

**U.S. TOXIC TORT LITIGATION AND
PRODUCT REGULATION**

**HISTORY, STRATEGIES AND
R.E.A.C.H. PARALLELS**

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OVERVIEW

- HISTORY OF U.S. TOXIC TORT LITIGATION
- LITIGATION TRIGGERS
- LEGAL THEORIES ALLEGED
- DAMAGES/RELIEF SOUGHT
- EXAMPLES OF TOXIC TORT CASES
- KEY ISSUES AND DEFENSE STRATEGIES
- R.E.A.CH. PARALLELS

HISTORY OF U.S. TOXIC TORT LITIGATION

- Late 1960s, United States focused on environmental issues
- United States created Environmental Protection Agency (“EPA”)
- Initially, EPA rules required record keeping and reporting
- Later, EPA rules addressed site operations and clean-up
- Caused increased public scrutiny of environmental issues in suburbs

History (cont'd)

- 1979 - Incident at Three Mile Island, Pennsylvania
 - Radiation release
 - Partial core nuclear meltdown
- Late 1970s - Love Canal, New York
 - 21,000 tons of buried chemical waste (dioxins)
- Everyone resolved to clean-up the country
- Response: Congress passed CERCLA (Superfund Law)

CERCLA

- **Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)**
42 U.S.C. §9601, et seq. (1980)
- The Comprehensive Environmental Response, Compensation, and Liability Act -- otherwise known as CERCLA or Superfund -- provides a Federal "Superfund" to clean up uncontrolled or abandoned hazardous-waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment. Through CERCLA, EPA was given power to seek out those parties responsible for any release and assure their cooperation in the cleanup.

WOBURN, MASSACHUSETTS (1986)

- 1984 epidemiology study shows local leukemia rate 24 times national average
- Cancer and birth defects linked to families with drinking water from two city wells
- Wells known to be contaminated with chloroform and trichloroethane

Woburn (cont'd)

- Suits by families of seven leukemia victims (six of whom died) and of children with several other illnesses
- Contamination linked to a tannery and a factory (W.R. Grace and Beatrice)
- Important to stay alert to toxic tort trends and developments because...

Woburn (cont'd)



LITIGATION TRIGGERS

- Chemical Exposure/Environmental Cases
- Pharmaceutical Cases
- Consumer Goods Cases

Chemical Exposure/Environmental Cases

- Regulatory action (Environmental Protection Agency)
- Cancer cluster
- New scientific or medical study*
- Relevant statutes
 - CERCLA (United States federal law)
 - New Jersey Spill Act (state law)

Pharmaceutical Cases

- Regulatory action (U.S. Food and Drug Administration)
- Announcement of marketing of new drug
- Post-approval medical study reveals new risks
- Adverse event reports
- Relevant statute is Food, Drug and Cosmetic Act (“FDCA”) (1938) [21 U.S.C.S. § 301, et seq.](#)

Consumer Goods Cases

- Safety officials' investigation (U.S. Consumer Product Safety Commission)
- Voluntary or mandatory product recall or “safety campaign”
- Consumer advocacy group product assessment (Consumer Reports)
- Multiple customer complaints
- Relevant statute is Consumer Product Safety Act (1973) 15 U.S.C. Sec 2051n, et seq.

LEGAL THEORIES

- Negligence (knowledge/fault based)
- Strict liability (“defect”, unreasonably dangerous product)
- Absolute liability (abnormally dangerous activity)
- Conspiracy/Market share/Concert of action
- Fraud/fraudulent concealment
- Equitable fraud (no intent to conceal)

Legal Theories (cont'd)

- Consumer fraud (consumer statute)
- Express or implied private enforcement of state environmental statutes
- Economic injustice/discrimination (placement of facility in poor/minority area)
- Trespass
- Battery
- Nuisance

TYPES OF DAMAGES/RELIEF SOUGHT

Personal Injury

- Injunctive relief (stop contamination)
- Pain and suffering (current injury)
- Enhanced risk of cancer
- Fear of cancer/cancerphobia

Personal Injury (cont'd)

- Medical monitoring (possible future illness)
- Wrongful death
- Out-of-pocket damages (wages, medical, funeral)
- Punitive damages

TYPES OF DAMAGES/RELIEF SOUGHT

Property Damage

- Injunctive relief
- Diminution in real property value (contamination)(“stigma”)
- Loss of quality of life (hedonic damages – nuisance/property damage only)
- Well closure costs
- Install clean water supply
- Punitive damages

EXAMPLES OF TOXIC TORT CASES

- Methyl Tertiary Butyl Ether (New York)
- Jackson Township (New Jersey)
- Lone Pine (New Jersey)
- Long Branch (New Jersey)
- West Orange (New Jersey)

METHYL TERTIARY BUTYL ETHER (“MTBE”)

- Banned gasoline additive
- Many towns and water districts sued manufacturers and distributors
- Allegations of contamination of water aquifer and drinking water wells
- MTBE alleged to cause bad taste/foul odor and is alleged health risk

MTBE (Cont'd)

- Continuous stream of toxic tort case law developing
 - Divisibility of harm
 - Allocation of liability
 - Importation of strict CERCLA standards into common law
- **STATUS:** Ongoing

Cherry Hill, New Jersey



AYERS V. JACKSON TWP. (NEW JERSEY)

- 339 local residents claim exposure to chemicals leaked from township landfill.
- Municipality is defendant
- Chemicals include benzene, chloroform, methylene chloride, trichloroethane, and trichloroethylene.
- Range of personal injuries claimed
- **RESULT:** Damages awarded at trial for loss of quality of life and medical monitoring

LONE PINE LANDFILL (NEW JERSEY)

- Hundreds of local residents sue 464 defendants
- Defendants manufactured or delivered to 45 acre landfill chemicals and waste products from 1959 to 1979 when it was closed.
- Sued for personal injuries caused by the same pollution, the nature of the injuries being allergies, skin rashes and similar ailments

Lone Pine (cont'd)

- Also alleged decline in property value.

RESULT: Dismissed because plaintiffs failed to make *prima facie* showing connecting exposure to injuries alleged

LONG BRANCH (NEW JERSEY)

- Suit by over 500 local residents
- Claimed exposure to polyaromatic hydrocarbons, benzene, xylene, lead, cadmium, zinc, copper and beryllium
- By-products (coal tar) from turn of 19th century gasification process
- Exposure routes are soil in local parks (donated), streams, and air

Long Branch (cont'd)

- Skin contact, vapors/dust, water ingestion, crabs (fishing)
- Trigger is excavation in the park which revealed presence of coal tar
- Followed by park closure and public health study by New Jersey environmental regulators
- **RESULT:** Mediated to conclusion on eve of trial after key medical monitoring ruling

WEST ORANGE, NEW JERSEY

- Closure of aircraft manufacturing facility
- Over 250 former employees sue
- Defendants are all companies who ever supplied any product listed on a Material Safety Data Sheet found by plaintiffs at the plant (OSHA required)
- Former employees claim exposure to all substances ever in the plant

West Orange (cont'd)

- All ailments claimed to relate to in-plant exposures
- **RESULT:** All cases dismissed on summary judgment

New Jersey Vineyard



KEY ISSUES AND DEFENSE STRATEGIES

- 1) Innovative Procedural Devices**
- 2) Class Action vs. Individual Cases**
- 3) Industry Liability**
- 4) Medical Monitoring**
- 5) Statutes of Limitation**

KEY ISSUES AND DEFENSE STRATEGIES

1) Innovative Procedural Devices (Exposure and Expert issues) - Lone Pine Order

- Before proceeding with defense discovery plaintiffs must show *prima facie* basis for claims
 - Facts of exposure and/or contamination for each plaintiff/property
 - Expert diagnosis report
 - Expert causation report

Defense Strategies (cont'd)

- Expert valuation report (property damage)
- Expert report linking contamination and loss of value
- Dismissal if no *prima facie* proof
- On all issues, should require facts and opinions for each plaintiff and each defendant
- General and specific (medical) causation

Defense Strategies (cont'd)

2) Class action vs. individual cases

- Cases adjudicated one at a time, not en masse
- Not usually class action because each injury different/causation different
- Small trial groups are typical
- Class still a risk with medical monitoring claims

Defense Strategies (cont'd)

3) Industry Liability

- Burden shift to defendants (“the market”)
- Requires defendants to disprove exposure or face market share liability
- Be alert to subtle efforts to shift burden or partial burden

Defense Strategies (cont'd)

4) Medical Monitoring

- Remedy first awarded in 1979 in DES cases (diethylstilbesterol)
- Present injury required or not?
- Independent cause of action or element of damages?
- Legal or equitable remedy (trust)

Defense Strategies (cont'd)

- Ayers v. Jackson Twp. factors
- Expert must show “reasonable and necessary” based on:
 - 1) the significance and extent of exposure
 - 2) the toxicity of the chemicals
 - 3) the seriousness of the diseases at risk
 - 4) the relative increase in the chance of onset of disease, and
 - 5) the value of early diagnosis

Defense Strategies (cont'd)

5) Statutes of limitation

- Long latent injuries
- Plaintiff knew or should have known
 - Injury and fault of another
- Check press reports/stories
 - Local residents comment?
 - Social media sites?

REACH PARALLELS

- Discovery
- Legal admissions
- Feasible alternatives
- Industry liability
- Fact admissions
- Scientific/Medical admissions
- Attack defense experts
- New legal theories
- REACH authorization as defense

REACH PARALLELS

- Helps plaintiff with discovery (whether or not permitted)
 - From European Chemicals Agency?
 - From defendant manufacturers, distributors?
 - Internet (free, publically available)
 - Saves financial resources to develop important parts of case that in the U.S. have usually caused dismissal
 - Build fact and expert case outside of defense view

REACH PARALLELS

- Helps Plaintiffs with legal admissions contained in REACH dossiers
 - Guidance on safe use
 - Risk/utility analysis
 - Proof of general causation

REACH PARALLELS

- Helps Plaintiffs with admissions of feasible alternatives
 - Disclosure of feasible alternatives required by REACH
 - Better scientific testing feasible?
 - Requirement to update testing?
 - Is a safer product arguably feasible based on REACH disclosed R&D?

REACH PARALLELS

- Helps Plaintiffs with evidence of industry liability
 - Collaboration on test protocols
 - Collaboration on publication of results
 - Collective testing
 - Joint submissions
 - Reliance on submissions of others
 - Total tonnage band registered (market share)

REACH PARALLELS

- Helps plaintiffs with factual admissions contained in REACH dossiers (prevents early dismissal)
 - Fact of product manufacture
 - Shipment information (amount, place, time?)
 - Names of “dangerous” substances
 - Trade names of substances

REACH PARALLELS

- Helps Plaintiffs with scientific and medical admissions in REACH dossiers
 - Physiochemical data
 - Human pathways and environmental fate
 - Study results (toxicological and ecotoxicological)
 - Study summaries (toxicological and ecotoxicological)

REACH PARALLELS

- Helps plaintiffs attack defense experts
 - Study results altered or manipulated
 - Not all study results disclosed
 - Adequate testing methods or not?
 - Testing protocols and methods better or worse because private?
 - No argument that resources limited?
 - No conservative regulatory assumption?

REACH PARALLELS

- Helps plaintiffs with potential new legal claims?
 - Possible private right of action (enforcement)?
 - Notices of violations, complaints, enforcement activities as evidence of liability?

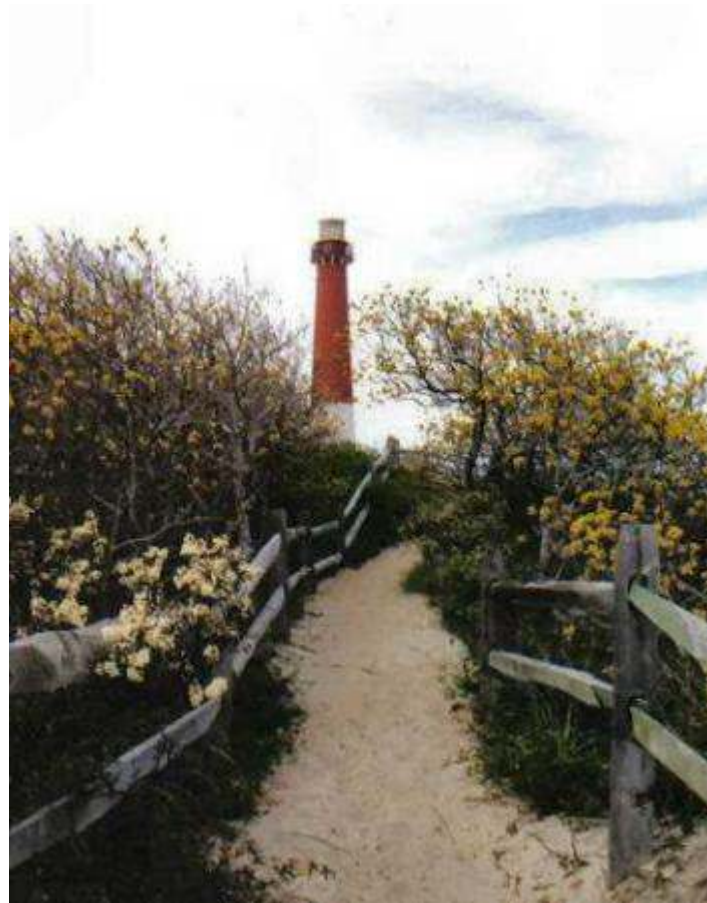
REACH PARALLELS

- REACH authorization as liability defense
 - Authorization does or does not = “safe”?
 - Regulatory community vs. medical community
 - Legal defense?
 - Or just defense evidence of no liability?

NON-LEGAL ISSUES FOR SUCCESSFUL TOXIC TORT MANAGEMENT

- 1) Emergency public relations plan
- 2) Open and ongoing relationship with local regulators and politicians
- 3) Identify liaison to communicate with special citizens' action group

QUESTIONS/DISCUSSION



THANK YOU!



RESOURCE LIST(TO BE POSTED AT LEX MUNDI TTPL SITE):

- Summary of U.S. Federal laws
- Toxic Substances Control Act – Compliance Monitoring
- Toxic Substances Control Act – Power Point
- MTBE Complaint (Hampton Bays)
- Long Branch Coal Tar Complaint
- Ciba – Geigy Complaint

Resource List (cont'd)

- Article on History of Medical Monitoring
- Day Pitney Alert on Massachusetts Medical Monitoring Decision
- Ayers v. Jackson Twp. – New Jersey Supreme Court Decision
- Lore v. Lone Pine – New Jersey Superior Court Decision
- Consumer Product Safety Act – Contents
- Day Pitney Article on Consumer Product Safety Improvement Act

END