AMERICAN BAR ASSOCIATION
Tort Trial and Insurance Practice Section

Fall 2019

# COMMITTEE NEWS

## Toxic Torts and Environmental Law

## Recent CERCLA Decisions in New York Highlight Strict Application of Pleading Standard

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### Synopsis

The importance of the *Twombly-Iqbal* standard is paramount to litigants sued under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 as amended ("CERCLA"), who can face strict liability if a claim survives the pleading stages. The procedural hurdle of this pleading standard is a substantive tool for defendants as evidenced by recent decisions, which suggest a strict application of this standard, from the Western District of New York and Northern District of New York.

The Western District of New York and the Northern District of New York recently issued decisions granting Defendants' motions to dismiss under CERCLA in *Elizabeth Andres et. al Andres v. Town of Wheatfield, No. 1:17-CV-00377,* 2019 WL 2491949 (W.D.N.Y. June 14, 2019) and Ward v. Town of Summer Hill, No. 518CV1053GLSATB, 2019 WL 2524733 (N.D.N.Y. June 19, 2019).

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### In This Issue

## Chair Message

Hello to all Committee Members!

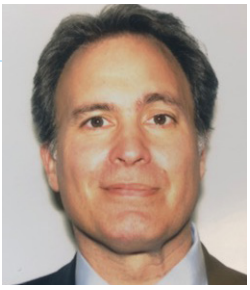
I hope everyone is enjoying Fall, and getting ready to welcome the New Year.

I would like to congratulate and thank our former Committee Chair, Jonathan Lively, for an outstanding job leading the TTEL Committee last year. Jonathan and the Committee's active membership did an amazing job putting on great programs this past year, and we are looking forward to continuing that path this coming year.

In the spirit of tremendous programming in beautiful places, mark your calendars now for our 29th Annual Spring CLE, which will be held April 3-4, 2020 at the Hotel Del Coronado, in sunny Coronado, California (right next to San Diego). Watch for the brochure coming soon. We are excited to build on last April's program, which was our first ever in Coronado, and was extremely successful. Thanks to Jeff Pypcznski and Randi Mueller (now Chair-elect) for planning such a great program, and special thanks to Jeff for agreeing to do it again this year!

Finally, I would like to thank our Newsletter Vice-Chair, Jason Botticelli, who has done a terrific job of pulling together informative and interesting articles. A big thanks also goes out to those who contributed articles. We are always looking for articles from our members, so don't hesitate to let Jason or me know if you would like to contribute to our next newsletter.

Please remember, this is your committee, so take advantage of the many opportunities to get involved. I encourage you to contact me at lkellner@lavin-law if you are interested in becoming active in the Toxic Tort and Environmental Law Committee or if you would like to know more about what we do.



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***Leland Kellner** is a shareholder in the Philadelphia office of Lavin, Cedrone, Graver, Boyd & DiSipio. Mr. Kellner concentrates his trial practice in automotive product liability, industrial and consumer product liability, automotive warranty litigation, and toxic tort litigation in Pennsylvania, New Jersey and New York.*

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## Editor Message

**Jason A. Botticelli**
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**Jason Botticelli** *is a partner at Goldberg Segalla LLP, working out of the Buffalo, NY office. He specializes in defending toxic tort and Product liability matters and is licensed to practice in NY and PA.*

It is my pleasure to present the TIPS TTEL Fall Newsletter, which features four articles addressing a diverse range of interesting topics, from analysis of recent NY CERCLA decisions to a discussion on the recent vaping deaths and the potential litigation that may be to come. We also have articles dealing with the toxicity of glyphosate and health and safety compliance in the cannabis industry.

I hope that you enjoy these articles. Committee members and nonmembers are encouraged to submit article proposals for upcoming Newsletters, the next of which will be published this coming fall. Articles must be between 1,000 and 3,000 words and must be relevant to recent legal, environmental and/or medical developments that would be of interest to those practicing toxic tort or environmental law. Please submit any proposed articles to me via email, in Word format: jbotticelli@goldbeargsegalla.com.

I would like to thank the authors that have taken the time to contribute to this edition, as well as the section members for their efforts in supporting this publication. A special thanks to Committee Chair, Leland Kellner, for his help with this Newsletter and for his leadership on this committee.

Sincerely yours,

Jason A. Botticelli

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# The State of Health & Safety Compliance in the Cannabis Industry: Are Your Workers being Protected?

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***Jason Lang** is board-certified Industrial Hygienist (CIH) and safety professional (CSP) who has worked in the field of Health & Safety consulting for over 10 years. Mr. Lang currently works with clients in many industries, including the cannabis industry, to aid in achieving and maintaining OSHA and State regulatory compliance and solving site specific issues and client concerns by performing Health & Safety site assessments and audits, monitoring employee exposures to chemicals and other hazards, providing up to date Health & Safety employee training, and by assessing laboratory compliance.*

The cannabis/CBD/hemp marketplace is expanding exponentially. According to the National Conference of State Legislatures, as of August 1, 2019, there are only four states that have no access to cannabis programs. All other states and the District of Columbia have some form of legal cannabis access, whether that be medical, adult recreational, or CBD (http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx). With this huge market, and the fact that cannabis markets are isolated within each state due to federal prohibition, the number of new cannabis businesses is staggering, with employment estimated at over 200,000 cannabis workers as of 2019 (https://mjbizdaily.com/us-cannabis-employees-increase-34-percent-2019). Businesses range in size from small operations to large multistate corporations. With the speed at which the cannabis industry is developing, it is not uncommon for a small operating business with only a handful of employees to expand to over a hundred employees in just a calendar year. Employers have a duty, both legally and ethically, to provide a healthy and safe work environment, and the cannabis industry is no different, regardless of the federal illegality of cannabis (https://www.osha.gov/Publications/all_about_OSHA.pdf).

The cannabis industry has some unique hazards and risks; however, issues with health and safety (H&S) compliance in the cannabis industry are no different than any other business. Ultimately, someone has to be responsible for implementing and maintaining H&S programs and procedures. Some businesses are very sophisticated and employ H&S professionals, have management systems in place, make H&S a part of their standard operating procedures (SOPs), and take a proactive approach to maintaining a healthy and safe work environment. However, this is not the norm. Often, H&S programs are ignored, or responsibilities are placed on staff that may have little to no experience or training. An untrained, inexperienced employee can easily become overwhelmed as they are not up-to-date with regulations and laws and are typically underfunded and understaffed to adequately complete the necessary work. Because of this, businesses often take a "head in the sand" approach to their H&S programs, until a focusing event takes place. That could be a major injury or incident, a regulatory inspection (OSHA), or perhaps the company is preparing for a sale of the business which is becoming increasingly common with cannabis businesses. Waiting for one of these focusing events can expose a business to serious legal and financial liability. Generally, H&S and OSHA compliance issues within the cannabis industry may include but are not

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# The Toxicity of Glyphoste: Disputed in the Laboratory and the Jury Room

Spending the better part of the last decade litigating asbestos claims, first at a plaintiff's firm, and now representing defendants alleged to have encountered asbestos, I keep getting asked the same two questions: when will asbestos litigation end, and what is the "next asbestos." Almost anyone that has worked in asbestos litigation will answer the former question the same. "We are done guessing because we all thought it would have ended by now." As for the latter, many other types of toxic exposure cases have come and gone, and few if any have had the impact close to what asbestos has had on a national level. Still because of the lessons we have learned with asbestos, when a new exposure comes around and results in large plaintiff's verdicts, mass tort litigators pay attention. Our attention recently has turned toward glyphosate.

Glyphosate is the active ingredient in Roundup, the most popular name brand for the world's most commonly used herbicide. It has been used residentially, but on a greater scale, commercially to selectively stop vegetative growth in farming. The amateur gardener likely knows Roundup as an effective weed killer. However, commercially it has multiple uses which include the killing of unwanted vegetation. Glyphosate can also be used directly on the crops that are intended to be harvested. Some crops such as corn and soybeans have been genetically engineered to tolerate certain herbicides. For these crops, grown as part of the "Roundup Ready" crop management program, the herbicide can be applied directly to them, killing any impeding vegetation and leaving the crops unharmed. Additionally, glyphosate is also used in desiccation, a process where the herbicide is applied directly to crops to aid in harvesting. The herbicide speeds up the harvest by killing the plants at the same time causing the crops to dry evenly.

Much like asbestos, usefulness of glyphosate is not in question. Asbestos is a great insulator and does a great job withstanding high temperatures. Similarly, glyphosate does a great job controlling unwanted plant growth, which helps to optimize crop yield. The problem with asbestos is that human exposure, under certain circumstances, can lead to life-ending disease. The most important question faced by manufacturers and users of glyphosate is whether it also causes debilitating illness. Originally, glyphosate was thought to be safe because it was designed to inhibit an enzymatic pathway required for protein analysis, which only exists in plants. After forty years of use, studies from seemingly reputable sources have reached opposite conclusions

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# The Next Big Thing? Vaping Deaths and Analysis of Potential Litigation Issues

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Vaping became so popular so quickly that it changed the social landscape. Almost overnight, it seemed as though walking to the door of the nightclub went from wading through the cigarette smoke of the tough guys standing outside to wafting through a realtor's dream odor mixture of banana nut bread and raspberry fruitiness. The sudden outbreak of reported deaths and lung injuries purportedly related to vaping has thus received spectacular attention in all forms of media. Everything seems to be moving a million miles a minute, and the potential legal liability seems immense. The purpose of this article is to take a step back, analyze what we currently know, and provide a broad legal backdrop to a hypothetical cause of the injuries.

At present, there is much that remains unknown about the alleged deaths and injuries stemming from use of vaping products. Here is what we do know: as of October 29, 2019, there are 1,888 cases of vaping product use associated with lung injuries reported to the Centers for Disease Control and Prevention ("CDC"), with 37 deaths confirmed, covering 24 states.[1] The outbreak has led to a flurry of activity relating to vaping products, including units of government attempting to ban their sales,[2] companies affected by those bans fighting back in court seeking to enjoin the imposition of the bans,[3] reports of disputed studies on whether e-cigarette vapor causes cancer,[4] and even large investors writing down billions of dollars of value of their investment in privately held vaping companies.[5]

The CDC has carefully noted that it has not identified the cause of the lung injuries in these cases, but the only commonality is that patients report the use of e-cigarette, or vaping, products. Further, the CDC notes that no one compound or ingredient has yet emerged as the cause of the illnesses, and that there might be more than one cause of the reported outbreak. Although there have been no conclusions reached, state and federal health officials have found the presence of the same chemical in samples of cannabis products used by people that have fallen ill,[6] and a preliminary report of 53 patients with lung illnesses in Illinois and Wisconsin found that 84% had used a product containing THC. The chemical additive is an oil derived from vitamin E called Vitamin E acetate and is the focus of New York's state investigation.[7] Although the FDA stated that it did not have enough data to conclude that Vitamin E acetate is the cause of lung injury, it also states that "the agency believes it is prudent to avoid inhaling this substance."[8] Clinicians in Utah and North Carolina have found the presence of abnormal immune cells in the lungs of some patients, which could be a useful marker for a diagnosis of a rare form of pneumonia known as lipoid pneumonia, according to findings reported by University of Utah in the New

England Journal of Medicine.[9] According to pulmonologist and critical care physician Daniel Fox at WakeMed Health and Hospitals in North Carolina, the present of the abnormal cells in the lungs can occur when either oils or lipid-containing substances enter the lungs.[10]

The purpose of this article is not to delve into what is actually causing the lung injuries and deaths. Doubtless, that issue is and will be the subject of much research and will become a central focus of the future litigation.

Given the initial reports, however, litigation is imminent. Indeed, it has already started -- Juul, the large e-cigarette manufacturer, was recently hit with the first wrongful death suit over its products.[11] Using past history as a guide, there will likely be widespread litigation over vaping products and the injuries and deaths now being reported. We do not know the cause of these injuries. It is important, however, to at least think about what legal issues might arise once a cause is known and plan accordingly. For purposes of this article, we are going to assume a hypothetical situation where the recent reported outbreak in lung injuries and deaths is that users of e-cigarette devices, also known as vape pens, are using THC products in the pens that contain Vitamin E acetate, and that the Vitamin E acetate is not being sufficiently heated in the pens during the inhalation process. The Vitamin E acetate is then reaching the lungs and causing injury. Again, this is not, by any stretch, currently proven.[12] Thus, this entire article is nothing but a large hypothetical. That said, if we assume this causation theory to be true and we gaze into a crystal ball as to the future of the oncoming wave of litigation, what do we see? The short answer is a mess. The longer answer is the rest of this article.

Initially, product liability varies by state, but everyone in the chain of distribution is potentially a defendant. That means the manufacturer, the distributor, the supplier, and the store that sells the product could all be on the hook. Usually, all defendants are named, but that is not true in all cases, such as when bankruptcy would impact a defendant's liability. The concept, though, is that the fault and liability falls primarily on the defendants best able to prevent the injury from occurring. Thus, most states will allow non-manufacturer defendants to get out of the case once a viable manufacturer is amenable to suit.

In our scenario, there are two potential product lines: the individual or entity that is making the THC product which is being inhaled, and the maker of the vaping pen device used to inhale the THC product. Although entire treatises can be written analyzing the law of product liability applied to these two potential chains of liability, this article's focus is meant to only provide a flavor (pun intended) of the potential litigation.

## Potential Theories of Recovery Against the THC Product Maker and Its Supply Chain

Under Section 402A of the Restatement (Second) of Torts, which most states have adopted and remains the starting point for discussion on American product liability law:

> 1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement (Second) of Torts § 402A (1965). In states that have adopted Section 402A, a product is deemed to be "unreasonably dangerous" if: (a) there is a physical defect in the product itself, or a "defective manufacture"; (b) a defect in the product's design; or (c) a failure of the manufacturer to warn of the danger or to instruct on the proper use of the product.[13] It would seem that the maker of the THC product under our scenario would face liability under the latter two theories.

Under a design defect theory, notably, Section 402(A) lacks a built-in standard for defining design defectiveness, which has led courts to adopt two primary tests, the "consumer expectation test" and the "risk-utility test." Depending on the law of the state being applied, either test may apply to our hypothetical THC product maker. Under the consumer expectation test, a product is defectively designed if the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Under the risk utility test, the inquiry is whether, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such designs. For our hypothetical THC product maker with the defective additive, the consumer expectations test would be a difficult hurdle to cross. However, arguably, depending on whether the particular case dealt with

medicinal uses of the THC product, the THC product maker would at least have an argument that the risk utility test may be met.

Under either test, the THC product maker still might be spared liability because of the "unreasonably unsafe product" protection of comment k to Section 402(A), which is commonly applied to makers of prescription drugs, usually on a case-by-case basis. Comment k to Section 402(A) delineates an exception to the strict liability standards of Section 402(A) for certain products deemed "unavoidably unsafe" from strict liability on the basis of defective design. If its product is found to be "unavoidably unsafe," then no there is no design defect liability for our THC product maker's product. Courts widely disagree as to when and how to apply comment k to prescription drugs. A minority of jurisdictions apply comment k's protections to manufacturers of all prescription drugs to strict liability suits based on defective design.[14] If not in such a state, assuming that the injured party used the THC product for medicinal purposes, the THC product maker at least would have an argument that it should fall under the safe haven rubric of comment k. In response, plaintiffs could likely raise three theories: (1) a THC product is not akin to the vaccines or prescription drugs that comment k has been applied to; (2) comment k's requirement that the drug maker "properly prepared" its product is not met with the use of Vitamin E acetate, as opposed to the use of another substance to achieve the same function; and (3) comment k requires the maker to have provided proper directions and warnings. Thus, the design defect theory of liability might merge with the other main area of potential liability for the THC product maker – failure to warn.

Under the failure to warn theory of liability, the THC product could be deemed defective if its manufacturer failed to provide adequate warnings regarding the risks associated with the product. This requires the plaintiff to prove that the manufacturer knew or should have known that the use of the product carries risks which the manufacturer failed to warn against. This theory of liability against the THC product manufacturer will thus likely turn to a battle of the experts over whether the manufacturer "should have known" about the dangers, which might involve searching for smoking gun texts or emails concerning the dangers of using Vitamin E acetate in our scenario. Further, a manufacturer must keep current with the scientific literature and discoveries in the field,[15] which might impact whether a duty arises at any particular point in time.

Interestingly, California and a handful of other states have passed Drug Dealer Liability Acts[16] that enable persons injured as a consequence of the use of an "illegal controlled substance" to recover damages from persons who knowingly participated in their marketing to shift the cost of damages to "those who illegally profit from that

market," but the Constitutionality and applicability of these Acts to our hypothetical THC product maker remains in question.

Further, the THC product manufacturer may also face liability for common law negligence, negligent misrepresentation, or even fraudulent misrepresentation. Under causes of action alleging negligence, the defense of comparative negligence may well reduce the plaintiff's recovery by the percentage of the plaintiff's own fault, given that the plaintiff may well have been inhaling a THC product illegally, or, in some states, eliminate recovery entirely if plaintiff is found to be over 50% at fault. Further, in the rare jurisdiction that still enforces common law contributory negligence or assumption of the risk, those affirmative defenses may eliminate recovery for the plaintiff altogether.

The THC product maker might also face liability under the U.C.C.'s implied theory of fitness for a particular purpose, which is essentially a guarantee that the product sold to the customer will be reasonably fit for its purpose. Clearly, the maker of the THC product to be used in a vape pen would know that its product will be heated and its vapors inhaled by its purchaser. Implied warranties require privity between the seller and the injured party, however, so, unless purchased in an internet sale, a plaintiff might not be able to assert this theory. Further, some jurisdictions may allow for the exclusion or modification of implied warranties.

## Potential Theories of Recovery Against the Vape Pen Manufacturer and its Supply Chain

Under the scenario where the Vitamin E acetate added to the THC product that is being inhaled using vape pens is the cause of the recently reported lung injuries and deaths, plaintiffs have the potential to also name and pursue the maker of the vape pen or e-cigarette maker, as well as all members of its supply chain.

For those of us raised in different times, the purpose of using a vaping pen, or e-cigarette, is to inhale only the vapor of the product going into it. The process involves heating the product to bring it to a boil. The batteries are sometimes pen-sized, but come in all shapes and sizes. One such battery allows the user to set the temperature for the boiling, with the concept being that the user could impact the effect of the product by increasing or decreasing the temperature.

Initially, users of vaping pens report that they are told by salespersons that the only product that will work in the vaping pen are products associated with the maker of the pen itself. For purposes of this article, we are going to assume that claim by the manufacturer is not correct, given that there seems to be inhalation of THC products

using the vape pens. Regardless, the makers of the vape pens will likely argue that they should not be held responsible for the plaintiff's misuse of their products and that the plaintiff cannot therefore establish proximate causation.

As noted above, with respect to strict product liability arising under Section 402A, a product may be deemed "unreasonably dangerous" if there is a "failure of the manufacturer to warn of the danger or to instruct on the proper use of the product." Under our scenario, that will likely lead to plaintiffs arguing that it was foreseeable to the makers of the vape pens that their pens could be used with THC products, and that THC products that included Vitamin E acetate caused the injuries. The liability, in such a case, might boil down (pun intended) to the foreseeability of the use of THC products in the vape pens, the sufficiency of the written warnings that the vape pen makers provide on their packaging and in their boxes to their customers, and whether the manufacturer had reason to know of the dangers such that a duty to warn arose.

Further, the makers of the batteries that are used in the vaping pens to heat the product may, themselves, face lawsuits and liability, as would all members of their respective distribution chains. Some of these battery devices allow for the user to control the temperature of the heating. A plaintiff might argue that should have been foreseeable to the maker of the batteries that improper heating of product that includes Vitamin E acetate might result in injury. Such a claim might seem defensible on factual grounds, but, once involved in a products liability action, one does not always get out easily. Further, the maker of the vape pens might be found liable for its component battery parts under this theory where it may have collaborated and contributed with the battery maker on the final design of the products.

## Conclusion

With the seemingly sudden onset of vape-related injuries and deaths, wild headlines, and fast-moving developments, it is difficult to ascertain the facts involving vaping's relationship, if any, to the injuries. Making the assumption – notably, one not proven – that a cause of these injuries is the presence of Vitamin E acetate that is being inhaled with THC products used in the vape pens, one can see that the wave of products liability litigation is going to involve numerous parties, detailed application of both old and new theories of liability, and potentially tens if not hundreds of defendants in each case. Due to the factual nature of many of the applicable defenses, the potential costs of defense, much less the costs of liability, are going to be exceedingly large. In this context, Altria's recent announcement that it is devaluing its 35% investment in Juul by **$4.5 billion** makes sense. A new wave of litigation, it seems, is upon us. Take a deep breath, but perhaps do not inhale.

## Endnotes

1 https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html (visited on November 1, 2019).

2 "As the Number of Vaping-Related Death Climbs, These States Have Implemented E-Cigarette Bans," Jamie Ducharme, Time, updated on October 11, 2019 (visited on November 1, 2019); "Governor enacts 120-day ban on flavored vaping products," Phil Drake, Great Falls Tribune, October 8, 2019, see https://www.greatfallstribune.com/story/news/2019/10/08/montana/3910301002/ (visited November 1, 2019).

3 "Michigan Vape Co. Drops Federal Suit After Ban Paused," Diana Novak Jones, Law360, see https://www.law360.com/articles/1215629/michigan-vape-co-drops-federal-suit-after-ban-paused (visited November 1, 2019); "Store Owners Resist State Vaping Bans as 'A Death Sentence For Their Business'", Colin Dwyer, NP,R see https://www.npr.org/2019/09/27/765002006/store-owners-resist-state-vaping-bans-as-a-death-sentence-for-their-business (visited November 1, 2019).

4 "Researchers find e-cigarettes cause lung cancer in mice in first study tying vaping to cancer," CNBC (October 8, 2019) (visited on November 1, 2019); but see Public Health England, "E-cigarettes around 95% less harmful than tobacco estimates landmark review," (August 19, 2015) at https://www.gov.uk/government/news/e-cigarettes-around-95-less-harmful-than-tobacco-estimates-landmark-review (visited November 1, 2019).

5 "Altria Cuts Value of Juul Stake by $4.5 Billion," The Wall Street Journal (November 1, 2019).

6 "Contaminant found in marijuana vaping products linked to deadly lung illnesses, tests show," Lena Sun, The Washington Post (September 6, 2019), see https://www.washingtonpost.com/health/2019/09/05/contaminant-found-vaping-products-linked-deadly-lung-illnesses-state-federal-labs-show/ (visited November 1, 2019).

7 "Up in Smoke: Where are Potential New Illnesses Tied to Vaping Leading the Cannabis Industry?," Adam Dolan, Drug & Device Blog (September 16, 2019), see https://druganddeviceblog.com/up-in-smoke-where-are-potential-new-illnesses-tied-to-vaping-leading-the-cannabis-industry/ (visited November 1, 2019).

8 Id.

9 Id., citing "Lung illness tied to vaping has killed 5 people as new case reports surge," Lena Sun, The Washington Post (September 6, 2019), see https://www.washingtonpost.com/health/2019/09/06/lung-illness-tied-vaping-has-killed-third-person-may-be-new-worrisome-disease-officials-say/?noredirect=on (visited November 1, 2019).

10 "Up in Smoke: Where are Potential New Illnesses Tied to Vaping Leading the Cannabis Industry?," Adam Dolan, Drug & Device Blog (September 16, 2019), see https://druganddeviceblog.com/up-in-smoke-where-are-potential-new-illnesses-tied-to-vaping-leading-the-cannabis-industry/ (visited November 1, 2019).

11 "Juul Hit with First-Ever Vaping Death Lawsuit," Emily Field, Law360.com (October 15, 2019), see https://www.law360.com/productliability/articles/1209609/juul-hit-with-first-ever-vaping-death-lawsuit-?nl_pk=385176b3-31aa-4ae3-9d59-aa70ba368f3e&utm_source=newsletter&utm_medium=email&utm_campaign=productliability&read_more=1&attachments=true (visited November 1, 2019).

12 Other potential causation theories exist, including that THC vaping products contain impermissibly high levels of pesticides, heavy metals, or fungus. However, they will not be discussed in this article, but nonetheless remain potential causes which might form the backbone of an alternative causation defense, depending on the particular case.

13 See, e.g., Mikolajczyk v. Ford Motor Co., 231 Ill. 2d 516, 901 N.E.2d 329, 335 (2008), opinion modified on denial of reh'g (Dec. 18, 2008).

14 See, e.g., Lindsay v. Ortho Pharm. Corp., 637 F.2d 87, 90 (2d Cir. 1980); Brown v. Superior Court, 44 Cal. 3d 1049, 751 P.2d 470 (1988); McKee v. Moore, 1982 OK 71, 648 P.2d 21, 23; Grundberg v. Upjohn Co., 813 P.2d 89 (Utah 1991); Young for Young v. Key Pharm., Inc., 130 Wash. 2d 160, 922 P.2d 59 (1996).

15 See, e.g., Braun v. Roux Distrib. Co., 312 S.W.2d 758, 763 (Mo. 1958).

16 See Cal. Health & Safety Code § 11700 (West), et seq.

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## Brief Refresher on the Twombly-Iqbal Standard

Prior to the rule articulated by *Twombly-Iqbal*, Courts applying Rule 12(b)(6) required only that "the complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[1] *Twombly-Iqbal* ushered in a new era where the courts are more stringent, requiring more than legal conclusions supported by plausible pleadings. "Detailed factual allegations are not required," rather "a short and plain statement of the claim showing that the pleader is entitled to the relief" is sufficient so long as there is sufficient factual matter to plausibly support the claim for relief.

This standard is even more accentuated in the context of CERCLA claims as a Plaintiff is required to plead specific statutory elements.[2] Since *Twombly* and *Iqbal*, courts and commentators alike have been grappling with their significance in the context of CERCLA. As summarized in a 2012 American Bar Association article, some legal commentators are convinced that these cases are of no real consequence in CERCLA litigation, while others predicted a sea change.[3] Similarly, courts analyzing CERCLA claims since *Twombly-Iqbal* have not been uniform in their application of this standard.[4] *Andres* and *Ward* demonstrate a rigorous application of the *Twombly-Iqbal* in the CERCLA context.

## Vague and Inconclusive CERCLA Claims Will Not Suffice

*Elizabeth Andres et. al v. Town of Wheatfield et. al.*[5]

The Plaintiffs in the *Andres* case, owners/renters of properties in proximity to the Nash Road landfill, alleged that they were exposed to toxic and hazardous substances emanating from it. Specifically, the Plaintiffs alleged damages as the result of the previous operation of a landfill that received waste from several corporations and municipalities including municipal, industrial, and hazardous waste. Plaintiffs alleged that despite the dangers that hazardous and other waste disposed of posed, the landfill site failed to post any warnings or signs, or to construct any fencing. Indeed, unaware of the landfill's previous operations, Plaintiffs used the area around and including the landfill for recreational purposes including biking and operating motorized vehicles leading to airborne migration of contaminants and even the transport of waste offsite. The landfill was operated between 1964 and 1968. Years later, in 1981, the Department of Health investigated the landfill and found that "the potential for migration of chemicals off-site is present."[6] In response, the Department of Health recommended an abatement and closure of the landfill site - which Plaintiffs claim was not done. Seven years later, the United States Environmental

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Protection Agency ("EPA") identified contamination in the groundwater, surface water and soils there. In 1989, the New York State Department of Environmental Conservation ("NYSDEC") investigated the landfill and, in line with the EPA's findings, recommended additional investigation into the potential for migration of contaminants, a further investigation into whether the regional aquifer was exposed to contamination from it, as well as requiring capping of the site, and construction of a fence. Plaintiffs alleged that despite these findings, no action was taken. In December of 2015, NYSDEC issued a notice informing residents of the exposure concern associated with the landfill.

Plaintiffs alleged that the Town "affirmatively acted to create and exacerbate toxic contamination at the site;" "sought or approved of the disposal of highly toxic chemicals;" despite requests from the Department of Health to permanently close the site, kept it open, concealed the risks, and "created a culture of deliberate indifference about the safety and conditions of the [Site] and its potential impact to Plaintiffs[.]"[7]

Plaintiffs filed their lawsuit in State Court on March 26, 2017 before the Town removed the suit to Federal Court on May 3, 2017. On October 27, 2017, Plaintiffs filed their First Amended Complaint, which defendants moved to dismiss. On June 18, 2018, the Court granted those motions with leave to amend.[8] On August 17, 2018, Plaintiffs filed their Second Amended Complaint and Defendants again moved to dismiss. On June 14, 2019, the Court dismissed Plaintiffs' allegations.

In addressing the standard of review in its decision, the Court hearkened to the *Twombly-Iqbal* standard stating that in order for a complaint to survive a 12(b)(6) motion, a plaintiff's complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[9] The Court further articulated the two-pronged approach for determining sufficiency of the complaint as "[f]irst, the court discounts legal conclusions and [t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements[.] Second, the court considers whether the factual allegations, taken as true, plausibly give rise to an entitlement to relief. This second step is fact-bound and context-specific, requiring the court to draw on its judicial experience and common sense. The court does not weigh the evidence nor evaluate the likelihood that a plaintiff's claims will prevail."[10]

Defendants moved to dismiss for failure to state a claim because Plaintiffs failed to plausibly allege (1) a theory of causation, (2) injuries, and (3) the essential elements of their claims under CERCLA.[11] The Court agreed that Plaintiffs failed to state a

claim to relief that is plausible on its face as required by the Federal Rules of Civil Procedure and the *Twombly-Iqbal* standard.

Regarding causation, the Court reasoned that Plaintiffs did not allege a "signature" injury linking the product to the alleged harm; that the allegations in the Complaint did not clearly state which substance caused the harm and in turn, whether a claim has been stated against a particular defendant. The Court found that the Complaint also did not allege how, when, or where the chemicals associated with the landfill entered Plaintiffs' properties.

The Court referenced several specific allegations in the Complaint as evidence of this deficiency. For example, one of the Plaintiffs alleged that he lived near the landfill for twenty-five years and "suffered and continues to suffer from personal injuries consistent with exposure to Defendants' toxic and hazardous chemicals including but not limited to: arrhythmia, hypertension, Coates disease, memory loss/ lapse of memory, rectal bleeding and skin cysts."[12] Another plaintiff claimed that she suffered rashes, anxiety, and sleep apnea. Yet another plaintiff claimed "asthma, anxiety hypothyroidism, migraine headaches, dry and itchy skin, fluid filled bumps on hands, eye irritation, and heart murmur…dental problems including weak enamel and multiple cavities which have resulted in several teeth extractions."[13] A fourth plaintiff alleged "hip dysplasia."[14] However, despite these specific allegations, the Court found that the Plaintiffs each failed to link those injuries to a specific cause.

Further, the Court found the allegations as to how the toxic materials from the landfill migrated onto the Plaintiffs' properties to be lacking. Specifically, the Court referenced the language from the Complaint that "[u]pon information and belief, Plaintiff's property was infiltrated by toxic components of the wastes disposed of[,] by[,] or for Defendants through groundwater seepage, soil vapor intrusion, surface water runoff from the Landfill, and other means…"[15] Without connecting any specific injury to any specific agent and mechanism of injury, the Complaint was insufficient.

Despite this first ground being sufficient to grant dismissal, the Court also analyzed Defendants' "challenges to the essential elements of the claims in order to facilitate appellate review and any further amendment."[16]

Regarding Plaintiffs' alleged injuries, the Court delineated the elements of a CERCLA 107(a) Cost Recovery claim necessary to plead a *prima facie* case as: (1) defendant is an "owner" as defined by the statute, (2) the site is a "facility" as defined by statute, (3) there has been a release or threat of a release of hazardous substances at the facility (4) plaintiff incurred costs responding to the release or threat (5) the costs and response conform to the National Contingency Plan; (6) and to plead a claim

under CERCLA 107(a)(4)(B) Plaintiffs must also allege that the costs incurred were "necessary. [17]" "If the plaintiff establishes these elements, 'the defendant is strictly liable for the presence of hazardous substances unless it succeeds in invoking one of the statutory defenses set forth in § 107 (b) (42 U.S.C.A. § 9607 (b) (West))."[18]

Citing to *Lozar v. Birds Eye Foods, Inc.,*[19] and *Cook v. Rockwell Int'l Corp*,[20] the Court agreed with Defendants that Plaintiffs' Complaint failed to specify which Plaintiffs incurred which costs. Furthermore, the Court took issue with the allegations that Plaintiffs incurred costs from substantial investigation and sampling costs, but the results of these investigations were not reflected in the Complaint.[21] Furthermore, the Court reasoned that Plaintiffs failed to include any results of their investigations as to the nature and extent of releases or threatened releases from the landfill. The Court found that absent these allegations, there was not a sufficient connection between alleged waste from the landfill and Plaintiffs claimed injuries. The Court further stated that the allegation that Plaintiffs incurred $80,000 in costs was insufficient to make out the element without specifying "at least one cognizable response cost incurred by each named plaintiff prior to filing the lawsuit."[22]

The Court then addressed Plaintiffs' Contribution claims under CERCLA 113(f): "[a]ny person may seek contribution from another person who is liable or potentially liable under [CERCLA § 107], during or following any civil action under [§ 106] or under [§ 107]. The Court found that because Plaintiffs failed to plausibly allege a Cost Recovery claim and the existence of a prior enforcement action, their Contribution claim must also fail.[23]

In sum, the Court agreed with Defendants that the claims were impermissibly vague and conclusory. Citing to *Twombly*, the Court held that the Complaint does not "give the defendant fair notice of what the…claim is and the grounds upon which it rests."[24]

Approximately two months after the *Andres* decision, on August 25, 2019, the same Judge dismissed the amended Complaint in *Bellafaire v. Town of Wheatfield*.[25] In that case, the Judge incorporated and adopted portions of the *Andres* ruling as the two complaints were "virtually identical."[26]

*Matthew Ward v. Town of Summer Hill et. al.*[27]

In *Ward,* Plaintiff brought claims against the Town of Summer Hill and Cayuga County under CERCLA alleging groundwater and property contamination from the Summer Hill Landfill, among other claims. Plaintiff alleged that his groundwater and property were contaminated with hazardous material from the landfill which was

"owned, operated, maintained[,] and otherwise controlled by the Town and County for approximately twenty years."[28]

In its motion to dismiss,[29] the County argued that Plaintiff's allegations were insufficient to state a claim as Plaintiff failed to plausibly allege that the County was a "responsible party" under CERCLA. Plaintiff, in response, argued that the County was a CERCLA "operator," claiming the County, in some fashion, exercised control over the landfill's operations. Plaintiff attached two exhibits in support of his argument that the County exercised sufficient control over the Landfill including FOIL requests, meeting minutes and field notes.

Analyzing the standard of review under a 12(b)(6) motion, the Court referenced its decision in *Ellis v. Cohen & Slamowitz LLP*.[30] In *Ellis*, citing to the standard in *Twombly*, the Court stated "[t]o survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'"[31] The Court went on to explain that to meet the standard under *Twombly,* "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Rather, the claim must be plausible on its face."[32]

The Court agreed with the County that Plaintiff failed to set forth a *prima facie* case under CERCLA. The Court reasoned that Plaintiff offered no reason why the Court should consider the exhibits to demonstrate his claim was sufficiently pled; but even if the Court did consider this material, the evidence did not suffice to establish the "operator" status of the County. Indeed, the Court adopted the County's argument that the field notes "repeatedly identify the Town as the owner and operator of the Landfill." Without sufficient allegations that the County is an "operator," Plaintiff did not plausibly state a claim and, accordingly, their case was dismissed as to the County.

## Conclusion

When faced with a vague or improperly pled Complaint, federal defendants already have the *Twombly-Iqbal* standard in their arsenal in seeking dismissal for failure to state a claim. The *Andres* and *Ward* cases present further ammunition to defeat an insufficient Complaint and suggest a possible trend towards a strict application of this heightened pleading standard. Specifically, Plaintiffs' CERCLA claims will be scrutinized to confirm they satisfy *all* necessary elements. Failing to plausibly satisfy any element – as in *Ward* – is fatal to the claim. In this regard, CERCLA's requirement that each of the several elements are pled to make out a claim compounds the

hurdle already established by *Twombly-Iqbal*. It will be important to watch if this trend continues, especially in the context of a Cost Recovery claim under CERCLA where defendants are strictly liable.

## Endnotes

1 (Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), abrogated by Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

2 (For a discussion of non-New York CERCLA cases see Open or Shut—Pleading Federal Environmental Claims After Twombly and Iqbal, Environmental Litigation and Toxic Torts Newsletter – July 2012, https://www.americanbar.org/content/dam/aba/publications/nr_newsletters/eltt/201207_eltt.pdf, accessed October 14, 2019).

3 ( Id.)

4 (Id.)

5 (US Dist Ct, WD NY, 17-cv-00377, Reiss, C., 2019). An appeal to the Second Circuit was filed on July 29, 2019. No decision has been rendered to date. An additional motion to amend is also pending. Harris Beach represents one of the co-defendants in this matter.

6 (Id. at *2).

7 (Id. at *3).

8 Defendants argued that the allegations in the Second Amended Complaint were nearly identical to the First Amended Complaint and that they remain vague and conclusory. (Id. at *4).

9 ( Id. at *4 citing to Elias v. Rolling Stone LLC, 872 F.3d 97, 2014 (2d Cir. 2017)).

10 (Id. [Internal citations omitted][Internal quotations omitted]).

11 Defendants also moved to dismiss for Plaintiffs' failure to state a claim of trespass and the Town moved to dismiss for failure to plead a Monell claim. Those claims are not addressed herein.

12 (Id. at *5).

13 (Id.)

14 (Id..

15 (Id. at *6).

16 (Id. at * 7).

17 The Court found that Plaintiffs' allegation of costs exceeding $80,000 and that their response was "consistent with the [NCP]" was sufficient at the pleading stage.

18 (Id.)(citing to Prisco v. A & D Carting Corp., 168 F.3d 593, 603 (2d Cir. 1999)).

19 (Lozar v. Birds Eye Foods, Inc., 678 F. Supp. 2d 589, 608 (W.D. Mich. 2009))

20 (Cook v. Rockwell Int'l Corp., 755 F. Supp. 1468, 1475 (D. Colo. 1991))

21 (Id. at *6).

22 (Cook, 755 F. Supp. at 1475).

23 The Court also addressed that Plaintiffs are not entitled to declaratory judgment under CERCLA because they have failed to state any claim under CERCLA. Harris Beach represented the County in this matter.

24 (Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

25 (US Dist Ct, WD NY, 17-cv-00377, Reiss, C., 2019).

26 (Id.at *1).

27 (US Dist Ct, ND NY, 18-cv-1053, Sharpe, G., 2019).

28 (Id.)

29 Plaintiff also brought claims under RCRA, common law negligence, private nuisance, trespass, and willful and wanton misconduct. Those claims are not addressed herein.

30 (Ellis v. Cohen & Slamowitz, LLP, 701 F. Supp. 2d 215, 218 (N.D.N.Y. 2010)).

31 (Id. at * 218).

32 (Id. [internal citations omitted][internal quotations omitted]).

*The State... Continued from page 5*

limited to: (1) a lack of OSHA required programs and employee training; (2) the use of flammable and irritating chemicals; (3) a lack of employee exposure data; and (3) the improper use of respirators.

## OSHA Required Programs & Employee Training

OSHA requires that all businesses develop and implement certain H&S programs, depending on the nature and the hazards of the business. For cannabis businesses, these generally include, but are not limited to: Illness & Injury Prevention and OSHA Recordkeeping, Emergency Response / Fire Prevention, Electrical Safety and Control of Hazardous Energy (LOTO), Confined Spaces, Hazard Communication, Laboratory Chemical Hygiene, Respiratory Protection, and Personal Protective Equipment (PPE).

Employees should be trained on how to respond to emergencies, the hazards (both chemical and physical) they may encounter in the workplace that may lead to exposures, how to handle and dispose of chemicals in the workplace, and the selection of appropriate personal protective equipment (PPE) for their respective work. Employees who wear respiratory protection must be trained on the proper use, inspection, storage, and care of their respirators. Maintenance staff should have a basic understanding of electrical safety, including lock out tag out (LOTO) and confined space training. All training information and program specific requirements are spelled out in an OSHA compliant, written program, and because one program "does not fit all", it is important that these programs be specific to the business and location of operation. The internet is a good resource for program materials; however, these materials must be modified to be site specific.

## Use of Flammable and Irritating Chemicals

Within cannabis grow, cultivation, and processing facilities, the wide-spread use of flammable and irritating chemicals is very common. Cleaning and extraction processes commonly use flammable organic solvents including ethanol, isopropyl alcohol and acetone and flammable gases include butane and propane. The improper use of and inadequate ventilation for such materials have led to facility fires and explosions (https://nmpoliticalreport.com/2016/03/18/video-explosion-rips-through-medical-marijuana-facility). Additionally, irritating chemicals containing bleach or peracetic acid solutions are used for cleaning and disinfecting surfaces and cleaning rooms after cultivation to prevent microbial growth. These chemicals can make it difficult to breath and can cause skin and eye irritation and damage.

## Employee Exposure Data

OSHA has established Permissible Exposure Limits (PELs) for nearly 500 chemicals. The definition of an OSHA PEL is an 8-hour Time Weighted Average (TWA) concentration that represents the highest level of exposure an employee may be exposed to without incurring the risk of adverse health effects (https://www.osha.gov/laws-regs/standardinterpretations/1995-10-06-3). However, most PELs were established shortly after OSHA was adopted as law in 1970, and have not been updated, such updates would require legislative approval. Therefore, OSHA PELs may be outdated and may not provide the adequate protection for all workplaces, but other recognized occupational exposure limits (OELs) can be utilized to promote safe work environments. Nevertheless, they are the current law and employers are required to protect employees from exposure exceeding these limits (https://www.osha.gov/dsg/annotated-pels). In order to control exposures below the PELs, the employer should understand (1) what chemical or physical hazard their employees are exposed to; and (2) what concentrations or levels their employees are exposed to. Employers may find published exposure data that exists in public resources that can provide some insight and allow for prioritization and decision making on ways to control exposures using ventilation or personal protective equipment (PPE). However, the only way to truly and accurately understand exposure risk is to conduct personal exposure monitoring by a professional such as a Certified Industrial Hygienist (CIH).

Certified Industrial Hygienists (CIHs) are professionals who have extensive training and experience in conducting exposure monitoring and exposure assessments, both personal employee exposure and premises monitoring. Employee monitoring involves a type of collection media that is attached near an employee's breathing zone, and which air is drawn into (either using a small pump or by natural air diffusion) and contaminates are collected. At the end of the assessment period, the media is sent to a laboratory for analysis and a contaminate concentration is provided. The concentration results may be compared to the PELs or other OELs of the materials and chemicals in use in the workplace to determine compliance. Once exposure risks are determined more precise decisions may be made concerning the need for and types of controls such as specific types of ventilation or PPE.

## Use of Respirators

The reasons employees may wear respirators in the workplace might fall into the following (1) The employer has done exposure monitoring and results have demonstrated the need to use a respirator to protect an employee from concentrations above PELs or other OELs; (2) The employer has done exposure monitoring and results

indicate respirators are not needed; however, the employee still desires to voluntarily use a respirator for comfort from odors or ease of mind; (3) No exposure monitoring has taken place but the employer and maybe employees believe they should wear a respirator and the employer provides such equipment; or (4) No exposure monitoring results are available and the employee brings his own respirator to the workplace because he feels he needs to wear something for ease of mind or comfort. The first two scenarios are the *only* proper and legal scenarios that any employee should wear a respirator. Respirators should never be handed out without knowing if they are required or voluntary; thus, after performing exposure monitoring. Additionally, employees should always be medically cleared to wear a tight-fitting respirator; and, all tight-fitting respirators need to be fit-tested on the employee annually. Also, employers must have an OSHA compliant, written Respiratory Protection Program with employee training, both voluntary use and required use.

## Conclusion

All employers, including those in the fast paced and growing cannabis industry, bear a huge responsibility in protecting employees and complying with H&S regulations. It is essential to a healthy and sustainable workplace that H&S programs and compliance begin as early as possible during a business' development and planning. Programs and procedures should be included in safe operating practices (SOPs). Health & Safety professionals like CIHs or Certified Safety Professionals (CSPs) have the experience and knowledge to navigate all of the H&S regulations. Compliance will lead to a happier, healthier, more safe work environment and help mitigate risks and liabilities.

*The Toxicity... Continued from page 6*

on whether glyphosate is toxic to humans. The chart below is a non-exhaustive look at some of the more frequently quoted studies on the subject.

| Date | Publisher | Finding |
|---|---|---|
| 4/30/19 | EPA | There are no risks to public health when glyphosate is used in accordance with its current label and that glyphosate is not a carcinogen. |
| 4/23/19 | Scientific Reports | Glyphosate exposure can induce the transgenerational inheritance of disease. |
| 2/10/19 | Mutation Research | Glyphosate exposure increases the risk of NHL by more than 40 percent. |
| 2/16/18 | Environmental Research and Public Health | Glyphosate has shown to be associated with the odds of premature mortality from Parkinson's Disease |
| 11/9/17 | Journal of the National Cancer Institute | No association was apparent between glyphosate and any solid tumors or lymphoid malignancies overall, including NHL |
| 5/24/16 | World Health Organization | Glyphosate is unlikely to pose a carcinogenic risk to humans exposed via the diet. |
| 10/30/15 | European Food Safety Authority | Glyphosate is unlikely to pose a carcinogenic hazard to humans |
| 3/20/15 | WHO/IARC | Glyphosate classified as probably carcinogenic to humans |

A comparison of the results of these studies is troubling. While one might think that we can look to science to provide objective answers to questions of toxicity, what we see are presumably reputable groups providing "objective" answers that contradict. Does this mean that one or more of the studies are incorrect? Are certain groups perhaps motivated beyond simply finding the correct answer? For instance, the IARC study was criticized by Reuters researchers for removing objective findings within a draft of their study that suggested Glyphosate was not a carcinogen. Ultimately IARC concluded that glyphosate was probably carcinogenic despite the contrary findings contained in the original first draft. Of course, no study

is perfect and because different studies take into consideration different inputs and assumptions, it is possible that the outcomes correctly reflect the data. It is also possible that two scientists can look at the same data and genuinely develop opposing conclusions. Still, it is hard to reconcile opposite results without suspecting some other confounder at play.

Take this conundrum and put it in a courtroom in front of six to twelve jurors with possibly no experience in farming, toxicology, or epidemiology. Add to this mix varying teams of lawyers and expert witnesses who are paid, in part, for their skills of persuasion. Not only is there a possibility that a jury could be swayed by a report or study that is the product of some internal bias, but there is also a guarantee that these attorneys and experts will attempt to influence the jury's task of finding the truth. This is the current state of affairs in the litigation against manufacturers, who incorporate glyphosate in their products. Other defendants who may not have manufactured the product, but caused others to use glyphosate may soon be brought into the fray. Of course, plaintiffs will have an uphill battle proving that any purchaser had knowledge of potential hazards when the manufacturer maintains to this day that the product is not harmful when used as directed.

Every case is different and the proper defense strategy will likely require an individualized assessment of the matter. This inquiry must include assessments of the specific court/jurisdiction and its history of handling toxic tort cases. Juries will ultimately decide whether or not glyphosate is harmful. Thus, the defense strategy must also include an assessment of the jury pool and prior verdicts from that jurisdiction. In such cases, national or in-house counsel for the defendants will be well advised to consult with local counsel to provide a foundational understanding of the landscape of the court in which the claims are filed. If the action is filed by a local plaintiff's firm, a local defense team, that has built a relationship with plaintiff's counsel, may also help in resolving the dispute before a jury decides whether to believe one or more studies, one or more experts, or one or more attorneys at trial.

To be sure, the large verdicts will attract more cases. While glyphosate litigation is still relatively new, over 17,000 plaintiffs have brought suits alleging damages from the pesticide. There is little incentive for the plaintiff's bar not to file these actions where the potential for a large verdict seems to be as likely as the potential for a defense verdict. Looking forward, a phenomenon known as *generational toxicology* could play a role in expanding glyphosate litigation. The theory posits that future generations can be affected by a prior generation's exposure to a toxin. If generational toxicology exists in persons exposed to glyphosate, we could certainly expect to witness a significant expansion of the pool of plaintiffs bringing suit against glyphosate related defendants.

## Calendar

| | | |
|---|---|---|
| December 8, 2019 | **Insurance Regulation Conference**<br>Contact: Juel Jones – 312/988-5597 | Winstead PC<br>Austin, TX |
| January 16-18, 2020 | **Life Health & Disability**<br>Contact: Danielle Daly – 312/988-5708 | Hotel Van Zandt<br>Austin, TX |
| January 29-31, 2020 | **Fidelity & Surety Law Midwinter Conference**<br>Contact: Janet Hummons – 312/988-5656<br>Speaker Contact: Juel Jones – 312/988-5597 | Grand Hyatt New York<br>New York, NY |
| February 12-16, 2020 | **ABA Midyear Meeting**<br>Contact: Juel Jones – 312/988-5597<br>Janet Hummons – 312/988-5656 | JW Marriott<br>Austin, TX |
| February 20-22, 2020 | **Insurance Coverage Litigation Midyear Conference**<br>Contact: Janet Hummons – 312/988-5656<br>Danielle Daly – 312/988-5708 | Arizona Biltmore Resort<br>Phoenix, AZ |
| March 5-6, 2020 | **Cyber Security Conference**<br>Contact: Janet Hummons – 312/988-5597 | TBD Atlanta, GA |
| March 14-18, 2020 | **20th National Trial Academy**<br>Contact: Janet Hummons – 312/988-5656<br>Danielle Daly – 312/988-5708 | National Judicial College<br>Reno, NV |
| March 27-28, 2020 | **Workers Compensation Conference**<br>Contact: Danielle Daly – 312/988-5708 | TBD<br>New Orleans, LA |
| April 2–3, 2020 | **Motor Vehicle Products Liability Conference**<br>Contact: Janet Hummons – 312/988-5656<br>Danielle Daly – 312/988-5708 | Hotel Del Coronado<br>Coronado, CA |
| April 3–4, 2020 | **Toxic Torts & Environmental Law Conference**<br>Contact: Juel Jones – 312/988-5597 | Hotel Del Coronado<br>Coronado, CA |

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