondra v. Chevron*, 2009 U.S. Dist. LEXIS 72296 (Neb. 2009) (Aug. 17, 2009)**
Sophisticated User Defense
Plaintiffs allege their decedents sustained injuries, including contracting Acute Myelogenous Leukemia ("AML"), by exposure to solvents containing benzene during the course of their work at Goodyear. Defendants sold products containing benzene to Goodyear. Defendants contend that they did not, as a matter of law, owe a duty to warn of an unreasonably dangerous product because Goodyear was a "sophisticated user" of the products. The parties contended that resolution of this issue required the court to determine whether Nebraska courts have adopted, or are likely to adopt the "sophisticated user" or "sophisticated intermediary" defenses. The court held that it need not make that determination because even if such a defense is available in Nebraska, the defendants had not presented evidence that shows, as a matter of law, that they are entitled to the defense. The court reasoned that these defenses required a defendant to show that reliance on a third party to warn ultimate users of a product's dangers was reasonable. According to the court, the evidence did not establish reasonable reliance. The evidence regarding the nature and extent of the defendants' knowledge of the danger, Goodyear's knowledge of the danger, and the plaintiffs' decedents' knowledge of the danger was in dispute.

Wisconsin

***Grace Christian Fellowship v. KJC*, 2009 U.S. Dist. LEXIS 76954 (E.D.Wisc. 2009) (Aug. 7, 2009)**

Preliminary Injunction

Following a gas spill which caused benzene contamination, plaintiff Grace, an adjacent property owner, brought a motion for a preliminary injunction. Grace sought an order requiring defendant "KJG to take specific investigatory and remedial steps to protect the children, teachers, staff, church members and employees who use Grace's building, from the gasoline saturated soils and 'free product' beneath Grace's building and the gasoline vapors which are emanating from under Grace's basement." After a lengthy hearing that included expert testimony, the court denied the request for a preliminary injunction because the plaintiff had not established that there was a complete exposure pathway from any gasoline vapors in the sub-slab under the Grace basement to the Grace building. Moreover, the court reasoned that the plaintiff had not shown that gasoline vapors were present in the Grace building creating "an imminent and substantial endangerment to health or environment."

ENVIRONMENTAL LAW

***Pakootas v. Teck Cominco Metals, Ltd.*, 632 F.Supp.2d 1029 (EDWA 2009)**

Indian Tribes Are Not Liable under CERCLA

The District Court for the Eastern District of Washington recently held that an Indian Tribe was not subject to liability for cleanup costs under CERCLA, 42 U.S.C. Section 9601 et seq. The court found that the Confederated Tribes of the Colville Reservation were not within the definition of “persons” under the statute, and Congressional intent to exclude Indian tribes from liability was clear from the language of the statute. The court pointed out that a tribe’s disposal activities would be subject to regulation under RCRA, SDWA, and CWA, all of which define “person” to include municipalities, and define “municipalities” to include Indian tribes. The decision was in response to plaintiffs’ motions to dismiss defendant’s CERCLA counterclaims.

***Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009)**

Lead Shot from a Gun Club Is Not Solid Waste under RCRA

Plaintiff homeowners in this Connecticut matter sued the defendant gun club, its members and guests, alleging violations of RCRA and CWA from the discharge and accumulation of lead shot on defendant’s property. The Second Circuit upheld the decision of the lower court to dismiss the plaintiffs’ complaint.

The RCRA claims were based on defendant’s alleged failure to dispose of hazardous waste with out a permit, and the lead munitions presenting an imminent and substantial endangerment. The court deferred to the position taken by the EPA, noted in an amicus brief by the United States, that the ordinary use of lead shot on a shooting range is not solid waste, because spent rounds are not discarded material and are not abandoned. Rather, they come to rest on the ground as a result of their proper and expected use. Additionally, plaintiffs failed to put forth sufficient evidence that the lead contamination would result in harm to human health or the environment and that the harm

was serious, even though some evidence showed soil samples from defendant's property to exceed the state regulatory standards for lead levels at residential sites.

The plaintiffs also attempted to claim that flooding created a hydrologic connection between waters on the property of the club and a nearby river, as well as a continuous connection between wetlands on the property and a tributary that flowed into the river. The main point in this matter for denying liability under CWA was that there was no point source, a discernible, confined or discrete conveyance, discharge from the property. Potential surface water runoff and windblown dust from a berm were insufficient to raise and issue of fact.

***Montville Twp. v. Woodmont Builders*, 2009 U.S. Dist. LEXIS 93629 (DNJ 2009)**
No CERCLA or State Law Liability Without Evidence of Actual Contamination
Plaintiff Township voluntarily remediated contaminated land and sued to recover the cleanup costs from a developer who contracted to build houses on a portion of the property and the previous owners. Before the previous owners held the property, it had been used as a fruit orchard, during which time the soil was contaminated with several hazardous chemicals including DDT, arsenic and lead, historically used as pesticides. Plaintiffs sued under CERCLA, the New Jersey Spill Act, and several common law causes of action.

The Township's claims against the developer were barred by a settlement agreement between the parties that specifically stated the Township would not make a claim under CERCLA or the state Spill Act. Even without the agreement, the court held that the developer would be entitled to summary judgment under both the federal and state claims, as the developer was not one who arranged for the disposal of hazardous substances. The developer was unaware of the soil contamination at the time it developed the lots, and so there was no evidence that it took intentional steps to dispose of a hazardous substance.

The court found that the claims against the previous owners of the land also failed. The plaintiffs alleged that the prior owners continued to operate an orchard, and that such operation resulted in the addition of contaminants to those already present. However, the Township's evidence failed to show that such use was continued. No documents were produced as evidence, such as receipts for the sale of fruit; payroll records; or an expert report alleging that the hazardous chemicals were introduced into the soil at the time defendant's owned the property. The court noted that a rough estimate of when the contaminants were introduced into the soil could likely have been given by tracking the degree to which the various pesticides had broken down to data from pesticides that had been introduced into the soil at a known time. Additionally, DDT would not even have been available at the time defendants owned the property, as it had already been banned from use.

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