

"Toxic Trespass" Could Be The Next Big Toxic Tort

By **Erin Marie Daly**, erin.daly@portfoliomedia.com

Thursday, Nov 15, 2007 --- With scientific advancements increasingly able to show the presence in the body of a wide range of chemicals previously unknown or not detectable, courts are beginning to face a new breed of toxic tort claims seeking to make pollution in people's bodies an actionable offense — and product liability lawyers say the worst is yet to come.

As new developments in biomonitoring and environmental testing reveal that many individuals' blood contains chemicals such as PBDEs, phthalates, pesticides, PCBs and bisphenols, courts are increasingly being asked to consider so-called "toxic trespass" or civil battery claims, National Geographic reported last year.

These lawsuits pose the question of whether the unwanted presence of chemicals in persons is an actionable harm if there is no resulting discernible injury or disease, and despite the fact that the health and environmental effects, if any, of these chemicals' presence in people's bodies is still a subject of scientific debate.

Hand in hand with these developments, several advocacy groups and lawmakers have introduced measures that would make chemical manufacturers strictly liable for the presence of chemicals in the body.

In Pennsylvania, the Community Environmental Legal Defense Fund, a nonprofit law firm, has proposed a model ordinance for adoption by local townships in the state which "recognizes the right of people to be free from involuntary corporate chemical trespass." The model ordinance, titled "Corporate Chemical Trespass Ordinance," would create a category of criminal violation for chemical trespass and provide municipal monies for chemical testing, among other things.

In addition, some states, such as California, have even gone so far as to greenlight measures that require biomonitoring programs.

In September 2006, the California Environmental Contaminants Biomonitoring Program was signed into law, requiring the California Department of Health Services and California Environmental Protection Agency to monitor the presence and concentration of designated chemicals in Californians using biological specimens obtained from statewide surveys. The results of the findings must be made public every two years, and when either physiological or chemical data obtained from a participant indicates a significant known health risk, the individual must be notified and advised.

While the link between chemical exposure and human health is still largely unestablished, such moves already have product liability lawyers shoring up in advance of what they predict will be an onslaught of toxic trespass suits in the coming years as the law catches up with the science.

Even though the U.S. Environmental and Protection Agency sets forth what it deems to be “safe” levels of chemicals, and corporations make efforts to keep levels well below that threshold, lawsuits are increasingly being filed on the basis of the mere presence of such substances even when people are found to have levels that are lower than those deemed safe by the EPA, says James A. “Jim” Langlais, a partner in Alston & Bird LLP’s toxic tort and environmental and land use groups.

The difficulty for these types of claims at trial, however, is that claimants are often unable to show any damages associated with these exposures, Langlais said.

“Under the current scheme, these types of claims encounter difficulty at the causation stage,” he said. “Part of living in an industrialized society is that there is a certain level of chemicals we have to put up with. Some may argue that they never knew those chemicals were inside their bodies, but there are background levels that are just there by nature. There is an argument to be made for man-made chemicals, which don’t just spontaneously appear. But even if you can get past the tort issues in court, you wouldn’t know who to point the finger at because some of these substances are so ubiquitous.”

At first blush, toxic trespass claims appear to simply be a rehash of medical monitoring claims, which typically seek an award for the cost of periodic medical monitoring or testing for early diagnosis of diseases, Langlais said.

Most courts have rejected claims for medical monitoring absent manifest physical injury, meaning that they refuse to compensate parties for their perceived increased risk of illness and injury due to the mere presence of the substance in the body, according to Langlais.

But, he added, since a trespass is a trespass regardless of whether it causes any damage, it is not inconceivable that under the right circumstances, a claim for toxic trespass could survive summary judgment and find its way to a jury.

“I can see a perfect storm scenario in which the right judge, the right jury pool, the right plaintiff and the right lawyers could get a toxic trespass claim past the summary judgment phase,” Langlais said. “And if the substance’s presence is shown to be the result of an intentional act, punitive damages are also a possibility. Jurors are becoming more educated on these issues, and we live in a new era in which the so-called ‘CSI-effect’ has led jurors to demand more proof and more science. Because of that, they may be more likely to find compensable damages in favor of the plaintiff [in this type of claim].”

Others agree that the causation issue is likely to be the most common sticking point as courts start to see more toxic trespass claims.

“The science has come a long way, but there are a few definitive areas where it's not totally there yet,” said Laura A. O’Connell, a partner in the environmental and commercial litigation and counseling group at Katten Muchin Rosenman LLP who has focused her practice on toxic torts. “There are many causes for a disease, and the chemicals you tend to see in these types of claims are ubiquitous. Asbestos, for example, is everywhere, so the question is how do claimants prove they were exposed? Also, what you see in these cases is chemical levels that are usually slightly over what the EPA allows. It's splitting hairs to argue that, say, three parts per billion made all the difference.”

Nancy J. Rich, also a partner at Katten Muchin who represents clients in environmental toxic torts, agreed, saying that while she's not convinced that a claimant with cancer couldn't persuade a jury, the causation issue is key.

“I think juries are actually more likely to go wider on really requiring scientific evidence of causation where you know people were exposed by the defendant, particularly when the level of exposure is documented,” Rich said.

At the moment, courts are beginning to see a wave of toxic trespass claims tacked onto class actions, Rich said, noting a recent lawsuit in which her firm defended a company facing a class action over contaminated groundwater in a Chicago suburb.

“One issue in that case was the alleged diminution in property value caused by the migration of chlorinated solvents into the soil and groundwater, but the other claim was for medical monitoring,” Rich said. “These people weren't sick, but they argued that because they had been drinking the contaminated water from residential drinking wells for decades, they were entitled to medical monitoring. If all that was out there for the plaintiffs' lawyers was the property value claim, they would have had a very weak case.”

In that particular case, the client chose to settle, even though the issue of whether and under what circumstances claimants can receive medical monitoring is relatively undecided, Rich said.

“Based on the circumstances in that case, my personal view is that if we had pressed on, the court would have allowed medical monitoring, which is why we settled the case,” she said.

In order to bolster against such claims, O'Connell said companies should be diligent about conducting environmental assessments.

“We always advise clients who are buying or selling property to go ahead and have a baseline assessment to identify any environmental problems,” she said. “And if a company thinks there has been a release, it shouldn't wait

until the EPA comes in to mitigate.”

O'Connell said that regarding investigations and mitigations on a company's property, two things are essential.

“If you think you didn't do it, go find the other liable parties,” she said. “Even if you don't prevail in court, if there is a situation with multiple accused entities, you can turn to your co-defendants when doing private allocations and shift the liability to the responsible party, reducing your share substantially. That's very important in trespass law — it's not like environmental law, where you have strict liability.”

Second, companies should consider where they might have future liability potential, O'Connell said.

“Look into environmental insurance — it's a huge part of environmental strategy these days. Companies have to think about what may happen a few years down the line,” she said.

As for the legislative front, O'Connell said that the courts are better suited to address the individual situations posed by toxic trespass claims.

As an example, she pointed to the multitude of asbestos claims over the past few decades, noting that legislative measures have been largely ineffective in dealing with the onslaught.

“Many of the companies targeted in the asbestos litigation didn't deserve what happened to them,” O'Connell said. “There were many fixes proposed in Congress, including a program to establish a fair way of handling the claims, but there was never the consensus to do it. For every dollar paid out on an asbestos claim, 80 cents goes to a lawyer and the rest goes to the injured person. It's sad that there can't be a program to address this multifaceted problem.”

Rich concurred, noting that the courts have been able to address these kinds of issues where the legislature won't step up to the task.

“In the Agent Orange suits, for example, there was significant evidence that soldiers who fought in Vietnam developed various diseases caused by the chemical, even though the scientific evidence wasn't quite there to make a rock-solid case,” Rich said. “A judge in New York established a fund through which people could make claims, and procedures and limitations were put into place. The courts are the right way to adjudicate disputes like this, because they can come up with a solution that is much closer to fitting each individual. I don't think legislative solutions have been all that effective.”

Langlais agreed that it is difficult to legislate these kinds of issues, because the science is evolving much faster than the legislation itself.

“By the time a measure would get to be a new law in a nice package with a

big bow on it, the science would have surpassed it,” he said. “The dynamics of the rapidly evolving science don’t lend to having the legislature step in; it’s a situation the courts may be in a better position to deal with and assess whether the traditional tort doctrines should extend to these new theories of liability. However, over time, more legislative initiatives such as California’s biomonitoring program will begin to crop up.”

In the meantime, public interest in these types of issues is only increasing, with the chemical industry itself struggling to keep abreast of the hype.

Earlier this month, the American Chemistry Council lashed out at a documentary by CNN reporter Anderson Cooper, who highlighted biomonitoring by undergoing a test which revealed the presence of several chemicals in his blood.

The ACC said the segment focused on the mere presence of particular chemicals as opposed to whether those chemicals are present at levels that cause harm to human health, noting that the Centers for Disease Control and Prevention has stated that “just because people have an environmental chemical in their blood or urine does not mean that the chemical causes disease.”

In fact, the ACC said, many chemicals, such as those in medicines, actually do just the opposite.

The ACC also said it is concerned about the responsible communication of biomonitoring results, not only to the individual but also to the larger community.

“It’s important to realize that the levels in humans reported in biomonitoring studies are very, very small, typically in parts-per-million, billion or even trillion,” the ACC said. “Biomonitoring data do not inform us about how the chemical was introduced, how long it has been there, or whether it poses any health risk whatsoever. It would be erroneous to suggest that just because effects can be observed in toxicity studies at high doses of a chemical, that the same effects would occur at much, much lower doses.”

As these issues continue to play out, lawyers can be sure of one thing: more litigation to come.

Whether the courts will start recognizing toxic trespasses and other emerging theories of liabilities remains to be seen, but what is certain is that the plaintiffs’ bar will continue to push the envelope, according to Langlais.

“[The plaintiffs’ bar] will continue to ask the courts to broaden their notions of torts to include chemical trespass as an actionable claim,” he said. “I think it’s inevitable that as the methods to detect substances become more sophisticated, more sensitive, and as more man-made substances enter the marketplace, the plaintiffs’ bar will increasingly ask the courts to extend traditional tort law doctrines to new theories like toxic trespass or battery.

And I think that in addition to seeing an increase in claims involving the presence of substances in the body, you should expect to see an increase in claims involving the presence of substances in the home.”