Toxics Law Reporter

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HIGHLIGHTS

BNA INSIGHTS: Class Action Settlement Objectors: Nuisance or Threat?
A recent ruling by a federal court in Connecticut rejecting a settlement in a putative class action, in the wake of numerous objections, and the ever-increasing scrutiny of class action settlements by courts, government regulators, commentators, and the public, has many class action attorneys wondering how to avoid a similar outcome in their next settlement, say attorneys Paul Karlsgodt and Raj Chohan in this BNA Insight. The authors offer practical advice for preventing similar objections to class action settlements, and defending against them if they occur. **Page 859**

Employer Not Liable to Worker's Spouse for 'Take-Home' Exposure
Delaware's highest court rules that an employer owed no duty of care to an employee's spouse, who allegedly contracted asbestosis from exposure to her husband's work clothes. The Supreme Court of Delaware says the woman and the employer did not have a legally significant "special relationship" that would give rise to a duty of care. An attorney who has defended companies against take-home exposure allegations tells BNA that the court "is enacting some judicial legislation to prevent these types of claims." **Page 841**

RCRA Notice of Intent to Sue Must Identify Specific Contaminant
When an alleged violation of the Resource Conservation and Recovery Act depends on the release of a particular contaminant, parties contemplating a citizen suit must specifically identify that contaminant in their notice of intent to sue, the U.S. Court of Appeals for the Second Circuit rules. The notice must contain sufficient information to permit the recipient to promptly correct the problem, the court says. **Page 849**

Hunting, Fishing, Bird Watching, Suffice for Standing in Wetlands Suit
A federal appeals court affirms that members of an environmental group and a hunting club have standing, and sustains an injunction halting work under a Clean Water Act dredge-and-fill permit at the construction site of a new coal-fired power plant in Arkansas. "Members of the Hunting Club and the Sierra Club regularly engage in a wide variety of activities in this area," the Eighth Circuit says. "This includes duck, deer, and turkey hunting, bird watching, alligator spotting, fishing, and other activities involving local and migratory wildlife," which are sufficient to show injury in fact. **Page 851**

Takings Claim Over Landfill Gas Not Saved by 'Reservation of Rights'
A landowner's just compensation claim under the Fifth Amendment alleging methane gas escaping from a municipal landfill reduced the value of his adjacent property is barred by claim preclusion, the U.S. Court of Appeals for the Eighth Circuit holds. The claim is barred even though, in a previous suit the landowner filed in state court, the landowner had filed a "reservation of rights" to bring the claim in federal court, and the state court did not address the claim. **Page 843**

ALSO IN THE NEWS

ASBESTOS: Sanctions for discovery abuse in asbestos litigation against Union Carbide Corp. were not supported by the evidence, a Texas appeals court says. **Page 842**

GULF OIL SPILL: A federal judge in Louisiana rejects racketeering claims against BP Exploration Plc. over the April 2010 blowout and oil spill in the Gulf of Mexico. **Page 843**

RADIATION: Some 139 plaintiffs reach a tentative settlement in decades-old litigation alleging injury from radiation emitted by the Hanford Nuclear Reservation in the state of Washington. **Page 842**

FOSAMAX: Finding Florida law unsettled on whether an objective standard determines if a product is defective, the court overseeing federal Fosamax multidistrict litigation certifies for interlocutory review a question concerning the scope of the risk-benefit analysis in design defect cases. **Page 844**

SUPERFUND: Morrison Enterprises LLC, a Nebraska grain company, asks the U.S. Supreme Court to review a federal appeals court opinion that restricted the company's right to recover response costs in superfund litigation. **Page 850**

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Toxic Torts

Occupational Exposure

Asbestos

Employer Not Liable to Worker's Spouse For 'Take-Home' Asbestos Exposure

Delaware's highest court held July 11 that an employer owed no duty of care to an employee's spouse, who allegedly contracted asbestosis from exposure to her husband's work clothes (*Price v. E.I. du Pont de Nemours & Co.*, Del., No. 719, 2009, 7/11/11).

The Supreme Court of Delaware said the woman and the employer did not have a legally significant "special relationship" that would give rise to a duty of care.

"The plaintiff's bar has been relentless in its efforts to create new avenues for recovery from asbestos exposures. With more and more of the traditional defendants either declaring bankruptcy or exhausting insurance coverage, the available parties to recover from become fewer," James S. Nowak, an attorney who has defended companies against cases alleging liability for take-home asbestos exposure, told BNA. "It seems to me that the Delaware Supreme Court is enacting some judicial legislation to prevent these types of claims," Nowak, of Buffalo's Kenney Shelton Liptak Nowak LLP, said.

In contrast, Matthew P. Bergman, who successfully represented plaintiffs in the take-home asbestos case *Rochon v. SaberHagen Holdings Inc.*, 2007 Wash. App. LEXIS 2453 (Wash. Ct. App. 2007), believes the opinion in *Price* is limited to the facts presented rather than a wholesale repudiation of such claims. "The record below does not even say whether the employer knew it had asbestos on its premises," Bergman, of Seattle's Bergman Draper & Frockt PLLC, notes.

The decision does not rule out the possibility that, under certain circumstances, a duty to a third party can exist, Bergman told BNA.

Spouse Washed Work Clothes. Bobby Price worked as a maintenance technician for E.I. du Pont de Nemours & Co. at a facility in Wilmington, Del., from 1957 until 1991. He allegedly brought asbestos fibers from products he worked with home on his vehicle, clothing, and skin.

Price's spouse, Patricia, was allegedly exposed to the fibers by washing his work clothes. Patricia Price now suffers from bilateral interstitial fibrosis and bilateral pleural thickening of the lungs.

Patricia Price sued DuPont, alleging that the company wrongfully released asbestos from its plant and that she was a reasonably foreseeable victim of its misconduct. Bobby Price filed a loss of consortium claim.

Misfeasance Versus Nonfeasance. Plaintiffs later moved to amend their complaint to state a claim based on a theory of misfeasance—that the release of asbestos carried into a worker's home is a trespass—rather than a claim of nonfeasance based on a failure to warn. The Delaware Superior Court denied the motion but certified the case to the state high court (26 TXLR 685, 6/16/11).

The court said that in a case of misfeasance, a party who does an affirmative act owes a general duty to others to protect them against an unreasonable risk of harm from the act. In a case of nonfeasance, a party who merely omits to act owes no general duty to others, and has a duty to another only if they have a legally significant special relationship.

The issue and underlying facts here are identical to those presented in *Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009) (24 TXLR 334, 3/12/09), the court said. In that case, the plaintiff alleged defendant negligently failed to either prevent her husband from taking asbestos home or warn the couple of the dangers posed by his wearing his work clothes home.

While it did not decide in *Riedel* whether the facts underlying the plaintiff's lawsuit could support a misfeasance claim in addition to a nonfeasance claim, the court said, it did explain unequivocally that the underlying facts constitute nonfeasance.

A Rose by Any Other Name. Because nonfeasance and misfeasance describe substantively different conduct, nonfeasance cannot constitute misfeasance. Although plaintiffs' desired amendment attempts to recast defendant's conduct as affirmative misfeasance, legal characterizations cannot change the nature of the underlying conduct, the court stated.

Defendant's failure to prevent the worker from taking asbestos fibers home or to warn plaintiffs about the dangers of asbestos does not rise to the level of affirmative misconduct required to assert a claim of misfeasance. No amount of semantics can turn nonfeasance into misfeasance or vice versa, the opinion said.

Having alleged only nonfeasance, plaintiffs must allege that a special relationship existed between the spouse and the defendant in order for the defendant to owe her a duty of care. Their relationship, however, does not fit any of the special relationships recognized by the *Restatement (Second) of Torts*, it said.

The court rejected plaintiffs' argument that the spouse had a special relationship with defendant because her husband worked for the company for more than 30 years, defendant provided health insurance to her as his spouse, and defendant sponsored company picnics and participated in programs promoting a family friendly workplace. These arguments are the same as those asserted in *Riedel*.

Finding that defendant owed no duty to the spouse, the court affirmed the denial of plaintiffs' motion to amend their complaint.

Chief Justice Myron T. Steele wrote the opinion.

Thomas C. Crumplar and Jordan J. Ponzo of Jacobs & Crumplar PA in Wilmington represented plaintiffs.