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Emerging Toxic Torts

New Developments In The Evolving Relationship Between Toxic Tort Liabilities And Environmental Regulations

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Commentary

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When we were kids, we used to think that getting permission from mom insulated us from trouble with dad. Similarly, common sense suggests that if a company does something specifically dictated by federal laws, and does it in a manner specifically prescribed in those laws, then that company is not getting itself into legal trouble with its neighbors. Unfortunately, common sense is not always the driving force behind toxic tort litigation.

It has become increasingly common for companies to be sued in toxic tort cases at sites where they have completed environmental cleanups under government supervision and direction. Such cleanups usually achieve the relevant state and federal cleanup objectives and safety goals, but people who live near the site sometimes have different views about what is "clean." These cases arise when neighbors of the remediated site allege that trace amounts of "contamination" migrated from the remediated site onto their nearby properties. Even though those trace amounts of chemicals may be well below what

the government determined was clean and safe, the neighbors believe otherwise. Their lawsuits usually demand removal of all stray molecules of the offending substance and allege that the value of properties where the stray molecules are located has been significantly diminished.

Against this backdrop, courts must decide whether existing regulatory standards define potential tort liabilities. Many courts are starting to rely upon regulatory standards to define the scope of potential toxic tort liabilities, but recent opinions from the MTBE multidistrict litigation have practitioners wondering where the trend is headed.

Regulatory Standards Define Common Law Duties

There is a growing and recognizable trend among courts to use regulatory standards to define common law duties in toxic tort cases. Some courts apply this rationale at the earliest stage of litigation in their a standing analysis. They conclude that a party who alleges chemical levels below the regulatory standard cannot show an injury-in-fact and therefore lacks standing to pursue the claims. In Iberville Parish Waterworks District No. 3 v. Novartis Crop Protection Inc.,¹ the district court held that two plaintiff water districts did not suffer injury-in-fact and lacked standing to sue a chemical manufacturer based on chemical levels in the water supply that were below the federally-promulgated maximum contaminant level (MCL).²

The water districts alleged they had been and would be forced to expend considerable sums of money to remove the herbicide atrazine from local water supplies. They sought to recover such funds from an atrazine manufacturer under negligence, trespass, nuisance and other theories. The district court found that the water district suffered no injury-in-fact because atrazine levels in the water supplies did not exceed the MCL on an annual basis. Significantly, even though one water district could show that atrazine levels in the drinking water had at times exceeded the MCL, the court looked only at the annualized levels as required by the EPA. Because atrazine levels remained below the SDWA requirement, neither water district suffered an injury-in-fact sufficient to confer standing.

Other courts incorporate the regulatory standard into their analysis of common law injury, rather than of standing.³ In Rockwell v. Wilhite,⁴ plaintiffs sued a neighboring landowner corporation for allegedly releasing polychlorinated biphenyls (PCBs) that deposited on plaintiffs' land. The trial evidence showed PCB concentrations no greater than 2.0 parts per billion, not "anywhere near" the federal standard of 50 parts per billion.⁵ Plaintiffs argued *any* detectable quantity of PCBs, no matter how minute, was proof of interference with the land and constituted an injury. The court found no scientific basis for this argument.⁶

The court expressed concern about the "seemingly limitless litigation that would ensue" if plaintiffs were permitted to recover, particularly given the "harsh reality . . . that thousands, if not millions of people, have been exposed to and/or ingested potentially harmful or toxic substances."⁷ "While it is true that the presence of PCBs on land may cause a reasonable person to stop using that land because of health risks PCBs pose," the court reasoned, "it is only the case when a significantly higher concentration of PCBs is present. At the concentrations present on the lands in question, a person of ordinary health and sensitivities would experience no interference with his or her use of the property."⁸ The court concluded that "[a]ny annoyance or interference sustained by the landowners here is the result of an irrational fear of PCBs. The law does not allow relief on the basis of an unsubstantiated phobia."⁹ Accordingly, the court affirmed the jury verdict in favor of defendants on their negligence

trespass and permanent nuisance claims because plaintiffs did not establish injury.¹⁰

Regulatory Standards Replace Common Law Duties

Some courts conclude regulatory standards displace a defendant's common law duties. In Taco Cabana, Inc. v. Exxon Corporation,¹¹ the Court of Appeals of Texas affirmed a jury verdict in favor of a former landowner who was accused by the current owner of knowingly leaving unreasonable levels of gasoline contaminants on the property. The court relied on the state Water Code and implementing administrative regulations which established appropriate clean-up standards. Because those standards dictated when corrective action was necessary, the court reasoned that they also defined when "unreasonable levels" of contamination were present.¹² The court affirmed the jury's award for defendant on the trespass claim because the levels on plaintiff's property did not exceed state standards.¹³

While the aforementioned courts relied on the MCL to determine whether the defendants ever had a duty to plaintiffs, some courts rely on the MCL to determine when the defendant's duty ends. In City of Moses Lake v. United States,¹⁴ the federal government conveyed to a local municipality several land parcels comprising the Larson Air Force Base, which had been used to assemble, station and maintain hundreds of military aircraft during World War II. The conveyance included the base drinking water system, a sewer system and a waste water treatment system.

More than two decades later, in 1988, the municipality discovered that several wells showed concentrations of trichloroethylene (TCE) at concentrations above the MCL. Over the next three years, the municipality sealed and lined the shallow zones of the three affected wells and began constructing a new reservoir. By 1992, TCE levels in two of the three affected wells decreased to non-detect, and the third well was taken out of service.

In 2004, the municipality sued the federal government and two contractors alleging negligence, nuisance and trespass. The contractors moved for summary judgment based on the statute of limitations. Plaintiffs attempted to avoid the statute of limitations by arguing that defendants committed a continuing tort.

The district court found no evidence of an “actual, existing danger” to support the municipality’s tort claims because TCE levels in the servicing wells had been non-detect for the past decade.¹⁵ When the contamination in these wells was rectified, “the trespass, the nuisance, and/or the negligent injury to property was permanently abated. There was no more injury.”¹⁶ In the absence of an injury, “[t]here has been no continuing nuisance, trespass or negligent injury, as borne out by the fact that no wells have exceeded the MCL since then . . .”¹⁷ To the extent the municipality was concerned about the possibility of drilling new wells that could become contaminated with TCE in excess of the MCL,¹⁸ the court acknowledged Moses Lake would have a cause of action because “clearly then a health risk will exist.”¹⁹ But that event had not occurred. The court therefore used the MCL to define the beginning and the end of defendant’s tort duties to plaintiffs.

In The Absence Of Regulatory Standards

In the absence of regulatory standards, some plaintiffs may argue any chemical level beyond background levels constitute an injury to property. Courts generally require plaintiffs to show an actual health danger to establish injury, rather than mere levels exceeding normal background concentration. In Bradley v. American Smelting & Refining Co.,²⁰ the district court held plaintiffs suffered no injury to their property from arsenic or cadmium emitted by the defendant’s smelter. Plaintiffs did not dispute that the arsenic and cadmium were imperceptible to human senses and had no demonstrable effect on their property. Although plaintiffs claimed the presence of these substances exceeded normal background levels, defense experts opined the concentrations presented no danger, and plaintiffs offered no contrary evidence. Without proof that the arsenic and cadmium presented a health hazard, the court granted defendant’s summary judgment motion on plaintiffs’ trespass and nuisance claims.²¹

As one court points out, the rationale behind requiring proof of an actual health hazard is analogous to many jurisdictions’ requirement that a plaintiff sustain actual physical injury, rather than mere exposure, in order to recover in toxic tort cases. In Smith v. Carbide and Chemicals Corporation,²² residents sued a local uranium enrichment facility alleging releases caused soil and groundwater contamination and con-

stituted an intentional trespass and permanent private nuisance. Plaintiffs argued the mere presence of technetium on their land constituted an injury.

The court disagreed and analogized the claims to those in a Kentucky Supreme Court case by a plaintiff seeking compensation to exposure to the popular drug Fen-Phen: “[T]he landowners’ theory that the presence of technetium on their land alone should be recognized as an injury is analogous to [Fen-Phen plaintiff] Wood’s position regarding her having ingested a potentially harmful or toxic substance (*i.e.*, its mere presence in her body), a theory rejected by the Supreme Court.”²³ Plaintiffs were required to prove the contaminants constitute a “scientifically demonstrable health or safety hazard” at the levels shown to be present on the property.²⁴ In the absence of that proof, the court affirmed the jury verdict for the defendant.

Regardless of whether courts incorporate regulatory standards as part of their analysis of standing, injury, preemption or the statute of limitations, these opinions share the key theme that the legislative, and not the judicial, branch is best equipped to set standards for chemical levels.

A North Carolina Superior Court recently enunciated this theme in Adams v. A.J. Ballard, Jr. Tire & Oil Co.²⁵ Residents of a North Carolina community filed individual claims arising from alleged MTBE contamination of private well drinking water supplies. The North Carolina MCL for MTBE is 200 parts per billion. With only three exceptions, plaintiffs could not show MTBE concentrations exceeding the MCL. Plaintiffs urged the court to adopt a different standard based on taste and odor, rather than the MCL. The court declined because the regulatory standards “form a bright line, objective, and easily determinable test.”²⁶ Taste and odor standards, by contrast, are “fuzzy and subjective tests, not readily reducible to a clear determination.”²⁷

The court deferred to state regulatory standards adopted by state authorities responsible for protecting the state water sources, who are “in a better position than courts to set and reset standards based on new scientific information and changing standards of health.”²⁸ Those state authorities, and not the courts, have the expertise to create “bright-line objective

determinants where specific chemicals are involved rather than subjective and ambiguous tests such as taste and odor.”²⁹

Under this rationale, the court allowed only those plaintiffs with wells contaminated above the MCL to pursue claims against defendants for negligent contamination.

These opinions also share the key theme that chemical levels below the applicable regulatory standard are safe. In Gleason v. Town of Bolton,³⁰ the Superior Court of Massachusetts emphasized that federal and state MCLs for drinking water supplies establish “stringent ‘safe’ standards.”³¹ When drinking water contaminants are below the MCL, according to the court, the water supplies “are considered safe for all purposes, including drinking.”³²

Under this rationale, the court granted summary judgment in favor of a defendant who allegedly released MTBE that migrated into the groundwater and contaminated a public water system. The plaintiff, who owned a restaurant, could not show MTBE levels in the restaurant water supply that exceeded the MCL. The court concluded, “[A]t no time during the plaintiff’s operation of the Restaurant was the water supply serving the Restaurant unsafe for drinking or any public purpose.”³³ Consequently, plaintiff did not suffer a compensable injury, and his negligence, trespass, nuisance and strict liability claims failed.³⁴

Other courts, by contrast, do not consider regulatory standards to define whether a plaintiff has been injured in a toxic court case. In Leuke v. Union Oil Co.,³⁵ for example, the court held the fact that “contamination levels in the water never exceeded levels considered to be safe merely showed compliance with regulatory standards and did not show [defendants] met the standard of care required under common law.”

Similarly, in Cook v. Rockwell International Corp.,³⁶ the court held property owners near former nuclear weapons manufacturing plant were not required to prove actual or verifiable health risk resulting from presence of plutonium and other substances on their property to establish liability for trespass or nuisance. Finally, the court in German v. Federal Home Loan Mortgage Corp.,³⁷ denied a summary judgment

motion on claims where contamination was below the MCL, because there were questions of fact as to whether plaintiff was injured. Although these cases are currently in the minority, there are a sufficient number to inject uncertainty into any analysis of this issue.

The MTBE Opinions

In In re: Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation,³⁸ the district court concluded that while the MCL may “serve as a convenient guidepost in determining that a particular level of contamination has likely caused an injury,” it does not define *whether* an injury occurred. The court therefore rejected defendants arguments that the municipal water provider plaintiffs lacked standing to sue them for alleged MTBE releases resulting in contamination of drinking water supplies. On its face, this sounds like it contradicts the trend seen in other cases.

The court distinguished cases relying on the MCL to define the interests of private well owner plaintiffs, because the instant plaintiffs had duties to test, monitor and treat contaminated water before the contamination reached the applicable MCL. Their interests, unlike those of private well owners, could be interfered with *whenever* contamination affects the quality of public water and not just when the contamination exceeded the MCL. Although defining plaintiffs’ injury according to the MCL “would provide a bright-line rule,” the court noted it would “do little else to promote standing principles.”³⁹ The court said, “[B]right lines grow faint in the area of standing.”⁴⁰

While the court left open the possibility that “it may eventually be determined that some levels of contamination below the applicable MCLs do not injure plaintiffs’ protected interest,” it found that plaintiffs presented sufficient evidence for purposes of standing to show that they “may have been injured — not as a theoretical matter, but rather as a question that is appropriate for judicial resolution.”⁴¹

If cases from elsewhere across the country suggest the emergence of a trend equating compliance with regulatory standards with compliance with tort duties, then where does the MTBE case fit in? More recently, U.S. District Judge Shira A. Scheindlin of the Southern District of New York touched on this issue (in the

same lawsuit) again and provided some additional insight. In a Dec. 14, 2006, opinion, Judge Scheindlin further explained the issue as follows:

The mere release of MTBE-blended gasoline does not cause OCWD [Orange County Water District] appreciable harm. Rather, it is only when a gasoline plume travels from the release point through the soil and actually enters the aquifer that appreciable harm could occur. Thus, there is no appreciable harm until MTBE is *present* in the groundwater. Yet, even so, not every detection of MTBE results in a *contamination* of the groundwater. The exposure to MTBE may be fleeting. Or, the levels of MTBE present in the groundwater may be sufficiently de minimis such that OCWD did not suffer appreciable harm. In an earlier decision, this Court rejected the Maximum Contaminant Level (MCL) as defining what is and is not an injury. But in permitting contamination below the MCL to constitute an injury, this Court made clear that not every detection necessarily results in an injury. While this Court need not—and indeed, on this record cannot—determine with specificity what level of contamination constitutes appreciable harm as a matter of law, OCWD clearly suffered appreciable harm when the level of contamination at a particular location caused OCWD to act, or reasonably should have caused it to act, in response to the contamination.

The key to understanding the MTBE case lies in its unique facts. The MTBE plaintiffs are municipalities. They allege their damages include money they spent responding to the existence of MTBE in groundwater. Federal law allegedly required them to spend that money, regardless of whether MCLs were exceeded. Thus, plaintiffs' alleged damage not only was independent of regulatory standards, but it also was a direct result of other regulatory requirements applicable to water districts.

Private plaintiffs who are not subject to the regulatory requirements applicable to water districts are situated much differently. Under no legal obligation to respond to the presence of chemicals in sub-MCL amounts, the issue with private plaintiffs is whether

they face any unreasonable risk or any dangerous situation that requires them to alter their lifestyles. Most courts have said “no,” and most allow private plaintiffs no recoveries. The MTBE case may sound like an erosion of that trend, but closer scrutiny reveals that it follows the trend to the extent that its unique facts would allow.

Conclusion

The trend still is developing and is by no means settled, but compliance with regulatory cleanup objectives does seem to offer varying degrees of protection from toxic tort lawsuits. Whether through motions to dismiss or summary judgment, or through trial presentations focused upon issues of “injury” and “safety,” plaintiffs filing these types of claims will face serious challenges and significant judicial skepticism. The degree to which such defenses will succeed obviously depends upon the specific facts of each case, but familiarity with these issues will provide practitioners with useful tools to be used in the defense of toxic tort claims.

Endnotes

1. 45 F. Supp. 2d 934 (S.D. Ala. 1995) (affirmed without opinion, 204 F.3d 1122 (11th Cir. 1999)).
2. The federal Safe Drinking Water Act empowers the U.S. EPA Administrator to promulgate MCLs for particular contaminants. 42 U.S.C. § 300g-1(b)(4)(B). MCLs are “safe levels that are protective of public health.” 52 Fed. Register 25690, 25693-94 (July 8, 1987). They are based on “the best available, peer-reviewed science and supporting studies,” as well as “data collected by accepted methods or best available methods.” 42 U.S.C. § 300g-1(b)(3)(A)(i)-(ii). Once established, MCLs must be reviewed by the U.S. EPA Administrator at least once every six years. *Id.* § 300g-1(b)(9). Where appropriate, the Administrator must revise the MCL upon review. *Id.* Any revision must maintain the protection of the health of persons. *Id.* MCLs “represent the level of water quality that EPA believes is acceptable for over 200 million Americans to consume every day from public drinking water supplies.” 55 Fed. Register 8666, 8750 (March 8, 1990).

3. Courts also incorporate the MCL into their analysis of whether there is a "threat of injury" necessary to support a RCRA claim. Rose v. Union Oil Company of California, No. C97-3808, 1999 U.S. Dist. LEXIS 967, *9 (N.D. Cal. 1999) (granting summary judgment on plaintiff's RCRA claim because chemical levels did not exceed MCLs).
4. 143 S.W.3d 604 (Ky. Ct. App. 2004).
5. *Id.* at 618 n.71.
6. *Id.* at 627.
7. *Id.*
8. *Id.* at 627.
9. *Id.*
10. For other cases finding no injury based on alleged chemical levels below the MCL, *see* Rose v. Union Oil Company of California, No. C97-3808, 1999 U.S. Dist. LEXIS 967, *18-*20 (N.D. Cal. Feb. 1, 1999) (awarding summary judgment for defendant because plaintiffs could not establish injury for negligence and nuisance claims where alleged chemical levels were below MCL); Price v. U.S. Navy, 818 F. Supp. 1323, 1325 (S.D. Cal. 1992) (finding no injury arising from the presence of asbestos in amounts below the state-authorized level); Brooks v. E.I. DuPont de Nemours & Co., 944 F. Supp. 448, 449 (D.N.C. 1996) (awarding summary judgment for defendant because plaintiffs could not prove their properties were contaminated when chemical levels did not exceed state groundwater standards). The rationale also applies to other regulatory standards, such as radiation dose limits. Finestone v. Florida Power & Light Co., No. 03-14040-CIV, 2006 WL 267330, *7 (S.D. Fla. Jan. 6, 2006) (restating prior holding that the duty of care for plaintiff's negligence claim against defendant for allegedly releasing radiation "is set forth by the Radiation Dose Limits for Individual Members of the Public applicable for the time of the releases in question" and codified at 10 C.F.R. § 20.1301(a)(1)).
11. 5 S.W.3d 773 (Tex. App. 1999).
12. *Id.* at 780.
13. *See also* Z.A.O., Inc. v. Yarbrough Drive Center Joint Venture, 50 S.W.3d 531, 543-44 (Tex. App. 2001) (following Taco Cabana and affirming judgment for defendant on trespass claim because contaminants were below state standard); Hartwell Corporation v. Superior Court of Ventura Co., 27 Cal. 4th 256, 276 (holding that private plaintiffs' damages claims against water authorities were preempted to the extent they were based on drinking water that met state water quality benchmarks).
14. 430 F. Supp. 2d 1164 (E.D. Wa. 2006).
15. *Id.* at 1184.
16. *Id.* at 1185.
17. *Id.*
18. *Id.*
19. *Id.* at 1184.
20. 635 F. Supp. 1154 (W.D. Wa. 1986).
21. *See also* Cantrell v. Ashland Inc., No. 2003-CA-001784-MR, 2003-CA-001865-MR, 2006 WL 2632567 (Ky. App. Sept. 15, 2006) (rejecting argument that the presence of naturally occurring radioactive materials in above-background levels constituted an injury to plaintiffs' properties).
22. 298 F. Supp. 2d 561 (W.D. Ky. 2004).
23. *Id.* at 572.
24. *Id.* at 573.
25. Nos. 01 CVS 1271, 03 CVS 912 & 03 CVS 1124, 2006 WL 1875965 (N.C. Super. June 30, 2006).
26. *Id.* at *32.
27. *Id.*
28. *Id.*
29. *Id.*
30. 14 Mass L. Rep. 678 (Mass. Super. 2002).

31. *Id.* at *4.
32. *Id.*
33. *Id.* at *5.
34. Further illustrating the confidence placed in the safety of the MCL by some courts, in In re: Wildewood, the Fourth Circuit affirmed a jury verdict for defendants arising from the release of TCE that migrated onto some plaintiffs' properties and a nearby lake that were near or above federal and state drinking water contamination levels. 52 F.3d 499, 501 (4th Cir. 1995). The court found that TCE levels "did not rise to the level of toxicological concern," so the owners did not present evidence that the use and enjoyment of their property was unreasonably interfered with by defendant. *Id.* at 503.
35. No. 00-Civ-008, 2000 Ohio App. LEXIS 4845, *12 (Ohio App. Oct. 20, 2000).
36. 273 F. Supp. 2d 1175 (D. Colo. 2003).
37. 885 F. Supp. 537, 558-59 (S.D.N.Y. 1995).
38. 458 F. Supp. 2d 149, 158 (S.D.N.Y. 2006).
39. *Id.*
40. *Id.* at 158 n.51.
41. *Id.* Shortly after the opinion was issued, the New York Supreme Court followed its rationale in Plainview Water District v. Exxon Mobil Corp., No. 009975-01, 2006 N.Y. Misc. LEXIS 3730, *17 (N.Y. Sup. Ct. Nov. 27, 2006). In Plainview Water District, defendant moved for summary judgment on the basis that plaintiffs lacked standing to recover damages arising from MTBE levels on their properties below the MCL. The court rejected their argument and adopted Judge Schiendlin's conclusion that "notwithstanding that the detected levels of contamination may not exceed the MCL, a plaintiffs' [*sic*] protected interests may be interfered with whenever contamination affects the quality of the water from which they supply the public." *Id.* (quoting In re: MTBE, 2006 WL at *158). ■

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