

Toxic Torts – Recent Relevant Decisions

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I. Introduction

Toxic tort litigation is a costly and complex type of legal work that is usually achieved through a solid, well-financed legal team that can fund experts and spend the amount of time necessary for a single case. The cases outlined in this paper are intended to provide attorneys with a broad overview of selected recent relevant decisions in toxic torts cases. The cases selected delineate the different causes of action in a toxic torts case and illustrate federal statutes and other state claims that can also be brought in a toxic tort action. The cases also depict the difficult task of adequately establishing all of the necessary and intricate evidence to prove a toxic torts case.

II. Cases

Families Concerned About Nerve Gas Incineration v. U.S., 380 F. Supp. 2d 1233 (N.D. Ala. 2005), came before the court on motion for summary judgment. Public interest groups brought a citizen-suit under the Resource Conservation Recovery Act (“RCRA”) that challenged the Army’s state-issued permit to operate a chemical weapons incinerator. Plaintiffs sought an injunction to shut down the incinerator alleging that the incinerator was in violation of its permit and did not have adequate monitoring devices to detect chemicals and toxins in the air. The court held that the incinerator was protected under the “permit shield” of Alabama’s

RCRA regulations. The evidence was insufficient to show that the incinerator failed to comply with the permit; therefore, the court presumed that the incinerator was in compliance with RCRA regulations simply because it operated under and complied with a state permit.

The “permit shield” under Alabama RCRA regulations provides that if the incinerator complied with the state hazardous waste permit, and was in full compliance with RCRA regulations, then the Army was entitled to summary judgment. *Id.* at 1245. Operators under the permit must: (1) have a contingency plan to demonstrate the facility’s reaction in an emergency situation, (2) inspect the facility according to a schedule, (3) design the facility to decrease the chances of a disaster, and (4) monitor emissions from the facility. *Id.* at 1246-1248. Because the evidence did not demonstrate that the incinerator acted against the permit’s requirements, the Army was granted summary judgment.

In response to entry of summary judgment for the defendants, in *Morgan v. Exxon Corp.*, 869 So.2d 446 (Ala. 2003), the plaintiffs appealed. Their original complaint alleged that the defendant oil company “operated six oil, gas and/or saltwater disposal wells, production equipment, disposal pits, and other facilities” on the plaintiffs’ property. *Id.* at 447. The plaintiffs claimed that the operation of the oil, gas, and disposal wells contaminated their property with “radioactive scales, residues, precipitates and other harmful, hazardous materials;” therefore, the plaintiffs brought their claims under the theories of negligence, nuisance, trespass to land, breach of contract, waste, strict liability, the tort of outrage, and conspiracy. *Id.*

The defendants offered the affirmative defense of the rule of repose. The court held that the rule of repose would be preempted by the Comprehensive Environmental Response, Compensation, and Liability Act, as amended by the Superfund Amendments and Reauthorization Act of 1986 (“CERCLA”). *Id.* at 448. More specifically, the plaintiffs would have to meet the elements of 42 U.S.C. 9658(a)(1) in order for Alabama’s rule of repose—“the passage of twenty years time from the moment that actions giving rise to the claim occurred”—to be preempted. *Id.* 42 U.S.C. 9658(a)(1) states as follows:

In the case of any action brought under State law for [1] personal injury, or property damages, which are caused or contributed to by exposure to any [2] hazardous substance, or pollutant or contaminant, [3] *released into the environment* from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the *federally required commencement date*, such period shall commence at the federally required commencement date *in lieu* of the date specified in such State statute.

The defendants argued that the plaintiffs must assert a valid CERCLA claim against the defendant in order to preserve their state law claims and invoke the federally required commencement date (FRCD). *Id.* at 449. The FRCD is “the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in 42 U.S.C. § 9658(a)(1) were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.” *Id.*

The court ultimately held that the plaintiffs did not present substantial evidence under the elements of subsection (a)(1), because they did not prove that

“(1) [their damages] were caused by exposure to a (2) hazardous substance (3) released into the environment.” *Id.* at 450. Because substantial evidence was not adduced, the rule of repose took effect and the trial court’s ruling granting the defendant’s motion for summary judgment was affirmed. Because the plaintiffs failed to present substantial evidence of a necessary element of the FRCD, the court declined to address whether plaintiffs must actually assert a CERCLA claim in order to invoke the FRCD.

In *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993 (11th Cir. 2004), landowners brought an action against the defendant scrap metal business alleging negligence, negligence per se, nuisance, trespass, violations under the Clean Water Act (“CWA”), violations under the Resource Conservation and Recovery Act (“RCRA”), and violations under state environmental statutes.

First, the United States Court of Appeals for the Eleventh Circuit held that the plaintiffs had standing to sue under RCRA and CWA. *Id.* at 1003. The plaintiffs presented factual information to show that their land and water was contaminated, and that the defendant allowed solid waste to migrate on their property. *Id.* The court held that an injunction granted under both federal and state statutes would redress the injury. *Id.*

Second, the court held that the plaintiffs’ CWA property claims were under the jurisdiction of the federal court. The court held that conditions delineated under the National Pollutant Discharge Elimination System (“NPDES”) qualified as an “effluent standard” under the citizen-suit provision of the CWA, which, in turn,

granted federal court jurisdiction. *Id.* at 1006. A permit established by the EPA and authorized under the NPDES qualified as an “effluent standard” and granted federal courts jurisdiction over CWA citizen suits alleging a violation of an EPA-approved state permit. *Id.*

Third, the court held that the plaintiffs established proper CWA violations. In order to establish a CWA violation, the plaintiffs must prove: “(1) there has been a discharge (2) of a pollutant (3) into waters of the United States (4) from a point source (5) without a NPDES permit.” *Id.* at 1008. Through pages of analysis and definitions of “point source” and “navigable waters,” the court held that although the defendants obtained a NPDES permit before the lawsuit began, plaintiffs presented sufficient evidence that no storm water monitoring had taken place as the permit required. *Id.* at 1010.

Fourth, the court held that the plaintiffs established proper RCRA violations. RCRA controls the regulation of disposal and hazardous wastes. *Id. citing* 42 U.S.C. § 6926(b). The plaintiffs succeeded on their RCRA claims because (1) the defendants did not have a permit to handle solid waste under RCRA; (2) the defendants did not have a permit to operate an open dump; (3) the defendants did not have a permit for a scrap tire generator; (4) the defendants unlawfully disposed of prohibited wastes that contained PCBs; and (5) the plaintiffs presented sufficient evidence to establish the defendants’ “past handling, storage, and disposal of hazardous wastes” that may have presented an imminent and substantial endangerment to the environment. *Id.* at 1011-1015.

Fifth, the court allowed the jury's verdict of a continuing nuisance to stand. *Id.* at 1016. Sixth, the statute of limitations did not bar the plaintiffs' claims for damages due to the "discovery rule" for environmental torts. *Id.* at 1017. The "federally required commencement date" found in 42 U.S.C. § 9658(b)(4) allows plaintiffs to sue within the four years time that they discovered the wrongdoing, and the lawsuit is not limited to the four years after discovery. *Id.*

In *Olden v. LaFarge Corp.*, 383 F.3d 495 (6th 2004), a class of 3,600 homeowners brought an action against LaFarge cement manufacturing plant for personal injury and property damage caused by toxic pollutants. The United States Court of Appeals for the Sixth Circuit held that the class was properly certified and that the individual class members could aggregate their damages to meet the amount in controversy requirement.

The district court granted class certification under Rule 23(b)(2) and Rule 23(b)(3). Rule 23(b)(2) class action certification is appropriate for the plaintiffs' request for injunctive or declaratory relief. *Id.* at 507. Rule 23(b)(3) class action certification is appropriate where questions of law or fact common to the members of the class predominate over questions of individual members. *Id.* LaFarge argued that common questions for the class did not predominate. The court addressed those arguments and specifically held that although individual damage determinations for personal injury and property damage claims would most likely be necessary, the plaintiffs raised common questions that would allow a court to determine liability

for the class as a whole. *Id.* at 508. The court affirmed the district court's ruling that the case could be bifurcated on the issue of damages and liability. *Id.* at 509.

In *LaBauve v. Olin Corp.*, 231 F.R.D. 632 (Ala. 2005), plaintiff property owners presented a motion before the court for class certification alleging property contamination caused by the defendant chemical plant. The plaintiffs claimed that their property value was lowered and also brought state law claims for trespass/wanton trespass, nuisance, absolute and strict liability, and fraud. The court held that in order for a class to be certified, they would have to verify that each putative class member had standing. The court granted standing for some plaintiffs and denied standing to other plaintiffs who did not have mercury test levels on their property that matched that of the dangerous mercury levels presented by the plaintiffs' experts. *Id.* at 648. Further, the court held that the plaintiffs' expert's model of proposed mercury readings at particular sites was uncertain and flawed by human interaction. Therefore, the expert's model was not enough to establish the plaintiffs' injury-in-fact. *Id.* at 649. Some plaintiffs did not present sufficient evidence to show that they were injured or were threatened by imminent mercury contamination. *Id.* at 650. One plaintiff in particular had standing to bring trespass and wanton trespass claims because of the high levels of mercury testing on her property. *Id.* at 665.

Plaintiffs proposed class certification to the court for two classes. Class A consisted of plaintiffs suffering property damage, subdivided into subclasses of air, ground, and water contamination. Class B would be comprised of commercial

fishermen whose industry was affected by the contamination. Although the plaintiffs presented enough evidence of air contamination, the court denied certification for Class A because the evidence was insufficient to support certification as to ground and water contamination. *Id.* at 665. The court ruled that they “cannot and will not certify amorphous, ill-defined subclasses based on mere speculation that plaintiffs might someday formulate meaningful definitions for those subclasses.” *Id.* at 664.

In *Rainer v. Union Carbide Corp.*, 402 F.3d 608 (6th Cir. 2005), uranium-enrichment plant workers in Kentucky brought an action for exposure to dangerous radioactive substances. The plaintiffs were not yet suffering from any symptoms of disease, but brought an action against General Electric, the supplier of uranium fuel, and plant operators. The district court rejected the plaintiffs’ claims for lack of present harm, and held that the Kentucky Workers’ Compensation Act provides for the exclusive remedy of the workers as needed. The United States Court of Appeals for the Sixth Circuit affirmed the district court’s decision because the Workers’ Compensation Act controls this case; the plaintiffs did not create a federal cause of action for public liability from nuclear incidents under the Price-Anderson Act; and the workers cellular damage was not a “bodily injury” under the Price-Anderson Act. *Id.*

The plaintiffs’ arguments alleging that the defendants had “deliberate intention” to cause injury or death failed to circumvent the Workers’ Compensation bar. *Id.* at 615. The court held:

[t]he definition of 'deliberate intent[ion] to produce injury' as used in the [Kentucky Workers' Compensation Act] is much narrower than 'intent' in general tort law, where the substantial certainty analysis is proper. And ... although a few states have either legislatively or judicially adopted the substantial certain[ty] standard for their intent-based exclusivity exception, none had their genesis in a federal court.

Congress enacted the Price-Anderson Act in 1957 to limit “legal liability of owners, operators, and suppliers of nuclear plants, and mandating that they purchase a specified amount of liability insurance.” *Id.* at 616 (citing 42 U.S.C. §§2011). The Act was amended in 1988 to create a federal cause of action “arising under nuclear incidents.” *Id.* The Price-Anderson Act required the plaintiffs to argue their “bodily injury” claim under the Act, but on the basis of Kentucky law. *Id.* at 617. The Court of Appeals held that Kentucky law requires a “present physical injury,” and the enhanced risk of disease is insufficient to bring a valid tort claim. *Id.* at 619. The court cited three public policy considerations to support their belief a state law tort claim would require a present, physical injury: (1) A case lacking a present, physical, injury would open the door for litigation for anyone with slight, subcellular damage; (2) the plaintiffs in this case would receive relief for only a nominal injury; and (3) the plaintiffs in the present case could not explain how damages would be calculated. *Id.* at 622.

In *College Park Holdings, LLC v. Racetrac Petroleum, Inc.*, **239 F.Supp.2d 1334 (N.D. Ga. 2002)**, the plaintiffs alleged Resource Conservation and Recovery Act (“RCRA”) violations and state statutory violations for the contamination of their

property caused by defendant's leaking underground storage tanks (USTs). As the court notes in this case, the purpose of a "citizen suit" under RCRA is to "authorize persons directly injured by environmental violation to act as private attorneys general and enforce RCRA requirements." *Id.* at 1346 (*citing* 42 U.S.C. § 6972(a)(1)(A)). In 1976, Congress enacted RCRA "to promote the protection of health and the environment." *Id.* at 1345. In 1984, Congress amended RCRA to require the Environmental Protection Agency develop regulations for underground storage tanks. *Id.* at 1346. The court notes that RCRA "authorizes a state UST program to operate in lieu of the federal program, if the state program has received formal approval from the EPA." *Id.* (*citing* 42 U.S.C. § 6991c(d)(2)). Georgia enacted a state UST funding program ("GUST"). This means that the GUST rules are enforceable by a RCRA citizen suit. *Id.*

In this case, the plaintiffs provided enough evidence to prove that defendant Racetrac did not fulfill its legal obligations under RCRA to "investigate, delineate, and remediate free product and groundwater contamination subsequent to leakage." *Id.* Further the court also held that the defendant's access denial to the plaintiff's property was inapplicable.

In *Church v. General Elec. Co.*, 138 F.Supp. 2d 169 (D. Mass. 2001), the plaintiffs sought class certification in an action against General Electric Company ("GE") for allegedly dumping waste containing PCBs into the plaintiffs' land surrounding GE's plant that caused the contaminants to continue to seep from GE's plant, into the river, and then downstream onto the plaintiff's properties. The court

granted the defendant's motion for summary judgment on the plaintiffs' claims arising under negligence, strict liability, and the Mass. Gen. Laws Ch. 21E. *Id.* at 175. The claims of negligence and strict liability were considered untimely based on the court's 1997 ruling that the plaintiffs' claims were time-barred as to damage that occurred before July 1992, but plaintiffs could bring an action for any conduct that occurred post-1992. The plaintiffs' claim under the Mass. Gen. Laws Ch. 21E required that the case concerns "contribution, reimbursement or an equitable share of the costs," which the court held that it does not because the plaintiffs never took initiative to clean up the land or take any action themselves. The plaintiffs never even stated anything about "contribution, reimbursement, or equitable share of costs" in their statement of damages. *Id.* at 176.

The court upheld the plaintiffs' claim for continuing nuisance and trespass. The court cited a decision of the Supreme Court of Utah that held:

Whether the trespass or nuisance is continuous or permanent is a different question from whether the resulting injury to the land or to the possessor's interests in the land is temporary or permanent ...A continuing trespass or nuisance...may cause either a permanent or temporary injury.

Although the District Court of Massachusetts upheld the plaintiffs' claims for nuisance and trespass, the court denied Rule 23(b) class certification because the extent of the contamination and damages to the individual properties were crucial, and the exposure and possible future risk of contamination could not be surveyed on a class basis.

In *Goasdone v. American Cyanamid Corp.*, 808 A.2d 159 (N.J. Super. 2002), a former plant worker sought a medical monitoring class of workers exposed to benzidine-related dyes during their employment. Class certification was denied because the class did not meet the cohesiveness or predominance requirements for class certification. A court will deny a class action for medical monitoring when numerous individual issues abound. *Id.* at 168. Issues that need to be resolved in this case in order for class certification to be appropriate are “the significance and exposure by each class member to defendants’ products, and whether medical monitoring is reasonable and necessary for each class member based on the class member’s unique medical history.” *Id.* at 170. Concerning the predominance requirement, the court cited a Ninth Circuit case that held, “If the main issues in a case require the separate adjudication of each class member’s individual claim or defense, a Rule (b)(3) action would be inappropriate.” *Id.* at 172.

III. Conclusion

This paper was designed to provide attorneys who do not practice environmental law with an overview of certain recent relevant decisions in toxic torts cases. Environmental and toxic torts cases are difficult to prove and require time, resources, and expertise. These cases were selected to give attorneys a wide range of toxic torts claims being filed, and to illustrate the arduous process for trying a case of this extensive nature.