Decades of strategic case development and trial experience.

WSHB TOXIC TORT UPDATE – CALIFORNIA DEFENDANTS LOSE BATTLE IN LONG RUNNING WAR OVER TOXIC TORT PLEADING

Publications
8.5.15

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. ConcoPhillips, 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.

PROFESSIONALS

David F. Wood

Timothy J. Repass

Patrick S. Schoenburg

RELATED SERVICES

Toxic Tort and Occupational Exposure

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.