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CLIENT ADVISORY

California Court Applies Product Liability Principles to Environmental Contamination

DECEMBER 2006

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On November 6, 2006, a California Court of Appeal reversed a trial court's dismissal of strict product liability claims against a major oil company that produced gasoline containing methyl tertiary butyl ether ("MTBE"), a fuel oxygenate. *D.J. Nelson v. Superior Court*, 144 Cal. App. 4th 689 (2006). The court rejected arguments challenging a plaintiff's use of strict product liability theories to seek recovery for "bystander" injuries that do not flow from the use or consumption of the allegedly defective product by the ultimate consumer. This published opinion is likely to be cited in future lawsuits seeking to impose liability upon manufacturers whose products cause environmental harm when spilled or released by third parties.

THE D.J. NELSON DECISION

A private water utility sued ExxonMobil Corporation ("ExxonMobil") and other refiners, distributors and retailers of gasoline containing MTBE for alleged contamination of water supply wells by MTBE released by gasoline spills or releases at nearby service stations. Shortly before trial, ExxonMobil successfully moved the trial court to dismiss plaintiff's strict product liability claims. The trial court concluded that California law did not allow a "bystander" (*i.e.*, one not a consumer or user of the product) to recover under strict product liability for an injury not "attendant to the use or consumption of the product," but instead occurring "while the product was still possessed and stored by a participant in the stream of commerce." 144 Cal. App. 4th at 687.

Plaintiff sought immediate appellate review by filing a petition for writ of mandate and requested a stay of the pending trial. The Court of Appeal granted the requested stay and proceeded to full briefing and a hearing on the merits.[1] It then reversed. Noting that California law differs from states that follow the *Restatement (Second) of Torts*, the appellate court found no requirement for

1 By the time briefing and argument occurred, nearly all defendants other than ExxonMobil had entered agreements to settle. One of these defendants was represented by Arnold & Porter.

a "sale or equivalent transaction" of a product before strict product liability attaches. 144 Cal. App. 4th at 688. In California, it held, liability for a defective product exists once the product is "'placed on the market, knowing that it is to be used without inspection for defects.'" *Id.* (quoting *Stein v. Southern Cal. Edison Co.*, 7 Cal App. 4th 565 (1992)). "Bystanders" injured as the result of a product's foreseeable use, distribution or storage by a third party after it has been placed on the market are entitled to the protection of the strict product liability doctrine. 144 Cal. App. 4th at 689. Here, the appellate court found these product liability requirements satisfied because a "reasonably foreseeable use of gasoline is its storage while at a gas station." 144 Cal. App. 4th at 690.

IMPORTANCE OF THIS DECISION

Unlike the state and federal law claims typically asserted in a private environmental lawsuit, a strict product liability claim does not target the party responsible for improperly spilling or releasing harmful contaminants into the environment. Instead, such claims are directed against companies that manufacture or produce chemicals or other substances capable of causing contamination when spilled or released. In addition to MTBE gasoline, strict product liability claims based on alleged environmental contamination have been asserted against producers of perchloroethylene,[2] a widely used solvent, and benzene, a component of all gasoline.

Strict product liability theories offer significant tactical and strategic advantages to a private environmental plaintiff. They expand a lawsuit's scope beyond discrete instances of improper spillage or disposal, and instead place the focus upon a manufacturer's decision to sell an allegedly "defective" product or, perhaps, the adequacy of warnings accompanying the product's sale. In this way, claims relating to multiple individual spill or release incidents can be aggregated into a single lawsuit. Where circumstances make it difficult to identify the particular manufacturer supplying the product causing the contamination at issue, plaintiffs may attempt to spread liability across an entire industry by resorting to collective liability theories such as market share liability.

Yet, strong grounds exist to question whether this newly popular application of product liability theories represents sound public policy or the correct application of legal principles. Central to the justification of placing strict product liability upon manufacturers in other contexts is the assumption that the manufacturer is in the best position to minimize harm caused by its product by changing the product's characteristics, providing enhanced warnings or taking other steps uniquely within its control. In cases involving environmental contamination, the party in by far the best position to prevent the harm is often a third party who spilled or released the product into the environment.

In itself, the *D.J. Nelson* decision is a narrow one, addressing only the issue of "bystander" liability when products cause injury prior to being sold to the ultimate consumer. Prior California opinions already had adopted a broad view of when such liability is appropriate. *Stein v. Southern Cal. Edison Co.,* 7 Cal. App. 4th 565, 571 (1992); *see also Price v. Shell Oil Co.*, 2 Cal. 3d 245, 500 (1970). Nonetheless, *D.J. Nelson* marks an early occasion in which a plaintiff's strict product liability claims based on environmental contamination have reached an appellate court. The California court's decision is likely to be cited in future cases seeking redress from manufacturers whose products produce contamination when released into the environment.

2 In June 2006, a California jury awarded $181 million in compensatory and punitive damages against several perchloroethylene manufacturers in a product liability suit brought by the City of Modesto, California. *Los Angeles Daily Journal*, "City's Strategy Prevails Over Chemical Firms," p. 1 (June 12, 2006); *Los Angeles Daily Journal*, "Jury Orders $175 Million to be Paid by Chemical Firms," p. 1 (June 14, 2006). Subsequently, the trial judge granted post-trial motions greatly reducing this award. *Los Angeles Daily Journal*, "Judge Cuts Punitives In Water Pollution Case by 90 Percent," p. 3 (August 3, 2006).

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