

New California Appellate Decision Aids Defendants In Challenging Secondary Exposure Complaints

A decision issued on November 24, 2009 by the Second District of the California Court of Appeal may substantially aid defendants seeking to challenge allegations of injury due to secondary exposure to chemicals and other toxic substances. It may also assist defendants in defending all toxic tort claims filed in California.

In Oddone v. Superior Court (Technicolor, Inc.), Case No. B213784, plaintiff Geraldine Oddone alleged that she had "suffered injuries and damages to her person" when her late husband, James Oddone, carried "toxic chemical substances" home with him from his job at a film processing facility. Geraldine Oddone allegedly suffered secondary exposure to these substances when she slept next to her husband, washed his clothing and "was intimate with" him.

Defendant Technicolor filed a demurrer to Mrs. Oddone's personal injury claims, which was sustained on the ground that plaintiff had failed to allege that Technicolor owed her a duty of care. Plaintiff was granted leave to amend. A first amended complaint was filed and defendant again demurred on the ground that no duty of care had been established. The second demurrer was sustained without leave to amend and a writ petition challenging the trial court's ruling followed.

The Court of Appeal found that the issue of defendant's duty was best analyzed pursuant to the familiar principles set forth by the Supreme Court in *Rowland v. Christian* (1968) Cal.2d 108, 112-13. *Rowland* sets forth at least eight factors to determine when one party owes another a duty of care. The Court of Appeal focused on the third, i.e., the closeness of the connection between the defendant's conduct and the injury suffered. In analyzing this factor, the Court turned to a Supreme Court decision which controls pleading in toxic tort cases filed in California, *Bockrath v. Aldrich Chemical Co.* (1992) 21 Cal.4th 71. The Court of Appeal noted that *Bockrath* requires that a plaintiff in a toxic tort case "must specify the chemical that caused the injury and in the course of doing so must of course also specify the injury." *Bockrath* was a primary exposure case, but

the Court of Appeal found that "the foregoing requirements are even more apropos" in the secondary exposure context "because the connection between the defendant's acts and the claimed injury is more attenuated than in a primary exposure case."

Because plaintiff failed to specify the chemicals to which she was allegedly exposed or the specific injuries that resulted, plaintiff could not establish the third *Rowland* factor, a "close connection" between the defendant's conduct and the injury suffered. The lack of specificity in the complaint also made it impossible to apply other factors set forth by *Rowland*. For instance, the Court found that since a specific chemical was not identified, there was no means of analyzing whether the harm was foreseeable or the certainty of the harm. For all of these reasons, the Court of Appeal upheld the dismissal of plaintiff's complaint.

The *Oddone* decision reflects a general skepticism on the part of the Court in regard to secondary exposure claims. It does not bar them, but it attempts to narrow the circumstances under which they can be filed. This may be particularly important in asbestos litigation, where many currently filed cases involve secondary exposure. This decision also bolsters the chances of all defendants seeking to challenge a toxic tort case at the pleading stage. *Oddone* repeats the Supreme Court's warning in *Bockrath* regarding "prospecting plaintiffs who sue multiple defendants on speculation that their products may have caused harm over time" At a minimum, every toxic tort complaint filed in California should be analyzed to determine whether it meets the minimum requirements of alleging specific products, chemicals and injuries, as required by both *Oddone* and *Bockrath*.



Steve Henning • Los Angeles
shenning@wshblaw.com



Patrick Schoenburg • Central CA
pschoenburg@wshblaw.com