

Toxic Tort Update

California Defendants Lose Battle In Long Running War Over Toxic Tort Pleading

The situation is commonplace: Plaintiffs in a toxic tort case name a score of manufacturers as defendants and list 34 chemical products in their complaint. Although specific products are identified, the balance of the allegations are vague, describing the injuries as resulting from exposure to "organic solvents . . . and other toxic chemicals." Despite the limited facts in the complaint, plaintiffs seek to recover on causes of action for strict liability, fraudulent concealment and breach of warranty.

This scenario played out in *Ofelia Jones v. Conco-Phillips, Inc.*, a case in which the California Court of Appeal just released a significant decision on the pleading standards for toxic tort cases. In *Jones*, plaintiffs alleged that exposure to multiple products manufactured or supplied by almost twenty defendants had caused their husband and father to contract heart, liver and kidney diseases, resulting in his death. Although the complaint identified specific products, with one exception it was vague in regard to the toxins in those products that caused the alleged injuries. Defendants, relying on the Supreme Court's decision in *Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, challenged the complaint and ultimately obtained an order from the trial court dismissing the case. The Court of Appeal reversed that decision.

Bockrath, a case in which WSHB Partner David Wood took a lead role for the defense, established specific requirements for pleading causation in toxic tort cases. To meet these standards, a complaint must "identify each product that allegedly caused the injury" and

allege that "each toxin that entered [plaintiff's] body was a substantial factor in bringing about, prolonging, or aggravating that illness." Based on this language and other references to "each" toxin, many defendants have interpreted *Bockrath* to mean that a plaintiff must identify both a specific product and its injury causing components to state a cause of action in a toxic tort case.

The Court of Appeal in *Jones* disagreed. Citing another decision, *Rivas v. Safety-Kleen Corp.* (2001) 98 Cal.App.4th 218, the Court of Appeal held that *Bockrath* was referring to toxins in a "general sense" and "was not expressing a requirement that the plaintiff identify specific chemical compounds before he or she can assert a claim." The balance of this discussion in *Jones* is equally unfavorable to defendants, with the Court noting that manufacturers have presumably studied the risks associated with their products and therefore are already aware of the toxins they contain. In essence, the Court of Appeal decided that a plaintiff in a toxic tort case need only identify a specific product in his or her complaint and not the injury causing toxins in that product. That holding may conflict with the rule stated in *Oddone v. Superior Court* (2009) 179 Cal.App.4th 813, 821, which held that to comply with *Bockrath*, a complaint must "specify the chemical that caused the injury."

The *Jones* decision also ruled on the applicability of several specific causes of action to toxic tort cases. Finding that manufacturers possess or exert control over the contents of their products, a duty to disclose is created which can be

used as the basis for a cause of action for fraudulent concealment. The decision also lowers the typical requirement of specificity in pleading fraud in this context, since defendants are held to have knowledge of facts, such as the "toxins" in their products, which have not been disclosed. In the view of the Jones Court, a complaint advising each defendant that it concealed or failed to disclose the "toxic properties" of its products is sufficient to state a cause of action for fraudulent concealment.

Finally, defendants argued that no warranty could arise where the decedent did not purchase a product from them. Despite the long standing requirement that parties must be in privity of contract for a cause of action based on warranty, the *Jones* decision found it was sufficient for plaintiffs to allege that decedent's employer purchased products from defendants. The employer was in privity with defendants and plaintiffs, on behalf of decedent, were permitted to essentially step into the employer's shoes for pleading purposes.

Unless it is overturned by the Supreme Court, this decision significantly limits defendant's ability to challenge toxic tort cases at their early stages, prior to costly discovery and retention of expert witnesses. This concern is not theoretical. Plaintiffs' counsel in both *Jones* and *Bockrath* was Raphael Metzger, who annually files a large volume of multi-defendant, multi-product toxic tort cases using the same basic complaint. *Jones* applies directly to this form complaint and generally protects similar pleadings from future challenges. Although this decision appears to conflict, at least in part, with prior cases such as *Oddone*, changes in our Supreme Court since *Bockrath* was issued may make further review unlikely.

This decision does not address whether defendants can serve contention interrogatories with respect to specific toxins. However, this panel appears to take the position that this issue should be left for expert discovery. If so, defendants may not be able to discover which specific

toxins plaintiffs are targeting until expert depositions are taken. In California, such depositions normally do not occur until a few weeks before trial. A request for earlier expert discovery may become a necessity in many cases.

This is just one decision from one Appellate Court, and some of the holdings could be interpreted as dicta. The decision also appears to conflict, at least in part, with prior cases such as *Oddone*. However, changes in our Supreme Court since *Bockrath* was issued may make reversal in favor of defendants unlikely, so we may be dealing with this issue on a case-by-case basis for some time to come.

If you would like a copy of this decision or to discuss its impact, please feel free to contact us.



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